

# THE MODERN FEDERAL DEATH PENALTY: A CRUEL AND UNUSUAL PUNISHMENT

*Hannah Freedman*<sup>†</sup>

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## INTRODUCTION

In the early hours of January 18, 2021, the Federal Bureau of Prisons, under the direction of Donald Trump’s Department of Justice, executed Dustin Higgs by lethal injection. Higgs’s

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<sup>†</sup> Staff Attorney and the Director of Juvenile Litigation, Justice 360 and adjunct clinical professor, Cornell Law School. A special thanks to Sam Thypin-Bermeo, without whose insight, feedback, and general brilliance this article would never have been possible. And thank you to Andrew Lee, Ryan Baldwin, Claire Piorkowski, Houston Brown, Andrew Gelfand, Peyton Brooks, and the other editors and members of the Cornell Law Review for their excellent editorial work. All mistakes are mine.

death marked the end of a chaotic flurry of executions by an outgoing administration that had executed twelve other people over the prior six months, for a total of thirteen executions.<sup>1</sup> The Trump executions were widely publicized and broadly condemned domestically and abroad,<sup>2</sup> in part because they took place in the depths of the COVID-19 pandemic;<sup>3</sup> in part because they took place during an election year (or, in the case of the last five executions, while Trump was a lame duck president); and in part because they represented an abrupt change-of-course for the federal government, which had not executed anybody in seventeen years.<sup>4</sup> Before Donald Trump's presidency, the reality was that most federal death sentences were not carried out;<sup>5</sup> from the beginning of the "modern era" of

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<sup>1</sup> The Trump administration executed the following individuals: Daniel Lewis Lee (7/14/2020); Wesley Ira Purkey (7/16/2020); Dustin Lee Honkin (7/17/2020); Lezmond Charles Mitchell (8/26/2020); Keith Dwayne Nelson (8/28/2020); William Emmett Lecroy, Jr. (9/22/2020); Christopher Andre Vialva (9/24/2020); Orlando Cordia Hall (11/19/2020); Brandon Bernard (12/10/2020); Alfred Bourgeois (12/11/2020); Lisa Montgomery (1/13/2021); Cory Johnson (1/14/2021); and Dustin John Higgs (1/16/2021). *Historical Information: Capital Punishment*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/history/federal\\_executions.jsp](https://www.bop.gov/about/history/federal_executions.jsp) [https://perma.cc/YK72-C9DA] (last visited Mar. 8, 2022).

<sup>2</sup> E.g., E. Tammy Kim, *Trump's Final Cruelty: Executing Prisoners*, NEW YORKER (Nov. 25, 2020), <https://www.newyorker.com/news/daily-comment/trumps-final-cruelty-executing-prisoners> [https://perma.cc/VP5L-SAEH]; Luke Harding, *Trump Administration Condemned over Lisa Montgomery Execution*, GUARDIAN (Jan. 13, 2021), <https://www.theguardian.com/world/2021/jan/13/us-carries-out-first-federal-execution-of-a-woman-in-nearly-seven-decades> [https://perma.cc/ZKC4-8CDY]; Holly Honderich, *In Trump's Final Days, a Rush of Federal Executions*, BBC NEWS (Jan. 16, 2021), <https://www.bbc.com/news/world-us-canada-55236260> [https://perma.cc/6MAD-MBH2].

<sup>3</sup> At least one of the people executed in 2021 appears to have had COVID-19 at the time of his death, and the federal executions were themselves COVID-19 "superspreader" events. See Michael Tarm, Michael Balsamo & Michael R. Sisak, *AP Analysis: Federal Executions Likely a COVID Superspreader*, AP NEWS (Feb. 5, 2021), <https://apnews.com/article/public-health-prisons-health-coronavirus-pandemic-executions-956da680790108d8b7e2d8f1567f3803> [https://perma.cc/E892-MF2D].

<sup>4</sup> Lee Kovarsky, *The Trump Executions*, 100 TEX. L. REV. 621, 621 (2022). As others have noted, the long hiatus in federal executions—and the fact that it took the Trump Administration almost four years to implement the campaign promise of executions—is partially attributable to difficulties in developing a viable execution protocol and obtaining the necessary lethal injection drugs. See *id.* at 671. Nevertheless, the following states carried out at least one execution between March 2003 and July 2020: Alabama; Arizona; Arkansas; California; Connecticut; Delaware; Florida; Georgia; Idaho; Indiana; Kentucky; Louisiana; Maryland; Mississippi; Missouri; Montana; Nebraska; Nevada; North Carolina; Ohio; Oklahoma; South Carolina; South Dakota; Tennessee; Texas; Utah; Virginia; and Washington. See *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database> [https://perma.cc/VC9P-P3CC] (last visited Mar. 31, 2022).

<sup>5</sup> This is not to imply that a death sentence is not excruciating, even when it is not carried out. As Justice Stevens observed, the death penalty arguably serves

the American death penalty in 1972<sup>6</sup> until the final months of the Trump presidency in 2020 and 2021, the federal government carried out only three executions, all while George W. Bush was in office.<sup>7</sup>

Trump's administration changed that. The thirteen executions that took place between July 2020 and January 2021 were more than the previous ten administrations combined; more than any administration in nearly seventy years; more than during the administrations of all one-term presidents except Chester Arthur and Benjamin Harrison in the 1800s; and more than during the administrations of all but eight other presidents in the country's history.<sup>8</sup>

The Trump executions are, in that sense, an anomaly, the outcome of "political and bureaucratic outliers that coincide infrequently."<sup>9</sup> The infrequency of that convergence, however, is not guaranteed. So long as people remain on federal death row, the possibility exists that future administrations will turn an unlikely event into a common practice. That political reality is concerning for what it reveals about the federal death penalty—it is arbitrary and a reflection of characteristically volatile American political tides, whose burdens are disproportionately borne by historically disenfranchised groups.<sup>10</sup>

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no retributive or deterrent purpose "for prisoners who have spent some 17 years under a sentence of death" and the inexorable waiting and uncertainty subjects the condemned to "one of the most horrible feelings." *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting the denial of certiorari).

<sup>6</sup> *Furman v. Georgia*, 408 U.S. 238, 238–39 (1972) (plurality opinion).

<sup>7</sup> Timothy McVeigh was executed on June 11, 2001; Juan Raul Garza was executed on June 19, 2001; and Louis Jones was executed on March 18, 2003. See *Execution Database*, *supra* note 4.

<sup>8</sup> Grover Cleveland oversaw fifty-eight executions over the course of his two terms in the White House. His first term went from 1885 to 1889 and his second term went from 1893 to 1897. Ulysses S. Grant oversaw thirty-five executions over two consecutive terms from 1869 to 1877. Franklin Delano Roosevelt oversaw thirty-three executions over more than three full terms, from 1933 to 1945. Chester Arthur oversaw twenty-eight executions over less than one full term in office (he became president when James Garfield was assassinated; one of the people executed during his term was Garfield's assassin). Benjamin Harrison oversaw twenty-four executions over one full term from 1889 to 1893. Harry Truman oversaw twenty-two executions over almost two full terms, from 1945 to 1953. James Monroe oversaw twenty-two executions over two full terms from 1817 to 1825. And Theodore Roosevelt oversaw fourteen executions over less than two full terms, from 1901 to 1909. See *infra* Part II.

<sup>9</sup> Kovarsky, *supra* note 4, at 623.

<sup>10</sup> The relationship between the franchise, political violence, and the death penalty in America, and in particular in the American South, is well-documented. See Brad Epperly, Christopher Witko, Ryan Strickler & Paul White, *Rule by Violence, Rule by Law: Lynching, Jim Crow, and the Continuing Evolution of Voter*

In another, broader sense, however, the Trump executions are highly representative of the post-*Furman* federal death penalty. Federal executions make up a vanishingly small number—only 16 out of 1540, or barely 1%—of overall executions in the United States since 1972,<sup>11</sup> and they make up a very small percentage of capital prosecutions in the United States since 1972. Most people under a federal death sentence are not executed, making the penalty (as opposed to the sentence) even more rare. Moreover, even though people who are sentenced to death by the federal government are demographically distinct from people on state death rows,<sup>12</sup> a majority of federal death row inmates share one important thing in common with people on state death rows: they were prosecuted for crimes committed on state territory, against private citizens, over which the federal government would not

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*Suppression in the U.S.*, 18 PERSPS. ON POL. 756, 759-65 (2020) (discussing, among others, IDA B. WELLS, A RED RECORD (1895) & Ida B. Wells, *Lynch Law in America*, in THE ARENA 15 (1900)). On the federal side, there is at least some loose empirical support for the idea that presidents are more likely to pursue executions during the end of their terms or during sitting duck periods, and that those executions are more likely to be carried out against non-white people. See Part II, *infra*.

<sup>11</sup> See Part II, *infra*.

