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Death in America under Color of Law: Our Long, Inglorious Experience with Capital Punishment

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Death in America under Color of Law:
Our Long, Inglorious Experience with Capital Punishment

Rob Warden* and Daniel Lennard†

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INTRODUCTION

What follows is a compilation of milestones in the American experience with capital punishment, beginning with the first documented execution in the New World under color of English law more than 400 years ago at Jamestown. The man who was executed, George Kendall, became first only because he had been (in the modern vernacular) “ratted out” by the man who otherwise would have been first. Maybe Kendall was guilty. Maybe not. We cannot know. But we do know that testimony of the sort that cost him his life—and spared his accuser the same fate—has proved categorically suspect in subsequent cases.

Kendall’s execution was at once an inauspicious dawning of the death penalty in what would become the United States and a harbinger of uncertainty of guilt that would mark ensuing calamity upon calamity—resulting from perjury by witnesses with incentives to lie, false or mistaken eyewitness identifications, coerced or fabricated confessions, false or misleading forensic evidence, all manner of official malfeasance, and ineffective assistance of defense counsel—factors that frequently occur in concert.

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1 See infra entry dated 1608.
2 Id.
3 CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM 3 (2005), https://www.aclu.org/sites/default/files/field_document/asset_upload_file119_30624.pdf (last visited Jan. 26, 2018) (accusers with incentives to lie were instrumental in a majority of false convictions in U.S. capital cases from mid-1970s through mid-2000s). For earlier examples, see, e.g., infra entries dated May 11-Aug. 29, 1741 (multiple executions stemming from testimony elicited with cash rewards), and Apr. 22, 1919 (seaman’s false conviction of triple murder on the high seas predicated on perjury by probable killer).
4 See, e.g., infra entries dated Dec. 22, 1819 (brothers condemned in Vermont after confessing to a murder that had not occurred; the case also involved false testimony by an in-custody informant and an erroneous forensic conclusion: mistaking animal remains for human ones), May 9, 1918 (false co-defendant
As our milestones show, capital punishment also has been plagued by racism,\(^5\) infliction of unspeakable pain both intentional and unintentional,\(^6\) executions for crimes to which the death penalty no longer applies,\(^7\) for the imaginary crime of witchcraft,\(^8\) and, in two instances, for murders that appear not to have occurred.\(^9\)

Maintaining the death penalty system, moreover, has cost state taxpayers billions of dollars more than life imprisonment would cost\(^10\) and has claimed lives of the mentally

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\(^5\) See, e.g., Richard C. Dieter, The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides, DEATH PENALTY INFO. CTR. (June 1998), https://deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides (last visited Jan. 26, 2018) (assessing race of victim and defendant as predictors of death sentences); \infra entries dated May 25, 1849 (race interjected for the first time in the capital punishment debate), May 8, 1964 (more than ninety percent of defendants executed for rape were black), Jan. 23, 1990 ("Somebody has to pay for this crime; 'Since you're the Nigger, you're elected.'"), \textit{and} Apr. 22, 1987 (Supreme Court deemed racial disparities in sentencing "an inevitable part of our criminal justice system").

\(^6\) Pain was intentional in the early experience, see, e.g., \infra entries dated May 16, 1691 (two men hanged but cut down while alive, disemboweled, burned, and beheaded in New York), Apr. 14, 1712 (two slaves hideously executed in Manhattan), \textit{and} Jan. 11, 1744 (a slave’s penis and testicles were torn off with hot pincers before he was hanged in Connecticut). As time passed, it became unintentional, see, e.g., \infra entries dated July 2, 1852 (double hanging in New Orleans described as "one of those horrid scenes . . . which chill the blood in veins"); June 20, 1890 (botched double hanging in Nevada), Aug. 6, 1890 (nation’s first electrocution in New York, described as "[m]ore fearful than . . . the most barbarous hanging"), Feb. 13, 1906 (botched hanging in Minnesota), Mar. 25, 1997 (after botched Florida electrocution, the state Attorney General proclaimed that murderers should avoid Florida "because we have a problem with our electric chair"), \textit{and} Jan. 16, 2014 (Ohio execution took twenty-six minutes, during which the man on the gurney gasped for air and appeared to writhe in pain).

\(^7\) See Appendix A: “Executions for crimes no longer punishable by death” (compilation of data from Executions in the U.S. 1608–2002: The Espy File, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions-us-1608-2002-espy-file (last visited Jan. 26, 2008) [hereinafter Espy], showing that from 1624 through 2003 there were 2,724 executions in what would become the United States for crimes to which the death penalty no longer applied).

\(^8\) Appendix A, \textit{See} \infra entries dated May 26, 1647 (woman hanged at Hartford, Connecticut), July 10–Sept. 22, 1692 (fourteen women and five men executed at Salem, Massachusetts), \textit{and} June 6, 1779 (black slave shot at Kaskaskia, Illinois County, Commonwealth of Virginia).

\(^9\) \infra entries dated Mar. 25, 1887 (after Nebraska hanging, murder victim found alive in Kansas), \textit{and} Dec. 30, 1892 (after Arkansas hanging, murder victim purportedly found alive, also in Kansas).

\(^10\) See, e.g., \infra entries dated June 30, 2008 (California study estimating marginal cost of the death penalty at $125 million annually), Feb. 2, 2017 (New Mexico fiscal impact report concluding that costs of restoring the death penalty “are very clear and very expensive”), \textit{and} Mar. 9, 2011 (Illinois spending totaled $200 million on capital prosecutions from 2000 to 2011, during which time only fifteen death sentences were imposed).
ill, the severely intellectually handicapped or brain-damaged, juveniles, and thousands of prisoners executed in U.S. jurisdictions that since have abolished or suspended capital punishment.

Despite denials by proponents of the death penalty that no executed person ever has been proven innocent—that there has not been, as the late Supreme Court Justice Antonin Scalia put it, “a single case—not one—in which it is clear that a person was executed for a crime he did not commit”—executions of innocent defendants have been acknowledged in three states, while executions of untold numbers of others who likely were innocent remain unacknowledged.

11 See, e.g., infra entries dated Dec. 6, 1638 (Salem hanging of woman for a murder motivated by a “revelation from heaven”), Aug. 5, 2013 (Florida lethal injection of man whose last words were, “I am the Prince of God and I will rise again”), and July 6, 2017 (Virginia lethal injection of prisoner suffering from “profound mental illness”).

12 See, e.g., infra entries dated May 21, 1919 (Tennessee electrocution of likely innocent man with mental capacity of an eight-year-old), June 24, 1986 (Georgia electrocution of man with sixty-five IQ who could not count beyond ten), Jan. 24, 1992 (Arkansas electrocution of brain-damaged man who had no concept of death and saved the dessert that came with his last meal to eat after his execution), Jan. 17, 1995 (Texas execution of man with a sixty-five IQ and adaptive skills of a seven-year-old), and Dec. 3, 2009 (Texas lethal injection of man with an IQ between sixty-eight and eighty-six).

13 See, e.g., infra entries dated Mar. 4, 1655 (Connecticut hanging of fifteen-year-old shepherd for bestiality), Nov. 11, 1710 (Massachusetts hanging of fourteen-year-old for infanticide), Jan. 11, 1744 (Connecticut execution of sixteen-year-old slave for castrating his master’s son), Dec. 20, 1786 (Connecticut hanging of twelve-year-old girl for murder), June 18, 1885 (Cherokee man hanged by federal authorities in Arkansas for a murder committed when he purportedly was only ten), June 16, 1944 (South Carolina electrocution of fourteen-year-old African American for beating two white girls to death), and Apr. 3, 2003 (Oklahoma carries out last U.S. execution of a crime committed by a person under age eighteen).

14 See Appendix B: “Executions where capital punishment has been ended” (compilation of data from 1630 through 2012 documenting 4,723 executions that occurred in twenty-four U.S. jurisdictions where the death penalty had been abolished or where executions had been ended by gubernatorial moratoria).


16 Infra entries dated Mar. 25, 1887 (William Jackson Marion, Nebraska), Jan. 6, 1939 (Joe Arridy, Colorado), and Oct. 14, 2009 (Thomas Griffin and Meeks Griffin, South Carolina).

17 See, e.g., infra entries dated Oct. 17, 1817 (woman hanged in New York for a murder to which her accuser confessed fifteen years later); Feb. 20, 1835 (man hanged in Alabama for a murder to which someone else would confess); Dec. 26, 1862 (Dakota tribesman executed for a crime for which he had been pardoned by President Abraham Lincoln); Mar. 5, 1909 (Nebraska man hanged for the murder of a woman whose husband confessed on his deathbed to killing her); May 21, 1919 (African American farmhand, hanged in Tennessee despite a white employer’s payroll record and testimony placing him miles from the crime scene when it occurred); Aug. 23, 1927 (Nicola Sacco and Bartolomeo Vanzetti electrocuted in Massachusetts for a double murder that they were unlikely to have committed); Sept. 10, 1984 (man electrocuted in Louisiana for a murder in the face of compelling evidence of his innocence); Mar. 15, 1988 (African American man electrocuted in Florida for a murder that two police officers, who had not been called as trial witnesses, would have testified he could not have committed); May 12, 1993 (Latino executed in Texas for a murder after the Supreme Court held that a free-standing claim of actual innocence was not a ground for federal habeas corpus relief); Aug. 24, 1993 (another Latino executed in Texas for a murder of which his prosecutor would proclaim him innocent); June 21, 1995 (African American executed in Missouri for a murder based on informant testimony that was materially false); Apr. 3, 1997 (man executed in Texas for a triple murder although two officers involved in the investigation doubted his guilt); July 23, 1997 (man executed in Virginia for a murder after being denied DNA testing that could have proved him innocent); June 22, 2000 (African American executed in Texas for a murder for which his conviction rested solely on a cross-racial identification while other eyewitnesses swore he was not the
Since 1977, when executions resumed under state laws enacted after the Supreme Court voided prior death penalty laws in 1972,18 for every ten death row prisoners executed, more than one has been exonerated.19 Of those executed, almost one in ten had volunteered, abandoning discretionary appeals—in effect committing state-abetted suicide.20

The idea for compiling the milestones that follow came from a 2008 non-fiction book by Nicholson Baker entitled Human Smoke: The Beginnings of World War II, the End of Civilization, a “riveting and fascinating”21 series of vignettes chronicling the horror of war and its devastation. Our goal was to accomplish something similar regarding the origins and horror of capital punishment, believing, as we do, in a thesis advanced by late Supreme Court Justice Thurgood Marshall that the average American, if fully informed of the realities of the death penalty, would “find it shocking to his conscience and sense of justice.”22 To that end, we present below more than 300 chronological vignettes, which we believe demonstrate that the history of the death penalty is a history of blunders that will validate the Marshall thesis for most readers.

To avoid disruptions in the flow of the vignettes, we use only one footnote at the end of each. To the extent practical—sometimes it was not—the order of sources in each footnote follows the order of the facts in the vignette to which the footnote pertains.

At the conclusion of the vignettes—in a brief section titled “The absurdity of the reality”—we offer a perspective on the future of the U.S. death penalty.

SEVENTEENTH CENTURY

1608: George Kendall, a former member of the Jamestown village council accused of spying for Spain, became the first person known to have been executed under English law in the New World—a distinction that almost went to Kendall’s accuser, James Read, a blacksmith who had been convicted of treason. Read saved himself by alleging what

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18 Furman v. Georgia, 408 U.S. 238 (1972) (plurality opinion). The first person executed under one of the new laws was Gary Mark Gilmore in Utah. See infra entry dated Jan. 26, 1996.

19 See Appendix C: “Executions, volunteers, and exonerations” (compilation of data showing that, of 1,465 men and women executed in U.S. jurisdictions from 1977 through 2017; 145 waived discretionary appeals, and there had been more than one exoneration for every ten executions).

20 Id.


22 Furman, 408 U.S. at 369 (Marshall, J., concurring).
Captain John Smith would describe as “a dangerous conspiracy . . . for which Captaine Kendall, as principal, was by a Jury condemned, and shot to death.”

May 24, 1610–June 22, 1611: Jamestown Governor Thomas Gates issued “Articles, Lawes, and Orders, Divine, Politique, and Martiall,” prescribing death for those convicted of “horrible, detestable sins,” such as “sodomy, adultery, and ravishing women,” whether “maid or Indian.” Deputy Governor Sir Thomas Dale expanded the list of offenses covered by the code to include taking God’s name in vain, cursing, speaking against royal authority, violating the Sabbath, sacrilege, theft, and perjury. There would be no record of executions carried out under the code, which would be in effect until 1618. After the Virginia Company’s charter was revoked in 1624, the elected assembly of Virginia would report that settlers had been “put to sundry deathes as by hanginge, shooting, and breaking upon the wheele”—and that a man who had stolen some oatmeal “had a bodkin thrust through his tounge and was tyed with a chain to a tree until he starved.”

Summer 1627: For the “rape and ravishment” of “fower mayden children,” Thomas Hayle, a twenty-one-year-old servant, was hanged at Jamestown, becoming the first colonial settler known to be executed for crimes other than murder or treason. Another man, who had been convicted of an unspecified crime against a seven-year-old girl, had been ordered to “do execution upon the bodye of Thomas Hayle,” and then to be whipped. A woman who allegedly knew about Hayle’s crimes but failed to report them had been given forty lashes.

September 30, 1630: John Billington, who had arrived on the Mayflower, became the first English settler to be hanged in Plymouth. He had shot his neighbor, John Newsomen, to death. Billington admitted the killing, but argued that the colony had neither the right to execute him nor an interest in doing so, since his death would deprive his wife and children of support. Governor William Bradford disagreed, decreeing that Billington, who was about fifty years old, “ought to die, and the land to be purged from blood.”

1632: Jane Champion was hanged in James City County, Virginia, “for murder & concealing ye death of ye child”—who apparently had been the product of adultery. The date of her execution was not recorded, but Champion probably was the first woman to be executed in the colonies.27

September 4, 1638: Three English settlers—Arthur Peach, Thomas Jackson, and Richard Stinnings—were hanged at Plymouth for stabbing a Narragansett tribesman known as Penowyanquis to death and stealing his wampum. Penowyanquis survived long enough to identify his attackers, whom the tribe captured and brought to the colony for trial. Governor William Bradford wrote that some “rude and ignorant” colonists believed it improper to hang white men for killing an Indian, but a jury found the defendants guilty and sentenced them accordingly. Penowyanquis’s friends witnessed the hangings, which, according to the governor, “gave them and all the country good satisfaction.”28

December 6, 1638: Dorothy Talbye became the first woman to be executed in Massachusetts. Acting on what she described as a “revelation from heaven,” she had broken the neck of her three-year-old daughter, Difficult. On the gallows at Salem, Talbye declined to cover her face and expressed an unrequited desire to be beheaded—a mode of death that she said would be “less painful and less shameful.” The previous year, she had been chained to a post “for frequent laying hands on her husband to the danger of his life” and had been whipped for “misdemeanors against her husband.”29

August 5, 1639: Gregory Peterson, a soldier at Fort Amsterdam on Manhattan Island, was shot for mutiny. Details of his crime are lost to history, but he was the first person to be executed in what would become New York. The New Amsterdam council records of the previous day noted simply, “Gregory Peterson, mutiny; guilty; sentence, to be conveyed to the place of execution to-morrow, and there shot to death.”30

October 30, 1639: A Native American named Nepauduck was hanged and then beheaded in New Haven, Connecticut, after he allegedly confessed that he had killed four white settlers, severed their hands as trophies, and abducted a white child during the Pequot War of 1837. Nepauduck was believed to be the first person executed in Connecticut and the first Native American executed in the colonies.31

27 Conway Robinson, Notes from Council and General Court Records, 13 VA. MAG. HIST. & BIOGRAPHY 389, 390 (1906).
28 LEGAL EXECUTIONS, supra note 26, at 7; PLYMOUTH PLANTATION, supra note 26, at 179–83;
MAYFLOWER, supra note 26, at 194–95.
31 LEGAL EXECUTIONS, supra note 26, at 8–9.
September 8, 1642: Seventeen-year-old Thomas Graunger was hanged in Plymouth for sodomizing a horse. His was the first known execution of a juvenile in Massachusetts. The horse was slain. Both were condemned in accordance with the Old Testament injunction: “If there is a man who lies with an animal, he shall surely be put to death; you shall also kill the animal.”

March 21, 1644: Mary Latham and James Britton—whose case in part may have inspired Nathaniel Hawthorne’s The Scarlet Letter—were hanged for adultery in Boston. Governor John Winthrop would write that Latham was a “proper young woman” whose father was “a godly man and had brought her up well.” In her late teens, a young man whom Latham loved had jilted her, and she “vowed she would marry the next that came to her.” Unfortunately, this happened to be “an ancient man who had neither honesty nor ability, and one whom she had no affection unto.” One night, Latham, then about eighteen, and Britton had left a party and walked into the woods, where a witness spotted them “upon the ground together.” On the gallows, Latham “proved very penitent, and had deep apprehension of the foulness of her sin, and at length attained to hope of pardon by the blood of Christ.” She and Britton are the only persons known to have been executed on American soil for adultery.

June 25, 1646: As directed by the Dutch governing authority of New Amsterdam, Jan Creoli, a slave, was “conveyed to the place of public execution, and there choked to death, and then burnt to ashes” for sodomy—a crime “condemned by God . . . as an abomination.” Creoli’s execution was not the end of the matter. Following it, ten-year-old Manuel Congo, the victim “on whom the above abominable crime was committed,” was taken to the site of the execution, tied to a stake, and flogged “for justice sake.”

May 26, 1647: Alse Young was hanged in the town square at Hartford, Connecticut, for witchcraft, which had been a capital offense in the state since 1642 in accordance with Exodus 22:18: “Thou shalt not suffer a witch to live.” Young was believed to be the first woman executed for witchcraft in the colonies.

March 4, 1655: Walter Robinson, a fifteen-year-old shepherd, was hanged in New Haven, Connecticut, for “that horrible sinn of beastialitie, with a bitch, and therein abasing the nature of man in a most filthy way.” A fisherman sailing through Long Island Sound had spotted Robinson and a sheepdog in flagrante delicto on a Sunday afternoon. After the

fisherman reported what he had seen, Robinson confessed. Before his execution, the dog was decapitated with a sword. Robinson and the dog were buried together.\textsuperscript{36}

\textit{June 17, 1660}: Jan Quisthout van der Linde, a Flemish soldier stationed at Fort Amsterdam on Manhattan Island, was convicted of sodomizing a young boy and sentenced “to be taken to the place of execution and there stripped of his arms, his sword to be broken at his feet, and he to be then tied in a sack and cast into the river and drowned until dead.” It also was ordered that “the boy on whom Quishtout committed by force the above crime [was] to be privately whipped, and sent to some other place by the first opportunity.”\textsuperscript{37}

\textit{February–March 1665}: Richard Nicolls, the English governor of New York, promulgated the Duke of York’s Code, making it a capital offense for children to “smite their Naturall Father or Mother” and for anyone to “deny the true God and his Attributes” or to engage in male homosexuality.\textsuperscript{38}

\textit{April 4, 1676}: Canonchet, a Narragansett chief, was executed for leading a massacre of an estimated 100 English soldiers in Rhode Island several days earlier. A party of English-allied Mohegan and Pequot tribesmen tracked him down and turned him over to the English in Stonington, Connecticut. There he was shot to death, beheaded, and quartered. His torso was incinerated. His head was preserved as a trophy and sent to authorities in New Haven.\textsuperscript{39}

\textit{August 12, 1676}: Matoonas, a Wampanoag chief whom the English called King Philip, was executed in Boston for leading a year-long uprising known as King Philip’s War. Two weeks before his execution, Matoonas was turned over to the English by a former ally, a Nipmuc leader known as Sagamore John, who received clemency for his own participation in the uprising. No sooner had Matoonas been sentenced to death than Sagamore John volunteered to carry out the execution. His offer accepted, he and several of his men took Matoonas to Boston Commons, tied him to a tree, and shot him to death. Boston’s most prominent clergyman, Increase Mather, would write, “Thus, did the Lord retaliate upon him the innocent blood which he had shed, as he had done so God hath requited him.”\textsuperscript{40}

\textit{September 22, 1681}: William Cheney was hanged in Boston for the rape of his family’s teenage maidservant. Unbeknownst to Cheney, a reprieve had been approved conditioned

\begin{footnotes}
\item \textsuperscript{36} \textsc{Charles J. Hoadly}, \textit{Records of the Colony or Jurisdiction of New Haven, from May, 1653, to the Union 132–33 (1858).}
\item \textsuperscript{37} \textit{Supra} note 30, \textit{Dutch Manuscripts}, at 9.
\item \textsuperscript{38} \textsc{Alden Chester & Edwin Melvin Williams}, \textit{Courts and Lawyers of New York: A History}, 1609–1925, at 310–16 (1925).
\item \textsuperscript{39} \textsc{William Hubbard}, \textit{A Narrative of the Indian Wars in New England from the First Planting Thereof in the Year 1607, to the Year 1677}, at 158–62 (1814); \textsc{John W. De Forest}, \textit{History of the Indians of Connecticut from the Earliest Known Period to 1850}, at 282–83 (1852).
\item \textsuperscript{40} \textsc{Increase Mather}, \textit{A Brief History of the Warr with the Indians in New-England, in So Dreadfull a Judgment: Puritan Responses to King Philip’s War 1676–1677}, at 135 (Richard Slotkin & James K. Folsom eds., 1978).
\end{footnotes}
on his showing remorse. On the gallows, he refused to listen to the sermon—and died not for his supposed crime but for his obstinacy.\textsuperscript{41}

\textit{December 7, 1682:} An assembly of freeholders convened by William Penn in Upland, Pennsylvania, enacted the Great Law of Pennsylvania, which restricted the death penalty to the crimes of treason and murder. Adulterers were to be publicly whipped and imprisoned for up to one year. Sodomy, incest, and rape were punishable by forfeiture of assets and up to one year in prison.\textsuperscript{42}

\textit{May 16, 1691:} Convicted of leading a two-year insurrection against the British colonial authorities in New York, Jacob Leisler and his son-in-law, Jacob Milborne, were executed by a manner prescribed ten days earlier—hanged “by the Neck and being Alive their bodys be Cutt downe to the Earth and their Bowells be taken out and they being Alive, burnt before their faces; that their heads shall be struck off and their Bodys Cutt in four parts.”\textsuperscript{43}

\textit{July 10–September 22, 1692:} Fourteen women and five men were hanged at Salem for witchcraft. A sixth man was pressed to death with stones for refusing to answer the charges against him. All twenty and scores of others, who ranged in age from five to nearly eighty, had been accused of sorcery by mischievous girls who hysterically told juries that they were being tormented in the courtroom by the defendants’ specters. The accused who admitted consorting with the Devil were spared from death, leaving only those who professed innocence to be hanged. The first being Bridget Bishop, who protested that she did not even know what a witch was. Bishop was followed to the gallows nine days later by five women, including Rebecca Nurse, a seventy-one-year-old invalid mother of eight whose piety had been renowned. Four men and a woman were hanged in August. Giles Corey was pressed with stones for two days in September, suffering an agonizingly slow death. The next day, his wife, Martha, was hanged.\textsuperscript{44}

\textit{April 5, 1696:} Susannah Andrews was hanged at Plymouth for the murder of twins, a boy and a girl, to whom she had given birth out of wedlock. Andrew confessed to the crime to her parents, John and Esther Andrews, who helped conceal the crime and were sentenced to death for complicity in it. Records are unclear, but Esther may have been hanged with Susannah, or shortly thereafter. John would remain in jail for at least two years, his ultimate fate unknown.\textsuperscript{45}

\textsuperscript{41} \textsc{Legal Executions, supra} note 26, at 54.
\textsuperscript{45} \textsc{Legal Executions, supra} note 26, at 104–05.
EIGHTEENTH CENTURY

February 2, 1708: A Native American slave known as “Indian Sam” and a black female slave whose name was not recorded were “put to all torment possible” in Jamaica Plaines, Long Island. Sam, who was alleged to have hacked his master, his master’s pregnant wife, and their five children to death with an ax while they slept nine days earlier, was hanged in chains “astride a sharp iron, in which condition he lived some time.” In a state of delirium, believing himself to be on horseback, he urged his supposed animal forward “with the frightful impetuosity of a maniac, while the blood oozing from his lacerated flesh streamed from his feet to the ground.” The woman, who was said to have instigated the crime, was roasted slowly over a low fire, remaining alive for several hours.46

November 11, 1710: Hannah Degoe, a fourteen-year-old black servant, became the first person to be hanged in Massachusetts under a 1696 “Act to Prevent the Destroying and Murder of Bastard Children.” Seven months earlier, the body of a newborn child had been found behind a chimney in the house where she worked in the town of Rehoboth. Prior to the 1696 Act, absent evidence of violence, a woman suspected of infanticide could escape prosecution by claiming that her child had been stillborn. The Act made it a capital crime to conceal the birth, death, or disposal of a child delivered by a mother alone.47

April 11, 1712: Black slaves named Claus, Robin, and Quaco were executed by different forms of torture in Manhattan for an uprising in which nine white men were murdered. Claus was strapped to a wheel, spread-eagle, and beaten to death. Robin was gibbeted alive and left to die of starvation and exposure. Quaco was burned at the stake. Over the next several days, another eighteen slaves suffered similar fates. It was alleged that the slaves had met in an orchard in the dark of the night of April 6, for what was described as an occult ritual. Then they had set fire to an outhouse and hid nearby. As the whites had rushed to extinguish the blaze, the slaves attacked them with guns, knives, swords, and hatchets. Governor Robert Hunter, in a letter to his superiors in London following the executions, would comment that “there has been the most exemplary punishment inflicted that could be possibly thought of.”48

December 10, 1718: Stede Bonnett, known as “the Gentleman Pirate,” grew faint as he ascended the gallows in Charleston, South Carolina. He had to be held erect as the noose was tightened before he dropped to his death. Born into a wealthy English family on Barbados in 1688, Bonnett had inherited his family estate. He lived a genteel, law-abiding life until 1717 when, following marital problems, he had bought a sloop, named it Revenge.

47 DAVID V. BAKER, WOMEN AND CAPITAL PUNISHMENT IN THE UNITED STATES: AN ANALYTICAL HISTORY 88 (2016); LEGAL EXECUTIONS, supra note 26, at 110–11.
hired a crew, and joined Edward Teach, better known as “Blackbeard,” in plundering merchant ships off the coast of Virginia and South Carolina. 49

July 19, 1723: Twenty-six crewmen of the pirate sloop Ranger died together on a custom-built gallows at Newport, Rhode Island. The Ranger and another pirate sloop, the Fortune, had attacked what their captains mistakenly had assumed was a well-stocked merchant vessel. It turned out to be a heavily armed man-o’-war, the HMS Greyhound, which was patrolling the area off Long Island in search of pirates. In an ensuing eight-hour battle, both sides had incurred heavy casualties. In the end, the Greyhound crew had secured the Ranger, capturing forty-two of its crewmen, but the Fortune escaped. All of the captured men claimed they had been forced to serve. On that basis, the court spared the lives of sixteen of the men. The mass execution occurred at noon before a large crowd, and the hanged men were buried in a trench on Goat Island in Newport Harbor. 50

July 12, 1726: As William Fly ascended the gallows at Boston Harbor with three fellow pirates, he appeared untroubled, even cheerful, but when he saw the noose, he chastised the hangman “for not understanding his trade” and proceeded to untie and retie the knot himself. At the urging of the presiding clergyman, each of Fly’s compatriots accepted his fate and urged onlookers to lead pious lives. Fly spoke last, saying he was unafraid of death and declaring that, if sailors were paid and treated better, fewer would be tempted by piracy. 51

May 11–August 29, 1741: Thirty black men, two white men, and two white women were executed in Manhattan for alleged roles in the “Great Negro Plot”—a supposed conspiracy said to have been organized by agents of the Roman Catholic Church to incite a slave rebellion that would enable Spain to capture New York City. After a slave named Cuffee was seen running away from a burning warehouse in April, it was rumored that rebellious slaves had set fire to other buildings owned by politicians and merchants. The authorities promptly offered cash rewards to anyone who came forward with information. When suspects were questioned, they claimed that they had been pressured to inform on others. Nearly 200 men had been arrested, and all but the thirty-four who were executed were released. Of those executed, seventeen of the black men were burned at the stake. The others were hanged. The last to die was John Ury, the supposed mastermind of the plot. 52

January 11, 1744: A sixteen-year-old slave named Barney was executed at Hartford, Connecticut, in a manner unique in the annals of crime and punishment. He had been

50 EDWARD ROWE SNOW, PIRATES AND BUCCANEERS OF THE ATLANTIC COAST 216–24 (1944); LEGAL EXECUTIONS, supra note 26, at 117–18.
convicted of castrating and leaving for dead his master’s six-year-old son, who survived. Fifty-six days before his execution, Barney was forced to stand on the gallows with a noose around his neck for an hour as spectators pelted him with rocks and other projectiles. His forehead was then branded with a “C”—for castrator—and he was given thirty-nine lashes—a standard colonial punishment, believed derived, ironically in Barney’s case, from Deuteronomy: “Forty stripes may be given him, but not more; if more lashes than these are given, your neighbor will be degraded in your sight.” For the next twenty-eight days, he was fed only bread and water and then given another thirty-nine lashes. Finally, after another twenty-eight days, he was returned to the gallows, where his penis and testicles were torn off with red-hot pincers and he was hanged.53

1752: Pierre Antoine Douchenet, a twenty-four-year-old French soldier, was hanged under the French governing authority in Louisiana for the non-fatal stabbing of two black slave women. It was the first known execution in the New World of a white person for a crime against blacks, although the slaves’ white owner may have been considered the primary victim.54

August 1754: A slave named Robin, who had been condemned for murdering his master, was hanged in chains in a gibbet to die a slow death of starvation and exposure in Beaufort, South Carolina. Up until “an Hour before he expired”—a week later—he “constantly declared his Innocence; but at last confessed.”55

September 18, 1755: Slaves named Mark and Phyllis were executed in Cambridge, Massachusetts—Mark by hanging, Phyllis by burning at the stake—for poisoning John Codman, their master. Mark’s body would be taken from the gallows to Charlestown Common where it was gibbeted and would endure as a landmark for at least two decades. Paul Revere, describing his famous ride of 1775, would mention passing the place “where Mark was hung in chains.”56

May 23, 1769: Joseph Andrews, a pirate, was hanged and gibbeted on Bedloe’s Island in New York Bay. Owing to Andrews’s reputation, the island would become known unofficially as Pest Island and later as Gibbet Island. In 1886, the Statue of Liberty would be erected on the approximate spot of the Andrews gibbeting. The island’s name would be changed to Liberty Island in 1956.57

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53 LEGAL EXECUTIONS, supra note 26, at 135–36; HOADLY, supra note 36, at 578–79.
54 ANDREW T. FEDE, HOMICIDE JUSTIFIED: THE LEGALITY OF KILLING SLAVES IN THE UNITED STATES AND THE ATLANTIC WORLD 194 (2017); Espy, supra note 7. For data on modern interracial executions, see infra entry dated Aug. 24, 2017.
July 28, 1769: A slave named Dolly and a man named Liverpoole were burned alive in Charleston, South Carolina, for the alleged poisoning death of the infant child of Dolly’s master, James Sands, and “attempting to put [Sands] out of the world the same way.”

December 4, 1770: After a riveting closing statement by John Adams, a Boston jury acquitted six of his clients—British soldiers on trial for their lives for the Boston Massacre. The jury found two other soldiers guilty only of manslaughter, for which the punishment was not death but branding of their thumbs. Adams contended that the soldiers had acted in self-defense after they were attacked by “a motley rabble of saucy boys.” He told the jury that the enduring value of the law lay in its neutrality and invulnerability to passion. It was better, he said, that many guilty men go free than that one innocent man be brought to the bar and condemned, “because it’s of more importance . . . that innocence should be protected, than . . . that guilt should be punished.” For his spirited defense of his unpopular clients, Adams would be vilified and lose much of his law practice, but in the long run the case would enhance his reputation. Years later, he would characterize his defense of the soldiers as “one of the most gallant, generous, manly, and disinterested actions of my whole life.”

November 15, 1771: Although Rhode Island law did not authorize the death penalty for non-fatal assaults, a slave named Caesar Hazard was hanged in South Kingston for beating a young white boy who had accused him of stealing a rooster. The death sentence was imposed under a 1682 English law, which the prosecutor and judge had construed as superseding colonial law—thus putting a legal imprimatur on what amounted to a lynching.

June 6, 1779: Nine days before he was to have been burned at the stake for witchcraft, a black slave named Manuel was shot to death in Kaskaskia on the east bank of the Mississippi River in southern Illinois, the last of thirty-five known executions for witchcraft on American soil.

June 18, 1779: In the Virginia General Assembly, Thomas Jefferson introduced a “Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital,” the preamble of which described the death penalty as “the last melancholy resource against those whose existence [has] become inconsistent with the safety of their fellow citizens.” Had the bill

60 LEGAL EXECUTIONS, supra note 26, at 152.
61 Espy, supra note 7; Warrant for Execution, in EDWARD GAY MASON, JOHN TODD, JOHN TODD’S RECORD-BOOK AND JOHN-TODD PAPERS 172 (1890).
been enacted, it would have restricted capital punishment to treason and murder. Jefferson begrudgingly had agreed to leave in force eye-for-an-eye sanctions for certain crimes—rape was punishable by castration, and murderers who poisoned their victims were subject to death by poisoning—although he personally decried such remnants of ancient codes as “revolting to the humanized feelings of modern times.” The legislature would not get around to considering Jefferson’s bill until 1785, by which time he was ambassador to France. When the bill was rejected by a single vote in 1786, James Madison would write Jefferson, lamenting, “Our old bloody code is by this event fully restored.”