<sup>12</sup> People on federal death row and people executed by the federal government over the past fifty years are more likely to be non-white than people on state death rows. See *Federal Death Row Population by Race*, FED. CAP. HABEAS PROJECT, <https://2255.capdefnet.org/General-Statistics/Federal-Death-Row-Population-By-Race> [<https://perma.cc/AX8H-PP6P>] (last visited July 23, 2022). They are likely to have been young—under the age of twenty-five—at the time of their offense. See John H. Blume, Hannah L. Freedman, Lindsey S. Vann & Amelia Courtney Hritz, *Death by Numbers: Why Evolving Standards Compel Extending Roper’s Categorical Ban Against Executing Juveniles from Eighteen to Twenty-One*, 98 TEX. L. REV. 921, 941-42 (2020) (noting that eight people on federal death row in 2020 were under the age of twenty-one at the time of their offense). And they often have viable claims of serious mental illness or intellectual disability. See Robert Dunham, *INSIGHT: Vast Majority on Federal Death Row Have Significant Impairments*, BL (July 8, 2020), <https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-vast-majority-on-federal-death-row-have-significant-impairments> [<https://perma.cc/3WBZ-96G5>] (noting that “more than 85% of those facing federal execution have at least one serious impairment that significantly reduces their culpability” and “[a]pproximately half of federally death-sentenced prisoners exhibit signs of severe mental illness”). This may be a product of the manner in which federal jury selection operates for capital cases, more limited post-conviction review in federal capital cases, and the DOJ’s relatively enhanced ability to defend death sentences on appeal, among other factors. *E.g.*, Kovarsky, *supra* note 4, at 651-53 (describing ineffective late-stage litigation under 28 U.S.C. § 2255 in advance of the Trump executions). The point, regardless of the cause, is that federal death row is made up of a disproportionate number and percentage of historically disenfranchised people, even when compared to death rows in states like Texas or Florida. See *Executions Database*, *supra* note 4.

have historically exercised jurisdiction.<sup>13</sup> A significant percentage of the people currently on federal death row are there for crimes that took place in states that no longer allow the death penalty.<sup>14</sup> And many people who were sentenced to death in federal courts post-*Furman* were prosecuted pursuant to statutes that have documented histories of racially biased enforcement.<sup>15</sup>

That series of observations forms the basis for this Article's thesis that the modern federal death penalty is unconstitutional in nearly all of its applications.<sup>16</sup> The Article makes that argument in three parts. Part I describes the American death penalty's origins in English common law,

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<sup>13</sup> The federal death penalty is the product of a complex web of statutory provisions scattered through the United States Code that authorize the penalty for a broad range of offenses. *See, e.g.*, 18 U.S.C. § 1111 (first-degree murder); *id.* § 794 (espionage); *id.* § 2113(e) (bank-robbery related kidnapping); 49 U.S.C. § 46502 (aircraft piracy resulting in death); 18 U.S.C. § 2119 (murder related to carjacking); 21 U.S.C. § 848(e) (murder related to a continuing criminal enterprise, or CCE); 18 U.S.C. § 1959 (murder involving a racketeering offense). The basis for federal jurisdiction over many of these crimes is the Commerce Clause, which, as interpreted by the Supreme Court, confers federal jurisdiction over "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *see also* *United States v. Aquart*, 912 F.3d 1, 17–18 (2d Cir. 2018) (rejecting a jurisdictional challenge to a capital CCE prosecution because "drug trafficking, even local trafficking, is 'part of an economic 'class of activities' that have a substantial effect on interstate commerce'" (quoting *Gonzales*, 545 U.S. at 17)); *United States v. Hager*, 721 F.3d 167, 183 (4th Cir. 2013) (holding the same).

<sup>14</sup> Until July of 2020, when the Trump Administration carried out the lethal injection of Dustin Honken, only one person in the country's history had been put to death by the federal government for a crime that occurred in a state without the death penalty. *See* Michael J. Zydney Mannheimer, *The Unusual Case of Anthony Chebatoris: The "New Deal for Crime" and the Federal Death Penalty in Non-Death States*, 70 SYRACUSE L. REV. 851, 851 (2020).

<sup>15</sup> *E.g.*, Kovarsky, *supra* note 4, at 628 (describing stark racial disparities in prosecutions pursuant to the continuing criminal enterprise statute).

<sup>16</sup> One major definitional caveat is important to note at the outset. This Article does not grapple with the constitutionality of federal death sentences that are imposed for crimes in which the federal government has a special interest—crimes committed on federal property, crimes involving acts of terrorism, treason, or espionage, and crimes against federal employees on the job, to name a few. There may be any number of powerful arguments against the federal death penalty in those circumstances, but it is neither ahistorical nor inconsistent with the founding-era understanding of capital punishment, and it is, therefore, beyond the scope of this Article. For similar reasons, the Article does not address federal death sentences imposed by military commissions. *See, e.g.*, *Ex parte Quirin*, 317 U.S. 1, 48 (1942) (affirming the military's jurisdiction over a group of alleged Nazi spies); James Speed, *Murder of the President*, 11 Op. Att'y Gen. 215, 215 (1865) (opinion of Attorney General James Speed that President Lincoln's assassins "can be rightfully tried by a military court"). For a discussion of the historical and ongoing debates surrounding the constitutionality of military tribunals, see Martin S. Lederman, *The Law(?) of the Lincoln Assassination*, 118 COLUM. L. REV. 323, 323 (2018).

which gave priority to local sentencing practices, even when they were inconsistent with national or international law, and especially when local practices favored leniency. It examines two specific examples of this principle—a sentencing practice known as the benefit of the clergy, which permitted juries to express leniency even when national law mandated a death sentence for a given crime, and a practice specific to Kent County called gavelkind, which also allowed historical local sentencing rules to override national law. Part I then turns to founding era debates about the role of the federal government in defining and enforcing criminal law and examines early post-founding sentencing practices, which confirm how the founders would have expected the federal death penalty to operate in practice. Specifically, for more than a century after the American Revolution, the federal death penalty was reserved for crimes in which the federal government had a special interest, like treason or murder on federal territory, and state law—not federal law—therefore determined whether a person could and should be sentenced to death for conduct occurring within a state’s borders, against its citizens. As a result, the states imposed and carried out nearly all death sentences in the United States, according to state and local sentencing practices. Of the relatively small number of federal executions that did take place pre-*Furman*, the vast majority were imposed for murders that took place on land under exclusive federal jurisdiction—meaning that the federal government alone could prosecute and punish the perpetrators and reinforcing the rule at common law that punishment must be carried out according to local practice. Part I concludes that the modern federal death penalty, in practice, is inconsistent with the founders’ original understanding.

Part II comprises a descriptive assessment of all known federal executions in American history. As others have noted,<sup>17</sup> there is a surprising paucity of empirical work on the federal death penalty, and no published work to date has examined the details of federal executions over time. This Article, therefore, attempts to serve as a starting point for closing that gap. Specifically, it draws on a newly developed database that documents 350 federal executions between 1790 and 2021 and examines the federal death penalty over five historical periods: post-Revolution to the Civil War; the end of the Civil War to 1900; 1900 to the end of World War II; World

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<sup>17</sup> E.g., Kovarsky, *supra* note 4, at 622.

War II to *Furman*; and the modern era. Part II concludes with a summary of modern-era federal death sentencing practices and the 44 individuals currently on federal death row.

Part III turns to the Article's doctrinal argument. It begins with an overview of the Supreme Court's evolving standards of decency jurisprudence. Drawing on the observations made in Parts I and II, it then argues that the federal death penalty is unconstitutional in its modern application, both because there is a national consensus against it and because it serves no penological goal. Compared to the large pool of people who commit murder in the United States, only a vanishingly small number are sentenced to death and executed by the federal government, and an even smaller number of those people are sentenced to death or executed for offenses that occurred in abolitionist states. It is also unusual compared to how "dependent sovereigns" punish murder and peer nations across the globe punish murder. Moreover, the federal death penalty is arbitrary, unpredictable, fails to accomplish any valid penological goal of punishment, and it is ahistorical. Part III concludes that in every constitutionally relevant way, the federal death penalty is cruel and unusual, an appendage of a political system that stopped existing decades ago and that persists because its effects are now (as they have always been) disproportionately imposed on marginalized members of American society.

## I

### AN ORIGINAL UNDERSTANDING OF THE FEDERAL DEATH PENALTY

The death penalty has been woven into the fabric of American government since before the founding.<sup>18</sup> Although it is never explicitly mentioned in the Eighth Amendment<sup>19</sup> or elsewhere in the Constitution, this is almost certainly because the founders assumed that it would be imposed.<sup>20</sup> That fact,

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<sup>18</sup> The full legal history of the federal death penalty is beyond the scope of this Article, but it has been described in detail elsewhere. For what is probably the most comprehensive review of the law surrounding the federal death penalty, see Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 *FORDHAM URB. L.J.* 347 (1999).

<sup>19</sup> The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

<sup>20</sup> The Fifth Amendment, for example, implies the existence of capital punishment without explicitly mentioning it. Little, *supra* note 18, at 360 (noting that the Fifth Amendment describes "capital" crimes and suggests that the government may deprive people of "life" if they are given due process of law); see

however, does not mean that the modern federal death penalty bears any resemblance to the penalty the founders envisioned.<sup>21</sup> To the contrary, at the time of the founding, the federal death penalty was restricted to a small category of crimes in which the federal government had a special interest, and when the death penalty was imposed, it was carried out according to local customs. The protection of local customs was a topic of vigorous debate at the constitutional conventions, and concern about protecting it is reflected in the language in state constitutions and post-revolution sentencing practices in the states. These sources, taken together, paint a vivid picture of the death penalty at the time of the founding.

#### A. English Common Law and the Role of Local Sentencing Practice at the Founding

At the time of the founding, the law governing the colonies was English common law.<sup>22</sup> English common law, in turn, consisted of concentric circles of legal tradition. At the highest level, the law of nations dictated that “a [system] of rules, deducible by natural rea[s]on, and [established] by univer[s]al con[s]ent among the civilized inhabitants of the world”

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*also* Thompson v. Oklahoma, 487 U.S. 815, 821 (1988) (“The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category.”).

<sup>21</sup> Although “the debates of the First Congress on the Bill of Rights throw little light on [the Eighth Amendment’s] intended meaning,” *Furman v. Georgia*, 408 U.S. 238, 244 (1972) (Douglas, J., concurring), the Supreme Court has, nevertheless, interpreted the original meaning of the Eighth Amendment by reference to various founding-era documents and practices. *E.g.*, *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (relying on Blackstone’s characterization of English common law to hold that the death penalty is unconstitutional as applied to insane people); *Gregg v. Georgia*, 428 U.S. 153, 170 n.17 (1976) (plurality opinion) (interpreting the Eighth Amendment based “primarily [on] statements made during the debates in the various state conventions called to ratify the Federal Constitution”); *Baze v. Rees*, 553 U.S. 35, 97 (2008) (Thomas, J., concurring) (relying on the “evidence we do have from the debates on the Constitution” to conclude that “the Eighth Amendment was intended to disable Congress from imposing torturous punishments”). These sources, therefore, form the basis for the arguments advanced in this Part.

<sup>22</sup> For example, New Jersey’s 1776 Constitution provided that “the common law of England, as well as so much of the statute law, as have been heretofore practised [sic] in this Colony, shall still remain in force” except for parts “repugnant to the rights and privileges contained in this Charter.” N.J. CONST. of 1776, art. XXII. Similarly, Delaware’s 1776 Constitution adopted the statutory and common law of England except the parts that were “repugnant to the rights and privileges contained in this constitution.” DEL. CONST. of 1776, art. XXV. New York’s 1777 Constitution followed the same tradition and followed colonial law “not repugnant to the government established by this constitution.” N.Y. CONST. of 1777, art. XXXV.



structured the relations between “independent [s]tates, and the individuals belonging to each.”<sup>23</sup> Nationally, “general customs” provided the “universal rule of the whole kingdom.”<sup>24</sup> At the most local level, “particular customs” governed “only the inhabitants of particular districts.”<sup>25</sup> Within this system, the crown, through its courts or sovereign, looked to the most local unwritten law to determine the appropriate punishment for an alleged crime, with some limited exceptions described below.<sup>26</sup> This principle of legal organization manifested in various ways that are of significance here.

First, local customs, rather than general common law, determined criminal punishment. In England, this produced strong regional variations in how punishment generally—and capital punishment in particular—was administered. For example, during the period in which England was governed by what is now known as the Bloody Code, more than 220 criminal offenses carried the death penalty.<sup>27</sup> As a result, between 1770 and 1830, an estimated 35,000 people were

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<sup>23</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*66.

<sup>24</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*67.

<sup>25</sup> *Id.*

<sup>26</sup> This Part makes its arguments based on the governing law in place at the time of the founding and in the years that immediately followed. Of course, the law then in place presupposed white European supremacy. Chief Justice Marshall, writing for the Court in 1823, succinctly captured the national sentiment in *Johnson v. M’Intosh*: America “offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy.” 21 U.S. 543, 572–73 (1823). Moreover, at the time of the Constitutional Convention in 1787, around 700,000 enslaved Black people lived in the United States, but the country’s early governing documents promised them no rights, no protection, and certainly no equality. ERIC FONER, *THE SECOND FOUNDING* 1–5 (2019); *see also Mail Robbery by Slave: United States v. Amy*, 4 Q.L.J. 163, 164–65 (1859) (“[A] *slave* is not such a legal ‘person,’ and is not within the meaning of the act, a slave not being, in ordinary legal contemplation, a *person*, but *property* . . . . [H]is legal character, so to speak, consisting in the absence of all the rights of property and liberty, so that a judgment against him, depriving him of either, to any extent, would be a mere legal nullity and absurdity.”). Simply put, the strength of the protections offered by American law pre- and post-revolution depended on legal and societal definitions of citizenship. Because non-white people were not legally considered citizens until reconstruction, or what has been called the second founding, *see FONER, supra*, at 6–7, the principles described in this Article should be understood through that lens.

<sup>27</sup> JOHN WALLISS, *THE BLOODY CODE IN ENGLAND AND WALES, 1760–1830* 1 (2018). An impressively broad range of conduct carried the death penalty. “We hanged for everything,” one contemporary observer noted—“for a shilling—for five shillings—for forty shillings—for five pounds—for cutting down a sapling! We hanged for a sheep—for a horse—for cattle—for coining—for forgery—even for witchcraft—for things that were, and things that could not be.” *Id.* at 1–2 (quoting CHARLES PHILLIPS, *VACATION THOUGHTS ON CAPITAL PUNISHMENT* 3 (1857)).

sentenced to death in England and Wales.<sup>28</sup> The rates of actual executions, however, varied dramatically from county to county. In the 1780s, a Londoner could expect to witness an average of around fifty executions each year, while residents of Cornwall and Oxfordshire could expect, on average, just one execution annually.<sup>29</sup> These regional differences were not unusual but instead reflected the fact that English law accounted for local preference and permitted judges, juries, and executive officials to give meaning to their idiosyncratic local practices.

The ancient doctrine of “benefit of clergy,” or *privilegium clericale*, offers one example of how local practice, not national law, governed capital sentencing. The doctrine, which exists today in vestigial forms as executive clemency and the doctrine of lenity,<sup>30</sup> operated as a way for courts to spare the lives of people condemned to die for trivial offenses. It was first documented during the rule of King Henry II, who negotiated an agreement with the Catholic Church that “in criminal cases, for the future, no clerk should be brought in person before a secular judge except for some offense against the forest laws or in respect of some service due by reason of feudal tenure.”<sup>31</sup> Members of the clergy were, in other words, beyond the jurisdiction of the secular courts with some limited exceptions. Because the church did not impose the punishment of death,<sup>32</sup> receiving the benefit of clergy was a means of avoiding capital punishment, regardless of the guilt of the accused.<sup>33</sup>

Over time, the doctrine evolved. Although it was originally available only to ordained monks and clerks, an ordinance passed in 1350 expanded the scope of the benefit to “all manner of clerks as well secular as religious,” which was interpreted to mean any white person who could read.<sup>34</sup> The

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<sup>28</sup> *Id.* at 53.

<sup>29</sup> *Id.* at 55–59.

<sup>30</sup> Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 924 (2020).

<sup>31</sup> Arthur Lyon Cross, *The English Criminal Law and Benefit of Clergy During the Eighteenth and Early Nineteenth Centuries*, 22 AM. HIST. REV. 544, 551 (1917) (quoting FELIX MARKOWER, CONSTITUTIONAL HISTORY & CONSTITUTION OF THE CHURCH OF ENGLAND 399 (1885)). The doctrine itself is said to be rooted in the Book of Chronicles and the Psalms, which provide: “Touch not mine anointed and do my prophets no harm.” *Id.* at 551, n. 31 (quoting I Chronicles, 16:22 & Psalms, 105:15).

<sup>32</sup> *Id.* at 552 (citing SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, 1 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 445 (1895)).

<sup>33</sup> *Id.* at 551–52.

<sup>34</sup> *Id.* at 552; see also Benefit of Clergy Act 1351, 25 Edw. III., c. 4 (extending the benefit of clergy to all who could read). The common test for literacy was a

invention of the printing press and the spread of literacy that followed in the 15th century expanded the benefit of clergy—by then a purely secular doctrine—to a much larger proportion of the British and colonial population than in the past, prompting concern that dangerous men<sup>35</sup> would escape punishment. This fear, in turn, ushered in legal efforts to restrict the doctrine's reach.<sup>36</sup>

Statutory enactments withdrew clergy from specific crimes but left the decision about when clergy would be available to local decision-makers. Specifically, by the 1700s, capital crimes were of two general categories: “aggravating circumstances” crimes and “clergyable amount” crimes.<sup>37</sup> The “aggravating circumstances” category included such offenses as theft, which, when charged as “simple,” was clergyable, but which could be converted into a nonclergyable offense if the jury found that the defendant committed the theft in an aggravated manner by breaking and entering at night.<sup>38</sup> The “clergyable amount” crimes made certain property offenses capital if the value of the goods involved exceeded a statutory

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verse from the Bible, usually the 51st Psalm, which came to be known as the “neck-verse.” “[I]f the accused was able to ‘read like a clerk’ he was handed over to the ordinary,” the church’s representative, “though it was an indictable offense at common law to teach a felon to read that he might claim his clergy.” Cross, *supra* note 31, at 552.

<sup>35</sup> Women were not permitted to invoke clergy until 1624, and even after that, they were prohibited from doing so for various clergyable offenses until the very end of the 17th century. Cross, *supra* note 31, at 554–55; see John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 39 (1983).

<sup>36</sup> One response was to prohibit secular citizens from claiming the benefit more than once. *E.g.*, 4 Hen. VII., c. 13 (1488). Instead, men convicted of murder were branded with the letter M, and all other convicted felons were branded with a T “openly in the court.” Cross, *supra* note 31, at 552. The practice of branding was viewed as a necessity in an era before criminal record keeping, and it carried over to the colonies and continued as an alternate form of punishment into the late 18th century. *Id.*; Langbein, *supra* note 35, at 37–38.

A second response to the expanded application of benefit of clergy permitted a convict who had been allowed clergy to be sentenced to “transportation,” meaning banishment to a colony or to hard labor, for a term of seven years. See 4 Geo., c. 11, § 1 (1717); *State v. Bosse*, 42 S.C.L. (8 Rich.) 276, 281–82 (1855) (describing a colonial-era South Carolina statute, 2 Stat. 521, § 2, that included the following provision: “persons convicted of any of the offences made felony by virtue of this Act as aforesaid, (to avoid judgment of death, or execution thereupon for such his offence,) shall make his election to be transported to any of his Majesty’s plantations”). This form of punishment was popular, and by some estimates around 70% of convicted felons pled clergy and were sentenced to transportation. George C. Thomas III, *Colonial Criminal Law and Procedure: The Royal Colony of New Jersey 1749–57*, 1 N.Y.U. J.L. & LIBERTY 671, 697 (2005).

<sup>37</sup> Langbein, *supra* note 35, at 40.

<sup>38</sup> *Id.*

amount.<sup>39</sup> In practice, victims of property offenses and prosecuting attorneys commonly “undercharged” by declining to charge the aggravating circumstances or the full amount, and even when the offenses were fully charged, the jury—aware of the punishment—could “downcharge” or issue a “partial verdict” by convicting of a lesser, clergyable offense.<sup>40</sup> Thus, even when English law mandated a sentence of death for a particular crime, English law yielded when local preference, expressed through the desires of local decision-makers, so demanded.