December 20, 1786: Hannah Ocuish, a severely mentally deficient twelve-year-old, was hanged in New London, Connecticut, for the murder of a little girl half her age. She had confessed to the crime, saying she had committed it out of revenge, the victim having caught her stealing strawberries the previous summer. “The sparing of you on account of your age,” said the judge who sentenced her, “would . . . be of dangerous consequences to the public by holding up the idea that children might commit such atrocious acts with impunity. [You will] be hanged with a rope by the neck, between heaven and earth, until you are dead, dead, dead.” She would be the youngest female ever to be executed under color of law on American soil.

March 9, 1787: In a paper read at the home of Benjamin Franklin in Philadelphia, Dr. Benjamin Rush, a signer of the Declaration of Independence, challenged the notion that the death penalty deterred crime. Murder, he argued, is propagated by the punishment of death for murder—a conclusion he drew from the fact that violence subsided in Tuscany after the death penalty was abolished but continued unabated in Rome, where public executions were routine.

April 2, 1792: The first Congress enacted a statute providing that “if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death.”

April 22, 1794: Pennsylvania became the first state to differentiate between degrees of murder, making only murder in the first degree—“willful, deliberate, and premeditated killing” or “committed in the perpetration or attempt to perpetrate, any arson, rape, robbery, or burglary”—punishable by death. Previously, death had been mandatory not only for all

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63 DEATH WATCH, supra note 32, at 62.
murders but also for burglary, robbery, rape, homosexual acts, and denying “the true God.” The law was spurred by an essay by William Bradford, then a justice of the Pennsylvania Court, later attorney general of the United States, proclaiming it “the duty of every government to endeavor to reform, rather than exterminate offenders” and never to inflict death when “not absolutely necessary to the public safety.”  

**Nineteenth Century**

October 17, 1817: Vehemently professing innocence, Margaret Houghtaling was hanged in Hudson, New York, for poisoning the fifteen-month-old son of Caty Ostrander, with whom she roomed. In 1841, a report to the New York Assembly would contend that Houghtaling had been innocent. Fifteen years after the child’s death, according to the report, “a poor miserable woman [Ostrander] lay sick in a wretched, filthy hovel; finding her last hour approaching, she sent for a clergymen, and confessed to him with her latest breath, that she was the murderess of the child, and described the means she made use of to throw suspicion on Margaret Houghtaling, and finally to procure her conviction.”

December 22, 1819: Stephen Boorn escaped the gallows in Vermont when the man he was alleged to have murdered—his brother-in-law, Russell Colvin—turned up alive, having lived the previous seven years in New Jersey. Boorn’s conviction had rested primarily on false confessions that he and his brother, Jesse, had made after large bones discovered in 1819 near Manchester were mistakenly assumed to have been Colvin’s; three doctors initially opined that the bones were of human origin, but after the bones were compared with a human skeleton, concluded that they were of animal origin. The Boorn case also featured the first known American jailhouse informant—a forger named Silas Merrill, who was freed from jail after telling the authorities that Jesse Boorn had admitted that he and Stephen had murdered Colvin. During interrogation, the brothers were told their only chance to avoid death was to confess and throw themselves on the mercy of the court. That proved bad advice. Both were sentenced to death. The Vermont legislature commuted Jesse’s sentence to life at hard labor. Had Colvin not reappeared, Stephen almost certainly would have been executed on January 28, 1820, and Jesse no doubt would have remained in prison until his death.

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December 28, 1827: Levi Kelly suffered an incapacitating nervous breakdown before he was hanged in Cooperstown, New York, for murdering a man who had come to the aid of a disabled child Kelly had been scolding. Unable to stand, Kelly and his bed were loaded onto a sleigh and taken to the gallows, where hundreds of spectators filled a wooden grandstand built for the occasion. When the sleigh arrived, many in the grandstand moved to get a look at Kelly. The structure collapsed, killing two spectators and injuring a score of others. After the dead and injured were removed, the hanging proceeded.69

November 11, 1831: Thirty-one-year-old Nat Turner was hanged at noon in Jerusalem, Virginia, for crimes that, to quote the Norfolk Herald, “the bare mention of which [makes] the blood run cold.” Turner had led a slave rebellion in which at least fifty-seven white men, women, and children had been slaughtered in Southampton County three months earlier. The immediate response of the white citizenry had been to lynch scores, if not hundreds, of black men, women, and children, but Turner and eighteen cohorts were tried, convicted, and legally hanged. Because Turner had been a preacher, the rebellion would spur southern states to enact laws restricting religion. It would become a crime punishable by death, for instance, to preach against slavery or to “write, print, publish, or distribute abolitionist literature” in some states—laws that flew in the face of the Free Exercise Clause of the First Amendment, which would not apply to the states until ratification of the Fourteenth Amendment thirty-eight years after the uprising.70

February 20, 1835: Charles R.S. Boyington calmly ascended the gallows in Mobile, Alabama, and began reading a rambling statement proclaiming his innocence. When the sheriff interrupted him, Boyington leapt into the astonished crowd that had gathered to watch him die. As a witness would recount, “The officers seized him quick, struggling with the death-like grasp they beat him back—the fatal cord is attached—a few agonizing contortions for life, and he is gone.” Based solely on circumstantial evidence, Boyington had been condemned by a jury for the murder of his friend, Nathaniel Frost. The men had lived in the same rooming house and often read poetry together. Frost had last been seen in Boyington’s company, and Boyington had left town the day after Frost disappeared. Several months after Boyington’s execution, a tavern keeper would confess on his deathbed that he—not Boyington—had slain Frost.71

July 10, 1840: On a gallows erected on a Lake Michigan beach in Chicago, John Stone, an Irish immigrant, became the first person to be legally executed in Chicago. He was hanged for the rape and murder of a farmer’s wife. The sheriff placed the noose over Stone’s head and asked, “Do you have anything more you want to say before the sentence is carried out?” Stone replied, “I swear to you, sheriff, I’m an innocent man. I believe there were two of them—two men—who did the murder I’ve been wrongly accused of.” The sheriff then asked, “If you didn’t kill Mrs. Thompson, who did?” “Even if I did know their names,” Stone answered, “I’d swing before I would have their blood upon me.” The trap was dropped, but the fall did not break Stone’s neck. He gagged and choked for several minutes before dying of strangulation. His body would be delivered, under court order, to two local physicians for dissection.72

November 18, 1842: John C. Colt, brother of firearms manufacturer Samuel Colt, stabbed himself to death in his cell at the Tombs in New York City an hour before he was to be hanged for the unpremeditated murder of a printer during an argument. Activist-novelist-poet Lydia Maria Child, an opponent of capital punishment, found it appalling that the gallows “had been erected for several hours, and with a cool refinement of cruelty, was hoisted before the window of the condemned”—driving him “to a fearful extremity of agony and desperation.” The day after Colt’s death, the New York Daily Herald would editorialize, “We will hope that this tragedy, viewed in all its proportions, has done much to hasten the Abolition of the Punishment of Death.”73

February 11, 1847: The New York Supreme Court of Judicature reversed the conviction of William Freeman, a black ex-convict who had been sentenced to death by a jury that rejected his insanity defense to his random murders of several members of a white family in the hamlet of Fleming in 1846. Freeman’s guilt had not been in question. The issue rather had been whether he had been able to distinguish between right and wrong when he committed the crime. The case drew national attention to the insanity issue, due in part to the prominence of the attorneys involved. Freeman had been defended by former New York Governor William H. Seward, future secretary of state under President Abraham Lincoln. The prosecutor had been John Van Buren, son of former President Martin Van Buren. Seward attributed the senseless murders to brain damage Freeman had suffered when beaten with a two-foot-long basswood board while falsely imprisoned for stealing a horse—a crime for which Freeman likely had been framed by the actual culprit. Van Buren countered that Freeman’s condition owed to his ancestry of “African slaves and Native American savages.” The trial had been a battle of experts who vehemently disagreed about Freeman’s sanity when he committed the murders—an issue that would remain forever unresolved. Freeman prevailed on appeal as a result of judicial error. Six months later, he would die while awaiting retrial.74

72 He Paid the Penalty: First Hanging in Chicago was Fifty-Three Years Ago, CHI. DAILY TRIB., July 10, 1893, at 12; ROBERT K. ELDER, LAST WORDS OF THE EXECUTED 70 (2010).
73 People v. Colt, 3 Hill 432 (N.Y. Sup. Ct. 1842); John C. Colt, N.Y. DAILY TRIB., Nov. 19, 1842, at 2; LYDIA MARIA CHILD, LETTERS FROM NEW YORK 220–22 (1850).
March 1, 1847: Michigan became the first U.S. state—the first government in the English-speaking world in fact—to abolish the death penalty for all crimes except treason, for which nobody had been or ever would be executed in any state. The Michigan legislature had overwhelmingly approved and Governor Alpheus Felch had signed the abolition legislation ten months earlier. There was no record of the legislative debate, but the drive for abolition was believed to have been inspired by the executions of Stephen G. Simmons in 1830 and Patrick Fitzpatrick in 1838. Simmons, an innkeeper described as “good when sober but fearsome in his cups,” was hanged in Detroit for the murder of his wife in a drunken rage. The sheriff had resigned rather than carry out the execution. Fitzpatrick, a resident of Detroit, had been hanged for the rape of a nine-year-old girl in what would become Windsor, Ontario. The victim had been the daughter of the operator of a boarding house where Fitzpatrick had been a guest at the time of the crime; she had identified Fitzpatrick only by the sound of his voice. After his execution, Maurice Sellers, who also had been a guest at the boarding house, would confess on his deathbed that he had committed the rape for which Fitzpatrick had been hanged.75

May 25, 1849: Washington Goode, a twenty-nine-year-old black sailor, was hanged in Boston for a killing that his supporters argued had rested on “circumstantial evidence of the most flimsy character” and that no white man convicted under the same circumstances would have faced execution. It was the first time that race had been interjected into the debate over capital punishment. Goode had been convicted by an all-white jury—Massachusetts law barred blacks from serving on juries—a fact that attorney-abolitionist Wendell Phillips argued had rendered Goode’s trial unfair. The victim of the crime also had been a black sailor who had been stabbed to death after a barroom fight in 1848. Goode had claimed complete innocence. The night before his execution, Goode had attempted suicide by hacking a vein near his elbow with a glass shard. Too weak to stand, he was strapped into a chair and carried to the gallows, where he drifted in and out of consciousness while the death warrant was read.76

July 5, 1851: A young Mexican woman known as Juanita, whose full name is believed to have been Josefa Segovia or Josefa Loazia, was hanged at Donieville, California, for stabbing a gold miner to death the previous day after he had broken into her shack and assaulted her. She had been tried and condemned by a hastily convened jury comprised of friends of the victim. On the gallows, she proclaimed that, if faced with similar circumstances again, she would do the same thing. Then she took the rope and with her own hands placed it around her neck, and before leaping from the scaffold to her death, told the assembled crowd, “Adios, señores!”77

July 2, 1852: Jean Adam and Anthony Delisle were hanged in New Orleans for the murder of a slave girl. A reporter who watched the hanging described it as “one of those horrid scenes which too frequently occur, and which chills the blood in the veins.” When the platform dropped, according to the reporter, “[b]oth nooses slipped and the unfortunate men fell together upon the pavement in a senseless condition. A stifled cry of horror broke from the spectators who crowded up to the spot. . . . [T]he condemned [were] revived in a few minutes and . . . conducted to the scaffold. . . . The ropes were again adjusted, the platform fell, and the criminals were launched into eternity.”78

December 2, 1859: John Brown sat on his coffin for a wagon ride from jail to the gallows at the edge of Charlestown, Virginia, where he was hanged. He did not speak, but handed a prophetic note to one of his jailers: “I, John Brown, am now quite certain that the crimes of this guilty land will never be purged away but with blood.” A month and a day earlier, the fifty-nine-year-old Christian fundamentalist had been found guilty of treason, insurrection, and murder for leading a band of abolitionists who seized the federal armory at Harpers Ferry, and arming blacks for what he hoped would be a holy war that would abolish slavery. Eighteen months later, Americans would go to war against each other, with soldiers of the North marching into battle singing, John Brown’s body lies a-moldering in the grave, / But his soul goes marching on.79

July 13, 1860: On Bedloe Island, future site of the Statue of Liberty, Albert W. Hicks was hanged for the federal crime of piracy. Hicks had commandeered an oyster sloop at sea and slain the captain and two mates with an ax. Before his execution, he composed a song, which ended: I stained my hands in human blood, / Which I do not deny; / I shed the blood of innocence, / For which I have to die. P.T. Barnum made a deal to obtain Hicks’s death mask. A huge crowd assembled for the execution. Hawkers sold beer and food and an anonymous composer would commemorate the event with a ballad: Twixt heaven and earth suspended, / On Bedloe’s Island Hicks was swung, / Some thousands there attended, / To see the horrid murderer swung.80

February 22, 1862: Thirty-six-year-old Nathaniel Gordon became the first and only person ever executed under an 1820 federal law that made importing slaves from foreign lands punishable by death. The evidence indicated that Gordon, captain of a sailing vessel known

78 Execution of Adam and Delisle—Horrid Spectacle, N.Y. TIMES, July 12, 1852, at 2 (quoting NEW ORLEANS CRESCENT, July 3, 1852).
80 The Sloop Murders, N.Y. TIMES, June 2, 1860, at 8; The Pirate Hicks, N.Y. HERALD, July 14, 1860, at 3; Hicks, the Pirate, Confesses, HARPER’S WEEKLY, July 16, 1860, at 374; EDMUND PEARSON, INSTIGATION OF THE DEVIL 207–16 (1930); RON SOODALTER, HANGING CAPTAIN GORDON: THE LIFE AND TRIAL OF AN AMERICAN SLAVE TRADER 219 (2006).
as the Echo, had traded 150 hogshead of whisky for 897 African men, women, and children—the youngest six months old—in the Congo in 1860. When the Erie sailed into New York Harbor with its human cargo, some thirty-five of whom had died and been cast overboard, Gordon was arrested, indicted, and offered a deal—a short sentence and fine in exchange for identifying his financial backers. He rejected the deal, evidently confident that a trial entailed minimal risk. In the forty years that the death penalty for slave importation had been on the books, no one had been executed. In fact, there had been just one conviction—that of a Captain James Smith, who received a short sentence, only to be pardoned by President James Buchanan. But the political climate changed in 1860 with the election of Abraham Lincoln, who denied Gordon’s bid for clemency. A crowd estimated at 400 gathered in the yard of the Tombs, New York City’s prison, for the hanging.81

December 26, 1862: In the largest mass execution in U.S. history, We-Chank-Wash-tandon-pee, known as Chaska, was among thirty-eight Dakota Indians who died on a scaffold in Mankato, Minnesota—even though his sentence had been commuted days earlier by President Abraham Lincoln. More than 300 Dakota originally had been condemned for murdering some 480 white settlers earlier in the year. Lincoln approved the executions of the thirty-seven others, sparing, among others, Chaska, who had been credited with saving the lives of a white woman, Sarah Wakefield, and her children. The executioners may have mistaken Chaska for a Dakota with a similar name who had been condemned for the murder of a pregnant woman.82

November 13, 1863: Sixty-three-year-old Chipita Rodriguez was hanged from a tree in San Patricio County, Texas, for the murder of a traveler named John Savage—a crime she may not have committed. Sheriff William Means, who arrested Rodriguez, sat on the grand jury that indicted her and other members of the grand jury sat on the trial jury that convicted her—all of which occurred in just four days. The jury had recommended mercy, but Judge Benjamin F. Neal had sentenced Rodriguez to death. She had not appealed. Her last words were said to have been, “No soy culpable”—“I am not guilty.” The motive for the crime was alleged to have been the theft of $600 in gold Savage was carrying, but the gold was found with his body, casting doubt on the motive theory. On June 13, 1985—121 years and seven months after her execution—the Texas legislature would approve a resolution acknowledging that Rodriguez’s trial had been unfair and her death unjust.83

81 SOODALTER, supra note 80, at 6, 15, 53, 58, 72, 75; The Execution of Nathaniel Gordon, N.Y. TIMES, Feb. 22, 1862, at 4.
May 1, 1868: Thomas C. Dula, a former Confederate army private whose story would be popularized ninety years later by the Kingston Trio with the ballad *Hang Down Your Head, Tom Dooley*, was hanged in Statesville, North Carolina, for the murder of Laura Foster, with whom he had been in an intimate relationship. Former North Carolina Governor Zebulon Baird Vance, believing Dula innocent, represented him pro bono. In the end, Dula would confess, but his supporters would contend that the confession did not diminish his innocence claim but rather, knowing that he was (to quote the ballad) “bound to die,” his intention had been only to absolve Ann Melton, an alleged accomplice, of culpability in the murder. Melton, with whom Dula also was believed to have been intimately involved, would be acquitted.  

March 17, 1879: The U.S. Supreme Court unanimously held that execution by firing squad did not constitute cruel and unusual punishment under the Eighth Amendment. Wallace Wilkerson had been convicted by a jury in Utah Territory of the murder of William Baxter during a card game twenty-one months earlier. “Cruel and unusual punishments are forbidden by the Constitution,” Justice Nathan Clifford wrote for the court, “but . . . shooting as a mode of executing the death penalty for the crime of murder in the first degree was not included in that category.” Sixty days later, Wilkerson would choose not to be blindfolded as he sat in a chair before five sharpshooters, with a three-inch target over his heart. But, when the sheriff commanded, “Ready, aim,” Wilkerson would draw up his shoulders, causing the target to move and the bullets to miss the target, causing him to jump forward, screaming, “Oh God!” He would wither on the ground, bleeding, until death was pronounced twenty-seven minutes later.  

June 18, 1885: James Arcene, a twenty-three-year-old Cherokee, was hanged by federal authorities at Fort Smith, Arkansas, for a murder in which he admittedly participated in 1872—when, by his account, he had been only ten years old. His age could not be independently verified, but his assertion seemed credible because it was legally irrelevant and no one challenged it. If true, he would be the youngest person ever executed on American soil. He was followed to the gallows minutes later by his co-defendant, William Parchmeal, also a Cherokee, who had been an adult at the time of the murder, the victim of which had been a Swedish national whom they robbed of twenty-five cents. Arcene and Parchmeal had escaped shortly after their convictions and remained at large until shortly before their executions.  

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March 25, 1887: William Jackson Marion was hanged in Beatrice, Nebraska, for the murder of his best friend, John Cameron, who had disappeared fifteen years earlier. Four years after the hanging, two of Marion’s relatives would discover Cameron alive and living in Kansas. Cameron would explain that he had taken flight in 1872 to avoid a shotgun wedding, having impregnated a young woman in Kansas, and, shortly after parting from Marion, traded his clothes, evidently those found on a corpse presumed to be his, to a Native American for two blankets before embarking on an extended trip to Mexico, California, and Alaska before returning to Kansas. In 1987, on the centennial of Marion’s hanging, Governor Robert Kerrey would grant Marion a full pardon.87

November 10, 1887: On the eve of what was to have been his hanging for his alleged role in Chicago’s infamous Haymarket bombing the previous year, Louis Lingg bit into a percussion cap that had been smuggled to him in the Cook County Jail. The explosion blew off portions of his face and neck. With his finger, he wrote in his blood on his cell floor, “Long live anarchy.” The next morning, four fellow anarchists—August Spies, Albert R. Parsons, Adolph Fischer, and George Engel—were hanged. The lives of two other convicted anarchists—Samuel J. Fielden and Michael Schwab—had been spared, thanks to executive clemency granted by Governor Richard J. Oglesby. The evidence was scant that any of the seven had anything to do with the bombing, which killed Mathias J. Degan, a Chicago police officer, as he and other officers tried to disburse a labor rally in Haymarket Square.88

April 24, 1889: A Minnesota law went into effect prohibiting newspapers from publishing details of a hanging beyond the statement of fact that the convicted person was “duly executed” and barring newspaper reporters from attending hangings. The law also required that condemned persons be held in solitary confinement until they were hanged, and that hangings be conducted before sunrise within the walls of county jails or other locations behind walls high enough to hide the gallows from public view. The St. Paul Dispatch, expressing a sentiment widely shared by other newspapers, deemed the law “unique as a piece of paternal, sumptuary law-making,” but it survived court challenges and remained in effect until Minnesota abolished the death penalty twenty-two years later.89

88 Lingg’s Fearful Death, CHI. DAILY TRIB., Nov. 11, 1887, at 1; Francis W. McNamara (as told to Charles Collins), Drama in the Death House: The Man Who Ate Dynamite, CHI. DAILY TRIB., Nov. 22, 1936, at D1; Two Saved from Death: The Sentences of Fielden and Schwab Committed, CHI. DAILY TRIB., Nov. 11, 1887, at 1; Dropped to Eternity: Advocates of Social Revolution Meet Their Doom, CHI. DAILY TRIB., Nov. 12, 1887, at 1; Spies v. People, 122 Ill. 1 (1887); Spies v. Illinois, 123 U.S. 131 (1887); Fielden v. Illinois, 128 Ill. 595 (1889); Schwab v. Berggren, 143 U.S. 442 (1892); EDGAR LEE MASTERS, THE TALE OF CHICAGO 257–58 (1933); HARRY BARNARD, EAGLE FORGOTTEN: THE LIFE OF JOHN PETER ALTGELD 96–104, 203–35, 260–67 (1938).
March 3, 1890: Although pronouncing James J. Medley guilty of the murder for which he had been sentenced to death in Colorado, the U.S. Supreme Court ordered his release on the ground that he had been held in solitary confinement under a state law enacted after the crime. In May 1889, when Medley had slain his wife, Colorado law provided that persons under death sentence be held in county jails until their executions. Three months after the crime, a new law had gone into effect providing that prisoners be held in solitary confinement at the state prison until their executions. Medley’s solitary confinement, thus, had been in violation of the ex post facto clause of the U.S. Constitution. Solitary confinement under the new law had been no “mere unimportant regulation,” said the Supreme Court—given that even short periods of solitary confinement sometimes had caused prisoners to fall “into a semi-fatuous condition, from which it was next to impossible to arouse them, and others [to become] violently insane; others, still, [to commit] suicide.”

June 20, 1890: Elizabeth and Josiah Potts died gruesome deaths in Nevada for the murder of Miles Faucett—who, they contended, had not been murdered but had committed suicide after they confronted him about molesting their four-year-old daughter. Faucett had been missing for eleven months when his dismembered body was found buried in a cellar at the Pottses’ former home in December 1888. There was no question that the couple had concealed Faucett’s death. Josiah admitted dismembering and burying the body. On the gallows, the Pottses kissed before black hoods were pulled over their heads. Elizabeth was portly and, when the trap was sprung, her head was almost severed. Blood streamed down the front of her white dress. Josiah survived the drop. It took fifteen minutes for him to strangle to death.

August 6, 1890: In Auburn, New York, William Kemmler became the first person to be executed by electricity. Two years earlier, New York had replaced hanging with the “scientific method” of execution. A state commission, groping for a humane alternative to hanging, had deemed death by electrocution “instantaneous and painless” and “devoid of all barbarism.” Alas, it would prove otherwise for Kemmler, who had been convicted of murdering a woman with a hatchet. A New York Times reporter who covered the execution deemed it “a disgrace to civilization.” A Boston Globe reporter deemed it “[m]ore fearful than anything ever beheld at the most barbarous hanging.”

December 30, 1892: Charles Hudspeth was hanged in Arkansas for the alleged murder of

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George Watkins, the husband of a woman with whom Hudspeth had been romantically involved. Hudspeth had been tried for the murder and sentenced to death both times even though Watkins’s body had not been found, nor would it be. Both convictions rested on the uncorroborated testimony of Watkins’s wife whose affair with Hudspeth had turned sour. The Arkansas Supreme Court reversed the first conviction because the trial court had refused to allow testimony regarding the accuser’s character, which was not good. The second conviction was affirmed, and the execution ensued eight months later. In 1893, Hudspeth’s lawyer, W. F. Pace, announced that he had found Watkins alive and well and living in Kansas.93

December 29, 1893: Rejecting an insanity defense, a jury sentenced twenty-five-year-old Patrick Eugene Prendergast to hang for the assassination of Chicago Mayor Carter H. Harrison Sr. at his home two months earlier. Applauding the verdict, the Chicago Daily Tribune declared that it would put “cranks” on notice that they would not be acquitted on insanity grounds, adding that it would “teach them that they must learn to control their ‘uncontrollable impulses’ or they will be hanged.” Renowned attorney Clarence Darrow, who had not represented Prendergast at trial, would appeal on the sanity issue—to no avail. Darrow would then seek clemency, noting that “the ablest physicians in Chicago . . . pronounced this man insane.” Darrow would argue, “I do not make this appeal on the ground of any technicality. I make it on the ground that this man was and is a lunatic—nothing else.” Clemency would be denied and Prendergast would hang in 1894.94

February 7, 1894: Some among the hundreds of spectators who gathered for the hanging of twenty-year-old Will Purvis in Columbia, Mississippi, suspected divine intervention when the noose unraveled and Purvis fell to the ground unhurt. He had been sentenced to death six months earlier for the murder of a fellow member of a white racist society known as the Whitecaps. The victim, Will Buckley, had been slain after he vowed to testify before a grand jury against Whitecaps who had flogged a black man. Purvis’s hanging would be rescheduled for July 31, 1895, but friends would help him escape, promising that he would surrender if his sentence were commuted to life in prison. A political controversy would ensue, culminating in the 1896 election of Governor Anselm J. McLaurin, who had promised to commute Purvis’s sentence—which McLaurin would do on March 12, 1896. Purvis thereupon would surrender. The following year, Joe Beard, a former Whitecap, would attend a Holy Rollers revival, which would move him to confess that he and two cohorts had killed Buckley and that Purvis had not been involved. Shortly thereafter, Buckley’s brother, Jim, who had identified Purvis as the killer at his 1893 trial, would recant. On December 19, 1898, McLaurin would grant Purvis a full pardon, pronouncing him innocent.95

93 THOMAS A. (TAD) DIBIASE, NO-BODY HOMICIDE CASES: A PRACTICAL GUIDE TO INVESTIGATING, PROSECUTING, AND WINNING CASES WHEN THE VICTIM IS MISSING 155 (2015); Hudspeth v. State, 9 S.W. 1, 5 (Ark. 1888); Hudspeth v. State, 18 S.W. 183 (Ark. 1892).
94 Harrison is Killed, CHI. DAILY TRIB., Oct. 29, 1893, at 1; Assassin Must Die, CHI. DAILY TRIB., Dec. 30, 1893, at 1; Prendergast Must Hang, CHI. DAILY TRIB., Dec 30, 1893, at 12; Governor Refuses to Interfere, CHI. DAILY TRIB., Mar. 23, 1894, at 7; Assassin is Hanged: Prendergast Dies on the Scaffold for Harrison’s Murder, CHI. DAILY TRIB., July 14, 1894, at 9.
March 29, 1897: Colorado abolished its death penalty, leading a parade of nine other states that would follow suit in the ensuing two decades: Kansas in 1907; Minnesota in 1911; Washington in 1913; Oregon in 1914; North Dakota, South Dakota, and Tennessee in 1915; Arizona in 1916; and Missouri in 1917. By 1920, eight of those states, all but Minnesota and South Dakota, had re-enacted death penalties. Various factors led both to abolition and reinstatement, and the factors varied among the states. Scholars have noted that ending capital punishment was only one piece of a wide-ranging progressive agenda that achieved anti-trust legislation, the Pure Food and Drug Act, workers’ compensation, child labor laws, women’s suffrage, and juvenile codes, among others, and that reinstatement was in response to, among other factors, poor economic conditions and social dislocation and widely held assumptions that the death penalty deterred crime and that its absence encouraged lynching.96

March 20, 1899: After New York Governor Theodore Roosevelt denied a sentence commutation, Martha M. Place became the first woman to be executed by electrocution, dying in the Sing Sing electric chair for the murder of her step-daughter, seventeen-year-old Ida Pace. “If there were any reasonable doubt about guilt—if there were any basis whatsoever for interference with the course of justice—I should so interfere,” Roosevelt said in rejected clemency. “But there is no ground for interference . . . . This murder was one of peculiar deliberation and atrocity.”97

December 29, 1899: William Martin, attired in a black suit and clean white shirt, was hanged for murder at Cairo, Illinois, becoming the last of 5,253 men and women—175 of the latter—executed in the United States during the nineteenth century. Eighty-two days earlier, Martin had shot and killed the victim, Joe Landrum, on a Cairo street; the crime was alleged to have stemmed from a love triangle. Martin was white, as were at least 2,047 of the others executed during the century. The race of 332 of those executed was unknown, but, of those whose race was known, 2,559, or 52%, were African-Americans, who comprised roughly 12% of the U.S. population.98

Twentieth Century

January 25, 1902: As J.B. Brown stood on the gallows in Palatka, Florida, just minutes away from hanging, the execution had to be halted after the death warrant was read. Due to a clerical error by an aide to Governor William S. Jennings, the warrant ordered the execution not of Brown but rather of the foreman of the jury that convicted Brown of

97 No Mercy for Mrs. Place: Gov. Roosevelt Declines to Prevent Her Execution, N.Y. TIMES, Mar. 16, 1899, at 1; Mrs. Place Executed: Went to the Chair Quietly and Died Instantaneously, N.Y. TRIB., Mar. 21, 1899, at 4.
robbing and murdering a train engineer three months earlier. At the behest of Brown’s lawyers, Jennings would agree to review the case and found it troubling enough that he would commute Brown’s sentence to life in prison. The conviction had rested primarily on the testimony of two jailhouse informants who claimed Brown had confessed. In 1913, James J. Johnson, who originally had been Brown’s co-defendant, but whose prosecution had been dropped, would confess on his deathbed that he alone had committed the crime. The confession included details that would persuade the trial prosecutor and trial judge that Brown was innocent. Together, they would beseech Governor Park Trammell “to rectify, as far as possible, a gross miscarriage of justice.” Trammell would grant Brown a full pardon, acknowledging his innocence. In 1929, the Florida legislature would award Brown a pension—$25 a month for “the period of [his] wrongful imprisonment.”

November 20, 1903: Tom Horn, an Army scout renowned for leading the party to which Geronimo had surrendered in 1886, was hanged in Cheyenne for the murder of Willie Nickell, the fourteen-year-old son of a Laramie County sheep rancher. The only evidence against Horn was a boastful statement that he had made under the influence of alcohol after being tricked into believing he was auditioning for a Montana cattle detective job. Three witnesses had heard the alleged confession, which Horn disavowed and which did not match the facts of the crime. Horn’s supporters contended that he had been framed by an unscrupulous deputy marshal and that the Nickell child probably had been slain by a neighbor youth in culmination of a longstanding feud.

July 19, 1905: After an effort to escape was foiled, Edward Gottschalk saved authorities in Ramsey County, Minnesota, the trouble of hanging him by doing it himself in the county jail. Gottschalk’s suicide spoiled Sheriff Anton Miesen’s plans for the officially scheduled event—for which the sheriff had sent printed invitations to prominent persons. “You have been appointed Deputy Sheriff to assist me at the execution of Edward Gottschalk,” said the invitations. “You will report at the County Jail at 1:00 o’clock A.M. sharp, August 8, 1905.” Gottschalk had been condemned for the murder five months earlier of Joseph Hartmann, with whom he had participated in the robbery of a St. Paul butcher shop in which the proprietor, Christian H. Shindeldecker, had been shot to death. Gottschalk maintained that he had killed Hartmann in self-defense when Hartmann turned on him after killing Shindeldecker.

February 13, 1906: What would be Minnesota’s last execution was botched: William Williams slowly strangled to death on a gallows in the basement of the Ramsey County Jail because Sheriff Anton Miesen used a rope that was too long. When Miesen sprang the

99 CONVICTING THE INNOCENT, supra note 95, at 33–39; IN SPITE, supra note 17, at 290; Brown v. State, 44 Fla. 28 (1902); Pardon of J.B. Brown (Oct. 1, 1913) (on file with authors).
100 ‘Tom’ Horn Dies Coolly: Noted Scout Hanged at Cheyenne for Child Murder—Denies Alleged Confession of Guilt, N.Y. TIMES, Nov. 21, 1903, at 5; By the Noose and Bullets Law Avenge Two Murders: Tom Horn Hanged in Wyoming for Murdering Boy, ATLANTA CONST., Nov. 21, 1903, at 4; Karen Cotton, The Life, Death and Legend of Tom Horn: 100 Years Later and the Jury’s Still Out, WYO. TRIB. EAGLE (Cheyenne), Nov. 14, 2003, at 12.
101 Two Murderers in Plot to Escape, ST. PAUL DAILY NEWS, May 15, 1905, at 1; Gottschalk Cheats Gallows, DULUTH NEWS-TRIB., July 20, 1905, at 1.
trap at 12:31 A.M., Williams’s feet landed on the floor. Three deputy sheriffs grabbed the rope, hoisting the gasping man into the air until he was pronounced dead shortly after fourteen minutes later. The ordeal—which newspapers reported in violation of the 1899 state law prohibiting publication of details of executions—gave impetus to the Minnesota death penalty abolition movement, which would succeed five years later.\(^{102}\)

\textit{June 12, 1908:} Ten minutes before Herman Billik (also known as Herman Zajicek) was scheduled to hang in Chicago for the poisoning murder of the daughter of his reputed paramour, U.S. District Court Judge Kenesaw Mountain Landis, future commissioner of Major League Baseball, granted a reprieve to allow Billik to appeal his sentence to the U.S. Supreme Court. The appeal would not proceed because before it was filed Governor Charles S. Deneen would commute Billik’s sentence to life in prison. In 1916, the prosecution’s star witness, a brother of the deceased, admitted that he had falsely accused Billik. After an investigation, the Illinois Pardon Board would advise Governor Edward F. Dunne that Billik “is at present an inmate of the prison hospital and, we believe, an innocent man.” Dunne would grant Billik a full pardon in 1917, enabling him to live the last four months of his life a free man.\(^{103}\)

\textit{March 5, 1909:} Standing on a gallows at Beatrice, Nebraska, moments before the trap dropped, twenty-eight-year-old R. Mead Shumway declared, “I am an innocent man. May God forgive everyone who has said anything against me.” Sixteen months earlier, Shumway had been convicted of the murder of Sarah Martin, wife of a farmer for whom Shumway had worked. One juror had held out against conviction, but finally joined in the guilty verdict. That juror had committed suicide before the execution, leaving a note expressing regret for the verdict. In 1910, the victim’s husband would confess on his deathbed that he had committed the killing.\(^{104}\)

\textit{March 17, 1911:} Andrew Toth, who had been sentenced to death two decades earlier for beating a watchman to death during labor unrest at the Edgar Thompson Steel Works in Braddock, Pennsylvania, was granted a full pardon and released from prison after a man named Steve Toth—unrelated to Andrew—confessed on his deathbed that he had beaten the watchman. Andrew’s death sentence had been commuted to life in prison in 1892. From personal funds, Andrew Carnegie, owner of the Thompson Works, would award the

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\(^{104}\) \textit{Shumway v. State,} 82 Neb. 152 (1908); \textit{In Spite, supra} note 17, at 346–47.
pardoned man a $40-a-month pension, enabling him to return to and live out his years in his native Hungary.105

March 31, 1911: Three months after the inauguration of Oklahoma Governor Lee Cruce, an ardent foe of capital punishment, a black man named Frank Henson was hanged in Tulsa County for the murder of a white deputy sheriff. It would be the only execution during the four-year tenure of Cruce, who would commute twenty-two other death sentences to life in prison.106

August 12, 1912: One after another, between 6:09 and 6:14 A.M., seven men went to their deaths in the New York electric chair at Sing Sing—in what would be the largest mass execution by electrocution in U.S. history. “It was a ghastly occasion,” Dr. Amos O. Squire, the Sing Sing physician, would recount. “The shrieking and wailing I heard that day was indescribable. The whole thing was like a nightmare, unreal and yet horrible.” The electrician who officiated received $200 for each man. Only three of the men had been convicted of killing anyone—John W. Collins of slaying a police officer in Manhattan, Joseph Ferrone of killing his wife in the Bronx, and Angelo Gustina of restraining a woman while a cohort, Santa Zanza, had stabbed her to death during a home invasion. The others—Vincentzo Cornu, Lorenzo Cali, Filipe Demarco, and Salvatore Demarco—had set out with Gustina and Zanza to rob the home where they mistakenly had believed that $3,000 in cash was kept. There they encountered three women, one of whom Gustina and Zanza killed while Cornu, Cali, and the Demarcos were in another part of the house. Zanza had been executed at Sing Sing a month before the others, making the total executed for the crime eight—the most ever to die in New York for a single crime.107

July 30, 1915: New York City Police Lieutenant Charles Becker went to his death in the Sing Sing electric chair proclaiming “absolute innocence of the foul crime for which I must die”—the 1912 murder of Herman Rosenthal, a Manhattan gambling parlor proprietor. Four hit men who had shot Rosenthal to death, allegedly on Becker’s orders, had preceded Becker to the electric chair. The principal witnesses against Becker had been three gamblers who testified under grants of immunity from prosecution; Becker contended that the gamblers had orchestrated Rosenthal’s murder because he had told Herbert Bayard Swope of the New York World that they had bribed Becker, who admitted taking bribes, but denied involvement in the murder. At Swope’s behest, Manhattan District Attorney Charles S. Whitman had led the prosecution and, after becoming governor of New York,  

105 Innocent Man Free After Twenty Years, N.Y. TRIB., Mar. 19, 1911, at 1; Injustice Stirs Carnegie, WASH. POST, Mar. 24, 1911, at 11; Carnegie Pensions Toth, N.Y. TIMES, Aug. 2, 1911, at 1; Toth Sails for Hungary, WASH. POST, Aug. 23, 1911, at 7; Commonwealth v. Toth, 22 A. 157 (Pa. 1891); Convicting the Innocent, supra note 95, at 286–93.

106 R. Michael Wilson, Legal Executions in Nebraska, Kansas and Oklahoma Including the Indian Territory 147–48 (2012); One White Man in Oklahoma with a Heart, Chi. Defender, Aug. 19, 1911, at 1; Lee Cruse Dead, N.Y. TIMES, Jan. 17, 1933, at 22.

107 Seven Die in Chair: Record Number of Executions for One Day at Sing Sing, N.Y. TRIB., Aug. 13, 1912, at 14; Amos O. Squire, Sing Sing Doctor 132–47 (1935); Electric Chair Claims 3 Murderer of Mrs. Mary Hall Among Those Put to Death, WASH. POST, July 9, 1912, at 5.
had denied clemency, prompting Becker’s wife to have a silver plate engraved and affixed to his gravestone: “Charles Becker Murdered July 30, 1915 By Governor Whitman.”

May 9, 1918: Charles F. Stielow, who had come within forty minutes of electrocution in New York for a double murder to which it falsely had been alleged that he had confessed, was freed along with his co-defendant, Nelson Green, after Governor Charles S. Whitman pardoned them based on innocence. Green, who actually had confessed, albeit falsely, had been sentenced to twenty years in prison under a plea agreement he accepted to avoid a death sentence. Stielow and Green had been framed by a private detective, who fabricated Stielow’s confession and coerced Green’s by deception, and a ballistics examiner, who falsely testified that a revolver owned by Stielow had been used in the crime. An investigation by the New York World was instrumental in exonerating the innocent men and identifying two career criminals as the killers.

April 22, 1919: President Woodrow Wilson pardoned Thomas M. Bram, who had twice been sentenced to death for a triple ax murder aboard a U.S. merchant ship on the high seas. When the crime had occurred twenty-three years earlier, the initial suspect had been a sailor who went by the name Charley Brown. When the ship put in at Halifax, Nova Scotia, however, Brown claimed to have seen Bram hack one of the victims to death. When Bram was confronted with the accusation, he asked where Brown had been at the time. Told that Brown had been at the wheel of the ship, Bram had said, “He could not see me from there”—a remark that the authorities had construed as a confession. Bram’s convictions and death sentences, which had been imposed following federal jury trials in Boston, rested on the inferential confession and Brown’s purported eyewitness account. Mary Roberts Rinehart, an acclaimed mystery writer, who had become convinced that Bram was innocent, based The After House, a 1913 novel, on the case, portraying Brown—“Charlie Jones” in the novel—as “a madman, a homicidal maniac of the worst type.” Rinehart’s advocacy was instrumental in persuading Wilson to pardon Bram.

May 21, 1919: Frank Ewing, a black farmhand, went to his death in the Tennessee electric chair for the rape of a white woman eleven months earlier on a farm south of Nashville. Ewing had been arrested several days after the crime as a suspect in the theft of a cow near Hendersonville, some twenty-five miles from where the rape had occurred, but he was put into a lineup, from which the rape victim identified him. Ewing, who was about twenty, but had the mental capacity of an eight-year-old, initially denied the crime, but eventually

110 Ship Murders Still a Mystery: Bram Pardoned, Question Is Still Without Answer, Who Killed Capt Nash, His Wife and Mate Blomberg, BOS. DAILY GLOBE, June 22, 1919, at E1; MARY ROBERTS RINEHART, THE AFTER HOUSE (1913); William S. Warden, Thomas M. Bram: An Unguarded Remark was Construed as a Confession to a Triple Ax Murder, in TRUE STORIES OF FALSE CONFESSIONS 283–87 (Rob Warden & Steven A. Drizin eds., 2009).
confessed under interrogation. The execution proceeded despite records that had come to light after his trial establishing that Ewing had worked for a white landowner named J.M. Summers near Hendersonville. Summers, whose reputation was impeccable, testified at a hearing on a motion for a new trial, but the motion was denied. Ewing’s lawyer appealed, arguing that it would have been “utterly impossible” for Ewing to have committed the crime. The Tennessee Supreme Court had affirmed the conviction, at which point Ewing’s only hope had been clemency from Governor A.H. Roberts. While his decision was pending, Roberts received an anonymous letter purporting to be from the man who actually committed the crime, saying he felt sorry for “the old nigger” facing execution. Roberts nonetheless denied clemency. Beneath a headline proclaiming “Negro Is to Pay Death Penalty at Daybreak,” the Nashville Tennessean reported, “The governor says the Negro is a picture of crime, and the crime of which he has been convicted is the most atrocious and vicious in the whole catalog of crime.”

November 19, 1919: Joseph Hillstrom, a prolific songwriter and organizer for the virulently anti-capitalist Industrial Workers of the World, or Wobblies, went to his death before a Utah firing squad professing his innocence. Born Joel Emmanuel Hägglund and popularly known as Joe Hill, Hillstrom had been convicted on dubious circumstantial evidence of the murder of John G. Morrison, a Salt Lake City grocer and former police officer who had been shot to death during a presumed armed robbery at his store on January 10, 1914. The night before his execution, Hillstrom had sent a wire to a compatriot, exhorting, “Don’t waste any time in mourning—organize.” That sentiment, reduced to its essence—“Don’t Mourn, Organize”—soon became a Wobbly rallying cry. Hillstrom’s bullet-riddled body was taken to Chicago, where thousands of unionists and assorted radicals and anarchists rallied in his memory. As he had directed, he was cremated and his ashes would be spread over five continents and forty-seven states—all except Utah, where he had vowed never to be caught dead. Subsequent generations would remember him not for the songs he wrote but for one written about him, popularized by Paul Robeson, Joan Baez, and Pete Seeger, including these lines: And standing there as big as life, / And smiling with his eyes, / Joe says, ‘What they could never kill / Went on to organize.’ / ‘Joe Hill ain’t dead,’ he says to me. / ‘Joe Hill ain’t never died.’

December 2, 1919: New York Governor Alfred E. Smith ordered the release of Luigi Fillipelli, a former death row prisoner who had killed a man in New York County in 1901 and whose sentence had been commuted to life in prison in 1903. The victim allegedly had struck Fillipelli’s wife. Fillipelli, who spoke only Italian, had pleaded through an interpreter that the killing was justified—“[C]ould I allow the insult to go unpunished?”—but then had insulted the judge as “the man in a woman’s dress.” Thereupon the judge told the interpreter: “Tell the prisoner that the murder was both premeditated and cowardly. Tell him that he must die.” Smith freed Fillipelli on the recommendation of the judge, who obviously had forgiven the insult.113

December 11, 1921: Tommy O’Connor—known variously as “Terrible Tommy” and “Lucky Tommy”—escaped from the Cook County Jail in Chicago four days before he was to hang for the murder of Patrick O’Neill, a Chicago police sergeant. O’Neill had been shot to death nine months earlier as he and two other officers had attempted to arrest O’Connor for a string of armed robberies. After the slaying, O’Conner had fled to Minnesota, where he had been arrested during an attempted train robbery. He had been extradited to Illinois and tried for the O’Neill murder, which he had denied committing. “O’Neill was shot down by his own pals, a mistake, of course, but they shot him,” O’Connor had maintained. A jury had rejected that defense, and O’Connor had been sentenced to death—“the wrongest verdict in the world,” O’Connor’s father protested. In jail, O’Connor either obtained a revolver, with which he forced a guard to surrender the key to his cell, or somehow procured a guard’s aid in the escape. In any event, O’Connor made his way into the jail yard and scaled a nine-foot wall. On the street below, he hijacked a car, which skidded on slippery pavement a few blocks away and crashed into a curb. He then disappeared on foot. Six years later, with O’Connor still at large, Cook County would abolish hanging in favor of the electric chair, but the gallows was preserved for the day O’Connor would be brought to justice—a day that never would come.114

February 8, 1924: Texas inaugurated its electric chair with five executions over two hours at the Huntsville prison. All five—Charlie Reynolds, Ewell Morris, George Washington, Mark Mathews, and Melvin Johnson—were African-American. In the ensuing forty years—until the death penalty would be temporarily suspended nationwide in 1964 while the Supreme Court pondered the constitutionality of capital punishment—more than 350 men (no women) would go to their deaths in what had become known as Texas’s “Old Sparky.” Of those, 224 would be black and 108 white. Twenty-four of the others would be Latino and one Native American.115

August 22, 1924: Clarence Darrow, the famed Chicago lawyer who often had argued that the justice system persecuted the poor, beseeched Judge John R. Caverly to spare the lives

113 Public Papers of Alfred E. Smith, Governor 1920, at 704 (1920); Murderer Assailed Judge, BALT. SUN, Feb. 22, 1901, at 10 (containing brief account of Fillipelli death sentence).
115 Billy Porterfield, Electric Chair Has Seen its Share of Pain, Death, AUSTIN AM. STATESMAN, Oct. 24, 1990, at B1; Execution data compiled from Espy, supra note 7.
of teenage thrill killers Nathan F. Leopold, Jr. and Richard A. Loeb because they were the sons of millionaires. Three months and a day earlier, fancying themselves Nietzschean supermen, Leopold and Loeb had set out to prove they could commit the perfect crime, kidnapping and killing fourteen-year-old Bobby Franks. Because a jury would have little sympathy for anyone who had done something so horrendous, Darrow had pleaded his clients guilty and waived a jury for sentencing. “[H]ad this been the case of two boys of this age, unconnected with families of great wealth, that there is not a state’s attorney in Illinois who would not at once have consented to a plea of guilty and a punishment in the penitentiary for life,” Darrow told Caverly. “We were here with the lives of two boys imperiled, with the public aroused—for what? Because, unfortunately, their parents have wealth—nothing else.” The argument was effective. Three weeks later, Caverly would hand the teenage killers sentences of life plus ninety-nine years.116

**August 23, 1927:** Italian-born anarchists Nicola Sacco and Bartolomeo Vanzetti went to their deaths in the Massachusetts electric chair for the murders of a paymaster and a guard during an armed robbery seven years earlier in Braintree, a Boston suburb. Both men had adamantly professed innocence, claiming to have been miles from the scene when the crime occurred on April 15, 1920. Future Supreme Court Justice Felix Frankfurter had been Sacco and Vanzetti’s most distinguished champion, helping turn their case, which had been riddled with prosecutorial and judicial impropriety, into an international cause célèbre. In 1977, Governor Michael S. Dukakis proclaimed the fiftieth anniversary of their executions “Sacco and Vanzetti Memorial Day”—declaring that the atmosphere surrounding the trial and appeals had been “permeated by prejudice against foreigners and hostility toward unorthodox political views” and that “any stigma and disgrace should be forever removed from the names of Nicola Sacco and Bartolomeo Vanzetti.”117

**January 12, 1928:** Tom Howard, a *Chicago Tribune* photographer, smuggled a tiny camera into the execution chamber at New York’s Sing Sing Prison and snapped a photograph of Ruth Snyder in the electric chair moments before her execution. The photo appeared on the front page of the next day’s *Tribune*-owned *New York Daily News* beneath a terse headline: “Dead!” Ten months earlier, Snyder and her lover, Henry Judd Gray, had murdered Snyder’s husband, Albert Snyder, editor of *Motor Boating* magazine, in the couple’s Long Island home. Hoping to collect $50,000 in insurance on Albert’s life, Ruth and Henry bludgeoned him to death with a sash weight, drugged him with chloroform, and strangled him with picture wire. Famed newsmen Damon Runyon described it as “probably the most


imperfect crime on record”—dubbing it “for want of a better name, the dumbbell murder.” Gray would follow Snyder into the electric chair minutes later.118

August 9, 1928: George Appel, convicted killer of a police officer, and Daniel J. Graham, Jr., a former police officer, went to their deaths minutes apart in the New York electric chair at Sing Sing for unrelated murders. Both professed innocence, but Appel had signed an affidavit stating that he had committed a different murder—the one, in fact, for which Graham would be executed. The victim of that crime had been Judson H. Pratt, a construction company paymaster, whom Graham had been assigned to guard. Graham had been arrested shortly after Pratt had been robbed of $4,700 and slain in November 1927. Appel had been condemned for killing Police Lieutenant Charles J. Kemmer during a restaurant holdup in December 1927. A month before the double execution, Appel had signed the affidavit confessing the Pratt murder, but the Court of Special Sessions found it an insufficient ground for granting Graham a new trial. Governor Alfred E. Smith rejected clemency, suggesting that Graham’s failure to offer an alibi indicated that he was guilty.119

May 16, 1929: A bill that would restore capital punishment in Michigan—that in fact would make it mandatory for anyone over age seventeen convicted of first-degree murder—was vetoed by Governor Fred W. Green, who called it “one of the most extreme and inflexible measures of its kind that has ever been proposed.” He predicted that juries would be reluctant to render guilty verdicts in first-degree murder cases if death were mandatory. “We are not suffering from a lack of laws,” said Green. “Our need is a good, strong, healthy public sentiment that would stand for making a life sentence mean a life sentence we would have less reason for complaint about crime.” 120

March 25, 1931: Two white girls claimed they had been raped by nine male African Americans on a freight train in northern Alabama, touching off what would become known as the case of the “Scottsboro Boys.” All nine, ranging in age from thirteen to twenty, were convicted and all but one were sentenced to death. Appeals led to landmark U.S. Supreme Court decisions in 1932 and 1935, establishing, respectively, that denial of effective assistance of counsel and exclusion of qualified African-Americans from juries violated the Fourteenth Amendment. In the interim, one of the alleged rape victims had recanted and the other had been discredited, but authorities would not drop the cases. The cases dragged on through the late 1940s, when eight of the defendants had won freedom and the ninth had escaped to Michigan, where he successfully fought extradition of Alabama. In

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118 Mrs. Snyder and Gray Die in the Chair, N.Y. TIMES, Jan. 13, 1928, at 1; Dead!, N.Y. DAILY NEWS, Jan. 13, 1928, at 1; Damon Runyon, The Dumbbell Murder, INT’L NEWS SERV., Apr. 27, 1927; People v. Snyder, 246 N.Y. 491 (1927).

119 Three Slayers Die in Sing’s Chair, N.Y. TIMES, Aug. 10, 1928, at 5; Graham ‘Cleared’ By Condemned Man, N.Y. TIMES, July 4, 1928, at 20.

120 Green Vetoes Death Penalty and Tells Why, CHI. DAILY TRIB., May 17, 1929, at 22; Electrocution Bill in Michigan Vetoed: Governor Calls Measure One of Worst, N.Y. TIMES, May 17, 1929, at 32.
1976, Alabama George Wallace pardoned the last surviving Scottsboro defendant. In 2013, the Alabama Board of Pardons and Paroles posthumously pardoned three of the others.\(^ {121} \)

**November 7, 1932:** Setting a precedent that defendants in capital cases are entitled to counsel under the Sixth Amendment, the U.S. Supreme Court reversed the convictions of eight illiterate black youths known as “the Scottsboro Boys,” who had been sentenced to death without legal representation. Upon retrial, two of the defendants would be represented by Samuel S. Leibowitz, an able New York attorney, and again would be convicted and sentenced to death—after the prosecutor exhorted the jury, “Is justice in the case going to be bought and sold in Alabama with Jew money from New York?” Those convictions in turn would lead to a second landmark Supreme Court holding that the systematic exclusion of blacks from juries violated the Fourteenth Amendment. Although the precedents had nothing to do with innocence, it would be established—to the official satisfaction of the state of Alabama, albeit some four decades after the case began—that no rape had occurred.\(^ {122} \)

**March 20, 1933:** Giuseppe Zangara was executed in Florida for the murder of Chicago Mayor Anton J. Cermak. Zangara’s execution set a twentieth-century speed record—taking place only fourteen days after Cermak had died and only ten days after the death sentence had been imposed. Zangara had been trying to assassinate President-elect Franklin D. Roosevelt in a Miami motorcade on February 15, but his shot missed its mark, striking and mortally wounding Cermak, who had been riding on the running board of Roosevelt’s limousine. Cermak had clung to life for nineteen days before expiring on March 6. Before his sentencing four days later, Zangara had told Dade County Judge Uly O. Thompson that he had but one regret: “I sorry I no shoot Roosevelt.” Strapped into the electric chair, Zangara yelled, “Lousy capitalists” With that, 2,300 volts of electricity coursed through Zangara’s body. Twelve minutes later, he was pronounced dead.\(^ {123} \)

**November 10, 1933:** President Franklin D. Roosevelt, in response to a question at his biweekly press conference, said that he “would like to see capital punishment abolished throughout this country.”\(^ {124} \)

**March 20, 1935:** Chester Novak, who vowed to be “the toughest guy that ever took the hot seat,” lived up to his word when he sat in the electric chair at the Cook County Jail in Chicago. After an initial jolt of 1,999 volts was followed by jolts of 900 volts lasting more

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\(^{122}\) *Powell*, 287 U.S. at 68–69; *James Goodman, Stories of Scottsboro* 133 (1994); *Norris*, 294 U.S. 587; Blinder, *supra* note 121, at A14.


than two minutes, a physician approached the chair, expecting to pronounce him dead, but declared, “This man is alive! His heart is still fluttering!” It took two more jolts to kill the thirty-year-old Novak, who had been condemned for killing a man during a holdup the previous year. More than a quarter of a century later, when the warden who presided over the execution was asked to name the toughest man he ever knew, he would respond, “That’s easy[,] Chester Novak.”

April 5, 1935: Nineteen-year-old Rush Griffin was mistakenly hanged at San Quentin for murder while his conviction was being appealed. Due to an oversight, prison officials had not been notified that the execution should not proceed. Griffin, who was black, had been sentenced to death for the murder of a white University of Southern California medical student five months earlier—a crime to which Griffin had confessed but later swore he had not committed. Whether innocent or guilty, Griffin was wrongfully executed. After his execution, his appeal would proceed as if he were living. His conviction and sentence would be affirmed—with no hint either that he was dead or that he claimed to have been innocent.

December 31, 1935: C.B. James, a thirty-two-year-old white convicted killer, went to his death in the Texas electric chair—ending a year in which there had been a record 197 executions in twenty-eight states. Georgia led with twenty-three, followed by Texas with twenty, California with seventeen, and New York with sixteen. Of the total, 114 were white, seventy-two black, four Asian, three Hispanic, and four of unknown race; 149 were electrocuted, forty-five hanged, and three gassed; 185 had been convicted of murder and twelve of rape. Three of the executed were women: May H. Carey, a white woman hanged with her son in Delaware for bludgeoning her brother to death; Eva Coo, a forty-three-year-old white woman electrocuted in New York for murdering a handyman; and Julia Moore, a woman of unknown age and race hanged in Louisiana for an unknown murder.

April 3, 1936: Bruno Richard Hauptmann, who steadfastly professed innocence, went to his death in the New Jersey electric chair for the kidnapping and murder of the infant son of famed aviator Charles A. Lindberg from the family home near Trenton on March 1, 1932. Although the family had met a $50,000 ransom demand, twenty-month-old Charles A. Lindberg, Jr. had been murdered; the body was found a few miles from the home on May 12, 1932. Hauptmann, a thirty-five-year-old carpenter, was arrested four months later in Manhattan after he bought gasoline with a marked bill that had been part of the ransom. He claimed to have come by the bill innocently, but the authorities claimed—dubiously—

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127 The C.B. James and Julia Moore executions are listed in Espy, supra note 7, from which the execution data also was compiled; Mother and Son Die on Gallows, N.Y. Times, June 8, 1935, at 34; Eva Coo Dies in Chair, N.Y. Herald Trib., June 28, 1835, at 1.
that a ladder used in the abduction of the child had been made of wood that matched attic flooring in Hauptmann’s house in the Bronx. The jury had deliberated eleven hours before returning its verdict after a trial widely considered to have been unfair even by observers persuaded of Hauptmann’s guilt.  

_August 14, 1936:_ Before a festive, jeering, all-white crowd estimated at more than 10,000 in downtown Owensboro, Kentucky, Rainey Bethea, a twenty-two-year-old black man, was hanged for the rape of a seventy-year-old white woman. Rainey had been convicted both of raping and murdering the woman, but he had been sentenced to die only for rape because it was the only crime punishable by hanging. Murder was punishable by death in the electric chair, which would have had to be carried out behind the walls of the Kentucky State Prison in Eddyville, depriving the public of the spectacle of his death. Bethea’s hanging would be the last public execution in the United States.

_Deckember 6, 1937:_ The Gallup Poll for the first time polled Americans on the death penalty, finding that 60% favored it for murderers, 33% opposed it, and 7% had no opinion.

_July 8, 1938:_ After a failed suicide attempt, and in defiance of his victim’s purported dying wish, Anthony Chebatoris was hanged by federal authorities in Michigan for a murder he had committed ten months earlier in the wake of an aborted effort to rob the Midland Chemical State Savings Bank. The victim had been a bystander, Henry Porter, who survived for twelve days—during which, according to his sister-in-law, he expressed the wish that, if he died, his killer’s life would be spared. Although Michigan had abolished the death penalty for all crimes except treason in 1846, Chebatoris had been tried in federal court and sentenced to death under the Bank Robbery Act of 1934. Michigan Governor Frank Murphy appealed to President Franklin D. Roosevelt to move the execution to another state, arguing that to carry it out in Michigan would be an affront to the people of the “first commonwealth on this earth to abolish capital punishment.” Although Roosevelt opposed capital punishment, he deferred to Attorney General Homer S. Cummings, who in turn deferred to U.S. District Court Judge Arthur J. Tuttle. Saying he had “neither the power nor the inclination to change the sentence,” Tuttle denied Murphy’s request. To prevent a recurrence of the controversy over the Chebatoris execution, Congress changed

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129 *Town Gay for Public Hanging*, N.Y. Herald Trib., Aug. 14, 1936, at 1; *Children Picnic as Killer Pays*, BOS. Revealer, Aug. 15, 1936, at 1; Burk Foster, *A Practice in Search of an Ethic: The Death Penalty in the Contemporary South*, in DEATH WATCH, _supra_ note 32, at 129. On May 21, 1937, a crowd of several hundred filed into a temporary stockade in Galena, Missouri, to watch the hanging of Roscoe Jackson for a 1934 murder, but the spectators were admitted only by special passes; thus, the execution, technically at least, was not public. _See_ Tim O’Neil, _Galena’s Gruesome Claim to Fame_, ST. LOUIS POST-DISPATCH, Mar. 20, 2001, at E1.

the law to provide that federal death sentences arising from crimes in abolitionist states be carried out elsewhere. Chebatoris thus was both the only person executed in Michigan after it became a state ninety-two years earlier and the first person who had been or ever would be executed under federal law in a state that did not have a death penalty.\footnote{Trap is Sprung on Chebatoris, DET. FREE PRESS, July 9, 1938, at 3; Lawrence M. McCracken, Doctors Fight to Save Killer After He Cuts Throat in Cell, DET. FREE PRESS, Oct. 30, 1937, at 1; Chebatoris to be Hanged at Dawn Today in Milan: Murphy’s Plea Refused, DET. FREE PRESS, July 8, 1938, at 1; Roosevelt Tries in Vain to Move Hanging Distasteful to Michigan, N.Y. HERALD TRIB., July 7, 1938, at 1; Aaron J. Veselenak, The Execution of Anthony Chebatoris, MICH. HIST. MAG., May/June 1998, at 35.}

\textit{January 6, 1939}: Severely mentally handicapped twenty-three-year-old Joe Arridy died in the Colorado gas chamber at Cañon City for the rape and murder two and a half years earlier of a fifteen-year-old Pueblo girl named Dorothy Drain—a crime to which he confessed but almost certainly had not committed. At the time of the crime, Arridy had been absent without leave from the Colorado State Home and Training School for Mental Defectives. Somehow he had wound up in Cheyenne, Wyoming, wandering around a rail yard, where he was picked up by railroad detectives and turned over to the Laramie County sheriff. When the sheriff learned that Arridy was from Pueblo, he had asked him about the Drain murder. Arridy promptly confessed. Until then, the Pueblo police had thought that they had the killer—a thirty-five-year-old homicidal deviant named Frank Aguilar, from whom police had seized the murder weapon—a hatchet. Aguilar had worked for the victim’s father and had recently been fired. Five days after a story about Arridy’s confession appeared in the \textit{Pueblo Chieftan}, Aguilar had claimed that he and Arridy committed the crime together. He said he had decided to rape the girl after he learned that her parents would be at a dance. On the way to the Drain house, he had a chance encounter with Arridy and invited him to join in the crime. Although there was nothing in Arridy’s past to suggest that he would commit such a crime, the authorities adopted Aguilar’s account. Aguilar was executed in 1937. Governor Bill Ritter, Jr. would grant Arridy a full pardon in 2011.\footnote{Arridy v. People, 103 Colo. 29 (1938); Ralph Cless, Joe Arridy Pays His Debt to Society—Lethal Gas Erases Grin, \textit{PUEBLO CHIEFTAIN}, Jan. 7, 1939, at 1; Bob White, Youth Confesses to Pueblo Sex Slaying, WYO. ST. LEDGER, Aug. 27, 1936, at 1; Harold Osborne, Frank Aguilar Executed for Brutal Crime, \textit{PUEBLO CHIEFTAIN}, Aug. 14, 1937, at 1; Office of Governor Bill Ritter, Jr., \textit{Gov. Ritter Grants Posthumous Pardon in Case Dating Back to 1930s}, DEATH PENALTY INFO. CTR. (Jan. 7, 2011), http://www.deathpenaltyinfo.org/documents/ArridyPardon.pdf.}

\textit{January 26, 1939}: Isidore Zimmerman was two hours away from death in the New York electric chair for a crime he did not commit—he had eaten his final meal, bade his parents farewell, and his head had been shaved to accommodate electrodes—when his sentence was commuted to life in prison by Governor Herbert H. Lehman. Zimmerman had been a nineteen-year-old scholarship student at Columbia University when he and four other young men landed on death row for fatally shooting a New York City police detective during a 1937 tavern holdup. Zimmerman was not alleged to have been present during the crime but rather to have supplied the murder weapon—an allegation that police and prosecutors knew from almost the beginning was false. Three of Zimmerman’s four co-defendants were electrocuted in a span of fourteen minutes on the day Zimmerman had
been scheduled to die. Zimmerman would languish in prison another twenty-four years before his exoneration in January 1962 based in part on recanted trial testimony that had been coerced by police. The New York legislature would pass four measures to compensate Zimmerman, three of which would be vetoed by Governor Nelson A. Rockefeller, before Governor Hugh Carey would approve the fourth one in 1981. The fourth co-defendant, whose sentence also had been commuted by Lehman, would die in prison.

November 21, 1941: Juanita (The Duchess) Spinelli, the fifty-two-year-old leader of a gang of armed robbers, died in the San Quentin gas chamber. She and two members of her gang—Mike Simeone, her common-law husband, and Gordon Hawkins, a twenty-two-year-old ex-convict—had been tried together and convicted of murdering another gang member, nineteen-year-old Robert Sherrard, whose body had been found in the Sacramento River in April 1940. There was no question that Sherrard had been murdered, but each defendant placed the blame on another. A week after Spinelli was executed, Simeone and Hawkins would follow her to the San Quentin gas chamber. Spinelli was the first woman to be legally executed in California in ninety years and one of five to be executed there during the twentieth century.

December 18, 1942: William Wellman, a thirty-six-year-old African American laborer and father of four, was strapped into the electric chair in Raleigh, North Carolina, about to die for a crime he could not have committed. Wellman had been convicted of raping a sixty-seven-year-old white woman in Iredill County on February 11, 1941, when he had been some 350 miles away at Fort Belvoir, Virginia, where he worked as a laborer and had signed a payroll sheet. The judge before whom Wellman had been tried had refused to allow the payroll sheet into evidence. After the trial, another man had confessed to the crime. The NAACP and Chicago Defender made Wellman’s case a cause célèbre. Literally moments before the execution was to proceed, Governor J. Melville Broughton granted a sixty-day reprieve and ordered an investigation. In April 1943, Broughton would grant Wellman a full pardon.