Another particularly well-documented and dramatic example illustrates the point even more starkly. For most of English history until 1870, “offenders punishable with death also forfeited their possessions,” including their land, according to a practice known as felony forfeiture.<sup>41</sup> Felony forfeiture was a defining feature of English criminal law that evolved out of the practice of stripping traitors of legal title to their lands and goods and transferring it to the king as a way to weaken those who might oppose the Crown.<sup>42</sup> Like traitors, felons forfeited their goods to the king, but their lands escheated to their lord “after the king had taken the waste and profits of those lands for a year and a day.”<sup>43</sup>

In the county of Kent in southeastern England, however, this practice did not adhere. Instead, a particular local custom, known as gavelkind, dictated what happened to a felon’s land after his execution. According to gavelkind, an executed felon’s lands passed not to his lord or to the king, but went to “the heir, notwithstanding the offence of his ancestor,” for him to “enjoy the lands by descent after the same customs and services, by which they were before holden.”<sup>44</sup> Or, as a

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 40–41. In England, partial verdicts produced stark regional differences in the outcomes of capital trials. For example, from 1750 to 1775, in cases where an indictment proceeded to trial on charges of burglary, housebreaking, or theft from a dwelling house, juries returned “partial verdicts” (thereby sparing the accused of the death penalty) in more than half of the cases in Cornwall versus more than 1/3 in London. Peter King & Richard Ward, *Rethinking the Bloody Code in Eighteenth-Century Britain: Capital Punishment at the Centre and on the Periphery*, 228 *PAST & PRESENT* 159, 179–81 (2015).

<sup>41</sup> K.J. Kesselring, *Felony Forfeiture in England, c. 1170–1870*, 30 *J. L. HIST.* 201, 201 (2010). Indeed, whether or not a crime was a “felony” depended not on the nature of the underlying conduct, but on whether it resulted in felony forfeiture. *Id.*

<sup>42</sup> *Id.* at 203.

<sup>43</sup> *Id.*

<sup>44</sup> THOMAS ROBINSON, *THE COMMON LAW OF KENT: OR, THE CUSTOMS OF GAVELKIND* 289 (3d ed. 1822).

proverbial expression summarized, “The father to the bough, And the son to the plough.”<sup>45</sup>

Although gavelkind was inconsistent with general English law, it was recognized and enforced, both locally and—to a modern observer, somewhat surprisingly—by the Crown, as illustrated by the following passage from a letter Richard II sent to the sheriff of Kent regarding the property of a hanged man: “Since according to the custom of Gavelkind in the case, we ought not to have the year, day, nor the waste, nor the chief lords the escheat thereof; but the next heirs of those thus convicted and hanged shall immediately succeed to their inheritance, notwithstanding such felony.”<sup>46</sup>

Similarly, as a 19th century treatise explained, “[W]hen a statute makes a new felony, or says, the offender shall suffer as in cases of felony, it entirely refers itself for the punishment to the common law,” and, as a result, “the land will escheat to the lord . . . in all places except in *Kent*, where the custom is allowed to have power to exempt the gavelkind lands from the general rule.”<sup>47</sup> Indeed, the Magna Carta and various acts of parliament protected local customs like gavelkind from interference by the national government,<sup>48</sup> leading Blackstone to describe practices that “affect only the inhabitants of particular districts” as “the second branch of the unwritten laws of England.”<sup>49</sup>

At the next level of governance, national law protected local customs even when they conflicted with the law of nations. The case of the Russian Ambassador illustrates this point. During Queen Anne’s reign, the Sheriff of Middlesex arrested the Russian Ambassador for a personal debt.<sup>50</sup> The insulted Ambassador complained to the Queen and then to Peter the Great, the czar of Muscovy, who “resented this affront very highly, and demanded that the sheriff of Middlesex and all others concerned in the arrest should be punished with instant death.”<sup>51</sup> Queen Anne refused because, she advised the czar, “she could inflict no punishment upon any, the meanest, of her

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<sup>45</sup> *Id.*; see also Kesselring, *supra* note 41, at 204 (quoting *Prerogativa Regis*, in STATUTES OF THE REALM 223–26 (A. Luders et al. eds., 1810–28)).

<sup>46</sup> CHARLES SANDYS, A HISTORY OF GAVELKIND AND OTHER REMARKABLE CUSTOMS IN THE COUNTY OF KENT (1851).

<sup>47</sup> ROBINSON, *supra* note 44, at 294–95.

<sup>48</sup> *E.g.*, 1 Edw. III c. 9 (1327) (“The King will, That Cities, Boroughs, and Franchi[s]ed Towns, [s]hall enjoy their Franchi[s]es, Cu[s]toms, and U[s]ages, as they ought and were wont to do.”).

<sup>49</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*75.

<sup>50</sup> *Id.* \*254–56.

<sup>51</sup> *Id.* at \*255.

subjects, unless warranted by the law of the land.”<sup>52</sup> Although Parliament, at the czar’s urging, passed a statute that acknowledged the arrest was “contrary to the law of nations” and prohibited future arrests,<sup>53</sup> the Sheriff avoided prosecution because of “established constitutions of her kingdom.”<sup>54</sup>

This legal system, which “embraced both a universal idea of the laws of England and an awareness of the need for regional diversity,” arrived in North America with colonialism.<sup>55</sup> In America, England allowed its colonies to pass laws that reflected local customs, but those laws were subject to review by the Privy Council, a body of advisors selected by the king to give guidance on matters of colonial administration, legislation, and judicial affairs.<sup>56</sup> The Privy Council acted as a court of last appeal in criminal cases and reviewed colonial statutory enactments, leading some historians to note that it functioned like a precursor to the modern Supreme Court.<sup>57</sup> Colonial statutory laws were subsidiary to the English law and, when

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<sup>52</sup> *Id.* at \*255.

<sup>53</sup> Diplomatic Privileges Act 1708, 7 Ann. c. 12.

<sup>54</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*256.

<sup>55</sup> MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* 31 (2004). It is important to make note of two limiting principles because they help clarify the scope and purpose of the general rule of local supremacy. First, when the sovereign maintained a special interest in a specific crime and its prosecution, local customs yielded to a more universal power. Indeed, people convicted of treason, even in Kent, forfeited their lands to the king. ROBINSON, *supra* note 44, at 293. Similarly, George I had little sympathy for local law when “the Earl of Islay, Argyll’s brother, protested the transportation of convicted Scottish rioters in 1724, on the grounds that the old Scots common law over rode [sic] the new statute.” MARGARET SANKEY, *JACOBITE PRISONERS OF THE 1715 REBELLION: PREVENTING AND PUNISHING INSURRECTION IN EARLY HANOVERIAN BRITAIN* 74 (2005).

Second, when a local custom violated a deeper principle of English law, the common law ignored it. As the Chief Justice of the King’s Bench wrote in 1772, “Customs of particular cities may deviate from the course of the common law, but a custom contrary to the first principles of justice can never be good.” *Fisher v. Lane* [1772] 95 Eng. Rep. 1065, 1068. For example, starting in 1609, common law dictated that when the king conquered a Christian land, that land’s laws remained in effect unless and until the king changed them. William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 418 (1968). When, however, the king conquered a non-Christian land, that land’s laws were instantly decreed “contrary to the laws of God” and were revoked, leaving the king to rule by “natural equity” until English law could be enacted. *Id.* (quoting *Calvin’s Case* [1608] 77 Eng. Rep. 377, 398).

<sup>56</sup> *Id.* at 419–20; Sharon Hamby O’Connor & Mary Sarah Bilder, *Appeals to the Privy Council Before American Independence: An Annotated Digital Catalogue*, 104 L. LIBR. J. 83, 84–85 (2012). The governors of all of the colonies except Carolina, Maryland, Connecticut and Rhode Island had to submit legislation to the Privy Council for approval before the legislation could go into effect. Stoebuck, *supra* note 55, at 419.

<sup>57</sup> O’Connor & Bilder, *supra* note 56, at 83–85.

challenged, were reviewed by the Privy Council under the “repugnancy principle”: colonial law could differ, even dramatically, from English law to accommodate local circumstances, so long as the colonial law in question was not “repugnant” to the laws of England.<sup>58</sup> Most colonial charters required that local legislation be sent to the Privy Counsel for review prior to enactment, to ensure, in the words of one charter, that “such ordinances be reasonable, and not repugnant or contrary, but as near as may be, agreeable to the laws and statutes of this our kingdom of England.”<sup>59</sup> Many colonial statutes were left in place that plainly conflicted with English law.<sup>60</sup> In total, the Privy Council disallowed only approximately 5.5% of all colonial legislative proposals—a quantitative indication of the extent to which English law, even as it was practiced in the colonies, prioritized local preference, sovereignty, and first principles of justice.<sup>61</sup>

Given this history, it is not surprising that after the colonies declared their independence, the founders worried about how their respective states’ local customs would be protected under the new federal Constitution. Some state leaders anticipated the problem and attempted to remedy it through provisions in the state constitutions that endorsed English common law and its preference for local practice.<sup>62</sup> Others explicitly adopted provisions in their state bills of rights or state constitutions that prohibited cruel and unusual punishment and, in some instances, that prohibited specific kinds of cruelty—further illustrating the extent to which the founders were concerned about protecting the ability of states to carry out punishments according their own rules and customs, without fear that the federal government might

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<sup>58</sup> *Id.* at 85.

<sup>59</sup> Charter of Carolina ¶ 6 (Mar. 24, 1663).

<sup>60</sup> For example, in 1705, the Pennsylvania assembly passed a law authorizing the use of holographic wills, which were widely used thereafter in the colony, even though the British Statute of Frauds and Perjuries plainly forbade them. Stoebeck, *supra* note 55, at 419–20. Other laws, arguably less obviously in conflict with English law, were annulled. For example, in 1766, the Privy Council recommended the repeal of a North Carolina law that authorized “any person whatever to kill and Destroy” fugitives because the law was of “a very extraordinary and dangerous nature” and was therefore “contrary to the Spirit and principle of the British Laws.” Munro, Acts of the Privy Council V, 38 (1766).

<sup>61</sup> ELMER BEECHER RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL 221 (1915).

<sup>62</sup> See *supra* note 22 and accompanying text.

attempt to impose different, more severe punishment on their citizens.<sup>63</sup>

The topic was a regular source of debate at conventions on the federal Constitution. At the New York convention, for example, Melancton Smith expressed his concern to Alexander Hamilton that “[a] general law . . . which might be well calculated for Georgia, might operate most disadvantageously and cruelly upon New York.”<sup>64</sup> In Virginia, Patrick Henry insisted that a bill of rights was essential because under the draft Constitution, members of the federal congress “[were] not restrained from inflicting unusual and severe punishments, though the bill of rights of Virginia forbids it.”<sup>65</sup> Four days later, on another crusade for the bill of rights, Henry invoked the story of the Russian Ambassador, described above, as an example of “a person [having been] treated in the most horrid manner, and most cruelly and inhumanly tortured,” and questioned whether “the security of territorial rights [could] grant him redress.”<sup>66</sup>

After each of these speeches, delegates defended the draft constitution by explaining how, in their view, the federal

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<sup>63</sup> For example, Virginia’s 1788 bill of rights included the following language: “That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 658 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter THE DEBATES III]. See also, e.g., MASSACHUSETTS BODY OF LIBERTIES 267 (1641) (“For bodilie [sic] punishments we allow amongst us none that are inhumane, Barbarous, or cruel.”); R.I. CONST. art. I § 8 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted; and all punishments ought to be proportioned to the offense.”); DEL. CONST. art. I § 11 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted; and in the construction of jails a proper regard shall be had to the health of prisoners.”); ME. CONST. art. I § 9 (“Sanguinary laws shall not be passed; all penalties and punishments shall be proportioned to the offence; excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.”). But see Laurence Claus, *The Anti-Discrimination Eighth Amendment*, 28 HARV. J.L. PUB. POL. 119, 133–34 (2004) (noting that various states adopted language that mirrored the Eighth Amendment or appeared even to go beyond it but arguing that such language was “constitutional ‘boilerplate’” (quoting Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” [sic] *The Original Meaning*, 57 CALIF. L. REV. 839, 840 (1969)).

<sup>64</sup> 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 262 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter THE DEBATES II] (statement of Melancton Smith).

<sup>65</sup> THE DEBATES III, *supra* note 63 at 412 (statement of Patrick Henry). At the same debate, while advocating for a bill of rights that protected Virginians from the federal government, Henry posed the following rhetorical question: “What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment.” *Id.* at 447 (statement of Patrick Henry).

<sup>66</sup> *Id.* at 512 (statement of Patrick Henry).



government would accommodate states' preferences. First, in response to Melancton Smith, Alexander Hamilton countered that "there might be more force in [his] objection" if federal laws were "to penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals" and then assured him that "the same spirit of accommodation, which produced the plan under discussion, would be exercised in lessening the weight of unequal burdens."<sup>67</sup> To assuage Henry's concerns about "cruel and ignominious punishments" inflicted on state militias, James Madison predicted, "If a change be necessary to be made by the general government, it will be in our favor" because "[t]he militia law of every state to the north of Maryland is less rigorous than the particular law of this state" and "the people of those states would not agree to be subjected to a more harsh punishment than their own militia laws inflict."<sup>68</sup> Finally, in response to Henry's invocation of the Russian Ambassador, James Madison delivered the clearest message that the federal government would not subject people to punishments forbidden by state constitutions:

As to the case of the Russian ambassador, I shall say nothing. It is as inapplicable as many other quotations made by the gentleman. I conceive that, as far as the bills of rights in the states do not express any thing [sic] foreign to the nature of such things, and express fundamental principles essential to liberty, and those privileges which are declared necessary to all free people, *these rights are not encroached on by this government.*<sup>69</sup>

## B. Early Post-Revolution Sentencing Practices in the United States

The founders' concerns about protecting local practice produced an early system of criminal law that accommodated states' unique interests. Each state developed its own criminal code, while the federal government asserted jurisdiction over criminal matters only when they involved a uniquely federal interest.<sup>70</sup> As a result, the federal government rarely

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<sup>67</sup> THE DEBATES II, *supra* note 64, at 268 (statement of Alexander Hamilton).

<sup>68</sup> THE DEBATES III, *supra* note 63, at 414 (statement of James Madison).

<sup>69</sup> *Id.* at 516 (emphasis added) (statement of James Madison).

<sup>70</sup> See *United States v. Hudson*, 11 U.S. 32, 34 (1812) ("[A]ll exercise of criminal jurisdiction in common law cases we are of opinion is not within [the federal courts'] implied powers."); see also Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1292 (1985) ("Congress, in short, was denied the power to grant a federal court the kind of common-law criminal jurisdiction that a court in England or one of the states would have.").

prosecuted criminal cases in general and carried out even fewer executions. When the federal government did impose the ultimate penalty, it did so for crimes that threatened the young country's sovereign interests—piracy, assaults on the mail system, murder on the high seas. The first federal legislation that authorized the death penalty, the Crimes Act of 1790,<sup>71</sup> illustrates this point.

Piracy, counterfeiting, and mail robbery plagued the young country, threatening the earliest institutions of government and undermining federal sovereignty,<sup>72</sup> and these crimes were, therefore, explicitly considered to be acts “against the United States.”<sup>73</sup> The first Congress passed the Crimes Act against this backdrop, and the legislation was an attempt to regulate only criminal activity that involved matters of “special federal interest.”<sup>74</sup> Consistent with the founders' view of “crime [as] a matter of principally local interest and impact,” the 1790 act left police power for the vast majority of criminal conduct to the states.<sup>75</sup>

The Crimes Act defined twenty-three substantive offenses but authorized the death penalty for just four types of crime<sup>76</sup>:

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<sup>71</sup> Crimes Act of 1790, 1 Stat. 112, 112.

<sup>72</sup> For example, when members of the House debated various aspects of the 1790 Act, including whether to retain the death penalty for counterfeiting, proponents of retaining the penalty argued that forgery and counterfeiting were sufficiently serious crimes to warrant death because they were “crime[s] against the most important interests of society, and of a peculiarly malignant tendency in the present and probable situation of the United States.” 1 Annals of Congress 1521 (April 7, 1789); see also, e.g., TRIAL OF WILLIAM BUTLER FOR PIRACY 15 (1813) [hereinafter TRIAL OF WILLIAM BUTLER] (“[T]he people of the United States, having surrendered to the general government, those powers which are the distinguishing attributes of sovereignty, in the intercourse of nations; it became necessary that the general government should be vested with such powers as would enable them to punish offences on the High-Seas and against the Law of Nations.”).

<sup>73</sup> Crimes Act of 1790, 1 Stat. 112, 112.

<sup>74</sup> See Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1138 (1995).

<sup>75</sup> *Id.*

<sup>76</sup> As others have noted, because the federal death penalty has always been a product of diverse statutory enactments (as opposed to a single law), the number of federal crimes for which death is a possible punishment depends on how one counts. See Little, *supra* note 18, at 363 n.68, 391 nn. 241-42.

treason,<sup>77</sup> intentional murder on federal property,<sup>78</sup> piracy,<sup>79</sup> and counterfeiting or forgery.<sup>80</sup> The first Post Office Act, passed in 1792, added mail robbery to the list.<sup>81</sup> Murder and piracy could only be federally prosecuted if they occurred in a “place or district of country, under the sole and exclusive jurisdiction of the United States” or “in any place out of the jurisdiction of any particular state,” respectively.<sup>82</sup> Later interpretations of the Act confirm that it was understood at the time as a means by which Congress could, consistent with the federal government’s limited authority to regulate criminal activity, gap fill the country’s network of criminal law, so as to not leave some serious crimes beyond the reach of any criminal prosecution.<sup>83</sup> But the Act was plainly not intended to interfere in the states’ ability to regulate crimes within their jurisdiction; as Chief Justice Marshall explained in reference to the piracy provisions of the Act of 1790, “If there be a common jurisdiction, the crime cannot be punished in the courts of the union.”<sup>84</sup>

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<sup>77</sup> Crimes Act of 1790, 1 Stat. 112, 112, § 1 (“[T]reason . . . shall suffer death.”); *see also* U.S. CONST. art. III, § 3 (Congress may “declare the [p]unishment of [t]reason”).

<sup>78</sup> Crimes Act of 1790, 1 Stat. 112, 113, § 3 (“[I]f any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful [sic] murder, such person or persons on being thereof convicted shall suffer death.”).

<sup>79</sup> Crimes Act of 1790, 1 Stat. 112, 114, § 9 (any person convicted of “piracy or robbery . . . upon the high sea . . . shall suffer death”); *see also* Crimes Act of 1790, 1 Stat. 112, 114, § 10 (setting the penalty for accessory to piracy at death).

<sup>80</sup> Crimes Act of 1790, 1 Stat. 112, 115, § 14 (any person convicted of “forging or counterfeiting any certificate, indent, or other public security of the United States . . . shall suffer death”).

<sup>81</sup> Post Office Act of 1792, 2 Stat. 232, 237, § 17 (“[I]f any person or persons shall rob any carrier of the mail of the United States, of such mail, or if any person shall rob the mail, in which letters are sent to be conveyed by post, of any letter or packet, or shall steal such mail, or shall steal and take from or out of the same, or from or out of any post-office, any letter or packet, such offender or offenders shall, on conviction thereof, suffer death.”); *see also* Act of April 30, 1810, 11 Stat. 592, 598, § 19 (mandating a sentence of death only for a second or successive mail robbery or for a mail robbery in which the offender put the postman’s “life in jeopardy”).

<sup>82</sup> Crimes Act of 1790, 1 Stat. 112, 113–14, §§ 3, 8.