June 16, 1944: George Junius Stinney, Jr., a fourteen-year-old African-American, was electrocuted in Clarendon County, South Carolina, for beating two white girls, ages eight and eleven, to death with a railroad spike. Stinney’s conviction and death sentence had not

135 400 Miles from Scene of Crime but Faces N.C. Chair, Chi. Defender, Dec. 19, 1942, at 5; Wins 60-Day Reprieve from Death Chair, Chi. Defender, Dec. 26, 1942, at 4; In Spite, supra note 17, at 352–53; Scott Christianson, The Last Gasp: The Rise and Fall of the American Gas Chamber 144 (2010).
been appealed, and records of the trial would be lost. He would be the youngest person executed in the United States in the twentieth century.\textsuperscript{136}

\textit{January 31, 1945:} Nineteen-year-old Private Eddie Slovik was executed by a firing squad of the U.S. Army’s 109\textsuperscript{th} Infantry in Sainte-Marie-Aux-Mines, France, for desertion to avoid combat. Of 21,049 U.S. military personnel convicted of desertion during World War II, only forty-nine were sentenced to death and only one—Slovik—was executed. His sentence had been imposed after a court martial that took less than two hours at Rötgen, Germany. General Dwight D. Eisenhower had denied clemency. Before Slovik had been drafted in 1943, he had served two brief prison terms—the first for stealing change, candy, chewing gum, and cigarettes from a Detroit drug store where he had worked, the second for unlawfully driving away an automobile and a parole violation. “They’re not shooting me for deserting the United States Army,” Slovik said in a final statement. “[T]housands of guys have done that. They’re shooting me for the bread I stole when I was twelve years old.”\textsuperscript{137}

\textit{May 3, 1946:} Willie Francis, a seventeen-year-old African American, sat hooded in Louisiana’s portable electric chair at the St. Martin Parish Jail, awaiting execution for killing a white druggist during an armed robbery of $4 a year earlier. But when the switch was thrown Francis did not die. A witness would recount, “I heard the one in charge yell to the man outside for more juice when he saw that Willie Francis was not dying, and the one on the outside yelled back he was giving him all he had. Then Willie Francis cried out, ‘Take it off. Let me breathe.’” The execution team removed his hood, unstrapped him, and returned him to his cell. His lawyers would contend that, after what Francis had been though, it would be cruel and unusual to kill him, but the U.S. Supreme Court would disagree, holding that the execution could proceed—which it would a little more than a year after the first attempt.\textsuperscript{138}

\textit{July 24, 1952:} Without explanation, President Harry S. Truman commuted the mandatory death sentence of his attempted assassin, a Puerto Rican nationalist named Oscar Collazo, to life in prison. The attempt on Truman’s life had occurred on November 1, 1950. A second Puerto Rican involved in the attack had been killed after shooting a guard to death. Asked in 1953 about his position on the death penalty, Truman would reply, “I’ve never

\textsuperscript{136} AP, \textit{Boy, 14, Dies in Chair for Slaying Two Girls}, WASH. POST, June 17, 1944, at 3; \textit{S. C. Electrocutes 14-Year-Old Youth: Gov. Refuses to Commute Sentence Despite Pleas from Both Races}, N.Y. AMSTERDAM NEWS, June 24, 1944, at 1A; David I. Bruck, \textit{Executing Teen Killers Again: The 14-Year-Old who, in Many Ways, was Too Small for the Chair}, WASH. POST, Sept. 15, 1985, at D1; Stuart Banner, \textit{The Nation: When Killing a Juvenile was Routine}, N.Y. TIMES, Mar. 6, 2005, at C4.


really believed in capital punishment. I commuted the sentence of the fellow who was trying to shoot me to life imprisonment. That’s the best example I can give you.”

June 19, 1953: Julius and Ethel Rosenberg died minutes apart in the electric chair at New York’s Sing Sing Prison for espionage—allegedly conveying U.S. nuclear arms secrets to the Soviet Union. For decades thereafter, defenders of the Rosenbergs would contend that the couple had been innocent victims of Cold War paranoia; the case had been marked by allegations of judicial bias and legal improprieties. After the fall of the Soviet Union, however, decoded Soviet cables would be released indicating that Julius in fact had reported to the KGB. It appeared that Ethel, who had been aware of his activities, had been prosecuted on weak evidence primarily in the hope that it would pressure Julius to confess and name conspirators. In light of the disclosures, Harvard Law Professor Alan M. Dershowitz would conclude that the Rosenbergs had been “guilty—and framed.” In 2008, Morton Sobell, a Rosenberg co-defendant who had been convicted of espionage and served eighteen years in federal prison, all the while steadfastly proclaiming his innocence, would acknowledge in a New York Times interview that he and Julius had been Soviet spies—but that Julius has provided nothing of value. “What he gave them,” said Sobell, “was junk.”

April 23, 1956: The United Methodist Church called for ending the death penalty, stating: “We stand for the application of the redemptive principle to the treatment of offenders against the law, to reform of penal and correctional methods, and to criminal court procedure. For this reason we deplore the use of capital punishment.”

March 15, 1957: Twenty-nine-year-old Burton W. Abbott died in the San Quentin gas chamber at the very moment that Governor Goodwin J. Knight was attempting to delay the execution. An accounting student at the University of California at Berkeley, Abbott had been convicted of the abduction and murder two years earlier of a fourteen-year-old Berkeley schoolgirl. Although he denied the crime, police had found the victim’s purse, glasses, brassiere, and some of her books in the basement of the home he shared with his wife and five-year-old son. For thirty minutes preceding the execution, one of Abbott’s lawyers, George T. Davis, had been trying to reach Governor Knight, who was spending the day aboard an aircraft carrier in San Francisco Bay, but the ship’s radiotelephone was busy. When the connection finally was made, Davis asked for a reprieve to allow time for

140 William R. Conklin, Pair Silent to End: Husband is First to Die—Both Composed on Going to Chair, N.Y. TIMES, June 20, 1953, at 1; Espionage Act of 1917, 18 U.S.C. § 792 et seq. (2012); United States v. Rosenberg, 195 F.2d 583, 592–96 (2d Cir. 1952) (affirming convictions and sentences); Rosenberg v. United States, 346 U.S. 273 (1953) (vacating stay of execution issued by Justice Douglas); Alan M. Dershowitz, Rosenbergs were Guilty—and Framed FBI, Justice Department and Judiciary Conspired to Convict a Couple Accused of Espionage, L.A. TIMES., July 19, 1995, at 9; Sam Roberts, 57 Years Later, Figure in Rosenberg Case Says he Spied for Soviets, N.Y TIMES, Sept. 12, 2008, at A1.
a last-ditch appeal. Knight agreed and directed an aide to call Warden Harley O. Teats on an open line from the governor’s office to San Quentin. “Did it start?” the aide asked Teats. “Yes,” Teats answered, “it’s too late.” Moments earlier, sixteen sodium cyanide pellets had dropped into sulfuric acid in the gas chamber, giving rise to lethal fumes that Abbott already had begun to inhale.142

October 10, 1958: The House of Bishops of the Protestant Episcopal Church called for ending capital punishment, citing “a growing body of public opinion which believes that capital punishment is archaic and ineffective,” research showing that “the death penalty falls for the most part on obscure, impoverished, friendless, or defective individuals, and rarely on the well-to-do and educated,” and “the condemnation to death of individuals who may be innocent.”143

December 27, 1958: Dr. Jack Kevorkian, a thirty-one-year-old Detroit pathologist who would become known as “Doctor Death” for helping more than 130 terminally ill patients end their lives 1980s and 1990s, proposed in a talk before the American Association for the Advancement of Science in Washington, D.C., that condemned prisoners be given the option of undergoing euthanasia so that their bodies could be subjected to medical experimentation and their healthy organs harvested for transplantation.144

April 6, 1959: Susan Hayward won the Academy Award for her portrayal of Barbara Graham in the 1958 film, I Want To Live! Graham and two men had been executed in 1955 for the 1953 murder of a crippled widow during a home invasion and robbery. I Want To Live! had drawn huge audiences and won critical acclaim. Bosley Crowther of the New York Times wrote that it had the “zip and the smash of an angry fist,” and John L. Scott of the Los Angeles Times hailed Hayward’s “sensational, nerve-shattering performance.” But there would be no decline in public support for capital punishment. In fact, it would increase slightly. In March 1960, the first Gallup Poll conducted after the film’s release would report approval of the death penalty for murder at 53%—up from 47% before the release.145

June 15, 1959: The U.S. Supreme Court held that a prosecutor violated the Fourteenth Amendment by failing to correct a key witness’s under-oath denial that he had been promised anything in exchange for testifying against Henry Napue, who had been

sented to death for the murder of a Chicago police officer in 1938. In fact, the prosecutor had promised to help the witness, George Hamer, win a reduction in a 199-year sentence he was serving for the same murder. “Had the jury been apprised of the true facts . . . it might well have concluded that Hamer had fabricated testimony in order to curry the favor of the very representative of the State who was prosecuting the case in which Hamer was testifying,” Chief Justice Earl Warren wrote for the unanimous court. In 1960, the prosecution would drop the charges, releasing Napue from prison.

May 2, 1960: Although not convicted of killing anyone, thirty-eight-year-old Caryl W. Chessman died in the San Quentin gas chamber eleven years after his conviction for robbery, sexual perversion, and three counts of kidnapping with bodily harm—a capital offense under the California “Little Lindberg Law.” Known as “the Red Light Bandit,” Chessman professed innocence until the end. His was among thirty-six executions that did or would occur during the tenure of Governor Edmund G. (Pat) Brown, an avowed opponent of the death penalty. Within hours of Chessman’s execution, Brown would issue a statement saying, “My personal opposition to capital punishment remains as strong as ever. I continue to hope that the people of California will change the law. Until they do, however, I must continue to uphold the law . . . with all the strength at my command.” Ronald Reagan would seize on Brown’s opposition to the death penalty to defeat him in the 1966 gubernatorial election.

May 17, 1960: Joseph “Mad Dog” Taborsky was electrocuted in Connecticut, where legislators had been on the verge of abolishing the death penalty before he and co-defendant Arthur “Meatball” Culombe terrorized the state with a series of six killings during holdups of small businesses in December 1956 and January 1957. Before the murder spree, Connecticut legislators had debated an abolition bill, which had the support of Governor Abraham Ribicoff and the Hartford Courant. But in the wake of the Taborsky-Culombe wave of terror, Ribicoff and the Courant had changed their positions, dooming the legislation. Taborsky previously had been on death row for a 1950 murder, but that conviction had been overturned because it had rested solely on the testimony of his mentally unstable brother. Shortly after Taborsky was freed, the serial murders had ensued, landing him back on death row and Culombe in prison, where he would die in 1970.

147 EDMUND G. (PAT) BROWN & DICK ADLER, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR’S EDUCATION ON DEATH ROW 20–42, 51, 106 (1989); Former Pen C § 209, as added Stats 1901 ch 83 § 2, amended Stats 1933 ch 685 § 1, ch 1025 § 1, Stats 1951 ch 1749 § 1, CAL. PENAL CODE § 209 (providing that “[a]ny person who kidnaps or carries away any individual to commit robbery shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person subjected to such kidnapping suffers bodily harm”); People v. Chessman, 38 Cal.2d 166 (1951); Walter Ames, Chessman Denies Guilt as He Dies: Execution of Red Light Bandit in Gas Chamber Ends 12-Year Legal Contest, L.A. TIMES, May 3, 1960, at 1; Richard Bergholz, Reagan Triumphs: GOP Scores Heavily in Nation: Finch Beats Anderson; Other Democrats in Tough Battles, L.A. TIMES, Nov. 9, 1966, at 1.
148 Killer Electrocuted, WASH. POST, May 19, 1960, at A7; Taborsky v. State, 116 A.2d 433 (Conn. 1955); Lynne Tuohy, When ‘Mad Dog’ was put to Death, HARTFORD COURANT, Jan. 2, 2005, at A1; Alaine
April 13, 1961: U.S. Army Private John Arthur Bennett, a mentally deficient, twenty-six-year-old son of a black Virginia sharecropper, was hanged at the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas, for the rape six years earlier of an eleven-year-old Austrian girl. While intoxicated, after leaving the base where he had been stationed in search of a brothel, Bennett had raped and almost drowned the victim. Condemned by a military panel in Austria, Bennett would be the only U.S. soldier known to have been executed for rape in peacetime. The victim, her parents, and Dr. Karl A. Menninger, one of the most preeminent psychiatrists of the era, founder of Topeka’s Menninger Clinic, had intervened on Bennett’s behalf, but President John F. Kennedy had denied clemency. The Los Angeles Times reported that in the six years between Bennett’s court martial and execution, eight other U.S. soldiers had been executed. All were black. Six white soldiers had been on military death row during those years. Some had killed young girls or had killed more than once. None were executed.149

August 1, 1962: Illinois Governor Otto Kerner commuted the death sentence of killer-turned-novelist Paul Crump to 199 years in prison on the ground that Crump had been rehabilitated. “The embittered distorted man who committed a vicious murder no longer exists,” said Kerner. “It would serve no useful purpose to society to take this man’s life.” U.S. District Court Judge Richard B. Austin, who as a state prosecutor in 1953 had taken Crump’s confession to the murder of Theodore P. Zukowski, a plant security guard, had opposed clemency, calling Crump “a cunning’ killer” living a masquerade of righteousness. Warden Jack Johnson of the Cook County Jail, where Crump had been on death row for nine years and had penned his novel Burn Killer Burn, had supported Kerner’s decision. In response to Kerner’s decision, Veronica Zukowski, widow of the man for whose murder Crump had been sentenced to death, said simply, “I am hurt.”150

March 15, 1963: Victor Harry Feguer, who had been diagnosed by a staff psychiatrist at the U.S. Medical Center for Federal Prisoners at Springfield, Missouri, as suffering “prolonged mental illness of a schizophrenic and sociopathic type,” was hanged in Iowa on federal charges of kidnapping and murdering a Dubuque physician in 1960. Feguer, a drifter from Michigan, had rented a room in Dubuque to which, feigning illness but with the probable intent of stealing narcotics, had lured the victim and shot him to death. A few days later, Feguer was arrested in Montgomery, where he had attempted to “trade down” a car he had stolen from the doctor. At Feguer’s federal trial, the psychiatrist who had


150 Simeon B. Osby, Crump Wins Fight for Life; Kerner Commutes Death Sentence, CHI. DAILY DEFENDER, Aug. 2, 1962, at 1; Clay Gowran, Crump’s Fate is Weighed by Parole Unit: Kerner to Learn Views Today, CHI. DAILY TRIB., July 31, 1962, at 1 (quoting Judge Austin); Ronald Bailey, Facing Death, A New Life Perhaps Too Late, LIFE, July 27, 1962, at 26 (quoting Warden Johnson); Widow of Crump’s Victim Tells Regret, CHI. DAILY TRIB., Aug. 2, 1962, at 2; People v. Crump, 125 N.E.2d 615 (Ill. 1955).
examined him in Missouri testified that it could be assumed that Feguer’s schizophrenia had affected his behavior at the time of the crime, but that there was no definitive evidence that he had been impaired to the extent that he would have been incapable of “understanding what is legally right or wrong or the legal and physical consequences of his actions.” Hence, Feguer met the legal standard of sanity. His would be the last execution in Iowa, which would abolish the death penalty in 1965, and the last federal execution during the twentieth century.151

April 1, 1963: By a margin of less than half of 1%, Michigan voters adopted a new Constitution making their state the first and only state to prohibit legislative enactment of a death penalty. As a result, the only way Michigan could reinstate capital punishment, which it abolished in 1847, would be by constitutional amendment. Such an amendment would require, first, either a two-thirds vote by both houses of the legislature or a petition signed by 10% of the number of registered voters who cast ballots in the most recent gubernatorial election, and, second, passage by a majority vote in a popular referendum.152

May 13, 1963: The U.S. Supreme Court held in a Maryland capital case that the prosecution’s suppression of evidence favorable to the accused before trial violated the Fourteenth Amendment. In separate trials, John Leo Brady and Charles Donald Boblit had been convicted and sentenced to death for a murder in connection with an armed robbery. Both admitted the robbery, but each blamed the other for the murder. The document that had been withheld from Brady’s defense was a statement Boblit had made to police stating that he, not Brady, had killed the victim. His sentence voided, Brady was entitled to a resentencing, but—because another death sentence was possible—he would not move promptly for the relief he had won. It would not be until 1970 that he would be resentenced to life in prison. He would be paroled a few years later. The impact of the rule Brady’s case established would be limited, given the difficulty in detecting violations and the lack of consequences for same.153

May 8, 1964: Ronald Lee Wolfe, a thirty-four-year-old habitual criminal, went to his death in the Missouri gas chamber for raping an eight-year-old girl. Wolfe had been released

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151 Hanging Decreed for Doctor Slayer, WASH. POST, Mar. 14, 1961, at A5; Feguer v. United States, 302 F.2d 214, 227–40 (8th Cir. 1962); Chris Clayton, Iowa Saw Last Federal Execution: The Impending Death of Timothy McVeigh has Brought Renewed Attention to Victor Feguer’s 1963 Hanging, OMAHA WORLD-HERALD, May 8, 2001, at 1; BEDAU, supra note 89, at 9 (showing Iowa abolishes the death penalty); see infra entry dated June 11, 2001 (discussing resumption of federal executions in 2001).


from prison in Georgia three days before he abducted the child from a church social in Troy, Missouri in 1959. After raping her, Wolfe dropped her off at a farmhouse, telling her to ask someone there to call her parents; had he killed her, it would have been less likely that he would have been caught. Based on a description the girl provided, Wolfe was arrested the next day in Hannibal, sixty miles from Troy. He signed a confession, which was corroborated by physical evidence. He was the last of seventy-nine men known to have been white who were executed for rape before the death penalty was suspended for crimes other than murder. In all, 930 men were executed for rape from the 1600s through 1964. Of those, 841, or 90%, were known to have been black, even though blacks never comprised more than about 12% of the U.S. population.\footnote{State v. Wolfe, 343 S.W.2d 10, 12 (Mo. 1961); Frank Hobbs & Nicole Stoops, U.S. Census Bureau Demographic Trends in the 20th Century 77 (2002), https://www.census.gov/prod/2002pubs/censr-4.pdf; see execution data from Espy, supra note 7; see also Appendix E.}

March 19, 1965: A day after a bill to abolish capital punishment failed by one vote in the Tennessee House of Representatives, Governor Frank Clement, a Democrat, commuted the sentences of all prisoners—five of them, all male—under death sentence in the state. Clement then went to the prison where they were housed to deliver the news in person, telling the men: “I can and have saved your lives, but I can’t pardon you for your crimes and sins. Now I say to you to devote yourselves to prayer behind these prison walls. Try to do something for the good of mankind so that when you meet your Lord you can have forgiveness for your sins.”\footnote{Gov. Clement Saves 5 from Death Chair, N.Y. Times, Mar. 20, 1965, at 1.}

May 24, 1966: For the first—and what would be the only—time in its history of gauging Americans’ opinion regarding the death penalty, the Gallup Poll found fewer favoring it (42%) than opposing it (47%), while 11% expressed no opinion.\footnote{Gallup, supra note 130.}

June 2, 1966: The Lutheran Church in America called for an end to capital punishment, saying that it falls disproportionately on those least able to defend themselves, has no discernible deterrent effect on murder, and renders miscarriages of justice irrevocable.\footnote{Edward B. Fiske, Lutherans Hit Death Penalty: Aides of 3.3 Million-Member Church Favor a Ban, N.Y. Times, June 30, 1966, at 26.}

August 10, 1966: James D. French went to his death in the Oklahoma electric chair for a murder he claimed to have committed for no reason other than a desire to be executed. In 1961, French had been serving a life sentence for murder when he strangled his cellmate to death. French had elected to be tried for the crime by a jury rather than pleading guilty, his stated rationale having been that a judge would be unlikely to sentence him to death if he pleaded guilty. The jury had imposed the death sentence he had sought. French had not wanted to appeal, but an appeal was mandatory in Oklahoma capital cases. While his appeal was pending, French had written letters to the Court of Criminal Appeals explaining his perverse motive for the murder and his desire to be executed, but the court initially had not been accommodating. It rather had reversed the conviction, holding that the trial judge
had erred in allowing French to be brought before the jury in chains. French had been retried before another jury and again sentenced to death, but that conviction also had been reversed, due to an erroneous jury instruction. French had been convicted a third time by yet another jury and again sentenced to death. The third conviction and death sentence had been affirmed. French was the only person executed in the United States in 1966. Minutes before he died in the electric chair, French reportedly quipped to reporters, “How’s this for a headline for tomorrow’s paper?—‘French Fries!’”

**February 13, 1967:** Declaring that the Constitution “cannot tolerate a state criminal conviction obtained by the knowing use of false evidence,” the U.S. Supreme Court unanimously vacated the conviction and death sentence of Lloyd Eldon Miller, Jr., who had come within seven hours of execution for the 1955 murder of an eight-year-old girl in Hancock County, Illinois. Miller was saved by a volunteer lawyer who discovered, among a considerable body of exculpatory evidence, that what a state forensic analyst had testified was blood of the victim’s type on a pair of jockey shorts presumed to have been Miller’s was paint. On March 20, five weeks after the Supreme Court decision, a federal judge in Chicago ordered Miller freed and barred a retrial.

**April 12, 1967:** Aaron C. Mitchell, a thirty-seven-year-old black man, became both the last person executed by gas in the United States and the last executed prior to a moratorium on executions while the U.S. and California Supreme Courts considered the constitutionality of capital punishment. Mitchell, who had gunned down a white police officer during a 1953 armed robbery at a San Francisco bar, was also the only person executed during Ronald Reagan’s two terms as governor (1967–1975). The day before the execution, Mitchell had tried to kill himself, slashing his arm with a razor after his distraught mother visited him at San Quentin. During the execution, Mitchell’s supporters sang *We Shall Overcome* outside the prison and neo-Nazi George Lincoln Rockwell waved a swastika-adorned sign proclaiming, “Gas, the only cure for black crime and Red treason.”

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June 3, 1968: The U.S. Supreme Court overturned Illinois statutory and case law that allowed prosecutors in capital cases to dismiss jurors, who, due to religious or other scruples against capital punishment, “might hesitate” to impose death sentences. For the six-three majority in the case of Cook County death row prisoner William C. Witherspoon, Justice Potter Stewart wrote, “[I]mposition [of the death penalty] by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law.” Witherspoon, who had been sentenced to death in 1960 for the murder of a Chicago police officer, would be resentenced to fifty years in prison in 1969 and paroled a decade later—long after his case had established a procedure known as “Witherspooning” for death-qualifying juries, increasing the likelihood of convictions.161

July 2, 1969: The United Church of Christ ended its General Synod after formalizing its position against capital punishment: “We simply believe that murder is wrong, whether committed by individuals or the state. Currently our churches are working for abolition of the death penalty.”162

December 29, 1970: Winthrop Rockefeller, the first Republican governor of Arkansas since Reconstruction, grandson of oil baron John D. Rockefeller, cleared out Arkansas death row—commuting the sentences of its fifteen inhabitants, all male, eleven of whom were African-American, to life in prison. “What earthly mortal has the omnipotence to say who among us shall live and who shall die?” Rockefeller asked. “I do not. Moreover, in that the law grants me the authority to set aside the death penalty, I cannot and will not turn my back on life-long Christian teachings and beliefs, merely to let history run out its course on a fallible and failing theory of punitive justice. . . . Failing to take this action while it is within my power, I could not live with myself.”163

May 3, 1971: By the narrowest of margins, the Supreme Court upheld California and Ohio statutes vesting unbridled discretion in juries to impose death sentences. The five-four ruling came in McGautha v. California, with which an Ohio case had been consolidated. Dennis Councle McGautha had killed a grocer during a robbery in Los Angeles County. The Ohio petitioner, James Earl Crampton, had killed his wife in Lucas County. Justice John Marshall Harlan wrote for the majority, “To identify before the fact those

characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.” Justice William J. Brennan lamented in dissent, “What a great regression it is when the end result is to approve a procedure that makes the killing of people charged with crime turn on the whim or caprice of one man or of 12 [sic]!”

_February 18, 1972:_ Declaring the death penalty “impermissibly cruel,” “incompatible with the dignity of man,” and “unnecessary to any legitimate goal of the state,” the California Supreme Court struck down the state’s capital punishment law by a six-to-one vote. The decision voided the death sentences of 107 prisoners, including Robert Page Anderson, on whose behalf the constitutional challenge was brought. Anderson had been condemned for shooting a San Diego pawn shop clerk to death during a 1965 robbery. Among sentences voided along with Anderson’s were those of Sirhan Sirhan and Charles Manson. Republican Governor Ronald Reagan blasted the decision, saying the court had put itself “above the will of the people,” but his Democratic predecessor, Edmund G. (Pat) Brown, deemed it “a correct decision.”

_May 6, 1972:_ The American Jewish Committee called for abolition of the death penalty, saying that it “degrades and brutalizes the society which practices it,” that it has been “discriminatory in its application,” and that it is “unjust and incompatible with the dignity and self-respect of man.”

_June 29, 1972:_ The U.S. Supreme Court held five-to-four in _Furman v. Georgia_ that arbitrary and racially discriminatory application of the death penalty rendered it cruel and unusual under the Eighth and Fourteenth Amendments. The decision, which voided capital punishment statutes in thirty-nine states and the District of Columbia, pertained only to application of the death penalty—not to the death penalty itself—leaving open the possibility that new laws would pass constitutional muster while permanently barring the executions of more than 600 prisoners nationwide. The constitutional challenge was brought on behalf of three death row prisoners—a convicted murderer, William Henry Furman—and two convicted rapists, Lucius Jackson, Jr. and Elmer Branch. All three were black, and all of their victims were white. The Court’s nine justices wrote separately, but Justice William J. Brennan summed up the majority’s reasoning: “Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment.” The dissenting justices, all of whom had been appointed by Richard M.

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Nixon, maintained that the fate of capital punishment should be the exclusive province of legislatures—not courts. “Were I a legislator,” wrote Justice Harry A. Blackmun, “I would vote against the death penalty for . . . policy reasons.” Chief Justice Warren E. Burger wrote that, were he a legislator, he would vote either to abolish the death penalty or to restrict its use “to a small category of the most heinous crimes.”

November 7, 1972: California voters overwhelmingly approved a ballot initiative known as Proposition Seventeen, which reinstated the death penalty law that had been in effect before the state supreme court declared it unconstitutional nine months earlier. Proposition Seventeen, sponsored by Republican Senator and future Governor George Deukmejian, also amended the California Constitution to provide that the death penalty “shall not be deemed [by state courts] to be, or to constitute, the infliction of cruel or unusual punishments.” The ballot initiative was moot, however, because the U.S. Supreme Court had decreed in Furman v. Georgia that no one could be subject to the death penalty absent safeguards against its arbitrary and capricious imposition.

December 8, 1972: A bill making Florida the first state to enact a new death penalty law after Furman v. Georgia was signed into law by Governor Reubin Askew. The law provided for bifurcated trials—the first phase to determine guilt, the second to weigh aggravating and mitigating circumstances and, unless a jury was waived, to render an “advisory sentence” of either life in prison or death, leaving the final decision to the trial judge.

April 10, 1974: The North Carolina Supreme Court reversed a 1973 first-degree burglary conviction and mandatory death sentence against Samuel A. Poole, holding that he had been convicted by a jury solely on “suspicion and conjecture.”

November 21, 1974: The U.S. Roman Catholic Conference, reversing the church’s longstanding support for capital punishment, called for its abolition.

September 15, 1975: Four members of a Los Angeles motorcycle club—Thomas V. Gladish, Richard W. Greer, Ronald B. Keine, and Clarence Smith, Jr., who had been sentenced to death in New Mexico for the murder of a young homosexual man near Albuquerque the previous year—were freed as a result of a confession from the actual killer and an investigation by Detroit News reporters Douglas Glazier and Stephen Cain. The bikers, who originally were from Detroit, had been convicted on the testimony of a motel

167 Furman, 408 U.S. at 305 (Brennan, J., concurring); id. at 375 (Burger, C.J., dissenting); id. at 406 (Blackmun, J., dissenting); Fred P. Graham, Court Spares 600, N.Y. TIMES, June 30, 1972, at 1.
168 Robert Rawitch, Death Penalty OK’d but its use Could be Years in Future, L.A. TIMES, Nov. 9, 1972, at A20; see supra entries dated Feb. 18, 1972, and June 29, 1972.
169 Florida Becomes First to Reinstate the Death Penalty, N.Y. TIMES, Dec. 9, 1972, at 32; see supra entry dated June 29, 1972.
maid, who claimed to have been forced to watch the men sodomize and mutilate the victim, but who recanted to the News, leading to evidence that she had been threatened by detectives and coached to lie. In fact, the victim had not been sodomized or mutilated, but rather had been shot. The bikers had been in California when the crime occurred—as corroborated by gasoline purchases on stolen credit cards—although prosecutors asserted that the alibi was a ruse. The exoneration occurred after a young drifter, Kerry Rodney Lee, following a religious conversion, walked into a police station in South Carolina and confessed to the crime, leading authorities to the murder weapon and other evidence of his guilt.172

December 22, 1975: Finding “no convincing evidence that the death penalty is a deterrent superior to lesser punishments [and that] the most convincing studies point in the opposite direction,” the Supreme Judicial Court of Massachusetts held that a mandatory death sentence for a murder committed in the course of a rape or attempted rape violated the state constitution.173

July 2, 1976: The U.S. Supreme Court held seven to two that the death penalty was not inherently unconstitutional, clearing the way for executions to resume. Justice Potter Stewart wrote for the majority that concerns about arbitrary and capricious application that the Court expressed in 1972 “can be met by a carefully drafted statute that ensures that the sentencing authority [judge or jury] is given adequate information and guidance.” In dissent, Justice William J. Brennan wrote:

Death is not only an unusually severe punishment, unusual in its pain, in its finality and in its enormity, but it serves no penal purpose more effectively than a less severe punishment; therefore the principle inherent in the clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment.

In three companion cases decided the same day, the Court struck down the post-1972 capital punishment laws of Louisiana, North Carolina, and Florida because they made death mandatory for everyone convicted of first-degree murder. To pass constitutional muster, said the Court, laws had to allow the sentencing authority to weigh mitigating evidence.174

January 17, 1977: “Let’s do it,” thirty-six-year-old Gary Mark Gilmore declared as he awaited execution by a firing squad at the Utah State Prison. Minutes later, Gilmore became the first person to be legally executed in the United States under a death penalty

statute enacted after 1972. The day before the execution, Gilmore had told his mother by telephone “Don’t cry, Mom. I love you. I want you to go on with your life.” She replied, “Gary, I’m going to stay brave for you until tomorrow, but I know I’ll never stop crying. I’ll cry every day for the rest of my life.” Seven months earlier, Gilmore had robbed and murdered a filling station attendant in Orem and a motel manager in Provo. He was charged with both crimes but tried, convicted, and sentenced to death only for the latter. Gilmore requested that his eyes be used for transplant purposes and, within hours of the execution, two patients received his corneas. He would be cremated the same day and his ashes would be scattered from an airplane over the area where the crimes occurred. Gilmore was the forty-fourth man to be executed in Utah since it became a state eighty-one years earlier and the thirty-ninth to die by firing squad, the others having been hanged.175

June 29, 1977: The U.S. Supreme Court held six to three that the death penalty was a “grossly disproportionate and excessive punishment” for the rape of an adult woman—and thus was cruel and unusual under the Eighth Amendment. The decision overturned the nation’s only law—Georgia’s—authorizing death for adult rape. In so doing, it vacated five Georgia death sentences, including that of Ehrlich Anthony Coker, who had been sentenced to death for the 1974 rape and kidnapping of a young mother. The decision closed what David E. Kendall, an NAACP Legal Defense Fund lawyer who argued Coker’s case, termed “one of the more shameful and racist chapters in the history” of U.S. jurisprudence. Although Coker was white, roughly nine in ten men executed for rape from 1930 through 1964—when the last such execution occurred—had been African-American including John Wallace Eberheart, Jr. and John Wesley Hooks, who had been condemned in Georgia for abducting and raping a white woman in 1974 and whose sentences were unanimously overturned the same day the Coker decision was handed down.176

May 25, 1979: Thirty-year-old John Arthur Spenkelink, one of 134 prisoners on Florida death row, became the first person in the nation to be executed involuntarily following Gregg v. Georgia. “You can’t do this, this is America! This is murder!” Spenkelink yelled as prison guards came to take him to the electric chair for a killing he always contended had been self-defense. He took a minute to settle down, stepped out of his cell, and did not resist as the guards escorted him into the execution chamber. After the execution, death penalty proponents donned T-shirts proclaiming, “One down, 133 to go.”177

176 Coker v. Georgia, 433 U.S. 584, 587 (1977); GA. CODE ANN. § 26-2001 (1972); Lesley Oelsner, *High Court Rules Out Execution of Rapists*, N.Y. TIMES, June 30, 1977, at 37; Eberheart v. Georgia, 433 U.S. 917 (1977); Eberheart v. State, 206 S.E.2d 12, 14–15 (Ga. 1974), vacated, 433 U.S. 917 (1977); Hooks v. State, 210 S.E.2d 668, 671 (Ga. 1974), vacated, 433 U.S. 917 (1977); see Appendix D: “Executions for rape by race” (compilation of data showing that from 1624 through 1964 there had been 1,086 documented executions for rape in what was or would become the United States; of those, 89.4% were African Americans, 7.9% were Caucasians, and 2.7% were other or unknown).
October 1980: A study by William J. Bowers and Glenn L. Pierce, of the Center for Applied Social Research at Northeastern University, found that executions do not deter murders, but rather stimulate them. The study, which encompassed murders and executions in New York State from January 1907 through August 1964, found that, on average, there were two additional murders in the month following an execution and one additional murder in the month after that. “The lesson of the execution, then, may be to devalue life by the example of human sacrifice,” Bowers and Pierce wrote. “Executions demonstrate that it is correct and appropriate to kill those who have gravely offended us. The fact that such killings are to be performed only by duly appointed officials on duly convicted offenders is a detail that may get obscured . . . . [T]he message of the execution may be lethal vengeance, not deterrence.”

July 22, 1980: The American Medical Association House of Delegates, meeting in Chicago, adopted a resolution stating that “a physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution.” Physician participation in executions would become controversial in light of botched lethal injections, resulting in unnecessary pain that could be avoided if physicians or other medical professionals participated in the process.