<sup>83</sup> *E.g.*, *United States v. Bevans*, 16 U.S. 336, 344 (1818) (describing “the intent of the act of Congress” as ensuring “that the crime would not go unpunished, even if the authority of the United States should not interfere”).

<sup>84</sup> *See id.* at 387 (vacating a conviction of murder from the United States District Court for the District of Massachusetts because although the murder took place on board an American ship, the ship was docked in a harbor that was “unquestionably within the original territory of Massachusetts”); *see also Ex parte Ballinger*, 88 F. 781, 783 (D. Va. 1882) (quoting “Mr. Bishop, the best writer on criminal Law,” for the proposition that “the dominion of the state and the

As a result, for the first decades of the country's existence, the federal death penalty was rare, both because the first Congress authorized it only under very limited circumstances, and because juries and presidents were hesitant to see it carried out. Between 1790 and 1829, there were only 138 federal capital trials.<sup>85</sup> Of those, 118 resulted in convictions; sixty-four of the 118 condemned men were pardoned; forty-two were executed; six went "unaccounted for"; three died in custody; two escaped; and one died by suicide.<sup>86</sup> Moreover,

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common-law jurisdiction of their courts are practically almost as exclusive as if congress had no constitutional authority in exceptional localities there"); *United States v. Jackalow*, 66 U.S. 484, 488 (1861) (vacating a conviction for piracy where the indictment did not specify "whether or not the offence was committed out of the jurisdiction of a State").

There was extensive debate in the first several decades after the founding about the scope of the federal government's authority under the Act of 1790 and the amendments that followed. For example, through the mid-1800s, defense attorneys argued (sometimes successfully) that the federal government could not prosecute piracy unless the crime took place "on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner." JACOB D. WHEELER, 1 REPORTS OF CRIMINAL LAW CASES WITH NOTES AND REFERENCES; CONTAINING, ALSO, A VIEW OF THE CRIMINAL LAWS OF THE UNITED STATES xxx (1824). A murder committed "on board a ship of the line of the United States" but "in a harbour, within the territory of a state," was not prosecutable under the Act of 1790, nor was robbery committed on a foreign vessel against a foreign citizen. *Id.* at xxix; *see also, e.g.*, *United States v. Palmer*, 16 U.S. 610, 641-42 (1818) ("Congress can inflict punishment on offences committed on board the vessels of the United States, or by citizens of the United States, any where [sic]; but congress cannot make that piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offences."); TRIAL OF WILLIAM BUTLER, *supra* note 72 (dismissing an indictment against William Butler, the captain of the Privateer Revenge, for robbery on the high seas because "Maritime offences can only be punished under a Law of Congress; and that the Law in this case is defective inasmuch as it goes to punish with Death, offences on the High-Seas, only in those cases in which the same offences would be punished with Death if committed on the Land: And consequently as the crime of Robbery is not made punishable by the Laws of the United States, the Prisoner's case is unprovided for"). Given the significance—life or death, *see Judicial Decision*, LOUISVILLE DAILY J., Apr. 26, 1884, at 3A (describing two cases, one in which the federal government had jurisdiction, and the outcome was an execution, and one in which the federal government lacked jurisdiction, producing the dismissal of twenty-five indictments)—of the jurisdictional question, it is not surprising that active debate continues about the scope of federal criminal jurisdiction. *See, e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2453 (2020) (holding that the Major Crimes Act deprived the state of Oklahoma of criminal jurisdiction over prosecutions against members of the Creek Nation on the Creek Reservation); *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2491 (2022) (holding that the federal government and the states have concurrent jurisdiction to prosecute non-Indians for crimes committed against Indians in Indian country).

<sup>85</sup> Little, *supra* note 18, at 366 (citing H.R. EXEC. NO. 20-146 (1829), reprinted in H.R. REP. NO. 53-545, app. at 6 tbl.1).

<sup>86</sup> *Id.* at 366 n.87 (citing H.R. EXEC. NO. 20-146 (1829), reprinted in H.R. REP. NO. 53-545, app. at 6 tbl.1). This count appears to exclude prosecutions in Washington, D.C., of which there was only one before 1829. *See Washington's*

from the time of the founding until at least the late 1800s, no federal prisoners were executed for crimes that could have been prosecuted by states, and with the exception of a small handful of executions in Washington, D.C., the approximately seventy-five federal executions carried out before the Civil War were all imposed for some form of piracy or armed robbery of the United States mail.<sup>87</sup>

This is not to say that the death penalty was rare in the country's early years; quite to the contrary. But a fundamental assumption upon which the Constitution and the first acts of Congress rested was that the federal government would play a very limited role in maintaining law and order, leaving the states to pursue their own criminal law as "an expression of local mores and concerns."<sup>88</sup> Accordingly, the states, applying their own procedural and substantive rules, occupied the field of crime and punishment. Between 1790 to 1829, when the federal government executed only forty-two people, the states carried out an estimated 779 executions, and did so for crimes against people (e.g., murder and rape), property (e.g., arson, forgery, and horse stealing), and the social order (e.g., inciting slave revolts, aiding the escape of enslaved people).<sup>89</sup>

Simply put, the federal death penalty at its inception was intended to apply in only a very narrow category of cases, where the punishment would deter crimes against the United States. The federal government's criminal jurisdiction was highly constrained, and even in circumstances where the federal government had an overriding interest, state authority predominated.<sup>90</sup> The result was that, until the 1990s, the

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*Old Jail and Its First Prisoner*, WASH. TIMES, May 19, 1895, at 10 (describing the execution of James McGirk, which involved the construction of a gallows "at the foot of Capitol Hill, between Pennsylvania and Maryland avenues" because McGirk was the first prisoner executed in Washington, D.C.).

<sup>87</sup> See *infra* Part II for a detailed empirical analysis of the federal death penalty and a description of the methods used to come by these numbers.

<sup>88</sup> Brickey, *supra* note 74, at 1138.

<sup>89</sup> M. WATT ESPY & JOHN ORTIZ SMYKLA, EXECUTIONS IN THE UNITED STATES, 1608-2002: THE ESPY FILE (2004), <https://doi.org/10.3886/ICPSR08451.v5> [<https://perma.cc/E3F4-EU74>].

<sup>90</sup> Perhaps the most obvious example is the execution of Leon Czolgosz in 1901, for the assassination of President William McKinley. Czolgosz was prosecuted under New York's first-degree murder statute and sentenced to death by a state jury after deliberating for less than three hours. See LeRoy Parker, *The Trial of the Anarchist Murderer Czolgosz*, 11 YALE L.J. 80, 81, 89 (1901). At the time, the federal murder statute did not extend to the killing of federal agents on state property, see Act of March 4, 1909, Pub. L. No. 350, 35 Stat. 1088, 1143, § 273, so the only way the federal government could have prosecuted Czolgosz would have been by military commission, as in the execution of the purported assassins of President Lincoln. See Lederman, *supra* note 16, at 323.

federal death penalty was used nearly exclusively to prosecute and punish murders that states could not reach. This is no longer true.

## II

### THE FEDERAL DEATH PENALTY BY THE NUMBERS

The modern federal death penalty bears almost no resemblance to the federal death penalty that existed at the time of the founding, except for the fact that federal executions remain relatively uncommon. At the time of the founding, the penalty was authorized for roughly five categories of offenses; today, the penalty is authorized for more than two-dozen kinds of offenses.<sup>91</sup> At the time of the founding, the penalty was imposed primarily against pirates who would not or could not otherwise be prosecuted by another sovereignty; today, the penalty is almost exclusively imposed for conduct that can (and often is) prosecuted by the states. And at the time of the founding, the federal death penalty was only pursued in circumstances where the federal government had some special interest or where federal sovereignty was threatened, while the penalty today is used primarily to accomplish political ends, regardless of the nature of the interests in question.<sup>92</sup> Those

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<sup>91</sup> *E.g.*, 8 U.S.C. § 1324(a)(1)(B)(iv) (bringing in and harboring certain aliens resulting in death); 18 U.S.C. §§ 32–34 (destruction of aircraft, motor vehicles, or related facilities resulting in death); *id.* § 36 (murder during a drug related drive-by shooting); *id.* § 37 (murder at an airport serving international civil aviation); *id.* §§ 241, 242, 245, 247 (civil rights offense resulting in death); *id.* § 794 (espionage); *id.* § 930 (murder in a federal facility); *id.* § 1091 (genocide); *id.* § 1118 (murder by a federal prisoner); *id.* § 1201 (kidnapping resulting in death); *id.* § 1203 (hostage-taking resulting in death); *id.* § 1513 (retaliatory murder of a witness, victim, or informant); *id.* § 1716 (mailing of injurious articles resulting in death); *id.* § 1751 (assassination of the president, vice president, or a member of their staff, or kidnapping resulting in their death); *id.* § 1958 (murder-for-hire); *id.* § 1959 (murder in furtherance of racketeering activity); *id.* § 1992 (terrorist attack on a railroad carrier or mass transportation vehicle resulting in death); *id.* § 2119 (carjacking resulting in death); *id.* § 2251 (child sexual trafficking, pornography, or exploitation resulting in death); *id.* § 2381 (treason); 21 U.S.C. § 848(e) (murder related to a continuing criminal enterprise); 49 U.S.C. § 46502 (aircraft piracy resulting in death).

<sup>92</sup> A good example is the Obama Administration's decision to pursue the death penalty against Dylann Roof in South Carolina, despite the fact that South Carolina retains the death penalty and was prepared to pursue a capital sentence against Roof, and despite the wishes of many of the surviving victims. See Alan Blinder & Kevin Sack, *Dylann Roof Is Sentenced to Death in Charleston Church Massacre*, N.Y. TIMES (Jan. 10, 2017), <https://www.nytimes.com/2017/01/10/us/dylann-roof-trial-charleston.html> [<https://perma.cc/YJU9-Q7ET>]. Another example is the Trump administration's execution spree in the leadup to the 2020 election, an apparent effort to draw a contrast between his platform and that of his Democratic opponents. See Isaac Arnsdorf, *Inside Trump and Barr's Last-*

differences are of constitutional significance, because they illustrate the extent to which the modern federal death penalty is inconsistent with the founding-era understanding of the Eighth Amendment. And the differences matter because they illustrate the extent to which the federal death penalty today is highly unusual.

This Part offers a descriptive assessment of the federal death penalty over time. It begins with an overview of an empirical analysis of all known federal executions, based on a newly developed database,<sup>93</sup> and describes five historical periods of the federal death penalty: the post-revolution era, when most federal executions took place in New England for the crime of piracy; the post-Civil War era, when westward expansion brought the federal death penalty to the territories, and when a single judge oversaw more than a quarter of all federal executions ever; the period from 1900 to the end of the Second World War, when nearly all federal executions were for

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*Minute Killing Spree*, PROPUBLICA (Dec. 23, 2020), <https://www.propublica.org/article/inside-trump-and-barrs-last-minute-killing-spree> [<https://perma.cc/D27U-62J8>].

<sup>93</sup> Other lists of federal executions exist, including the notorious Espy files and a significantly more comprehensive and accurate list compiled and maintained by Professor William Lofquist. See *Project Overview*, FED. DEATH PENALTY PROJECT, <https://federaldeathpenaltyproject.org/about/> [<https://perma.cc/E2GQ-RG9Q>] (last visited Apr. 29, 2022). Professor Lofquist's list, which he describes as a "graveyard" of federal executions, "a place to bring together all of those who have been executed and to see what meaning may be made of their killings," grew out of the shared observation that very little is known about the history of the federal death penalty. *Id.* Professor Lofquist's list, however, excludes executions carried out in Washington, D.C. To my knowledge, the database appended to this Article is the first complete attempt to document all federal executions, with the exception of executions carried out by military authorities or following military commissions.

In order to build the database, I began with the Espy files and reviewed the executions listed there as having been carried out by the federal government. Some of the executions listed in the Espy database were never carried out because the sentences were commuted or because the person was pardoned and others could not be confirmed (for example, there is no evidence in any newspaper or court document that four people, including two women, were hanged in San Francisco in 1890—an event that almost certainly would have garnered extensive publicity at the time). From there, I conducted an exhaustive series of searches on WestLaw for federal cases addressing murder or death sentences, and I reviewed available charging documents from the Library of Congress's criminal case records, available through [ancestry.com](https://ancestry.com). I then searched newspaper archives at the Library of Congress's website (<https://chroniclingamerica.loc.gov/>) and at [newspapers.com](https://newspapers.com). Finally, I reviewed congressional reports that described federal death sentencing practices to confirm that the number of death sentences I documented was consistent with those reported contemporaneously. Of course, the database is almost certainly incomplete, but it is at least a starting point for understanding the broad patterns of the federal death penalty over time.

murders in Washington, D.C.; the period from World War II until *Furman v. Georgia* in 1972, which saw a dramatic decline in the use of the federal death penalty, even as sources of statutory law authorizing it grew; and the modern era, which is dominated by the thirteen Trump executions. Part II concludes with a summary of the eighty-six modern era death sentences imposed by the federal government.

### A. Overview

Since 1790, the federal government has carried out at least 350 executions. Of those, approximately 104 occurred in Washington, D.C., a jurisdiction that is, in many ways, more appropriately treated like a state—prosecutions in Washington, D.C., were largely for local kinds of offenses, and the district’s criminal code was nearly identical to a state criminal code. However, because criminal trials in Washington, D.C., were for most of the country’s history held in federal courts, prosecuted by the Department of Justice, pursuant to federal law, and were reviewed by federal courts of appeal and the federal executive branch during the clemency process, they are included as part of this analysis but treated as distinct. The following two charts show the number of federal executions by year; the first includes executions from Washington, D.C., and the second excludes those.

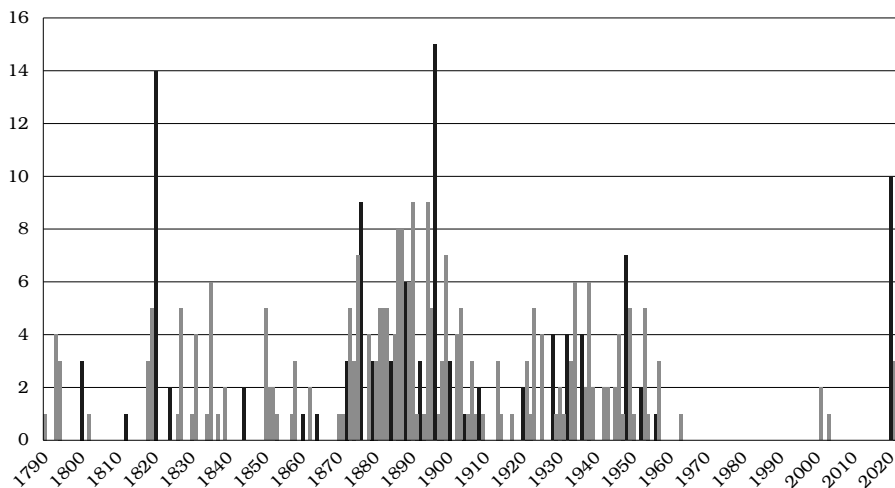


Chart 1: Federal executions from 1790 to 2021, including executions in Washington, D.C. Black lines indicate an election year.



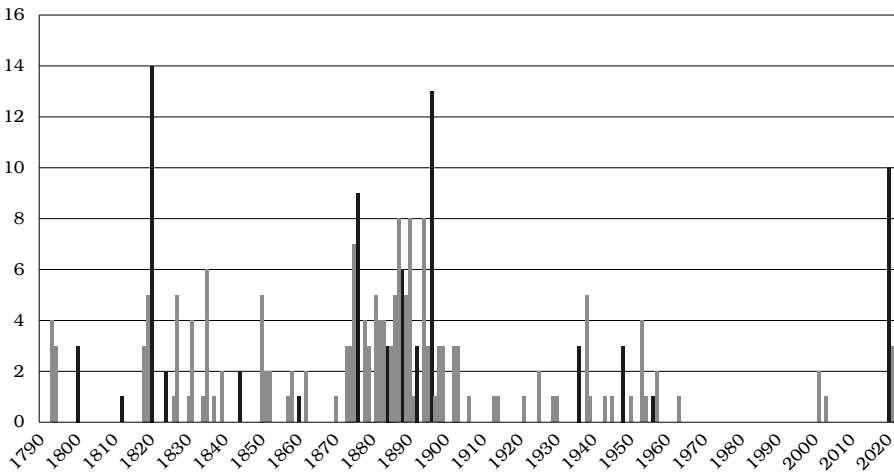


Chart 2: Federal executions from 1790 to 2021, excluding executions in Washington, D.C. Black lines indicate an election year.

The largest number of executions took place in the forty-year block between 1870 and 1910, when the country was rapidly industrializing and when international immigration generated a sense of economic threat in American cities. This time period also saw the most consistent application of the federal death penalty, with executions taking place nearly every year between 1875 and 1900. Otherwise, however, the administration of the penalty has been temporally relatively spotty, with years passing between executions, although one significant pattern does jump out: more executions take place during election years. The four years with the highest numbers of federal executions were presidential election years, and with the exception of the election of 1820, they were highly contested and bitterly fought elections.

	<i>Number of executions</i>	<i>Voter turnout</i> <sup>94</sup>
1820	14	unknown
1876	9	81.8%
1896	15	79.3%
2020	10	61.7

<sup>94</sup> *Voter Turnout in Presidential Elections*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/data/voter-turnout-in-presidential-elections> [perma.cc/42GU-XTN@] (last visited Dec. 4, 2022); *However You Measure It, Voter Turnout Jumped in 2022*, Pew Rsch. Ctr. (Jan. 28, 2021), <https://www.pewresearch.org/fact-tank/2021/01/28/turnout-soared-in-2020-as->

The 2020 executions were, in this way, as in many others, an historic anomaly; only two other years in the country's history saw more executions, and no year in the 20th or 21st century even came close.

The historical periods also correspond roughly with geographic regions, at least until the modern era, in another reflection of the politics of the federal death penalty.

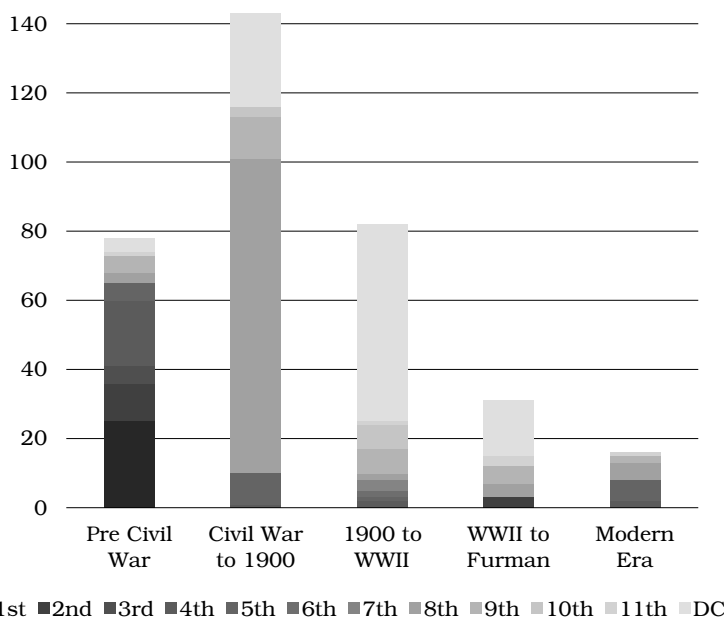


Chart 3: Distribution of federal executions by modern circuit over five historical periods.