July 30, 1980: Troy Leon Gregg, whose case—Gregg v. Georgia—had given a green light to the resumption of capital punishment in 1976, was found floating in the Catawba River near Asheville, North Carolina, two days after he and three fellow death row prisoners escaped from Georgia’s maximum security prison at Reidsville. Gregg had been beaten to death in a barroom brawl near his family home in York, South Carolina. Shortly before his body was discovered by swimmers, his cohorts—Timothy W. McCorquoda, Johnny L. Johnson, and David A. Jarrell—surrendered to FBI agents, who, acting on a tip, fired tear gas into a house in which the men were hiding. To escape from Reidsville, the four had donned pajamas that had been altered to resemble guards’ uniforms, sawed through two sets of bars, climbed over a fence, and fled in a car that had been left in the prison parking lot for them by an outside accomplice. Authorities suspected that one of Gregg’s fellow escapees had killed him, but no one was prosecuted. Gregg had been condemned for killing two men who had given him a ride in 1973. He had steadfastly maintained that he acted in self-defense after one of the men slashed him with a knife and the other came at him with a piece of pipe.

178 William J. Bowers & Glenn L. Pierce, Deterrence or Brutalization: What is the Effect of Executions?, 26 CRIME & DELINQ. 453, 456, 481 (1980).

March 1982: The General Board of the American Baptist Churches—citing “the sacredness of life and the obligation to ‘overcome evil with good’ as taught in the Scriptures”—called for an immediate end to executions.\(^{180}\)

June 18, 1982: The Illinois Supreme Court held by a four-three vote that a person cannot be executed in Illinois for a murder that occurred in another state. Three years earlier, Thomas J. Holt had abducted his estranged nineteen-year-old wife in Lake County, Illinois, taken her across the state line into Kenosha County, Wisconsin, and strangled her to death. After convicting Holt of both kidnapping and murder, Lake County Judge John L. Hughes sentenced him to death. Writing for the majority, Supreme Court Justice Seymour Simon wrote that no appellate court anywhere had ever allowed a conviction in one state for a crime committed in another to stand, adding that “we do not think this court, in this case, should be the first.”\(^{181}\)

July 2, 1982: The U.S. Supreme Court held that the Eighth Amendment forbids the execution of accomplices in robberies during which murders occur unless it can be shown that the accomplices intended to kill the victims. Earl Enmund had waited in a car some 200 yards from a rural Florida home in 1975 while Sampson and Jeanette Armstrong had gone to the door and, under the pretext that their car had overheated, asked for water. When eighty-six-year-old Thomas Kersey brought them a jug of water, Sampson Armstrong pulled a gun, whereupon Kersey’s seventy-four-year-old wife, Eunice, appeared, shot, and wounded Jeanette Armstrong. The Armstrongs then began firing, killing the Kerseys and fleeing in the car with Enmund. All three were convicted. Edmund and Sampson Armstrong were sentenced to death, and Jeanette Armstrong to life. In 1987, Sampson Armstrong’s death sentence was vacated on ineffective assistance grounds. He was resentenced to life in prison.\(^{182}\)

December 7, 1982: Texas began a post-\textit{Gregg v. Georgia}\ execution spree by putting forty-year-old Charles Brooks, Jr., (also known as Shareef Ahmad Abdul-Rahim,) to death by lethal injection. Not only was Brooks the first of his era to be executed in Texas, he also was the first person in the United States to be executed by lethal injection. Six years earlier, either Brooks or his cousin, Woody Loudres—it never would be determined which—shot and killed David Gregory, a twenty-six-year-old auto mechanic whom they had abducted. Following separate trials, both had been sentenced to death. Loudres’s conviction would be overturned as a result of racial discrimination in jury selection. On remand, he pleaded guilty in exchange for a forty-year sentence. Although the defendants were equally culpable in the crime, only Brooks was eligible for execution. In November 1982, Brooks, whose appeals had been denied in both state and federal courts,


\(^{181}\) People v. Holt, 440 N.E.2d, 102, 103, 107 (Ill. 1982).

filed a motion in the U.S. Court of Appeals for the Fifth Circuit for a stay of execution. He alleged that his and his co-defendant’s sentences were disproportional and that there was no rational basis for the difference. Although Jack Strickland, the prosecutor who had procured the death sentence against Brooks, supported the motion on proportionality grounds. The U.S. Court of Appeals for the Fifth Circuit denied the stay. Brooks appealed to the U.S. Supreme Court, which, on the eve of his execution, denied the stay by a vote of six to three.\(^{183}\)

**April 22, 1983:** The electrocution of thirty-three-year-old John Louis Evans III for the murder of a pawnbroker in Mobile, Alabama, was a debacle. When the first jolt was administered, sparks surrounded his head. On the second jolt, flames shot from his head and smoke rose from his leg, but he survived. After a second jolt, Evans continued to breathe. From the rear of the observation room, his lawyer cried out, “I ask for clemency. This is cruel and unusual punishment.” The corrections commissioner tried to reach Governor George Wallace on what was supposed to be a direct line, but there was no answer. A third jolt was administered. Again Evans survived, but he died before a fourth jolt could be administered. During his trial, Evans had declared that he felt no remorse for his crime and threatened to kill the jurors. His execution was Alabama’s first since 1965.\(^{184}\)

**July 18, 1983:** “The very thought of taking the condemned man from his cell in the night hours, leading him down a passageway to the death chamber where he is placed in the deadly apparatus and deliberately killed—the whole procedure is impossible to contemplate without horror and dread,” Judge Frank X. Yackley told John E. Whitehead. “All my life I have been against taking a man’s life regardless of his guilt. But as a judge and agent of the state, I have to follow the law. The law directs me to the sentence of death.” Eleven months earlier, Whitehead had kidnapped five-year-old Vicki Wrobel, raped her, and led her to the Mazon River in Grundy County, Illinois, where he had wound his shirt around her neck and twisted it into a ligature, choking her and holding her under water until she strangled and drowned. So emotionally wrenching was imposing a sentence he abhorred that the judge in effect passed a death sentence on himself, according to his widow, Sel Erder Yackley; what a psychiatrist had termed the “torment” of sentencing Whitehead had triggered a bipolar disorder. Three years after the sentencing, Judge Yackley would put a bullet through his temple. In 2002, Whitehead would die of natural causes at age fifty-three on Illinois death row.\(^{185}\)

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September 2, 1983: Thirty-four-year-old Jimmy Lee Gray, who had confessed to sodomizing and murdering three-year-old Deressa Jean Scales, died gruesomely in the Mississippi gas chamber. When the cyanide was released, Gray’s head jerked back and he began to choke and strain at the straps holding him to the seat. His fists clenched, his face contorted, and he appeared to be breathing when witnesses were escorted out of the witness room eight minutes into the execution.186

April 5, 1984 (12:15 A.M. EST): In a case that would become the subject of a renowned book by Sister Helen Prejean and a film starring Susan Sarandon and Sean Penn, thirty-four-year-old Elmo Patrick Sonnier was electrocuted for the 1978 murders of a young couple in Louisiana.187

April 5, 1984 (7:09 A.M. EST): Arthur Frederick Goode III—who had spent nine of his thirty-four years in mental institutions and whose IQ was approximately twice his age—went to his death in the Florida electric chair, saying, “I have remorse for the two boys I murdered. But it’s hard for me to show it.” Six years earlier, Goode had left a Maryland psychiatric hospital and gone to Cape Coral, where he raped and murdered an eight-year-old boy. Then he had taken a bus north and raped and murdered an eleven-year-old boy in Virginia. When tried for the Florida crime, Goode had waived his right to counsel, admitted guilt, and asked Judge John Shearer, Jr. to sentence him to death. Shearer had granted the request, saying that only Goode’s death would “once and for all guarantee . . . that he would never again kill, maim, torture, or harm another being.” Shearer added that society could “no longer help or rehabilitate Arthur Goode. All we can do is extinguish him.” Goode would soon think better of his death wish and vigorously pursue appeals. The principal issue would be his sanity. From death row, he had written grotesque letters to, among others, the parents of the victims. He showed no sign of contrition, vowing that if he were released he would kill the first boy he saw. Two months before the execution, Governor Bob Graham had appointed three psychiatrists to evaluate Goode’s sanity. In a letter that was tantamount to a death warrant, the psychiatrists had concluded that “Goode understood the nature and the effect of the death penalty and why it is to be imposed on him.”188

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May 10, 1984: In the wake of what U.S. Supreme Court Justice Thurgood Marshall termed “an indecent desire to rush to judgment in capital cases,” James Adams, an African-American, was executed for the murder eleven years earlier of a well-to-do white rancher in Florida. Adams’s conviction rested on what his all-white jury apparently saw as conclusive evidence: the testimony of a witness who claimed to have seen Adams and the victim shortly before the crime in their respective cars near the victim’s home, the testimony of other witnesses who said they had seen Adams’s car in the driveway of the home, jewelry taken from the home recovered from the trunk of the car, and currency in Adams’s possession stained with blood of the victim’s type. Other facts—some known at the time of the trial, some not discovered until years later—supported Adams’s claim of innocence. First, the only witness who positively identified him as the driver of the car near the victim’s home had previously accused Adams of having an affair with his wife and had threatened revenge. Second, another witness who saw the car told the police that he was certain that Adams had not been the driver. Third, Adams had claimed from the beginning that he had lent his car to a woman who had it at the time of the crime. In a pretrial interview, the woman had substantiated his account, but, when called as a defense witness at the trial, changed her story, indicating that she had used the car at a different time. Fourth, a witness said that he heard a female, not a male, voice yell from the victim’s home, “In the name of God, don’t do it.” Fifth, of the currency with blood on it, only one bill was consistent with the victim’s blood type. That type was O positive—which the victim shared with 45% of the population. Sixth, before trial, the state crime laboratory had excluded Adams as the source of hairs found on the victim’s hands.\footnote{Wainwright v. Adams, 466 U.S. 964, 965 (1984) (Marshall, J., dissenting); In Spite, supra note 17, at 5–10; Ingle, supra note 186, at 187–88.}

May 14, 1984: The U.S. Supreme Court erected a high barrier against claims of ineffective assistance of counsel for defendants on death row—holding, in the case of Florida serial killer David Leroy Washington, that to prevail required establishing not only that counsel’s performance had been inadequate, but also that there had been “a reasonable probability” of a different outcome if counsel had performed adequately. Not having met the standard, Washington would die in the Florida electric chair two months later. In ensuing years, the decision would be, as one scholar put it, “roundly and properly criticized for fostering tolerance of abysmal lawyering.”\footnote{Strickland v. Washington, 466 U.S. 668, 693–94 (1984); Washington v. State, 362 So. 2d 658, 660–62 (Fla. 1978); Florida Inmate Executed, L.A. Times, July 14, 1984, at A2; William S. Geimer, A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel, 4 WM. & MARY BILL RTS. J. 91, 94 (1995).}

September 10, 1984: Strapped into the electric chair, Timothy George Baldwin looked directly at Louisiana Pardon Board Chairman Howard Marsellus and declared, “Y’all are about to execute an innocent man and someday you’ll have to answer for this.” Before Baldwin’s trial for the 1978 murder of eighty-five-year-old Mary James Peters, the godmother of Baldwin’s son, there was doubt of his guilt. Witnesses had reported seeing a man in his twenties with long hair wearing a short-sleeved shirt leave Peters’ home shortly after the crime. Baldwin, who had no record of violence, was thirty-eight, had a crew cut, and always wore long-sleeved shirts because he was embarrassed by tattoos he had gotten
in his youth. After his conviction, a receipt was discovered indicating that he had checked into a motel seventy miles from the scene of the crime less than an hour after it occurred. Moreover, Peters, who had survived the attack and regained consciousness before she died, had said that she did not know the man who attacked her—although she knew Baldwin well. Nevertheless, his appeals were denied. His only hope then had been that the pardon board, headed by Marsellus, would recommend clemency to Governor Edwin W. Edwards. No such recommendation ever came. Marsellus, who was convicted of taking a $5000 payoff in 1986, would reveal that he had believed Baldwin was innocent. “I did something morally wrong,” he would say. “I gave in to the prestige and power, the things that went with my job. I knew what the governor, the man who appointed me, wanted—no recommendation for clemency in any death case . . . . I will carry this to my grave.”

December 12, 1984: After a two-minute jolt in the Georgia electric chair, Alpha Otis Stephens appeared to be dead, but his body was so hot that physicians waited six minutes before examining him. He was still breathing. It took another two-minute jolt to kill him. A prison official would explain that Stephens “was just not a conductor” of electricity.

June 25, 1985: In highlighting the arbitrariness and capriciousness of the death penalty, New York Times columnist Tom Wicker deemed it “a hideously uncertain punishment”—citing recent exemplary executions in Texas and Georgia. “If execution can be justified at all,” wrote Wicker, “it certainly should be reserved for those unquestionably responsible for the worst crimes. But for any number of reasons, whether a particular defendant should have been executed is all too often all too questionable.” The Texas case Wicker cited was that of Charles Milton, a black man executed for killing a woman during a Fort Worth liquor store robbery. When the store’s owner grabbed the barrel of the gun, the owner’s wife broke two bottles of wine over Milton’s head. As the men continued to struggle, the gun went off, killing the woman. Milton had no prior record of violence. The Georgia case was that of John Young, a black man who had a record of violence and whose crime had been unspeakably hideous—stomping three elderly persons to death. It was Young’s background that gave rise to doubts about the appropriateness of the death penalty in his case—as Wicker reported: “As a child he was sleeping in the same bed with his mother, a prostitute, when she was murdered beside him; he was left to fend for himself from age eight, becoming, among other things, a child prostitute in order to survive.”

March 11, 1986: The Georgia Board of Pardons and Paroles granted a posthumous pardon to Leo M. Frank, an Atlanta factory superintendent who had been lynched in 1915 after his death sentence for the murder of a thirteen-year-old female employee had been commuted

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to life in prison. Frank’s conviction, fueled by anti-Semitism, had rested almost entirely on the testimony of an ex-convict factory janitor, who in all likelihood had committed the crime, but claimed that Frank had admitted killing the child because she would not have sex with him.\(^\text{194}\)

June 24, 1986: Thirty-three-year-old Jerome Bowden, who had an IQ of sixty-five and could not count past ten, was electrocuted for the murder of Kathryn Stryker during a home invasion ten years earlier in Georgia—a crime Bowden denied, but to which he had signed a confession that he was incapable of reading. Bowden had been accused of the murder by sixteen-year-old James Lee Graves, whom police questioned after learning that he had raked leaves for Stryker the day she was slain. Graves claimed that Bowden had beaten Stryker with a pellet gun—which had been recovered from Graves’s home along with jewelry taken from Stryker. There had been no physical evidence linking Bowden to the crime, but none had been needed in light of his confession. The defense tried to keep the confession out of evidence, but to no avail. A jury found Bowden guilty and imposed the death penalty; Graves, because of his age, was sentenced to life without parole. Bowden had been scheduled for execution in October 1985, but less than twenty-four hours before he was to die, he received a temporary stay. When told that his execution had been put off, Bowden’s response was, “Gee, that’s nice. Does that mean I can watch \textit{Hill Street Blues} Thursday night?” In ensuing months, efforts to save Bowden based on his “mental retardation” would fail. He would be executed thirty-three minutes after the U.S. Supreme Court, by a vote of seven to two, rejected a final stay. His last words were, “I hope that by my execution being carried out, I hope it will bring some light to this thing that is wrong.” His wish was fulfilled when, in response to public outrage over his execution, the Georgia General Assembly approved the nation’s first statute barring executions of the “mentally retarded.”\(^\text{195}\)

June 26, 1986: The U.S. Supreme Court held five to four that it was cruel and unusual to execute killers who were insane to the extent that they were unable to understand either that they are about to die or why. The ruling remanded the case of Alvin Bernard Ford, an allegedly delusional Florida death row prisoner, who purportedly had come to believe, among other things, that he was Pope John Paul II, that he had replaced all of the members of the Florida Supreme Court, and that prison guards had been murdering prisoners and putting their bodies into concrete enclosures used for beds. Justice Thurgood Marshall wrote the majority opinion, concluding that executing the insane would violate evolving  


standards of decency and noting that the practice consistently had been branded “savage and inhuman”—beginning with Sir William Blackstone nearly two centuries earlier. In dissent, Justice William Rehnquist countered that under common law the determination of sanity had been an executive rather than a judicial function. On remand, a U.S. District Court judge held in 1989 that Ford had not in fact been insane. While that decision was being appealed, Ford died of natural causes in 1991.196

November 4, 1986: California Chief Justice Rose Elizabeth Bird, who had voted to overturn sixty-one capital cases in her just-under-ten-year tenure on the court, was swept out of office in a retention election by a resounding margin of the popular vote. Associate Justices Cruz Reynoso and Joseph Grodin, who had concurred in overturning most of the capital cases that had come before the court, likewise were ousted by substantial margins. Their removal followed a multi-million-dollar advertising campaign featuring photographs of murdered children and their survivors criticizing the court’s rulings in capital cases.197

November 8, 1986: During plea negotiations for the rape and murder of seven-year-old Melissa Ackerman in LaSalle County, Illinois, Brian Dugan, a psychopathic sex killer, confessed “hypothetically” that he had raped and murdered ten-year-old Jeanine Nicarico nearly four years earlier in neighboring DuPage County—a crime for Rolando Cruz and Alejandro Hernandez had been sentenced to death. In accordance with the wishes of the Ackerman family, the death penalty was not sought in that case—Dugan pleaded guilty in exchange for a life sentence. But DuPage County prosecutors maintained that the Nicarico confession, which could not be used against Dugan unless he received immunity from the death penalty, was false. Cruz and Hernandez won new trials in the Nicarico case on grounds unrelated to Dugan’s confession, but again were convicted—Cruz was sentenced to death and Hernandez to eighty years in prison. Those convictions began to unravel in 1992 when Assistant Illinois Attorney General Mary Brigid Kenney resigned rather than oppose Cruz’s appeal, concluding that he was innocent—as prosecutors belatedly acknowledged in 2009 when they charged Dugan with the Nicarico crime based on DNA implicating him and exculpating Cruz and Hernandez. Dugan pleaded guilty to and was

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197 For Bird, the vote was 2,417,877 (33.8%) in favor and 4,727,413 (66.2%) opposed to retention; for Reynoso, 2,616,057 (39.8%) in favor and 5,962,752 (60.2%) opposed to retention; for Grodin, 2,798,895 (43.4%) in favor and 3,651,639 (56.6%) opposed to retention. Gerald F. Uelmen, California Judicial Retention Elections, 28 SANTA CLARA L. REV. 333, 346 (1988); Lanie Jones, Taking Aim at Bird: Conservative Group Wages Fight Against Chief Justice in Court of Public Opinion, L.A. TIMES, Dec. 9, 1985, at A1; Edwin Chen, California Court Fight: Bird Runs for her Life, NATION, Jan. 18, 1986, at 42–44; Frank Clifford, Bird Calls Opposition’s Attack ‘Mean-Spirited’, L.A. TIMES, Nov. 6, 1986, at A3; Tom Wicker, A Naked Power Grab, N.Y. TIMES, Sept. 14, 1986, at E25.
sentenced to death, but the sentence was wiped out in 2011 when Governor Pat Quinn signed legislation abolishing the Illinois death penalty.\(^{198}\)

**November 26, 1986**: Branding the death penalty “anti-God” and “incompatible with an enlightened society,” New Mexico’s outgoing Democratic governor, Toney Anaya, emptied the state’s death row of its five occupants, all men convicted of murder, commuting their sentences to life in prison. The decision drew praise from church groups and prisoners’ rights organizations, but telephone calls to Anaya’s office ran some twenty to one against it. Commuting the sentences made the men eligible for parole—but only technically. Realistically, Anaya vowed, “they will never again set foot in society.”\(^{199}\)

**January 21, 1987**: Perry Cobb and Darby Tillis (also known as Darby Williams), who had been sentenced to death for the 1977 murder and armed robbery of the owner and an employee of a Chicago hotdog stand, were freed based on evidence that the crime had been committed by the boyfriend of a woman who had been the star witness against them. It had taken three jury trials to convict Cobb and Tillis. The first two trials ended in hung juries. The third ended in convictions and death sentences imposed by Cook County Circuit Court Judge Thomas J. Maloney, who would be convicted in federal court in 1993 of taking bribes in murder cases. It was alleged that Maloney engaged in “compensatory bias”—imposing harsh sentences in cases in which he had not been bribed, such as the Cobb-Tillis case, to camouflage bribes he had taken in other cases.\(^{200}\)

**April 2, 1987**: The Illinois Supreme Court unanimously overturned the conviction and death sentence of Andrew Wilson, who alleged that his confession to the murder of two Chicago policemen had been obtained by torture at the hands of Chicago Police Commander Jon Burge and subordinate detectives. The evidence indicated that Wilson had been shocked with wires attached to his ears, lips, fingers, and genitals, suffocated with a plastic bag, beaten, burned on a hot radiator to which he was handcuffed, and burned with cigarette butts. The Supreme Court found that Cook County Circuit Court Judge John J.  


Crowley had erred when he denied a motion to suppress the confession. Beyond Wilson’s confession, there was overwhelming evidence that he was guilty of the 1982 slaying of Police Officers William Fahey and Richard O’Brien—but the state high court said that the use of a coerced confession could never be deemed harmless error. Wilson was entitled to a new trial. He would be retried the following year and sentenced to life in prison. 201

April 22, 1987: In the case of an African-American man named Warren McCleskey, under death sentence for killing a white police officer during an attempted armed robbery in Atlanta, the U.S. Supreme Court narrowly rebuffed a constitutional challenge to the Georgia death penalty based on racial disparities in capital sentencing. A study led by David C. Baldus, an Iowa law professor, had found that the death penalty had been imposed in 22% of 2,500 Georgia murder cases in which blacks were convicted of killing white victims, compared with only 3% of cases in which white defendants were convicted of killing black victims, and only 1% of cases in which blacks were convicted of killing black victims. In a five-four opinion by Justice Lewis F. Powell, Jr., the Court held that racial disparities in sentencing were “an inevitable part of our criminal justice system.” New York Times columnist Anthony Lewis wrote that the decision “effectively condoned the expression of racism in a profound aspect of our law.” In 1991, McCleskey would go to his death in the Georgia electric chair. In 1994, Justice Powell’s biographer report that the Justice had come to oppose the death penalty in all cases and had proclaimed that if he could change his vote in any case, it would be McCleskey’s. 202

May 20, 1987: Twenty-six-year-old Edward Earl Johnson died in the Mississippi gas chamber for the murder of a police officer and the rape of a sixty-nine-year-old woman seven years earlier—crimes that he had insisted he had not committed. His conviction had rested on ballistics evidence purporting to link a weapon he owned to the officer’s death and on the rape victim’s identification testimony, but several alibi witnesses testified that Johnson had been at a card game when the crimes had occurred. Johnson’s last words to Warden Donald A. Cabana, who supervised the execution, were: “I want you to know exactly what you’re doing when you execute me. I want you to remember every last detail, ‘cause I’m innocent, Mr. Cabana . . . I’m innocent.” 203

June 12, 1987: Asked if he had any last words, Jimmy L. Glass replied, “Yeah, I’d rather be fishing.” With that, the twenty-five-year-old high school dropout went to his death in the Louisiana electric chair for the murder of a middle-aged couple on Christmas 1982. Glass had challenged Louisiana’s use of electrocution as its sole mode of execution,


arguing that it was cruel and unusual, but in 1985 the U.S. Supreme Court denied certiorari by a five-to-four vote—notable for a dissent by Justice William J. Brennan, Jr., who wrote that electrocution amounts to “nothing less than the contemporary technological equivalent of burning people at the stake.” On Christmas Eve, 1982, Glass and Jimmy C. Wingo had escaped from the Webster Parish jail in Minden, Louisiana, and made it on foot to the nearby town of Dixie Inn. There, Glass shot Newton and Earline Brown to death in their bed. He claimed that Wingo had forced him at gunpoint to kill the Browns—after Glass called Wingo by name within their earshot. Not so, said Wingo, who claimed he had not even gone into the Browns’ home with Glass. Juries at separate trials believed neither version of what had occurred. Wingo, like Glass, would lose his appeals. Four days after Glass’s electrocution, Wingo, ten years older than Glass, would die in the same electric chair, proclaiming, “I am an innocent man.”

March 15, 1988: “I was not guilty for the charge for which I was arrested and this morning I tell you I am not guilty of the charge for which I am about to be executed,” fifty-four-year-old Willie Jasper Darden, an African-American convicted by an all-white jury, said just before he went to his death in the Florida electric chair for a murder that occurred a quarter of a century earlier at a furniture store in Lakeland. At Darden’s trial, two eyewitnesses identified him as the killer, although he did not fit the descriptions they initially gave to police. Darden had a solid alibi, but it was not presented at his trial. Four alibi witnesses—including two police officers—could have placed him eight miles from the crime scene at the time of the crime. Darden’s court-appointed defense team—a pair of lawyers who had never tried a capital case—conducted no investigation and called no witnesses except Darden. After he exhausted state appeals, Darden sought a federal writ of habeas corpus, and a magistrate recommended that it be granted. The district court, however, rejected the recommendation and a divided panel of the U.S. Court of Appeals for the Fifth Circuit affirmed. The U.S. Supreme Court also affirmed by a five-to-four vote. In dissent, Justice Harry Blackmun wrote that the majority opinion “reveals a Court willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe.”

November 18, 1988: The Anti-Drug Abuse Act, authorizing the death penalty for anyone convicted in federal court of committing or procuring a murder in connection with a continuing criminal enterprise, was signed into law by President Ronald Reagan.

March 21, 1989: Randall Dale Adams, a forty-year-old former Army paratrooper who had been sentenced to death for the 1976 murder of a Dallas police officer, walked free after

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204 ‘Rather be Fishing’ says Prisoner before Execution, CH. TRIB., June 13, 1983, at 4; Glass, 471 U.S. at 1094 (Brennan, J., dissenting from denial of certiorari); Wingo v. Blackburn, 783 F.2d 1046 (5th Cir. 1986); AP, Louisiana Executes 3d Killer this Week; Convict had Slain 2, N.Y. TIMES, June 12, 1987, at A23; Von Drehle, supra note 177, at 21–23, 71–72, 371.


he won a new trial and the charges were dismissed—as a direct result of *The Thin Blue Line*, an acclaimed documentary film by Errol Morris. At Adams’s 1977 trial, the star witness for the prosecution was sixteen-year-old David Harris, who admitted after the trial that he had shot the officer to death. In addition to Harris’s perjury, Adams’s false conviction and death sentence had been marked by perjured identification testimony and by police and prosecutorial misconduct, including the withholding of exculpatory evidence and subornation of perjury.\textsuperscript{207}

*May 1, 1989:* Full-page advertisements placed by real estate developer Donald J. Trump, at a cost of $85,000, appeared in the *New York Times, New York Daily News, New York Post,* and *New York Newsday* calling for reinstatement of the New York death penalty in light of the arrest twelve days earlier of five young “criminals”—Antron McCray, Kevin Richardson, Yusef Salaam, Raymond Santana, and Korey Wise—for the rape and beating a young woman jogging in Central Park. In fact, the crime had been committed by a serial rapist, Matias Reyes, whose confession years later, corroborated by DNA, would be instrumental in exonerating the so-called Central Park Five, who received $41 million in damages for their false convictions. Trump continued to insist that the five were guilty.\textsuperscript{208}

*August 24, 1989:* The Orthodox Church in America adopted a resolution supporting “abolition of the death penalty in this and all countries.”\textsuperscript{209}

*December 7, 1989:* Carlos De Luna was executed for stabbing a Corpus Christi filling station clerk to death six years earlier—a crime that De Luna’s relatives, friends, and supporters believe was committed by a violent felon named Carlos Hernandez. About forty minutes after the murder, police had found De Luna shirtless, shoeless, and hiding under a pickup truck a few hundred yards from the station. “I didn’t do it,” he had told the officers, “but I know who did.” There had been no physical evidence linking De Luna to the crime—no blood, even though the victim had been stabbed repeatedly, had bled profusely, and had struggled with her attacker. Two eyewitnesses had identified De Luna at his trial, one saying he had seen De Luna outside the station with a knife, the other saying he had seen De Luna run from the scene. De Luna had testified that he hid under the pickup because he was on parole and had been drinking, a violation that could have sent him to prison. He insisted that Hernandez had committed the crime. The lead prosecutor told the jury that Hernandez was a “phantom”—despite the fact that Hernandez was well known to the prosecutor’s second chair, who had prosecuted Hernandez in another case. Seventeen years after De Luna’s execution and seven years after Hernandez had died in prison, *Chicago Tribune* reporters Maurice Possley and Steve Mills would reinvestigate the case,


interviewing five witnesses who said that Hernandez had boasted of committing the crime and had gloated that De Luna, whom he called his “stupid tocayo,” had gone to death row in his place. A detective who knew both Hernandez and De Luna would tell Possley and Mills that the filling station stabbing was the kind of crime Hernandez—but not De Luna—would commit.\footnote{210}

January 23, 1990: Clarence Brandley, an African-American high school custodian in Conroe, Texas, who had been sentenced to death for the rape and murder of the student manager of a visiting volleyball team a decade earlier, was freed after his conviction was reversed and the charges against him were dropped. The victim had been white, as were four other custodians who were alternative suspects. Years later, one of the custodians quoted a Texas Ranger involved in the investigation as declaring that somebody had to pay for the crime and telling Brandley, “Since you’re the nigger, you’re elected.” Brandley had been indicted by an all-white grand jury. Semen recovered from the victim that might have established his innocence had been lost or destroyed by the medical examiner. After one trial ended in a hung jury, Brandley was convicted at a second trial and sentenced to death. The prosecution used peremptory challenges to exclude blacks from both juries. After Brandley’s conviction was affirmed by the Texas Court of Criminal Appeals, a young woman came forward claiming that her common-law husband, from whom she was estranged, had told her that he committed the crime. James McCloskey of Centurion Ministries took up Brandley’s cause and established that key testimony implicating Brandley had been perjured, prompting the Court of Criminal Appeals to designate a special judge to conduct an evidentiary hearing. After ten days of testimony, the judge recommended that Brandley be granted a new trial. Never in his thirty years on the bench, the judge said, had he encountered “a more shocking scenario of the effects of racial prejudice . . . and public officials who for whatever motives lost sight of what is right and just.” The Court of Appeals accepted the recommendation, leading to dismissal of the charges against Brandley.\footnote{211}

May 4, 1990: Six-inch flames shot from his head and smoke filled the execution chamber as forty-three-year-old Jesse Joseph Tafero endured three 2000-volt jolts of electricity over seven minutes in “Old Spark,” the Florida electric chair. Tafero died for the murders of Florida Highway Patrol Officer Phillip Black and Black’s friend, Donald Irwin, a Canadian constable. The officers had been gunned down after they approached a car in a rest area off Interstate 95 on February 20, 1976. In the car were Rhodes, Tafero, Sonia “Sunny” Jacobs, and Jacobs’s two children, one of whom had been fathered by Tafero. Rhodes attributed the murders to Tafero and Jacobs; Tafero and Jacobs attributed the murders to Rhodes. Rhodes was allowed to plead guilty to second-degree murder and avoid the death penalty, in exchange for testifying against Tafero and Jacobs, who were sentenced to death. Jacobs’s sentence was reduced to life in 1981. Shortly before Tafero’s execution, filmmaker Micki Dickoff, a childhood friend of Jacobs, wrote to her after reading a newspaper article describing Tafero’s imminent execution. In 1990, Dickoff

\footnote{210}Maurice Possley & Steve Mills, Did One Man Die for Another Man’s Crime? The Secret that Wasn’t, CHI. TRIB., June 27, 2006, at 1 (citing each installment of the authors’ three-part series to page one); DeLuna v. State, 711 S.W.2d 44 (Tex. 1986).

\footnote{211} IN SPITE, supra note 17, at 119–36.
went to Florida with Jacobs’s legal team and began gathering evidence that would win Jacobs a new trial in 1992. To secure her prompt release, Jacobs would enter an Alford plea—a guilty plea without acknowledging guilt—to secure her prompt release. Four years later, Dickoff’s fact-based film, In the Blink of an Eye, would air as an ABC Movie of the Week.212

September 12, 1990: Saying that he deserved to die, fifty-year-old Charles Walker became the first person executed in Illinois in twenty-eight years—a fate for which he had volunteered by abandoning his discretionary appeals after losing his mandatory appeal. Seven years earlier, on a hot June afternoon, Walker, an ex-convict and alcoholic, had been fishing on Silver Creek, near the southern Illinois town of Mascoutah, when Kevin Paule and Sharon Winker happened along. Walker, who had just run out of beer and had no money, decided to rob them. According to Walker, Paule blurted out, “I know you—you’re Walker.” After Walker shot Paule and Winkler, he went to a tavern to drink with the $40 he had taken from them.213

1991: The Evangelical Lutheran Church in America declared its opposition to the death penalty “because it is not used fairly and has failed to make society safer,” in addition to which it “undermines any possible alternate moral message, since the primary message conveyed by an execution is one of brutality and violence.”214

January 24, 1992: Having so little understanding of his impending death that he saved the dessert that came with his last meal to eat later, forty-two-year-old Ricky Ray Rector died by lethal injection in Arkansas. He was an African-American who eleven years earlier had shot a white police officer to death and then put the gun to his own temple and pulled the trigger, giving himself what a surgeon who operated on him described as “a classic frontal lobotomy.” Shortly before he was taken from a holding cell into the death chamber, Rector mentioned that in the fall he would vote for Bill Clinton—who had interrupted his presidential primary campaign in New Hampshire to fly to Little Rock and reject last-ditch pleas to spare Rector’s life. Political consultant David Garth would note that the case afforded Clinton an opportunity to prove that he was tough on crime. “He had someone put to death who had only half a brain,” as Garth would put it. “You can’t find them any tougher than that.”215


February 10, 1993: The Chicago Police Board fired Commander Jon Burge for employing “improper means”—a polite euphemism for torture—to obtain confessions from African-American murder suspects, including eight men who had been sentenced to death. Among those tortured was Andrew Wilson, whose conviction and death sentence for the 1982 murder of two police officers had been vacated in 1987 in light of photographs showing severe injuries he suffered while in the custody of Burge and his subordinates. Upon retrial, Wilson was sentenced to life in prison. During the Burge years, eight men were sentenced to death based largely on confessions that Burge underlings and his subordinates had extracted. None of the eight would be executed. Four would be pardoned based on innocence a decade later by Illinois Governor George H. Ryan.216

March 2, 1993: Walter McMillian, a black Alabaman sentenced to death by a jury from which the prosecution had systematically excluded blacks, was exonerated and released following discovery that his conviction for the 1988 murder of a white woman had stemmed entirely from perjured testimony and the withholding of exculpatory evidence by the prosecution. At the time of the crime, the prosecution knew but suppressed evidence that McMillian had been at a church fish fry eleven miles away, where he had been seen by dozens of witnesses, including a police officer. McMillian’s conviction rested on the testimony of two key witnesses, both of whom lied and one of whom complained in a tape-recorded pretrial interview withheld from the defense that he was being coerced to lie. The second witness, seeking favorable treatment from the prosecution for crimes of his own, testified that he had seen McMillian’s low-rider truck near the crime scene, but the truck had not been modified into a low-rider until weeks after the crime.217

May 12, 1993: Lionel Torres Herrera went to his death by lethal injection in Texas proclaiming, “I am innocent, innocent, innocent. Make no mistake about this; I owe society nothing . . . I am an innocent man, and something very wrong is taking place tonight.” Herrera had been convicted of murdering two police officers in 1981, but evidence would surface years later indicating that the officers were slain by Herrera’s brother, Raúl, who by then had himself been killed. The evidence included an affidavit from Raúl’s son stating that he had seen his father commit the murders and affidavits from Raúl’s former attorney and former cellmate stating that Raúl had confessed to them. Based on the affidavits, Lionel Herrera filed a successor petition for a federal writ of habeas corpus, which was denied. The U.S. Supreme Court granted certiorari, but held six to three that a freestanding claim of actual innocence is not a ground for habeas relief. “Nothing could be more contrary to contemporary standards of decency . . . than to execute a person who is actually innocent,”

wrote Justice Harry Blackmun in a dissent joined by Justices John Paul Stevens and David H. Souter.\(^\text{218}\)

June 28, 1993: Kirk Noble Bloodsworth, an ex-Marine who had been sentenced to death for the 1984 murder and rape of a nine-year-old girl in Baltimore County, Maryland, became the nation’s first prisoner to have been sentenced to death and exonerated by DNA. Bloodsworth had twice been convicted of the crime. His first conviction, after which he had been sentenced to death, was reversed because the state had illegally withheld exculpatory evidence. Upon retrial, he was again convicted, but sentenced to life in prison. That conviction was affirmed, despite tardy disclosure of additional exculpatory evidence. Both convictions rested on identifications by multiple witnesses who testified that they had seen Bloodsworth either with the victim, Dawn Venice Hamilton, or in the vicinity of the crime the day it occurred. Initially, two boys, ages ten and seven, had told police they had seen the child with a man who had curly hair near the area where the child’s body was found. The ten-year-old described the man as skinny and six feet, five inches tall—the same height as the boy’s uncle. Based on the ten-year-old’s description, police prepared a facial composite sketch, which was shown on television. Bloodsworth became a suspect when police received an anonymous tip that he resembled the man depicted in the sketch. Shortly thereafter, the ten-year-old identified Bloodsworth from a photo array—even though he was six feet tall, not six-five, and was anything but skinny, weighing more than 200 pounds. The seven-year-old identified another person from the photo array, but that boy’s mother testified that her son told her he had identified the wrong person because he was scared and that the culprit actually was the man shown in photo number six—Bloodsworth. The other three identification witnesses were adults, one of whom claimed to have seen Bloodsworth talking to the Hamilton child near her home; the others testified that they had seen him in the area. Edward T. Blake, a California forensic geneticist, conducted the DNA testing that exonerated Bloodsworth. Two decades later, DNA would identify the actual culprit—Kimberly Shay Ruffner, who bore even less resemblance to the description provided by the ten-year-old witness than Bloodsworth did; Ruffner stood only five-eight.\(^\text{219}\)

August 24, 1993: After his last request—for bubblegum—was denied, Ruben M. Cantu died by lethal injection in Texas for a murder he insisted he had not committed. He had been just seventeen in 1984 when two youths broke into a house under construction in San Antonio and shot two workmen, one of whom died. Cantu’s conviction rested on


identification testimony by the surviving victim, Juan Moreno, who had failed to identify him from two photo spreads before identifying him from a third. The case attracted little attention until more than twelve years after his execution when the Houston Chronicle came up with evidence of his innocence. Both Moreno, the survivor of the attack and star witness for the prosecution, and David Garza, Cantu’s codefendant, who had been tried separately and sentenced to prison, told the Chronicle that Cantu had not been involved in the crime. The Chronicle also corroborated Cantu’s claim that he had been in Waco, 180 miles from San Antonio, when the crime occurred. In the aftermath of the Chronicle disclosures, Sam Millsap, Jr., the Bexar County district attorney responsible for sending Cantu to death row, became an ardent advocate for abolishing the death penalty. Millsap’s successor, Susan B. Reed, initially pronounced the disclosures “very troubling” and promised a thorough investigation—which resulted in a 113-page report concluding that Cantu had been guilty after all. The report alleged that Richard Reyna, an investigator hired by the NAACP Legal Defense Fund, somehow planted the false idea of Cantu’s innocence in Moreno’s mind. Reyna responded, “It is deeply insulting to Mr. Moreno to suggest—as this DA’s report does—that he would go out of his way to exonerate the man who killed his friend and who tried to kill Mr. Moreno himself—and very nearly succeeded.”

February 22, 1994: Dissenting from the denial of certiorari in a Texas capital case, U.S. Supreme Court Justice Harry Blackmun delivered a scathing denunciation of capital punishment. Declaring that the Court over the years had “allowed vague aggravating circumstances to be employed, relevant mitigating evidence to be disregarded, and vital judicial review to be blocked,” the eighty-five-year-old Richard Nixon appointee who once supported capital punishment vowed, “From this day forward, I no longer shall tinker with the machinery of death. . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.” The petitioner in the case was Bruce Edwin Callins, who had shot a laid-off bricklayer to death in a topless bar in the Fort Worth area in 1980. Blackmun predicted that the Supreme Court eventually would recognize that capital punishment cannot be administered fairly and constitutionally. “I may not live to see that day,” he wrote, “but I have faith that eventually it will arrive.” Neither Callins nor Blackmun would live to see that day.

May 10, 1994: John Wayne Gacy, Jr., a fifty-two-year-old construction contractor who murdered thirty-three young men in the Chicago area during the 1970s, died by lethal...
injection at Stateville Correctional Center near Joliet. His was the first involuntary execution in Illinois in thirty-two years—since James Dukes went to his death in the electric chair at the Cook County Jail in 1962 for the murder of a Chicago police detective. Ironically, had Gacy committed his murders in Iowa—where he lived, and had been convicted of sodomy, before moving to Illinois—he would not have faced execution; Iowa abolished its death penalty in 1965. And had his murder spree ended eighteen months earlier, he would not have faced execution in Illinois, where the death penalty was not restored until June 21, 1977. Gacy’s final murder—that of fifteen-year-old Robert Piest—had occurred on December 11, 1978.222

May 11, 1994: The U.S. Senate killed a proposed Racial Justice Act that would have permitted defendants to challenge death sentences with statistical evidence of racially discriminatory patterns in sentencing or prosecution. The Act, first proposed in 1988, in effect would have overruled the U.S. Supreme Court, which in 1987 had rejected such a challenge in the case of Warren McCleskey, holding that to prevail McCleskey would have had to show that conscious and deliberate official bias affected his specific case. The Senate voted on the Act during the controversy over President Bill Clinton’s crime bill. Democratic Senator Joe Biden of Vermont lamented, “We don’t have the votes for anything that has ‘racial justice’ in it, even the word ‘racial.’”223

July 28, 1994: U.S. House and Senate negotiators reached an accord on a sweeping anti-crime bill that, upon being signed into law by President Bill Clinton, would expand the federal death penalty to cover sixty crimes, including murder of certain government officials; fatal drive-by shootings; murder for hire; and kidnapping, carjacking, or sexual abuse resulting in death. Clinton deemed the measure “the toughest, largest, smartest federal attack on crime in the history of the country.”224

August 3, 1994: James William Holmes, Darryl V. Richley, and Hoyt Franklin Clines died by lethal injection in rapid succession on the same gurney for a 1981 murder during a home invasion in Rogers, Arkansas. It was the nation’s first mass execution since the U.S. Supreme Court permitted the resumption of executions in 1976.225

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January 17, 1995: Thirty-seven-year-old Mario Marquez, who had an IQ of sixty-five and the adaptive skills of a seven-year-old, was executed by lethal injection in Texas after telling his lawyer, “I want to be God’s gardener and take care of the animals.” Eleven years earlier, in a fit of jealousy, Marquez had slain his eighteen-year-old estranged wife and her fourteen-year-old niece; he was tried and sentenced to death only for the latter crime. The jurors who found Marquez eligible for the death penalty were unaware of his mental impairment—the result of brain damage he suffered in childhood from repeated beatings by his father with sticks, whips, and clubs. At the time of the trial, Texas law had barred the introduction of evidence of mental impairment as mitigation. The law was changed while Marquez’s appeals were pending, but—in a classic catch-22—the appellate courts held that the issue had been waived because the evidence had not been presented at trial. Marquez’s execution—which his lawyer, Robert L. McGlasson, deemed “a disturbing blight on our civilized society”—occurred only hours before George W. Bush was sworn in as governor. Lieutenant Governor Bob Bullock, acting in place of Governor Ann Richards, who was out of the state, had conferred with Bush before denying Marquez’s last-ditch bid for clemency.226

May 17, 1995: Girvies Davis died by lethal injection for one of a series of Illinois murders to which he signed confessions, even though, shortly after confessing, he recanted, insisting that he had committed none of the killings. Ten days after he was arrested on an armed robbery charge, according to Davis, officers had taken him for a midnight ride in a squad car, stopped on a secluded road, and offered him a choice—run for his life or sign the confessions. Jail records showed that he had been taken from his cell around 10:00 P.M. and not returned until 4:30 A.M., after he had signed the confessions. Prosecutors conceded that he did not commit some of the murders to which he confessed, but the jury that convicted him was unaware of that and also of another fact—that he was illiterate. When his illiteracy was reported by newspapers shortly before his scheduled execution, one juror was stunned. “We never would have found him guilty if we’d known he couldn’t read or write,” the juror said. Fifteen hours before the execution, when Davis’s only hope was executive clemency, that juror sent a fax to Governor Jim Edgar. “I believe my verdict was wrong,” the juror wrote. “I deeply regret this terrible mistake on our part, and I hope it does not cost cause Mr. Davis his life.” Unmoved, Edgar rejected clemency, stating in a news release that he had no doubt that Davis was “responsible for the murder for which he received the death penalty.”227


227 David Protess & Rob Warden, A PROMISE OF JUSTICE: THE EIGHTEEN-YEAR FIGHT TO SAVE FOUR INNOCENT MEN 2–13 (1998) [hereinafter PROMISE]; Janan Hanna, Edgar Rejects Clemency Plea, CHI. TRIB., May 17, 1995, at 9; Eric Zorn, Man’s not Innocent, but he’s not Guilty Enough to Die, CHI. TRIB., Apr. 18, 1995, at 1. During his tenure, 1991–1999, Edgar blocked the execution of Guinevere A. Garcia over her objection, infra entry dated Jan. 16, 1996, but condoned the executions of nine men in addition to Davis: John Wayne Gacy, see Kuczka & Karwath, supra note 222; James P. Free, Jr. and Hernandez Williams, see Alex Rodriguez & Lou Ortiz, 2 Killers Executed, CHI. SUN-TIMES, Mar. 22, 1995, at 1; Charles Albanese, see Sue Ellen Christian & Charles Mount, Albanese Executed for 3 Murders, CHI. TRIB.,
May 25, 1995: Attorney Walter J. Walvick left Greensville Correctional Center in Jarratt, Virginia, carrying the belongings of his client, Willie Lloyd Turner, who had just been executed for the 1978 murder of a jewelry store owner. Turner was reputed to have been brilliant. He had been one of the masterminds of a successful mass escape from death row, although he had not joined his cohorts in their escape. In the final hours of his life, Turner told an interviewer, “This could turn out differently, but I’m choosing not to hurt people.” The main thing he left behind, according to Walvick, was a manual typewriter and a note instructing Walvick to look inside the instrument. When he did—according to Walvick, whose veracity prison officials would not acknowledge—he found a loaded .32-caliber revolver, a plastic bag containing a dozen bullets, and a one-word note: “Smile.”

June 21, 1995: Larry Griffin was executed in Missouri for the murder of a drug dealer named Quintin Moss in St. Louis fifteen years earlier. The only evidence linking Griffin to the crime had been the testimony of a purported eyewitness, Robert Fitzgerald, who—as Missouri Supreme Court Justice Charles B. Blackmar would put it—“had a seriously flawed background.” Fitzgerald testified that he had been driving a friend and the friend’s little girl to a relative’s house on a scorching summer afternoon in 1980, when his car overheated and stalled in the drug-infested neighborhood where Moss was slain. When gunfire erupted from a slow-moving car, Fitzgerald claimed to have pushed the little girl to the ground and thrown his body over hers, protecting her, all the while focusing his attention on a man in the front seat firing a handgun. Fitzgerald even claimed to have memorized the license number of the car and given it to the first police officer who arrived at the scene. Later, from a photo array, Fitzgerald had identified Griffin as the man firing the handgun. After the execution, NAACP Legal Defense Fund (LDF) would find evidence indicating that Griffin almost certainly had been innocent. A bystander who had been wounded in the shooting provided an affidavit saying that he had seen the crime and was certain the man firing the handgun was not Griffin, whom he had known for years. The first police officer at the scene stated that Fitzgerald had not been there when he arrived—and that Fitzgerald had not provided the license number. Fitzgerald could not be asked about these claims because he died before the LDF became involved. In view of the findings, St. Louis Circuit Attorney Jennifer M. Joyce would order an investigation. Through non-public law enforcement records, her investigators located the man who was...

Sept. 20, 1995, at 1; George Del Vecchio, see James Webb, Killer of Child is Executed in Illinois, St. LOUIS POST-DISPATCH, Nov. 22, 1995, at B8; Raymond Lee Stewart, see Tom Sheridan, Commentary, Does Everyone Feel Better Now?, CHI. SUN-TIMES, Sept. 22, 1996, at 36; Walter Stewart and Durlyn Edmunds, see AP, 2 Murderers are put to Death in Rare Illinois Double Execution, ST. LOUIS POST-DISPATCH, Nov. 20, 1997, at A10:1; and Lloyd Wayne Hampton, see Charles Bosworth, Jr., Executed Killer said Life was Full of Rage, ST. LOUIS POST-DISPATCH, Jan. 22, 1998, at A12. The only other post-\textit{Furman} executions were those of Charles Walker (condoned by Edgar’s predecessor, Gov. James R. Thompson), see supra entry dated Sept. 12, 1990, and Andrew Kokoraileis (condoned by Edgar’s successor, Gov. George H. Ryan), see Christi Parsons & Cornelia Grumman, Kororaleis’s Execution Carried Out, CHI. TRIB, Mar. 17, 1999.

with Fitzgerald when the crime occurred. The man corroborated parts of Fitzgerald’s account, but contradicted him on two salient points. First, the car had not stalled and they were not merely passing through the neighborhood. They had gone there to buy narcotics; Moss had been Fitzgerald’s drug dealer. Second, Fitzgerald had not shielded the man’s daughter—the man had not even had a daughter. Nonetheless, Joyce would proclaim that “the right man was held responsible.”

January 16, 1996: Illinois Governor Jim Edgar blocked the execution of Guinevere A. Garcia fourteen hours before she was scheduled to die by lethal injection—even though the thirty-seven-year-old double murderer had abandoned her appeals and urged that the execution proceed. In 1991, four months after serving ten years of a twenty-year prison sentence for the smothering murder of her eleven-month-old daughter, Garcia had murdered her sixty-year-old husband—the crime for which she was to have died. Edgar denied that his commutation of Garcia’s sentence to life in prison was related to her gender, asserting rather that her husband’s murder had been “comparable to [crimes] that judges and jurors [had] determined over and over again should not be punishable by death.” That rationale would be doubted in some quarters. A year after Edgar spared her life, Garcia would fail in a suicide attempt in prison.

January 26, 1996: Five simultaneous rifle shots broke the silence at the Utah State Prison a few minutes after midnight, ending the life of thirty-six-year-old John Albert Taylor, who chose a firing squad over death by lethal injection, as had Gary Gilmore nineteen years earlier. Taylor, who had raped and strangled eleven-year-old Charla Nicole King to death with a telephone cord in 1989, said he chose to die by firing squad because he feared “flipping around like a fish out of water” if lethally injected.

February 6, 1996: Alabama Attorney Jefferson B. (Jeff) Sessions III and Governor Fob James endorsed proposed state legislation that would authorize death sentences for twice-convicted drug traffickers, including marijuana dealers. The legislation was among thirty-one crime proposals that the attorney general and governor, both Republicans, claimed
would “fix a broken system.” The Alabama Legislature would adjourn in May 1996 without acting on the proposals.\textsuperscript{232}

\textit{June 24, 1996:} Verneal Jimerson was absolved of a 1978 rape and double murder in East Chicago Heights, Illinois, for which he had been sentenced to death—as had his separately tried co-defendant, Dennis Williams. In dismissing the charges, Cook County Circuit Court Judge Sheila M. Murphy said Jimerson had been the victim of an “egregious denial” of due process—a characterization that applied equally to Williams, whose case was dismissed a week later. The convictions, and those of two other innocent men and an innocent young woman, had stemmed from a coerced false confession from the latter, false testimony by both an informant and a purported eyewitness, false forensic evidence, and prosecutorial misconduct. Northwestern University journalism students working under the direction of Professor David Protess were instrumental in obtaining DNA testing and confessions from the actual killers that led to the exonerations of the five innocent defendants, who brought civil cases that Cook County settled in 1999 and 2008 for $40 million.\textsuperscript{233}

\textit{August 8, 1996:} William Frank Parker, who converted to Buddhism on Arkansas death row, died by lethal injection after Governor Mike Huckabee took the unusual step—one of his first official acts after taking office two weeks earlier—of advancing the execution date six weeks. In 1984, Parker, then thirty, had shot and killed his former in-laws, Sandra and James Warren. He then had abducted his ex-wife, Pam Warren, who had divorced him five months earlier. He inexplicably had taken her to a police station, where he had shot and wounded both her and a policeman before he was disarmed. Parker had been tried and convicted twice. The first conviction was reversed because, to qualify the crime as a capital offense, the state had contended that Parker killed his in-laws during a burglary—although the evidence clearly indicated otherwise. At his second trial, the prosecution had alleged a different death-qualifying factor—that the murders had been premeditated. Parker again had been convicted and again sentenced to death. In 1989, after his religious conversion, he waived further appeals, but litigation concerning his competence dragged on until near the end of his life. Huckabee, a Baptist minister, rejected clemency pleas first made to his predecessor, Governor Jim Tucker, from, among others, the Dalai Lama and Mother Teresa. “I don’t want to die, but I’m ready,” Parker said shortly before the execution. “In fact, I’m sort of looking forward to the journey. I’ve studied it for so long.”\textsuperscript{234}

\textit{March 25, 1997:} “They’re burning him alive,” a witness muttered as 2,000 volts of electricity surged through the body of thirty-nine-year-old Pedro Medina, causing orange

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and blue flames to leap from his head and filling the execution chamber of the Florida State Prison at Starke with smoke. After the execution, Attorney General Bob Butterworth told reporters that Medina’s experience should serve as a deterrent to other killers. “People who wish to commit murder,” he said, “they better not do it in the state of Florida because we may have a problem with our electric chair.” Medina died for the 1982 murder of Dorothy James, an Orlando school teacher who had befriended him shortly after he arrived in Florida as a Mariel boatlift refugee from Cuba in 1995. In his final round of appeals, there were two issues: his sanity and his guilt. On death row, he told prisoners, guards, and mental health experts about having conversations with deceased persons, including Albert Einstein and Anne Frank, and guards once saw him eat feces from a napkin. There was no physical evidence linking him to the crime and police had ignored an alternative suspect—a former boyfriend of the victim. Among those who questioned Medina’s guilt was the victim’s daughter, Lindi James. “They have not proven to me that this is who did it,” she said. “It’s not right that he should die with so little evidence.”

July 23, 1997: Fifty-five-year-old Joseph Roger O’Dell III was executed by lethal injection in Virginia after he was denied DNA testing that could have exonerated him of the rape and murder for which he had been sentenced to death twelve years earlier. In 1983, O’Dell and the victim, Helen Schartner, had left a Virginia Beach bar separately. Two hours later, O’Dell had appeared at a convenience store with blood on his face, hands, and clothes. Schartner’s body had been found the next day. She had been beaten, raped, sodomized, and strangled. O’Dell had been arrested shortly thereafter on a tip from a woman with whom he had been living. His conviction had rested primarily on the blood on his clothes, which was Type O, matched Schartner’s blood type: Type O. In 1990, blood enzyme testing had included Schartner as a possible source of the blood on O’Dell’s clothes and O’Dell as a possible source of semen recovered from Schartner. In ensuing years, O’Dell had sought DNA testing, which had the potential to positively establish his innocence or guilt. The testing was denied even though, unless it proved exculpatory, it neither would have delayed the execution nor cost the state anything. After his execution, in an effort to exonerate him posthumously, the Roman Catholic Diocese of Richmond would seek the DNA testing that O’Dell had been denied. The prosecution objected, asserting that, if the results indicated that O’Dell had not raped Schartner, “it would be shouted from the rooftops that the Commonwealth of Virginia executed an innocent man.” The DNA would be destroyed after the testing was denied.

April 3, 1997: In the face of seemingly compelling evidence of his innocence, David Wayne Spence died by lethal injection in Texas for the torture murders of three teenagers in a Waco park. The prosecution had theorized that Spence was hired by a convenience store operator, Muneer Mohammed Deeb, to kill a young woman in a scheme to collect

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insurance on her life. The prosecution’s theory was that Spence had mistaken one of the victims for the woman he was supposed to kill and, after killing her, had killed the others to eliminate witnesses. The only physical evidence purporting to link Spence to the crime had been a dental impression of his teeth that Dr. Homer Campbell, a New Mexico forensic odonatologist, had claimed “perfectly” matched bite marks on the breast of one of the female victims. During the appeals process, five forensic odonatologists had concluded that Spence’s teeth did not match the bite mark. In a prior case, based on a teeth comparison, Campbell had identified a corpse as that of a missing runaway who turned up alive. In addition to sponsoring Campbell’s testimony at the trial, the prosecution presented six jailhouse informants who testified that Spence had admitted the murders to them. One of the informants, Robert Snelson, would recant, stating, “We all fabricated our accounts of Spence confessing in order to try to get a break from the state on our cases.” Two police officers involved in the original investigation, Marvin Horton and Ramon Salinas, had acknowledged during the appeals process that they doubted Spence’s guilt. Deeb, like Spence, was sentenced to death for the murders, but had won a reversal of his conviction and been acquitted upon retrial.237

**September 17, 1997:** Despite a plea for clemency from the Mexican government on the ground that he had been deprived of his right under the Vienna Convention on Consular Relations to consult with consular officials after his arrest, Mario Benjamin Murphy, a Mexican national, was executed in Virginia. Murphy and two other men had been hired by Robin Radcliff and her lover to kill her husband, a Navy cook who was beaten to death in 1996. All five conspirators had been convicted of the murder, but only Murphy had been sentenced to death. Nineteen at the time of the crime, he had confessed to police and proceeded to plead guilty. The day after the execution, the U.S. State Department, which had not tried to stop the execution, would send its “deepest regrets” to the Mexican government for “apparent failure to provide Mr. Murphy with consular notification.” By late 2015, thirty other foreign nationals—nine from Mexico, four from Cuba, two from each Germany and Vietnam, and one from each Canada, El Salvador, Guyana, the Dominican Republic, Guyana, Honduras, Iraq, Jamaica, Pakistan, Paraguay, South Africa, and Thailand—would be executed in the United States in the apparent absence of consular notification before interrogation.238

**February 3, 1998:** Thirty-eight-year-old Karla Faye Tucker became the first woman to be executed in Texas since 1863. Outside the Huntsville Penitentiary, where the execution took place, some demonstrators chanted, “Bye, bye, Karla Faye,” as others sang “Amazing

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Grace.” Tucker’s guilt was beyond question. She and her boyfriend, Daniel Garrett, had slain Deborah Thornton and Jerry Lynn Dean with a hammer and pickaxe in Houston on June 12, 1983. Tucker told police that she had an orgasm as she hacked the victims. On death row, Tucker claimed to have transformed herself from a drug-addled killer into a born-again Christian—eventually attracting worldwide attention and support from Pope John Paul II, teleevangelist Pat Robertson, and the Reverend Billy Graham, among others. Governor George W. Bush, himself a professed born-again Christian, was unmoved. He denied Tucker’s plea for clemency; in a recorded interview, he would mock her plea for her life, whispering with pursed lips, “Please,” drawing out the word, “don’t kill me.”

February 5, 1998: In a case linked more inextricably than any other with abolition of the Illinois death penalty, Anthony Porter, who had come within two days of lethal injection the murders of two teenagers in a Chicago park in 1982, was released from prison after a man named Alstory Simon confessed to the crime. Seven months after confessing on videotape to Paul Cioli, a private investigator working with a team of Northwestern University journalism students led by Professor David Protess, Simon had pleaded guilty, apologized in court to the mother of one of the victims, and was sentenced to thirty-seven years in prison. Nonetheless, in a long-standing effort to undercut Protess and the innocence movement, Cook County State’s Attorney Anita Alvarez freed Simon in 2014, questioning Porter’s innocence. Although her top assistants advised her that there was “not sufficient evidence to seek to vacate Simon’s convictions,” Alvarez did precisely that.

April 16, 1998: The Illinois Supreme Court reversed the conviction of Steven L. Manning, a former Chicago police officer and FBI informant who had been sentenced to death for the 1990 murder of his former business partner. James Pellegrino. Manning’s conviction had rested on the testimony of Tommy Dye, a cocaine dealer with a record of ten felony convictions who received a sentence reduction from fourteen years to six years on burglary charges after testifying that Manning had admitted the murder to him in the Cook County jail. Before Manning’s trial, in an effort to corroborate his allegation, Cook County


prosecutors had arranged for Dye to wear a wire during additional conversations with Manning in jail. In six hours of ensuing tape recordings, there was nothing corroborative, but the prosecution nonetheless proceeded anyway. On the stand, Dye claimed that Manning had repeated his earlier admission during two brief gaps on the tapes. Holding that the trial court had erred in admitting into evidence the irrelevant tape-recordings and hearsay testimony from the victim’s wife into evidence, the Supreme Court remanded the case for a new trial, but the charges were dropped.241

November 14, 1998: At the emotional peak of a three-day conference on innocence and the death penalty organized by Northwestern University Law Professor Lawrence C. Marshall, twenty-nine former death row prisoners from around the country walked across a stage in a jammed, 700-seat Chicago auditorium, each intoning, “If the state had its way, I’d be dead today,” and signing their names on a large board proclaiming, “We are alive today despite the criminal justice system’s intense efforts to kill us.”242

December 8, 1998: Dudley Sharp, leader of a Texas pro-death-penalty group called Justice for All, was quoted as justifying possible mistaken executions on the ground that innocent persons occasionally must be sacrificed for the greater good, analogizing: “When we use vaccines, we accept that a certain number of people are going to die from their use.”243

January 28, 1999: After a brief meeting with Pope John Paul II in St. Louis, Missouri Governor Mel Carnahan, a Baptist deacon, spared the life of fifty-two-year-old Darrell J. Mease, who had been scheduled to die by lethal injection thirteen days later for a triple murder he had admitted committing in 1988. The victims had been Mease’s former drug dealer, the drug dealer’s wife, and their nineteen-year-old paraplegic grandson. Carnahan’s commutation of the sentence to life in prison surprised even Mease’s death penalty lawyer, Kent E. Gipson, whom the New York Times quoted: “Quite frankly, this case was probably one of the weaker clemency cases…. [T]here were no real claims of mental illness, no question of guilt. It was a triple murder…. I guess timing is everything, huh?”244

March 10, 1999: Roy Michael Roberts died by lethal injection for the murder of a Missouri prison guard after Governor Mel Carnahan, who was the state’s Democratic candidate for the U.S. Senate, rejected clemency, despite evidence that Roberts might have been innocent, not only of the murder, but also of an armed robbery for which he was in prison when the murder occurred. The guard, sixty-two-year-old Thomas Jackson, was stabbed to death at a medium security prison in 1983. At the time, Roberts, age thirty, was nearing

completion of his sentence for the armed robbery conviction, which rested on identification testimony by the victims, a restaurant manager and waitress, who were robbed of at gunpoint by a masked man in a dark parking lot in 1978. Not having seen the robber’s face, the victims identified Roberts by his voice and build. The murder conviction rested on the testimony of three guards and a prisoner who testified that Roberts had held Jackson while he was stabbed by other prisoners. No physical evidence linked Roberts to the crime, and eight prisoners testified that he had not been involved. As Carnahan entertained Roberts’s last-ditch plea for clemency, St. Louis Post-Dispatch columnist Bill McClellan interviewed a man named Carl Harris who bore a striking resemblance to Roberts and claimed to have committed the armed robbery for which Roberts had been convicted. Carnahan was unmoved. Strapped to the gurney, Roberts addressed his last words to the governor: “You’re killing an innocent man, and you can kiss my ass.” To have granted clemency, said the Post-Dispatch, “would have been political suicide” for Carnahan, who in 2000 would die in an airplane crash, but he would be elected posthumously to the Senate, defeating Republican incumbent John Ashcroft.245

April 15, 1999: Ronald Keith Williamson, a former minor league baseball player for the Oakland Athletics and New York Yankees who had come within five days of execution for the 1982 murder and rape of twenty-one-year-old Debra Sue Carter in Ada, Oklahoma, was freed after his exoneration by DNA testing. Dennis Fritz, who had been sentenced to life in prison in the case, also was exonerated by DNA and released. Both had been implicated in the crime by the apparent actual killer, Glen Gore, whom DNA testing following the Williamson and Fritz exonerations determined was the source of semen recovered from the victim. The case also featured ineffective assistance of trial counsel, for failure to “fully investigate and utilize evidence” of Williamson’s history of mental illness, false testimony from a jailhouse informant who claimed Williams had confessed, a purported confession by Williamson, and misleading, if not provably false, forensic evidence, including microscopic hair comparisons and dubious fingerprint analysis from the exhumed body of the victim.246

July 8, 1999: The execution of 344-pound Allen Lee “Tiny” Davis in Florida seemed as grizzly as the crime that sent him to the electric chair—the bludgeoning death of a Jacksonville woman “almost beyond recognition” and the beating and gunshot deaths of the woman’s two daughters, aged five and ten, on May 11, 1982. When the switch was thrown, Davis reared back in “Old Sparky,” as the electric chair was known, partially


exposing his contorted face beneath his death hood. Blood gushed from his nose and ran down his face, soaking his white tee shirt. When the current was cut, his chest heaved about ten times before he was finally still. In the immediate aftermath of the Davis execution, another death row prisoner would challenge use of the electric chair as cruel and unusual punishment, but the Florida Supreme Court would hold that “abundant evidence [revealed] that execution by electrocution renders an inmate instantaneously unconscious, thereby making it impossible to feel pain.”\(^\text{247}\)

\textit{December 19, 1999:} For stabbing a quadriplegic man to death during a robbery nearly a quarter of a century earlier, fifty-four-year-old Sammie Felder, Jr. died by lethal injection in Texas, becoming the last of 8,082 men and women (only forty-two of the latter) legally executed in the United States during the twentieth century. Felder had been tried, convicted, and sentenced to death three times for the crime, which occurred in Harris County in March 1975. In appealing his third conviction, Felder contended that the victim had not died from the stabbing but from being removed from life support—a contention that the Texas Court of Criminal Appeals rejected, pointing out that the victim “would not have required any life support had it not been for the actions of appellant.” The long delay between the crime and the execution was not an issue.\(^\text{248}\)

\textbf{Twenty-First Century}

\textit{April 6, 2000:} Conservative pundit George F. Will observed in his \textit{Washington Post} column that “capital punishment, like the rest of the criminal justice system, is a government program, so skepticism is in order.”\(^\text{249}\)

\textit{June 8, 2000:} “They butchered me back there,” Bennie Demps declared in a final statement minutes before dying by lethal injection in Florida for the 1976 stabbing death of a fellow prisoner—a crime for which Demps claimed to have been framed. His conviction had rested largely on the uncorroborated testimony of a corrections officer who claimed that the prisoner, Alfred Sturgis, had identified Demps as one of three men involved in the attack; the officer claimed that he had written a contemporaneous report but that the report had been lost. Demps had accused the authorities of fabricating the case against him out of anger that a death sentence he had received for a 1971 double murder had been overturned when the U.S. Supreme Court voided state death penalty laws in 1972. Whether innocent or guilty of the Sturgis murder, Demps’s execution was painful. The problem occurred because the Florida lethal injection protocol required two intravenous drips. The first line


\(^{248}\) LOUIS J. PALMER, JR., \textit{ENCYCLOPEDIA OF CAPITAL PUNISHMENT IN THE UNITED STATES} 314 (2d ed., 2008); execution data from \textit{Espy, supra} note 7; Felder v. State, 564 S.W.2d 776 (Tex. 1978); Felder v. McCotter, 765 F.2d 1245 (Tex. 1985); Felder v. State, 758 S.W.2d 760 (Tex. 1988); Felder v. State, 848 S.W.2d 85, 88, 90 (Tex. 1992).

\(^{249}\) George F. Will, \textit{Innocent on Death Row}, WASH. POST, Apr. 6, 2000, at A23.
had been inserted easily enough, but attempts to insert the second had failed. Finally, the executioners had abandoned the protocol and proceeded with the execution. “They cut me in the groin; they cut me in the leg,” said Demps. “I was bleeding profusely. This is not an execution, it is murder.”

**June 12, 2000:** A team of law professors and criminologists led by Columbia University Law Professor James S. Liebman released a study showing that, from 1973 to 1995, two-thirds of capital convictions nationwide had been overturned on appeal—most as a result of ineffective assistance of defense counsel and police and prosecutorial misconduct. Seventy-five percent of the defendants whose death sentences were voided had received lesser sentences upon retrial, by judicial order, or pursuant to plea bargains. Seven percent had been found not guilty. Eighteen percent had been resentenced to death, but substantial numbers of their sentences had again been overturned on appeal.

**June 22, 2000:** In a drama that played out against the backdrop of Texas Governor George W. Bush’s presidential campaign, Gary Graham (also known as Shaka Sankofa), a thirty-six-year-old African-American, died by lethal injection for a murder he had adamantly denied committing. His conviction had rested solely on an identification by a woman named Bernadine Skillern, who testified that she had seen Graham—for just seconds through her car windshield, at night, from about thirty-five feet away—shoot fifty-three-year-old Bobby Grant Lambert to death in a Houston supermarket parking lot. A week after the 1981 murder, Graham, age seventeen, had been arrested for a string of armed robberies. After tentatively identifying him in a photo, Skillern had tentatively identified him in a live lineup. Graham’s trial lawyer had been Ronald G. Mock, who, just three years out of law school, had been appointed to the case by the trial judge. If Mock had done even a cursory investigation, he would have learned of two eyewitnesses who would have sworn that Graham was not the killer; both had better views of the killer than Skillern had. By the time of Graham’s execution, Mock had been appointed in a dozen other capital cases—and had a perfect record of losing. Graham’s last hope had been clemency from the presumptive Republican presidential nominee, who denied it. Graham was dragged handcuffed into the execution chamber. Strapped to the gurney, he said, “I did not kill Bobby Lambert.”

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250 Mary Jo Melone, *Inmate Died Shaking his Fist at State of Florida*, ST. PETERSBURG TIMES, June 8, 2000, at 1B; Rick Bragg, *Florida Inmate Claimed Abuse in Execution*, N.Y. TIMES, June 9, 2000, at A14; Demps v. State, 761 So. 2d 302, 303 (Fla. 2000); see supra entry dated June 29, 1972; Demps v. State, 272 So. 2d 803 (Fla. 1973); Anderson v. State, 267 So. 2d 8 (Fla. 1972).


July 2, 2000: Discussing his support for capital punishment, New York businessman Donald Trump gave a simple statement on the issue, stating “if you criminally take a life you’d better be prepared to forfeit your own.” He added, “My only complaint is that lethal injection is too comfortable a way to go.”

September 22, 2000: A New York Times study showed that homicide rates in states with death penalties exceeded those of states without death penalties by anywhere from 48% to slightly more than double. “Whatever the factors are that affect change in homicide rates,” observed Steven Messner, a State University of New York criminologist who reviewed the study results, “they don’t seem to operate differently based on the presence or absence of the death penalty in a state.”

January 16, 2001: As a result of DNA testing, Christopher Ochoa, a former honors student and editor of his high school literary magazine, was deemed innocent and released from a Texas prison, where he had been serving a life sentence for a 1989 rape-murder he had not committed—but in which he had been coerced into confessing, pleading guilty, and falsely implicating his best friend, Richard Danziger. The latter had denied the crime, but had been convicted on Ochoa’s testimony—provided under a plea agreement into which Ochoa had entered to avoid the death penalty. DNA also exonerated Danziger, but his release would be delayed three months because he had suffered severe brain damage in a prison beating and it would take that long to arrange appropriate care. Beginning in the mid-1990s, a prisoner named Achim Josef Marino, serving a life sentence for aggravated robbery with a deadly weapon, had begun writing letters to police and others, including Governor George W. Bush, confessing that he had committed the crime attributed to Ochoa and Danziger. In 1998, police had interviewed Ochoa, but he continued to profess guilt—apparently believing that to deny the crime would destroy his chance of eventual parole. A year later, however, Ochoa asked the Wisconsin Innocence Project to investigate the case—culminating in the exculpatory DNA testing, which implicated Marino. The City of Austin would settle civil claims brought on behalf of Ochoa and Danziger for just under $15 million.

January 20, 2001: Just two hours before George W. Bush would succeed him, President Bill Clinton commuted a federal death sentence that was pending against David Ronald Chandler to a sentence of life in prison. A decade earlier, Chandler, an Alabama marijuana

grower, had become the first person to receive a federal death sentence under the Anti-Drug Abuse Act of 1988 for procuring a murder—that of a purported informant. From the beginning, Chandler had maintained his innocence. His conviction had rested on the testimony of the admitted hitman, who had received a twenty-five-year sentence in exchange for his testimony and who recanted after the trial.256

June 11, 2001: U.S. Attorney General John Ashcroft had cleared the way for up to 1,100 survivors and relatives of victims of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City to watch Timothy McVeigh die by lethal injection via closed-circuit television. Only 232 of those invited showed up for the viewing. For causing the deaths of 168 men, women, and children in the 1995 bombing, McVeigh was executed at the Terre Haute, Indiana, federal prison. His was the first federal execution in thirty-seven years. After the closed-circuit viewing, USA Today interviewed attendees, whose reactions ranged from that of a woman who had lost three family members (“This is a demarcation point, a period at the end of a sentence”), to that of a young woman who had lost a three-year-old niece and preferred electrocution to lethal injection (“It might have hurt just a little more”), to that of a surviving mother who expressed empathy for McVeigh’s father (“I know what it’s like to lose a child.”).”257

June 17, 2001: Flanked by relatives of victims of murders for which defendants with low IQs had been convicted, Texas Governor Rick Perry vetoed a bill that would have prohibited the execution of “mentally retarded” persons—something that had happened six times in Texas since the state’s first post-Gregg v. Georgia execution in 1982. “If this bill had become law,” said Perry, “it would have prevented murderer from being held fully responsible for their actions even if they understood right from wrong.” Senator Rodney Ellis, a principal sponsor of the legislation, said the veto meant that “Texas will continue to be viewed as bloodthirsty and callous.” The governor, Ellis said, “had an historic opportunity to show the world that we are not only tough on crime, but fair and compassionate as well. He missed that opportunity.”258

July 20, 2001: At the behest of its namesake, the Terrell Unit—Texas death row—was renamed by the Texas Board of Criminal Justice. Reacting to the renaming, Charles T. Terrell, for whom the unit had been named before it became death row, told a reporter: “The unit is probably the closest thing we have to the German death camps. I got tired of seeing the name Terrell on the news every time something bad happened.” The name was


257 Richard Willing, *McVeigh, Killer of 168, Dead Victims Mark Day of Tumult and more Tears*, USA TODAY, June 12, 2001, at A1; Sara Rimer, *Victims Not of One Voice on Execution of McVeigh*, N.Y. TIMES, Apr. 25, 2001, at 1; *supra* entry dated Mar. 15, 1963 (discussing the most recent previous federal execution).

258 Gaiutra Bahadur, *Governor Vetoes Execution Ban; Mental Retardation Sentencing Bill would Undercut Juries, Perry says*, SAN ANTONIO NEWS-EXPRESS, June 18, 2001, at 1A.
changed to the Polunsky Unit, after Allan B. Polunsky, who, like Terrell, was a former chairman of the Texas Board of Criminal Justice.259

**June 20, 2002:** The U.S. Supreme Court held six to three that, in light of evolving standards of decency, the execution of “mentally retarded” persons was cruel and unusual punishment, but left it up to the states to determine which prisoners qualify as “retarded.” The case involved Daryl Renard Atkins, a mildly impaired—IQ fifty-nine—high school dropout on death row in Virginia for the abduction, robbery, and murder of an airman stationed at Langley Air Force Base. Writing for the majority, Justice John Paul Stevens noted that since 1989—when the Supreme Court had last considered the retardation issue, declining in 1989—when it declined to block the execution of a mildly impaired man in Texas—legislation forbidding the execution of the “mentally retarded” had been enacted by eighteen states. “It is not so much the number of these States that is significant, but the consistency of the direction of change,” Stevens wrote. “Moreover, even in those states that allow the execution of mentally retarded offenders, the practice . . . has become truly unusual, and it is fair to say that a national consensus has developed against it.” The dissenting opinion by Justice Antonin Scalia noted that, of thirty-eight states with death penalties, twenty had not banned executions of the “mentally retarded.” Absent an authentic consensus, Scalia wrote, the majority opinion rested “upon nothing but the personal views of its members,” adding that “[t]he arrogance of this assumption of power takes one’s breath away.”260

**October 17, 2002:** A Gallup Poll found that a record 70% of Americans favored the death penalty for persons convicted of murder, while 25% opposed it and 5% had no opinion.261

**January 11, 2003:** Declaring that capital punishment in Illinois was “haunted by the demon of error—error in determining guilt, and error in determining who among the guilty deserves to die,” Governor George H. Ryan granted clemency to 163 men and four women under death sentence in the state. The clemency came three days before Ryan left office and one day after he had granted pardons based on innocence to four African-Americans—Stanley Howard, Madison Hobley, Leroy Orange, and Aaron Patterson—who had been convicted and sentenced to death solely as a result of confessions they had made under torture by Chicago police. The pardons brought the number of Illinois death row exonerations to seventeen—nearly 6% of the 289 defendants who had been sentenced under the state’s death penalty law, which had been enacted in 1977. Ryan, a Republican who once had staunchly supported the death penalty, predicted that his action would “draw ridicule, scorn, and anger” from proponents of the death penalty. “But,” he added, “I can tell you this: I will sleep well knowing I made the right decision.”262

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261 GALLUP, *supra* note 130.

March 18, 2003: Louis Jones, Jr., a decorated Gulf War veteran, died by lethal injection at the federal penitentiary at Terre Haute, Indiana, for the 1995 abduction, rape, and murder of Tracie Joy McBride, an Army private stationed at Goodfellow Air Force Base in San Angelo, Texas. Jones had sought clemency, contending that exposure to Iraqi nerve gas had turned him into a killer, but President George W. Bush allowed the execution to proceed. Jones would be the last of thirty-seven prisoners—thirty-five men and two women—to be executed by the federal government in the last ninety years preceding this writing.263

April 3, 2003: Scott Allen Hain died by lethal injection in Oklahoma for kidnapping two Tulsa restaurant workers, robbing them of $565, forcing them into the trunk of a car, and setting fire to the car as they screamed and banged on the lid of the trunk. The crime occurred in the wee hours of October 6, 1987, when Hain was seventeen. Less than two years after his execution, the U.S. Supreme Court banned executions for anyone who committed a capital crime before age eighteen. In the interim, no one had been executed in the United States for a crime committed before age eighteen reaching that age, making Hain the last.264

May 7, 2003: A Gallup Poll found that 73% of Americans believed that innocent persons had been executed in the United States in the preceding five years, while 22% did not believe that had happened, and 5% had no opinion. Nevertheless, just two weeks later, another Gallup Poll found 70% of Americans in favor of the death penalty for persons convicted of murder, while 48% believed that the death penalty was not used often enough.265

November 5, 2003: Reputed to be the most prolific serial killer in U.S. history, fifty-four-year-old Gary Leon Ridgway—known as the “Green River Killer”—avoided a death sentence by pleading guilty to forty-eight murders in Washington State during the 1980s and 1990s. He would be sentenced to life in prison. In all, more than ninety murders, mostly of sex workers in King County, Washington, would be attributed to Ridgeway. In 2011, he would plead guilty to a forty-ninth murder.266

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265 GALLUP, supra note 130.

February 17, 2004: Cameron Todd Willingham was executed by lethal injection in Texas for the supposed arson murder of his three daughters, although the fire that claimed their lives two days before Christmas 1991 almost certainly was accidental. The children—Amber, age two, and twins Karmon and Kameron, age one—died of smoke inhalation. At Willingham’s 1992 trial, an expert witness for the prosecution had testified that the floor, front threshold, and front concrete porch of the home had been burned, which could occur only when an accelerant has been used purposely to start a fire. The witness added that igniting of the floors and thresholds is typically employed by arson killers to impede any rescue attempts by firemen. Willingham was convicted and, after his appeals failed, went to his death, proclaiming: “I am an innocent man—convicted of a crime I did not commit. I have been persecuted for twelve years for something I did not do. From God’s dust I came and to dust I will return—so the earth shall become my throne.” Ten months after the execution, the Chicago Tribune published an investigative report by Maurice Possley and Steve Mills concluding that the arson theories on which Willingham’s conviction rested were baseless. One leading arson authority summed up the situation succinctly: “There’s nothing to suggest to any reasonable arson investigator that this was an arson fire.”

March 1, 2005: Noting that “the United States now stands alone in a world that has turned its face against the juvenile death penalty,” the U.S. Supreme Court held five-four that in light of “evolving standards of decency that mark the progress of a maturing society[,]” the Eighth and Fourteenth Amendments bar executions of juveniles for crimes committed before age eighteen. The ruling, which removed seventy-two prisoners from death rows in twelve states, affirmed a 2003 Missouri Supreme Court decision in the case of Christopher Simmons, who at age seventeen had broken into a woman’s home with a fifteen-year-old accomplice, kidnapped the woman, bound her hands and feet with electrical wire, wrapped her face in duct tape, and thrown her from a railroad trestle into the Meramec River, drowning her. From the 1600s forward, in what had become the United States, there had been 364 documented executions for crimes committed by persons under age eighteen. Twenty-two occurred under laws enacted after Furman v. Georgia.

May 13, 2005: Serial sex murderer Michael Bruce Ross, a 1981 graduate of Cornell University two months shy of his forty-sixth birthday, became the first person executed in Connecticut—in New England, for that matter—in forty-five years. Ross died by lethal injection for the strangulation murders of four of eight young women whom he had


confessed to killing. He was just ten months old when Connecticut last executed someone—Joseph Taborsky, for six murders known as the “Mad Dog Killings.” Owing to Connecticut’s lack of recent experience with executions, the state incurred more than $33,000 in expenses for, among other things, travel for training the execution team, intravenous catheters and tubing, portable toilets for the crowd expected to gather outside the prison for the execution, a mobile office, and curtains for the witness observation room. Ross made no final statement, but he had told an interviewer that he did not want a gravestone because “kids will come up and see ‘Ross’ [and say], ‘That’s the guy that killed all them women.’ Just forget me. Forget it, like I never existed.” Ross’ would be the last execution in Connecticut before it abolished the death penalty in 2012.

August 30, 2005: The Georgia Board of Pardons and Paroles granted a full, unconditional pardon to Lena Baker, an African-American mother of three who had died in the Georgia electric chair at age forty-four in 1945 for murdering a violent and sexually abusive white man for whom she had been employed as a maid. Baker had been convicted by an all-white, all-male jury following a one-day trial.

February 1, 2006: Emery University Economics Professor Paul H. Rubin presented written testimony to a U.S. Senate committee contending “conservatively” that empirical data show that each execution carried out in the United States prevents eighteen murders. Six years later, the National Research Council of the National Academies of Sciences would conclude that studies contending that the death penalty deters murders are “fundamentally flawed” and “not informative about whether capital punishment decreases, increases, or has no effect on homicide rates.”

July 19, 2006: After a four-year investigation that cost taxpayers roughly $7,000,000, special prosecutors issued a report saying there was no doubt that Chicago Police Commander Jon Burge and at least a dozen of his subordinates had tortured African-American murder suspects to extract confessions during the 1980s. However, the special prosecutors, Edward Egan and Robert Boyle, concluded that the torturers could not be prosecuted because the three-year time limit on bringing charges for felony assault and/or official misconduct had expired. “We have considered every possible legal theory that would permit us to avoid the effect of the statute of limitations,” the report asserted. “Regrettably, we have concluded that the statute of limitations would bar any prosecution.”

272 Michael Higgins, Clock Runs out on Cases, CHI. TRIB., July 20, 2006, at 1.
July 21, 2006: Chicago Mayor Richard M. Daley issued a statement calling two decades of police torture “a shameful episode in our history” and declaring that if he had been aware of the torture, he would not have tolerated it. “Do you think I would sit by . . . that I had knowledge about it, and I would allow it?” Daley protested when pressed by reporters. “I would not allow anything like this.” But in fact, there was no doubt that Daley had known about police torture allegations since 1982, when Police Superintendent Richard Brzeczek sent him a copy of a letter from Dr. John Ryba, the Cook County Jail medical director, regarding the torture of Andrew Wilson. Ryba requested “a thorough investigation of this alleged brutality.” At the time, Daley was the elected state’s attorney of Cook County. A series of court rulings in ensuing years also should have put him on notice that the torture was occurring. Daley had the power—and the duty—to act to stop it, yet he did nothing.273

March 25, 2007: Reversing an editorial position established in 1869 and reiterated in 1952 and 1976, the Chicago Tribune called for abolition of the death penalty, declaring: “The evidence of mistakes, the evidence of arbitrary decisions, the sobering knowledge that government can’t provide certainty that the innocent will not be put to death—all that prompts this call for an end to capital punishment. It is time to stop killing in the people’s name.”274

September 25, 2007: “We close at five,” Sharon Keller, presiding judge of the Texas Court of Criminal Appeals, responded when asked to keep the court open a little late to hear an emergency motion to stay the execution of Michael Wayne Richard. Earlier that day, the U.S. Supreme Court had granted certiorari in a Kentucky case, Baze v. Rees, challenging the constitutionality of lethal injection. Richard’s motion had been expected in light of Baze. One of Richard’s lawyers had called to ask that the court remain open fifteen to thirty minutes beyond normal closing, saying that a computer glitch had delayed filing of the motion. At 4:45 P.M., the court’s general counsel relayed the request to Keller, who denied it. The court closed at 5:00 P.M. Richard, a fifty-year-old convicted murderer-rapist with an IQ of sixty-four, would die by lethal injection less than four hours later. Keller would deny responsibility for the execution—for which she would be reprimanded.275

November 19, 2007: Andrew Wilson, whose death sentence for murdering two Chicago police officers in 1982 had been overturned because he had been tortured by Police Commander Jon Burge and his men, died of natural causes in prison. His death at age fifty-

five would enable Dale Coventry and Jamie Kunz, Cook County public defenders who represented Wilson, to reveal a secret that they said they had been bound by the attorney-client privilege to keep for more than the last quarter of a century—that Wilson had confided to them that he committed another 1982 murder for which an innocent man, Alton Logan, was serving a life sentence. If Wilson had acknowledged that murder during his lifetime, he almost certainly would have been executed. If there had been no death penalty at the time, Logan probably would not have been imprisoned for a quarter century for a crime he had not committed. The belated revelation of Wilson’s confession would lead to Logan’s release on bond five months later. Five months after that, the charges against Logan would be dismissed.\(^{276}\)

**December 17, 2007:** Governor Jon S. Corzine signed a death penalty abolition bill, making New Jersey the first state to abolish capital punishment since U.S. executions resumed in 1977. The law spared the lives of eight death row prisoners, including Jesse Timmendequas, a repeat sex offender who raped and murdered seven-year-old Megan Kanka in 1994—a crime that inspired Megan’s Law, the name given to both federal and state legislation requiring sex offenders to register and authorizing public dissemination of their names and addresses. The impetus for abolition in New Jersey, where there had not been an execution in forty-four years, included the growing number of death row exonerations nationally and studies documenting the costs of continuing the death penalty.\(^{277}\)

**January 9, 2008:** The Chicago City Council unanimously agreed to a $19.8 million settlement of civil rights lawsuits brought on behalf of four African-American men who had been sentenced to death based primarily on confessions obtained by rogue Police Commander Jon Burge and his subordinates. All four of the wronged men—Madison Hobley, Leroy Orange, Aaron Patterson, and Stanley Howard—had received pardons based on innocence five years earlier. Several aldermen expressed dismay that the city was


legally bound to continue paying Burge’s police pension. “Jon Burge is still walking around in Florida, spending the city’s money,” said Alderman Ed Smith. “We should . . . not allow this man to continuously live off the fat of this city while he bathes in the sun. It’s a disgrace.”

April 16, 2008: Seven members of the U.S. Supreme Court concurred in a plurality opinion upholding the constitutionality of lethal injection protocols used by at least thirty of the thirty-six states with death penalties on their books. The ruling came in a case brought by two Kentucky death row prisoners, Ralph Stephen Baze, Jr. and Thomas Bowling, who argued that death by injection violated the Eighth Amendment prohibition of cruel and unusual punishment. In the lead opinion, Chief Justice John Roberts rejected that proposition, writing: “Because some risk of pain is inherent in even the most humane execution method . . . the Constitution does not demand the avoidance of all risk of pain.”

June 25, 2008: Thirty-one years after outlawing the death penalty for adult rape, the Supreme Court forbade it for child rape as well—striking down a Louisiana law under which forty-three-year-old Patrick Kennedy was to be executed for raping his eight-year-old stepdaughter a decade earlier. The justices split five to four, the majority holding that Kennedy’s execution “could not be reconciled with our evolving standards of decency and the necessity to constrain the use of the death penalty.” On the campaign trail, Senator Barack Obama, the presumptive Democratic presidential nominee, was quick to assure voters that he disagreed, declaring that “the rape of a small child . . . is a heinous crime.”

June 30, 2008: The California Commission on the Fair Administration of Justice, which the state Senate appointed in 2004 to study wrongful convictions and the capital punishment system, concluded that the latter was “dysfunctional” and “close to collapse.” Under California’s three-decade-old death penalty law, the commission reported, 813 prisoners had been sentenced to death, while only thirteen had been executed, including two who had abandoned their discretionary appeals—in effect committing state-abetted suicide. Thirty-eight had died of natural causes, fourteen had committed suicide, and six had been exonerated, leaving 670 prisoners on death row, thirty of whom had been there more than a quarter of a century. With the state facing a $17 billion budget deficit, the commission found that the death penalty added $125 million annually to the costs of the criminal justice system and that another $90 million per year would be needed to bring the delays within range of national averages. According to the commission, seeking the death penalty adds about $500,000 to the cost of a murder trial, confinement on death row adds

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279 Baze, 553 U.S. at 87 (Stevens, J., concurring) (plurality opinion in which Justice Stevens, an ardent opponent of capital punishment, nonetheless concurred in the result, explaining: “The conclusion that I have reached with regard to the constitutionality of the death penalty itself makes my decision in this case particularly difficult. It does not, however, justify a refusal to respect precedents that remain a part of our law. . . . I am persuaded that the evidence adduced by petitioners fails to prove that Kentucky’s lethal injection protocol violates the Eighth Amendment.”).
$90,000 per prisoner per year to the normal cost of incarceration, and providing legal representation for indigents on death row during appeals costs millions more per case.281

October 21, 2008: A federal grand jury indicted sixty-year-old former Chicago Police Commander Jon Burge for lying under oath about torturing African-American murder suspects between 1973 and 1993, when he was fired from the force. The federal statute of limitations barred prosecuting Burge for the torture itself, which sent at least five innocent men to death row, but not for lying about the torture in a 2003 deposition. “If people commit multiple crimes, and you can’t prosecute them for one, there’s nothing wrong with prosecuting them for another,” said Patrick Fitzgerald, the U.S. Attorney for the Northern District of Illinois. “If Al Capone went down for taxes, that was better than him going down for nothing.” The indictment charged that Burge had lied when he denied in a deposition that he knew of no physical abuse occurring under his command. The deposition in which it was alleged that he had lied was taken in a civil suit brought on behalf of Madison Hobley, one of four innocent men who had been sentenced to death as a result of confessions obtained by Burge and his men.282

March 18, 2009: Governor Bill Richardson signed legislation abolishing the New Mexico death penalty for crimes committed after the law’s effective date of July 1, 2009. Delaying the effective date left open the possibility of executing the state’s two death row prisoners—Robert Fry and Timothy Allen—and Michael Paul Astorga, who was facing trial for the 2006 murder of a deputy sheriff during a traffic stop. In signing the bill, Richardson, a one-time Democratic presidential hopeful, said, “I do not have confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crime.” Richardson did not explain why his stated rationale did not apply to crimes that occurred before the effective date of the law. Fry and Allen would remain on death row, but Astorga would receive a life sentence.283

April 14, 2009: Concurring in the denial of a writ of habeas corpus for a man named Mark Wiles, who had challenged his death sentence in Ohio based on ineffective assistance of trial counsel, Boyce F. Martin, Jr., chief judge emeritus of the U.S. Court of Appeals for the Sixth Circuit, agreed that Wiles had failed to show that his counsel was unconstitutionally ineffective, but added: “The system’s deep flaws and high costs raise a simple but important question: is the death penalty worth what it costs us? In my view, this broken system would not justify its costs even if it saved money, but those who do not agree may want to consider just how expensive the death penalty really is . . . . Make no mistake: the choice to pay for the death penalty is a choice not to pay for other public goods like roads, schools, parks, public works, emergency services, public transportation,

and law enforcement. So we need to ask whether the death penalty is worth what we are sacrificing to maintain it.” Wiles would die by lethal injection at age forty-nine in 2012.\footnote{284} 

_June 5, 2009:_ Republican Governor M. Jodi Rell vetoed a bill narrowly approved by both houses of the Connecticut General Assembly to repeal the death penalty. “We will not tolerate those who have murdered in the most vile, dehumanizing fashion,” she said. NAACP President Benjamin Todd Jealous, who was in Hartford for the veto, deemed it “a cowardly act.” As long as the death penalty remained on the books, Jealous said, Connecticut would continue “spending millions of dollars killing the killers you’ve already caught.” In New England, only Connecticut and New Hampshire would continue to have death penalties.\footnote{285}

_July 9, 2009:_ The Florida Supreme Court affirmed the conviction and death sentence of Ricardo Gill for a murder that probably would not have occurred had there not been a death penalty. In 1999, Gill, a violent ex-convict with a history of mental illness, had pleaded guilty to the murder of a travel agent. He told the judge that he wished to be sentenced to death and that, if denied that wish, he would kill again. The judge did deny Gill’s wish, sentencing him to life—citing his long history of mental problems and suicidal impulses. A few days later, Gill strangled a cellmate to death. Gill pleaded guilty to the cellmate’s murder in 2005, again demanding death. “You will give me a license to kill if you give me another life sentence,” said Gill. “I am a hundred percent sure this time it will not be an inmate that is killed.” The judge sentenced him to death. Despite affirmance on appeal, the sentence had not been carried out as of this writing eight years later.\footnote{286}

_October 14, 2009:_ The South Carolina Parole and Pardon Board posthumously pardoned Thomas and Meeks Griffin, acknowledging the innocence of the African-American brothers who had been electrocuted ninety-four years earlier for the murder of John Lewis, a seventy-three-year-old Confederate veteran. The initial suspects in the murder had been an African-American couple, Bart Davis and his twenty-two-year-old wife, Anna—the latter having been intimately involved with Lewis. After the murder, Bart Davis had been seen leaving the Lewis home and, when the police went to the Davis home, they found bloody trousers and packed bags, suggesting that the Davises were about to flee. But charging the Davises would have exposed Lewis’s interracial sexual liaison with Anna. Apparently putting the posthumous reputation of a deceased prominent white man ahead of the lives of innocent black men, the authorities framed the Griffins. Harvard Professor Henry Louis Gates, Jr. learned of the case nine decades later while researching the


genealogy of famous African-Americans. The Griffins were great uncles of Tom Joyner, a syndicated radio host, who sought the pardons."\(^{287}\)

November 10, 2009: So-called “Beltway Sniper” John Allen Muhammad went to his death by lethal injection in Virginia hours after his last-ditch bid for clemency was rejected by Democratic Governor Tim Kaine. Asked if he wished to say anything, Muhammad, forty-eight, rolled his eyes. He and Lee Boyd Malvo, a teenaged accomplice who had been sentenced to life in prison, had randomly shot six men and four women to death over seventeen days in Virginia, Maryland, and the District of Columbia during October 2002. Muhammad could have been tried in any of the three jurisdictions, but the authorities chose Virginia because it was known for its speedy appeals and execution process. Indeed, Muhammad’s execution had come relatively quickly. The time elapsed between his conviction and execution had been just six years, compared with a national average of more than a decade.\(^{288}\)

December 3, 2009: Forty-four-year-old Bobby Wayne Woods, who had scored between sixty-eight and eighty-six on IQ tests, was executed in Texas for the 1997 rape and murder of an eleven-year-old girl. “He’s transparently child-like and simple,” said his lawyer, Maurie Levin. “It’s a travesty.” Levin had sought to present video evidence of Woods’s “mental retardation,” but the Texas Department of Corrections refused her request to videotape an interview with Woods. His last words were, “Bye, I am ready.”\(^{289}\)

February 12, 2010: Ninety-four-year-old Viva Leroy Nash, the nation’s oldest death row prisoner, died of natural causes at the Arizona State Prison Complex at Florence. Thanks to adroit appellate lawyers, Nash survived twenty-seven years on death row, where he had been sent for murdering twenty-three-year-old Greg West during an armed robbery at a Phoenix coin and stamp shop in 1982. As West pleaded for his life, Nash methodically had shot him three times, according to an eyewitness. Less than a month earlier, Nash had escaped from a Utah prison where he had been serving five years to life for the murder of a Salt Lake City postal worker. In all, Nash had spent seventy-five of his ninety-four years behind bars.” At the end, he was nearly deaf and legally blind, confined to a wheelchair, and suffering from dementia and mental illness.\(^{290}\)

\(^{287}\) HENRY LOUIS GATES, JR., IN SEARCH OF OUR ROOTS: HOW 19 EXTRAORDINARY AFRICAN AMERICANS RECLAIMED THEIR PAST 162–65 (2009); State v. Griffin, 100 S.C. 331 (1915).


March 5, 2010: Forty-eight-year-old Joe D’Ambrosio, who had been falsely convicted and sentenced to death after the prosecution withheld exculpatory evidence at his jury trial in Cuyahoga County, Ohio, was freed after more than twenty-one years behind bars for a murder he had maintained from the beginning he had not committed. Prosecutorial misconduct in the case betrayed a “startling indifference to D’Ambrosio’s rights,” according to a federal judge who reviewed the case and granted habeas corpus relief, resulting in D’Ambrosio’s exoneration. The D’Ambrosio case was one of ten cases in which courts found that Cuyahoga County District Attorney Carmen Marino had engaged in misconduct over several years preceding his retirement in 2002.291

April 2, 2010: Declaring that “we are healers, not executioners,” the American Board of Anesthesiologists decided to revoke the certification of any member who participates in an execution by lethal injection. Decertification would prevent an anesthesiologist from working in most hospitals.292

April 29, 2010: Twenty-seven-year-old Brian Nelson, who had been sentenced to death for a 2002 quadruple murder in Will County, Illinois, hanged himself in his cell at the Pontiac Correctional Center the day before he was to be resentenced to life in prison. “As nuts as it sounds, he preferred the death sentence over natural life,” Nelson’s attorney, Steve Haney, told the Chicago Tribune. “He had indicated he would rather have stayed on death row, with the definite potential of dying by lethal injection, than to live the rest of his natural life in the midst of the general population in prison.” The Illinois Supreme Court ordered the resentencing because, while the jury was deliberating Nelson’s fate, the trial judge replaced a juror who was holding out against sentencing him to death.293

June 28, 2010: A federal jury found former Chicago Police Commander Jon Burge guilty of perjury and obstruction of justice for lying under oath when he denied that he knew about or participated in the torture of African-American suspects during his twenty-three-year tenure on the Chicago police force. Outside the courthouse, activist demonstrators hailed the verdict and demanded that Mayor Richard M. Daley be held accountable for failing to stop the torture after he was informed of it in 1982. Daley had been Cook County state’s attorney at the time and, as such, had been responsible for sending four innocent


men to death row based on confessions extracted by Burge and his men. “Mayor Daley, you can’t hide,” the demonstrators chanted. “We’ve got justice on our side.”

March 9, 2011: Declaring it “impossible to create a perfect system, free of all mistakes,” Illinois Democratic Governor Pat Quinn signed legislation abolishing capital punishment in Illinois. Under the state’s death penalty law, enacted in 1977, 305 defendants had been sentenced to death. Of those, twenty had been exonerated and released, an error rate in excess of 6%, while only twelve had been executed. Governor George H. Ryan, Quinn’s Republican predecessor, had declared a moratorium on executions in 2000 and commuted the sentences of all death row prisoners in 2003. Since 2000, seventeen defendants had been sentenced to death, while the state had expended upwards of $120 million on capital prosecutions—more than $13 million per death sentence. Quinn commuted the sentences of those seventeen to life in prison without parole.

March 29, 2011: In an opinion by Justice Clarence Thomas, a five-member majority of the U.S. Supreme Court threw out a $14 million civil judgment that a federal jury in Louisiana had returned in favor of John Thompson, who had come within three weeks of execution in 1999 for the murder of Raymond T. Liuzza, Jr., a prominent New Orleans businessman. Thompson and a co-defendant, Kevin Freeman, had been charged with the 1984 murder based on information provided by a man who collected a $15,000 reward from the Liuzza family. As a result of publicity surrounding the arrests, witnesses had come forward to accuse Thompson of an unrelated armed robbery, for which he would be tried first. Before the trial in that case, a spot of blood from the perpetrator on the clothing of one of the victims had been tested, resulting in a positive exclusion of Thompson. Four Orleans Parish assistant district attorneys had been aware of the exclusion, but had not disclosed it. Thompson was convicted and sentenced to forty-nine and a half years in prison in the armed robbery case. A month later, he was convicted of the Liuzza murder, based in part on the testimony of his co-defendant, Freeman, who received a five-year sentence. Before Thompson’s sentencing for the murder, one of the prosecutors who had been aware of the exculpatory blood evidence in the armed robbery case argued that, since Thompson already was serving a long prison sentence, the only way to punish him further was to sentence him to death. The jury obliged. After exhausting appeals, Thompson’s execution was set for May 20, 1999. Only then did his lawyers learn of the exculpatory blood evidence, the $15,000 reward, and other exculpatory evidence, including eyewitness accounts indicating that Freeman, acting alone, had slain Liuzza. At the trial of Thompson’s federal civil suit against District Attorney Harry F. Connick and the four assistants involved in the cases, the jury heard evidence indicating that withholding exculpatory evidence had occurred in


at least four other cases. The U.S. Court of Appeals for the Fifth Circuit affirmed the judgment, but the majority on the Supreme Court held that the prosecutors were not civilly liable for the violation of their constitutional obligation to turn over exculpatory evidence.296

September 21, 2011: Troy Anthony Davis, a forty-two-year-old African-American, died by lethal injection in Georgia for the 1989 murder of a Savannah police officer working as a security guard at a fast-food restaurant. Davis’s conviction rested primarily on the testimony of seven witnesses—all of whom had identified him as the killer at his 1991 trial and eventually recanted. Davis had steadfastly maintained his innocence during his two decades on death row and had garnered support—to no avail—from Pope Benedict XVI, Archbishop Desmond Tutu, former President Jimmy Carter, and former FBI Director William Sessions.297

April 25, 2012: Proclaiming that “doing away with the death penalty was the only way to ensure it would not be unfairly imposed,” Connecticut Governor Dannel P. Malloy signed a bill removing death as a sentencing option going forward, but leaving it intact for earlier cases. Malloy, a Democrat, had previously supported the death penalty. In 2015, the Connecticut Supreme Court held four-three that capital punishment “no longer comports with our state’s contemporary standards of decency,” thus barring executions for crimes committed before Malloy signed the abolition bill into effect. In 2016, after composition of the Connecticut Supreme Court changed, it revisited the issue and reaffirmed the across-the-board execution ban by a five-two vote. Connecticut had carried out 126 executions from 1639 through 2005.298

August 5, 2013: Despite a long history of mental illness and just moments after declaring, “I am the Prince of God and I will rise again,” sixty-five-year-old John Errol Ferguson died by lethal injection in Florida after the U.S. Supreme Court denied his last-ditch bid for a stay of execution. In the early 1970s, Ferguson had been confined to a mental institution, where he had been diagnosed as “grossly psychotic” and incapable of distinguishing right from wrong. “This man is dangerous and cannot be released under any circumstances,” a doctor had concluded in 1975. Nonetheless, in under than a year, Ferguson would be free. In 1977 and 1978, he would commit eight murders in Dade County, for which he was


sentenced to death. The Florida Supreme Court acknowledged that Ferguson was mentally ill, but nonetheless held that the law required “only that defendants be aware of the punishment they are about to receive and the reason they are to receive it.”

September 9, 2013: Rick Scott, Florida’s Republican governor, approved a request by Pam Bondi, Florida’s Republican attorney general, to delay the scheduled September 10 lethal injection of Marshall Lee Gore, a notorious Miami rapist-killer, because it conflicted with her re-election kickoff fundraiser in Tampa. Scott had a fundraiser of his own that evening. “Campaign contributions trumped public justice,” the South Florida Sun-Sentinel editorialized. “By letting it happen, state leaders made a mockery of being tough on crime and placing the public interest before all else. And foremost, the state let down the victims—and the families who have waited more than two decades for closure.” The execution would be carried out on October 1.

November 12, 2013: Former President Jimmy Carter, who as governor of Georgia had signed a bill reinstating the state’s death penalty in 1973, called for ending capital punishment worldwide, saying that it had been imposed too often on the poor, minorities, and mentally handicapped. Under the reinstated Georgia law, fifty-three executions had been carried out.

January 16, 2014: It took twenty-six minutes for Dennis McGuire to die in Ohio as he gasped for air, clenched his fists, arched his back, strained against his restraints, and appeared to writhe in pain until an untested combination of two execution drugs—hydromorphone and midazolam—finally killed him for the rape and murder of a young pregnant woman a quarter of a century earlier. As a result of the botched execution, Ohio executions would be suspended indefinitely.

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301 Bill Rankin, Carter: Abolish Death Penalty, ATLANTA J.-CONST., Nov. 13, 2013, at 3B.

April 10, 2014: Retired U.S. Supreme Court Justice John Paul Stevens called for modifying the Eighth Amendment to say, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment such as the death penalty inflicted.”

April 29, 2014: Clayton D. Lockett died of a heart attack forty-three minutes after his execution began in Oklahoma under an experimental three-drug protocol. Ten minutes after the first drug—midazolam—began flowing, a physician supervising the execution, in violation of ethical standards, thought that Lockett was unconscious, but he was not. When the drugs that were supposed to paralyze him and stop his heart—vecuronium bromide and potassium chloride—began to flow, he writhed in agony. The blinds separating the execution chamber from the viewing area were closed, witnesses were ushered out, and the execution was halted several minutes later. By then, however, the debacle had thrown Lockett into cardiac arrest, which accomplished what the drugs had not. Another prisoner, Charles Warner, had been scheduled to die immediately after Lockett, but his execution would be delayed. In the ostensible hope of eliminating pain, the dosage of midazolam would be quintupled, but Warner’s execution nonetheless would be problematic—judging, at least, from his final words when he died on March 15, 2015: “My body is on fire.”

May 20, 2015: The Republican-dominated, unicameral Nebraska Legislature put the state’s death penalty on a veritable roller coaster by voting thirty to thirteen to abolish it. Republican Governor John Peter (Pete) Ricketts would promptly veto the measure, but within days legislators would override the veto. Three months later, the legislative action would be put on hold when a group called Nebraskans for the Death Penalty—with $425,000 contributed by Ricketts and his family, owners of the Chicago Cubs—presented petitions with enough valid signatures to require a popular referendum on the issue. In November 2016, voters would overturn the repeal, restoring death sentences for ten prisoners. If an execution were carried out, it would be the first since 1997 when an African-American man named Robert E. Williams was electrocuted for murdering two women.

June 24, 2015: A federal judge in Massachusetts—a state without the death penalty since 1972—imposed a jury-mandated death sentence on Dzhokhar A. Tsarnaev for the 2013 Boston Marathon bombing, which had claimed three lives and injured some 280 runners and spectators. Moments before the sentencing, the Chechen-born Tsarnaev apologized, telling victims and survivors in the hushed courtroom, “I’m sorry for the lives that I have

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taken, for the suffering that I’ve caused you, for damage that I’ve done. Irreparable
damage.” He had been three months shy of his twentieth birthday when he committed the
bombing with his older brother, who was killed by police. The brothers had been
radicalized by, among other things, watching video-recorded lectures of Anwar al-Awlaki,
a U.S. citizen and radical Muslim cleric who would be killed by a Central Intelligence
Agency drone strike in Yemen five months after the Boston bombing.306

August 12, 2015: Twenty-seven-year-old Daniel Lee Lopez died by lethal injection at
Huntsville State Penitentiary in Texas after waiving discretionary appeals of his murder
conviction, which stemmed from the death of Corpus Christi Police Lieutenant Stuart
Alexander. Lopez had been fleeing police in an SUV when he had run over and killed
Alexander in 2009. Lopez’s lawyers had tried to block the execution on the grounds that
he suffered from severe mental illness and had not intended to kill Alexander—arguments
that the U.S. Supreme Court rejected. Lopez thus became one of 141 U.S. death row
prisoners who volunteered to be executed following their convictions under laws enacted
after 1972.307

September 30, 2015: Richard E. Glossip had eaten what was assumed to be last meal when
Oklahoma Governor Mary Fallin canceled his execution for a murder that occurred
seventeen years earlier because one of the drugs that was about to be used to kill him was
not authorized under the state’s lethal-injection protocol. The protocol specified potassium
chloride, but a supplier had sent potassium acetate, which had been improperly used in the
execution of Charles F. Warner eight months earlier. Warner had been the lead plaintiff in
a U.S. Supreme Court case alleging that another drug used in Oklahoma executions—a
sedative known as midazolam—failed to achieve full anesthetization, violating the Eighth
Amendment. Midazolam had replaced the previously authorized sedative—sodium
thiopental—in the 2014 botched execution of Clayton D. Lockett. After Warner’s
execution, Glossip succeeded him as the lead plaintiff in the case before the Supreme
Court, which rejected the challenge, holding five-four that prisoners could not challenge a
mode of execution unless they proposed an alternative mode, which Glossip had not done.
In dissent, Justice Stephen Breyer opined that the court—instead of trying “to patch up
the death penalty’s legal wounds one at a time”—should decide whether the death penalty
itself is cruel and unusual. Breyer wrote that “intense community pressure” involved in
capital cases increases the likelihood of false convictions. Although Glossip’s innocence
was not an issue before the Supreme Court, he had been condemned solely on the testimony

306 Milton J. Valencia & Patricia Wen, Tsarnaev Apologizes for Attack; Judge Sentences Him to Death, BOS.
GLOBE, June 25, 2015, at A1; Scott Shane, Dead Reckoning, N.Y. TIMES MAG., Aug. 30, 2015, at 56.
17 (2015); Information on Defendants who were Executed since 1976 and Designated as “Volunteers”,
DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/information-defendants-who-were-executed-
1976-and-designated-volunteers (last visited Jan. 15, 2018) (showing a list of all volunteers available). For
an overview of the volunteer issue, see John H. Blume, Killing the Willing: ‘Volunteers,’ Suicide and
Competency, 103 MICH. L. REV. 939 (2005).
of Justin Sneed, who admittedly had committed the murder for which Glossip had been condemned and had been spared a death sentence in exchange for implicating Glossip.308

_February 3, 2016_: Ten days shy of his seventy-third birthday, Brandon Astor Jones died a painful death by lethal injection of pentobarbital in Georgia for the murder and robbery of a convenience store manager more than thirty-six years earlier. After corrections personnel spent thirty-two minutes unsuccessfully trying to insert an intravenous line into Jones’s arms, a physician, in apparent violation of various codes of medical ethics, spent another thirteen minutes inserting the line into a vein near Jones’s groin. Six minutes later, after the pentobarbital had begun to flow, according to a press witness, Jones’s “eyes popped open” as he “fought death.” The day before the execution, a sharply divided U.S. Court of Appeals for the Eleventh Circuit had rejected constitutional challenges to both Georgia’s one-drug execution protocol and a state law classifying the identity of “any person or entity” participating in an execution as a “confidential state secret.”309

_May 23, 2016_: The U.S. Supreme Court held that by striking every prospective black juror in a Georgia capital case against a black defendant, the prosecution had violated a landmark principle laid down thirty years earlier in _Batson v. Kentucky_ to discourage racial discrimination in jury selection. Such discrimination had been shown to significantly increase the likelihood of death sentences. The defendant, Timothy Tyrone Foster, had been convicted in 1987 of killing a seventy-nine-year-old white woman during a burglary the previous year, when he was eighteen. Chief Justice John Roberts, Jr., writing for a seven-one majority, concluded that the prosecution’s purportedly race-neutral reasons for exercising peremptory challenges to secure an all-white jury were “difficult to credit because the [prosecution] willingly accepted white jurors with the same traits that supposedly rendered [one of the blacks] an unattractive juror.”310

_August 2, 2016_: The Delaware Supreme Court struck down the state’s death penalty on the ground that it violated the Sixth Amendment by empowering judges, as opposed to juries, to determine whether aggravating factors had been proved. Delaware Attorney General

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Matt Denn announced he would not appeal to the U.S. Supreme Court. The Delaware high court held in December 2016 that its decision applied retroactively, voiding the sentences of thirteen death row prisoners.\footnote{Rauf v. State, 145 A.3d 430, 442–43 (Del. 2016); Jessica Masulli Reyes, \textit{Death Penalty Void in Del.}, NEWS J. (Wilmington), Aug. 3, 2016, at A10; Powell v. State, 153 A.3d 69, 71 (Del. 2016).}

\textit{December 31, 2016:} The year ended with only twenty executions carried out and only thirty new death sentences imposed, down from record highs of ninety-eight executions and 279 death sentences in 1999.\footnote{Facts About the Death Penalty, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/documents/FactSheet.pdf (last visited Jan. 15, 2018).}

\textit{February 2, 2017:} If New Mexico, which abolished the death penalty in 2009, were to bring it back for three categories of murders, as proposed by Republican Governor Susana Martinez, it would cost taxpayers up to $7.2 million during its first three years, according to a fiscal-impact report released by a legislative committee. “The economics of the death penalty, though impossible to predict exactly, are very clear and very expensive,” the report said.\footnote{See supra entry dated Mar. 18, 2009 (describing New Mexico abolition under Martinez’s predecessor); N.M. Leg., Reg. Sess., H.B. 72 (2017) (showing this pending legislation would restore the death penalty for the murder of peace officers, persons under eighteen, and corrections employees or contractors by prisoners); \textit{LEGISLATIVE FIN. COMM., N.M. LEGISLATURE, FISCAL IMPACT REPORT} (2017), https://www.nmlegis.gov/Sessions/17%20Regular/firs/HB0072.PDF.}

\textit{February 7, 2017:} Jefferson B. Sessions III, who as attorney general of Alabama had advocated the death penalty for twice-convicted drug dealers and whom the \textit{New York Times} had dubbed “the Grim Reaper of Alabama” in an op-ed headline, was confirmed by vote of fifty-two to forty-seven in the U.S. Senate as the eighty-fourth Attorney General of the United States. Among the Alabama condemned whose executions Sessions had championed before his election to the U.S. Senate in 1996 were Varnall Weeks, who had claimed to believe that he would become a tortoise in the afterlife and reign over the universe, Samuel Ivery, who had proclaimed himself “a ninja of God,” and James Wyman Smith, whose court-appointed counsel had asked for a delay in sentencing because he had not read the relevant Alabama statute.\footnote{John J. Donohue III & Max Schoening, \textit{Jeff Sessions, the Grim Reaper of Alabama}, N.Y. TIMES, Jan. 9, 2017, at A17; \textit{Roll Call Vote 115th Congress—1st Session}, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_votecfm?congress=115&session=1&vote=00055 (last visited Jan. 15, 2018) (summarizing the Senate’s roll call vote on Feb. 7, 2017); Weeks v. Jones, 100 F.3d 123,124, 126 n.3 (11th Cir. 1996); Ivery v. State, 686 So. 2d 495, 500 (Ala. Crim. App. 1996); MARTIN YANT, PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED 165 (1991) (quoting James Wyman Smith’s counsel); see supra entry dated Feb. 6, 1996.}

\textit{March 7, 2017:} Rolando Ruiz was executed after twenty-two years on Texas’s death row, most of that time in solitary confinement, where he had developed, in the words of U.S. Supreme Court Justice Stephen Breyer, “severe anxiety and depression, suicidal thoughts, hallucinations, disorientation, memory loss, and sleep difficulty.” Those symptoms had been cited by Ruiz’s attorneys in support of his claim that prolonged isolation constituted
cruel and unusual punishment. Breyer, dissenting from a denial of certiorari, pointed out that the Supreme Court in 1890 had “recognized long-standing ‘serious objections’ to extended solitary confinement.” In the ensuing 127 years, the Supreme Court had not determined whether extended solitary confinement could withstand Eighth Amendment scrutiny, but Breyer opined that the Ruiz case would have been an appropriate one in which to conduct such scrutiny.315

March 15, 2017: Recently elected Florida Ninth Judicial Circuit State Attorney Aramis D. Ayala announced at an Orlando press conference that she would not seek the death penalty in any case because doing so would not be “in the best interest of justice.” Governor Rick Scott, citing his constitutional responsibility to take care that state laws “be faithfully executed,” immediately began reassigning death-eligible Ninth Circuit cases to Fifth Circuit State Attorney Brad King. Ayala would challenge the reassignments, but the Florida Supreme Court would hold that Scott had properly exercised his authority.316

March 28, 2017: The U.S. Supreme Court vacated a Texas death sentence against Bobby James Moore, a mildly intellectually disabled man who thirty-seven years earlier, at age twenty, had shot a supermarket clerk to death during a botched armed robbery. Justice Ruth Bader Ginsberg wrote for a five-three majority that the Texas Court of Criminal Appeals, in condoning Moore’s death sentence, had ignored diagnostic standards developed in 2010, relying instead on outdated standards developed in 1992. The New York Times editorialized that the decision “drove home the futility of the tortured, macabre exercises the court engages in whenever it deals with capital punishment,” allowing states to engage “in a practice that the rest of the developed world rejected long ago.”317

April 20–27, 2017: In what a New Yorker writer would observe “came to resemble a lethal injection clearance sale,” Arkansas executed four men in a rush to carry out as many executions as possible before the end-of-the-month expiration of its supply of midazolam, the sedative used in the state’s lethal-injection protocol. Republican Governor Asa Hutchinson originally had hoped to execute eight men before the April 30 deadline, but courts blocked four of the executions. The first to die was fifty-one-year-old Ledell Lee, who had been denied DNA testing that he insisted could prove his innocence of the 1993 murder for which he had been sentenced to die. Lee’s execution had been sanctioned by a five-four majority of the U.S. Supreme Court, with recently confirmed Justice Neil Gorsuch casting the deciding vote. On April 24, the state went on to execute Jack Harold

316 Frances Robles & Alan Blinder, Prosecutor will no Longer Seek the Death Penalty, N.Y. TIMES, Mar. 17, 2017, at 21; Michael Auslen & Mark Puente, 21 Cases Taken from Ayala, TAMPA BAY TIMES, Apr. 4, 2017, at 1; FLA. CONST. art. IV, § 1(a); FLA. STAT. § 27.14.1 (2017); Ayala v. Scott, 224 So. 3d 755 (Fla. 2017).
Jones, Jr., fifty-two and a diabetic amputee, and Marcel Wayne Williams, forty-six, also a diabetic. Finally, on April 27, the state executed Kenneth Williams, thirty-eight. All four had been on death row for more than fifteen years. All four had been convicted of killing white victims. All but Jones were black.\\footnote{318}

July 6, 2017: Despite what his lawyers described as “a profound mental illness” that rendered him delusional and unable to understand the consequences of his acts, thirty-five-year-old William Charles Morva went to his death by lethal injection in Virginia for murdering a hospital security officer and a deputy sheriff on successive days in 2006. Governor Terry McAuliffe, a Democrat on record as opposing the death penalty, denied Morva’s last-ditch appeal for clemency, which had drawn support from more than two dozen members of the Virginia General Assembly, Amnesty International, the ACLU of Virginia, various mental health organizations, and the daughter of the slain deputy sheriff. Morva believed, according to the clemency petition filed on his behalf, that he suffered from a life-threatening gastrointestinal condition requiring him to “adhere to a diet of raw meat, berries, and pinecones,” that he felt called upon to lead indigenous tribes in some imaginary quest, and that he had been the victim of a conspiracy of local law enforcement and former President George W. Bush. In denying clemency, McAuliffe released a statement saying, “After extensive review and deliberation, I do not find sufficient cause in Mr. Morva’s petition or case records to justify overturning the will of the jury that convicted and sentenced him.”\\footnote{319}

July 13, 2017: In exchange for immunity from the death penalty, twenty-year-old Cosmo DiNardo, a drug-dealing scion of a wealthy family, confessed to robbing and murdering four young men the previous week in Bucks County, Pennsylvania. DiNardo’s confession implicated his cousin, Sean Kratz, also twenty, in the murders. Kratz, for whom the death penalty remained a possibility, albeit unlikely, admitted being present for three of the murders, but denied killing anyone. Bucks County District Attorney Matthew D. Weintraub made the deal with DiNardo to facilitate finding the body of one victim of the victims, whose remains had not been with those of the others. The deal “highlights how arbitrary the death penalty is,” said Robert Dunham, executive director of the Death Penalty Information Center. “It’s clearly arbitrary that a quadruple murderer is spared capital prosecution because he was successfully able to hide the victim’s body, and the death penalty gets pursued against an accomplice in a robbery gone bad.”\\footnote{320


July 24, 2017: At an event sponsored by the Washington Council of Lawyers at George Washington University Law School, eighty-four-year-old Supreme Court Associate Justice Ruth Bader Ginsberg suggested, “We may see an end to capital punishment by attrition as there are fewer and fewer executions.”

July 26, 2017: Ronald R. Phillips died by lethal injection in Ohio for the murder and rape of his girlfriend’s three-year-old daughter in Akron in 1993—when Phillips had been nineteen. In 2013, Republican Governor John Kasich had granted a stay of execution to allow medical experts to consider Phillips’s request that he be allowed to donate his healthy organs for transplantation. “I realize this is a bit of uncharted territory for Ohio,” said Kasich, “but if another life can be saved by his willingness to donate his organs and tissues then we should allow for that to happen.” In 2014, Kasich rejected the organ donation request without explanation and, after a botched lethal injection, temporarily suspended executions, delaying Phillips’s until 2017.

August 24, 2017: Florida executed fifty-three-year-old Mark James Asay for two fatal shootings, alleged to have been racially motivated, more than twenty-nine years earlier in Jacksonville. At Asay’s 1988 trial and in subsequent proceedings, both victims had been identified as African-Americans, but it was discovered belatedly that one had been a white Hispanic man. The jurors who convicted Asay had voted nine to three to sentence him to death. In 2016, the Florida Supreme Court held that imposition of a death sentence required a unanimous jury recommendation, but then held the following year that the unanimity requirement applied only prospectively—not retroactively. Of ninety-three Florida executions after the reinstatement of capital punishment in the 1970s, Asay’s was the first of a white person for killing an African-American. Nationally, of 1,459 executions under reenacted death penalties, only twenty whites had been executed for killing at least one black victim, while 288 blacks had been executed for killing at least one white victim.

October 11, 2017: The Gallup Poll found that public support for the death penalty fell to a post-1966 low of 55%, with 41% opposed, and 3% expressing no opinion.

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324 GALLUP, supra note 130.
November 1, 2017: President Donald Trump called for the execution of Uzbekistan immigrant Sayfullo Saipov, who admitted using a truck the previous day to kill seven men and a young mother of two on a Manhattan bicycle path.325

January 1, 2018: Following a year in which executions and death sentences slightly exceeded the previous year’s record post-Furman lows, the population of state death rows stood at 2,816, down more than 20% from a post-Furman high of 3,593 in 2000.326

March 10, 2018: At a rally in Moon Township, Pennsylvania, President Donald Trump called for enactment of a U.S. death penalty for drug dealers—an idea he said he took from Chinese President Xi Jinping.327

March 15, 2018: Oklahoma Attorney General Mike Hunter announced a plan to execute condemned prisoners with nitrogen gas. With seventeen prisoners under death sentence and having not executed anyone in more than three years, Oklahoma would be the first state to use nitrogen, which had been used in assisted suicides. Hunter called it “the safest, the best, and most effective method available.”328

March 19, 2018: Because the record below had not been adequately developed, the U.S. Supreme Court declined to consider “[w]hether Arizona’s capital sentencing scheme, which includes so many aggravating circumstances that virtually every defendant convicted of first-degree murder is eligible for death, violates the Eighth Amendment.” The question was posed in the case of Abel Daniel Hidalgo, who had killed two men in a murder-for-hire scheme in Maricopa County in 2001. Hidalgo obtained records showing that between 2002 and 2012 at least one death-qualifying factor had been present in 856 of 866 Maricopa County first-degree murder cases—indicating that the law failed to reserve the death penalty for the worst offenders, as required under Furman v. Georgia and Gregg v. Georgia. After 2012, moreover, the number of death-qualifying factors in the Arizona statute had been increased. The state courts nonetheless denied Hidalgo an evidentiary

328 Barbara Hoberock, Oklahoma Could be the First State to Use Nitrogen Gas for Executions, TULSA WORLD, Mar. 16, 2018, at 1.
hearing at which empirical evidence could have been adduced to establish definitively whether the law resulted in arbitrary and capricious application of the death penalty. Concurring in the unanimous denial of certiorari, Justice Stephen G. Breyer—who in 2015 had deemed it “highly likely” that the death penalty violated the Eighth Amendment—wrote that future capital defendants “may have the opportunity to fully develop a record”—making the issue better suited for certiorari and potentially setting the stage for abolition of capital punishment in all states.\textsuperscript{329}

**THE ABSURDITY OF THE REALITY**

Death penalty abolitionists no doubt find it encouraging that executions and death sentences are on the wane.\textsuperscript{330} The death penalty has been abolished by nineteen states and the District of Columbia, ended by gubernatorial moratoria in four states, and not carried out in more than five years in another fifteen states—thirty-eight jurisdictions in all, containing two-thirds of the U.S. population.\textsuperscript{331} The most recent federal execution occurred in 2003.\textsuperscript{332}

Perhaps the trend bodes well for the prospect that the U.S. Supreme Court, on a not-too-distant day, will conclude that capital punishment is cruel and unusual in all instances, thus enforcing “evolving standards of decency that mark the progress of a maturing society.”\textsuperscript{333} Based primarily on the evolving standards rationale, the Supreme Court has ended the death penalty for crimes other than murder,\textsuperscript{334} for the “mentally retarded,”\textsuperscript{335} for the insane,\textsuperscript{336} for those who commit murders before age eighteen,\textsuperscript{337} and for those who participated in felonies that resulted in murders but who neither killed nor intended to kill anyone.\textsuperscript{338}

The prospects for the next logical step—ending capital punishment across the board—unquestionably were better before the Senate abolished the filibuster for Supreme Court nominees in order to narrowly secure the confirmation of Justice Neil Gorsuch to

\textsuperscript{329} Petition for Writ of Certiorari at 1, Hidalgo v. Arizona (No. 17-251); Hidalgo v. Arizona, 138 S. Ct. 1054, 1054, 1057 (2018) (Breyer, J., concurring in denial of certiorari); Furman, 408 U.S. at 369 (per curiam); Gregg, 428 U.S. at 153 (joint opinion of Stewart, J., Powell, J., and Stevens, J.); Glossip, 135 S. Ct. at 2776–77 (Breyer, J., dissenting); Adam Liptak, *Supreme Court Won’t Hear Challenges to Arizona’s Death Penalty Law*, N.Y. Times, Mar. 20, 2018, at 19.

\textsuperscript{330} See supra entry dated Dec. 31, 2016.

\textsuperscript{331} See Appendix E: “Jurisdictions where there have been no executions in five years” (compilation of data showing that thirty-nine jurisdictions containing two-thirds of the U.S. population had abolished capital punishment, had ended it by gubernatorial moratoria, or had not carried out an execution in at least five years as of Aug. 15, 2017).

\textsuperscript{332} See supra entry dated Mar. 18, 2003 (discussing execution of Gulf War veteran for rape-murder in Texas).

\textsuperscript{333} Trop, 356 U.S. at 101.

\textsuperscript{334} Coker, 433 U.S. 584 (barring death for rape of an adult woman); Kennedy, 554 U.S. 407 (barring death for rape of a child).

\textsuperscript{335} Atkins, 536 U.S. 304.

\textsuperscript{336} Ford, 477 U.S. 399.

\textsuperscript{337} Roper, 543 U.S. 551.

\textsuperscript{338} Enmund, 458 U.S. 782.
succeed the late Antonin Scalia.\(^{339}\) While Gorsuch’s ascension restored the Court’s longstanding ideological balance, filling upcoming vacancies could turn the court hard right for a generation or more.\(^{340}\)

Had Hillary Clinton defeated Donald Trump in 2016, a jurist ideologically aligned with progressive principles likely would have been Scalia’s successor, hastening what might have seemed the inevitable recognition that the death penalty offends perceptions of decency currently prevailing among at least a consequential minority of Americans. For the moment, perhaps the remnant of the dashed progressive hope lies only in the shambles of the durable lament that “[f]or all sad words of tongue or pen, [t]he saddest are these: ‘It might have been!’”\(^{341}\) On an optimistic note, it well may be that the inevitable remains inevitable—merely postponed while “[t]he arc of the moral universe [bends] towards justice.”\(^{342}\)

The status quo, meanwhile, is reminiscent of a satiric short story by Bruce Jay Friedman featuring an adventurer named Flick, who, somewhere deep in Africa, against all odds, captures an exotic, near-extinct creature known as a Sharpe’s grysbok. Flick then is off to Paris, where he prevails on a retired master chef to indulge in one final preparation of his signature dish, *Casserole de langue de Sharpe’s grysbok au champignons*. From Paris, casserole in hand, Flick files to Chicago and hurries to Stateville Correctional Center near Joliet. “Good work, Flick,” the warden tells him, “and let’s hope the next joker is a steak-and-apple-pie man.”\(^{343}\)

The absurdity of Friedman’s story of course exceeds that of even the more bizarre of the foregoing anecdotes, but the salient difference between the story and reality has nothing to do with plausibility. Rather, it is simply that the former is humorous and the latter is not.

Maintaining capital punishment today—in light of its lack of a deterrent effect on crime,\(^{344}\) its racially discriminatory imposition,\(^{345}\) the risk of executing the innocent,\(^{346}\) and its obscenely high cost\(^{347}\)—makes no more sense than serving *Casserole de langue de Sharpe’s grysbok au champignons* as a last meal to a condemned man.

That said, the outlook for abolition of the death penalty in the United States remains positive—even if it is likelier to come later than sooner.


\(^{342}\) Martin Luther King, Jr., *Where do we go from Here?,* (Aug. 16, 1967), in *A Call to Conscience: The Landmark Speeches of Dr. Martin Luther King, Jr.* 199 (Clayborne Carson & Kris Shepard eds., 2001).


\(^{345}\) See supra note 5.

\(^{346}\) See supra note 17.

\(^{347}\) See supra note 10.
APPENDIX A

Executions for crimes no longer punishable by death

From 1622 through 2003, there were 2,523 executions for crimes enumerated below for which the death penalty has been abolished in all U.S. jurisdictions. (In addition, there were 569 executions for unspecified felonies, which are excluded from this data set. Some, perhaps most, of those executions were for crimes no longer punishable by death.)

<table>
<thead>
<tr>
<th>Crime</th>
<th>Date Range</th>
<th>Total</th>
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<tbody>
<tr>
<td>Accessory to murder</td>
<td>1808–1906</td>
<td>36</td>
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<tr>
<td>Adultery</td>
<td>1643</td>
<td>2</td>
</tr>
<tr>
<td>Aiding runaway slaves</td>
<td>1743–1859</td>
<td>20</td>
</tr>
<tr>
<td>Arson (non-fatal)</td>
<td>1681–1893</td>
<td>97</td>
</tr>
<tr>
<td>Attempted murder</td>
<td>1662–1960</td>
<td>62</td>
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<tr>
<td>Attempted rape</td>
<td>1734–1960</td>
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<td>Burglary &amp; attempted rape</td>
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APPENDIX B

Executions in states that have ended capital punishment

As of January 1, 2018, nineteen states and the District of Columbia had abolished the death penalty and four had ended it by gubernatorial moratoria (*). From 1630 through 2012, when the last of the twenty-four jurisdictions ended capital punishment, they had carried out 4,734 executions.

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APPENDIX C

Executions, volunteers, and exonerations

Since U.S. executions resumed on January 17, 1977, following the U.S. Supreme Court decisions in Furman v. Georgia and Gregg v. Georgia, there had been 1,465 executions as of January 1, 2018. Of those, 145 had volunteered, waiving discretionary appeals—in effect committing state-abetted suicide. This table presents the numbers by jurisdiction. Key: A = Executions, B = Volunteers, C = Exonerations

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<tr>
<td><strong>Totals</strong></td>
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Source: Executions in the U.S., DEATH PENALTY INFO. CTR. (Searchable Execution Database), https://deathpenaltyinfo.org/views-executions (last visited Jan. 26, 2018). (Note: DPIC lists 161 exonerations, but three of those—two in Florida and one in North Carolina—were for convictions predating Furman v. Georgia and are excluded from the data in this table.)
APPENDIX D

Executions for rape and attempted rape by race of defendant

From 1624 through 1964, there were 1,086 documented executions for rape or attempted rape (including those committed in conjunction with other non-fatal crimes, such as robbery and burglary) in what was or would become the United States. Of those who were executed, 971 (89.4%) were African-American, eighty-six (7.9%) were Caucasian, and twenty-nine (2.7%) were other or unknown.

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<td><strong>86</strong></td>
<td><strong>29</strong></td>
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### APPENDIX E

**Jurisdictions where there have been no executions in five years**

As of January 1, 2018, forty states and the District of Columbia—containing two-thirds of the U.S. population—had abolished capital punishment (*), had ended it by gubernatorial moratoria (**), or had not carried out an execution in at least five years (**). In addition, neither the federal government nor any branch of the U.S. military had carried out executions in the last five years. Key: A = Year of most recent execution, B = Population (000 omitted), C = Percent of U.S. population

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<td>Year</td>
<td>Population</td>
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