Finally, any overview of the death penalty in the United States would be incomplete without mention of race. The federal death penalty has always been—and continues to be—implemented in a racially discriminatory manner. Specifically, despite the fact that America has always been a white majority country,<sup>95</sup> since 1790, fewer than half of the executions carried

nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president/ft\_21-01-19\_2020turnout\_1a/ [perma.cc/CJ9M-PY2A].

Voter turnout is reflected as a percentage of the eligible voting-age population and is used here as a rough proxy for public investment in the election. Although voter turnout in 2020 appears low compared to the numbers from the 19th century, the 2020 turnout was the highest rate in approximately sixty years.

<sup>95</sup> See Gary D. Sandefur, Molly Martin, Jennifer Eggerling-Boeck, Susan E. Mannon & Ann M. Meier, *An Overview of Racial and Ethnic Demographic Trends*, in 1 AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 43–45 (2001). It is worth noting that the “race” categories I have assigned the individuals executed by the federal government may not accurately correspond to the way in which the condemned would have identified while alive. For example, multiple sailors

out by the federal government were carried out against white people.

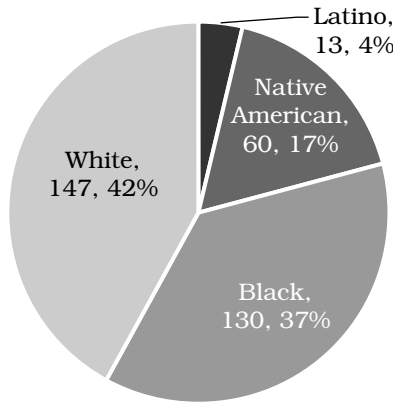


Chart 4: Race of individuals executed by the federal government, 1790 to 2021.

Black and Native American people have always been disproportionately represented among people executed by the federal government, and this was especially true in the 100 years from the end of the Civil War to *Furman*.

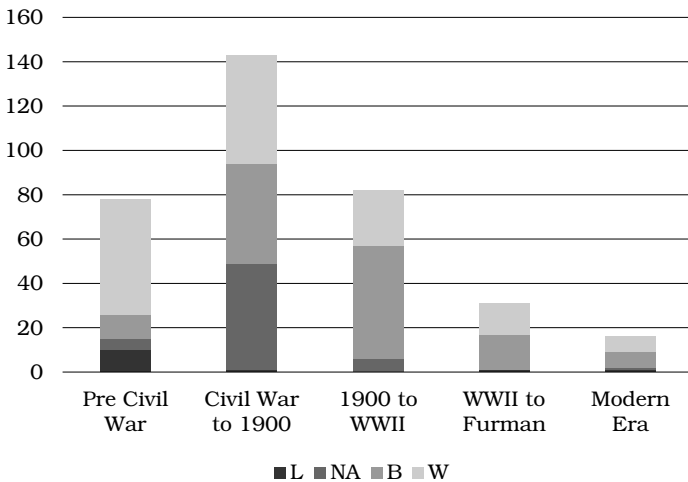


Chart 5: Race of individuals executed by the federal government, by era.

executed in the pre-Civil War period were from Spanish-speaking countries and required interpreters. See, e.g., A BRIEF SKETCH OF THE OCCURRENCES ON BOARD THE BRIG CRAWFORD, ON HER VOYAGE FROM MATANZAS TO NEW-YORK 7 (1827) (describing how an interpreter was needed to read prisoners accused of piracy their rights). I categorized these people as Latino, although if they were alive today, they might identify otherwise.

Adding victim race to the analysis makes the effect even starker. Of the 254 people executed by the federal government for single-victim offenses, 200 (78.7%) had a white victim. In the time periods when executions were carried out most disproportionately against non-white people, the victims were overwhelmingly white—again, a reflection of the politics of the federal death penalty and the fact that it has always been used as a tool of social control.<sup>96</sup>

## B. The Five Eras of the Federal Death Penalty

As the charts above illustrate, the federal death penalty breaks down into five rough periods, based on surges in executions; geographic distributions of executions; and political and demographic changes that contributed to broad patterns in American life. For example, in the pre-Civil War period, more than two-thirds of all federal executions (70.5%, or fifty-five of seventy-eight) took place in jurisdictions that correspond to the modern First, Second, and Fourth Circuits—jurisdictions with large port cities that prosecuted pirates when they were brought to the United States. Unsurprisingly, almost all of the seventy-eight federal executions during this period were for piracy. The handful of exceptions were six executions for robbery of the federal mail;<sup>97</sup> the executions of five Cayuse Indians following a procedurally defective trial, based wholly on circumstantial evidence and in the wake of a war between

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<sup>96</sup> For a discussion of the death penalty as a means of race-based social control, see generally James D. Unnever, Francis T. Cullen & Cheryl Lero Jonson, *Race, Racism, and Support for Capital Punishment*, 37 *CRIME & JUST.* 45, 45 (2008) (“[A]nimosity to racial or ethnic minorities predicts support for capital punishment . . .”). See also Ryan D. King & Darren Wheelock, *Group Threat and Social Control: Race, Perceptions of Minorities and the Desire to Punish*, 85 *SOCIAL FORCES* 1255, 1255 (2007) (“[N]ewly collected data suggests that individual perceptions of African Americans as threatening to economic resources is a strong predictor of punitive attitudes.”).

<sup>97</sup> Only six people were ever executed for this offense. Three of them were convicted of killing the postal worker in the process, while three others were executed for robbery alone. They were all white, as were their victims. Four of the executions were for robberies in Baltimore, one in eastern Pennsylvania, and one in Mobile, Alabama. See Thomas Ruys Smith, *The Dying Confession of Joseph Hare: Transatlantic Highwaymen and Southern Outlaws in the Antebellum South*, in *THE OXFORD HANDBOOK OF THE LITERATURE OF THE U.S. SOUTH* 1–26 (Fred Hobson & Barbara Ladd eds., 2016) (detailing the life and execution of Joseph Thompson Hare and his codefendant, James Alexander, in 1818); *Execution*, *CHARLESTON COURIER*, July 22, 1820, at 2A (noting the executions of Morris Hull and Peregrine Hutton in Baltimore in 1820); *Indictment*, *United States v. Hutton*, No. xx (May 3, 1820); JOHN MORTIMER, *THE MAIL ROBBERS: REPORT OF THE TRIALS OF MICHAEL MELLON, THE LANCASTER MAIL ROBBER; AND GEORGE WILSON AND JAMES PORTER ALIAS MAY, THE READING MAIL ROBBERS* 23 (1830) (detailing a synopsis of the six bills of indictment against James Porter); *Execution*, *U.S. GAZETTE*, July 2, 1830, at A2.

white settlers and Indian tribes;<sup>98</sup> two white men hanged, who protested their innocence, for the murder of a Mexican trader in St. Louis;<sup>99</sup> the first person executed in the newly formed Western District of Arkansas;<sup>100</sup> and four executions for murders that occurred in Washington, D.C., three of which involved domestic violence.<sup>101</sup> The remainder of the federal executions before the Civil War were for piracy,<sup>102</sup> and as a result, the people executed were often foreign-born.

This period was also defined by a mandatory death penalty statute and resulting reluctance to convict, judicial chaos surrounding the scope of federal jurisdiction, and the relatively informal development of trial and execution procedure.<sup>103</sup> At

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<sup>98</sup> See generally RONALD B. LANSING, *JUGGERNAUT: THE WHITMAN MASSACRE TRIAL 1850* (1993) (describing the 1847 deaths of Missionaries Marcus and Narcissa Whitman and the 1850 murder trial of five Cayuse Indians); DETROIT FREE PRESS, Aug. 26, 1850, at A2; *The Historical Setting*, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, <https://www.ctuir.org/about/brief-history-of-ctuir/> [<https://perma.cc/9WHF-4XYJ>] (last visited July 24, 2022).

<sup>99</sup> *To the World*, BROOKLYN DAILY EAGLE, Aug. 28, 1844, at 2 (last words of John McDaniel); *Execution of John McDaniel and Joseph Brown*, WHIG STANDARD, Aug. 26, 1844 at 2 (describing the executions of John McDaniel and Joseph Brown and noting that “[b]oth died with protestations of innocence”).

<sup>100</sup> S.W. HARMAN, *HELL ON THE BORDER; HE HANGED EIGHTY-EIGHT MEN* 99–100 (1898).

<sup>101</sup> *The Trial of Cornelius Tuell for the Murder of His Wife—He is Found Guilty*, EVENING STAR, Apr. 18, 1864, at 3 (detailing the execution of Cornelius Tuell for killing his wife); *Execution of James Powers*, DETROIT FREE PRESS, July 2, 1858, at 1 (detailing the execution of James Powers for shooting another man on the street); *Extraordinary Scene in Court*, LANCASTER EXAMINER, June 29, 1853, at 1 (detailing the death sentence of Daniel T. Woodward for shooting and killing his wife on Christmas Eve); *At the Foot of the Hill*, EVENING STAR, May 14, 1892, at 8 (detailing the execution of James McGirk for “the crime of wife murder”).

<sup>102</sup> One of these cases warrants some skepticism. On July 13, 1860, Albert Hicks was purportedly executed on what is now Ellis Island in New York, for robbery on the high seas and for the murders of George Burr, Oliver Watts, and Samuel Watts aboard an oyster sloop. See *Indictment, United States v. Hicks*, No. 212 (Apr. 13, 1860); *THE TRIAL OF ALBERT W. HICKS, FOR PIRACY* 16 (1860). However, in the months after Hicks was supposedly killed, newspapers began publishing reports that he might have survived the hanging and was alive—but only barely—at his sister’s home. *Rumored Resuscitation of Hicks the Pirate*, WYANDOT PIONEER, Sept. 6, 1860, at 1A. According to these reports, “Hicks was only pulled up a distance of two and a half feet—utterly insufficient to break his neck.” *Id.* Although he was declared dead thirteen minutes after the hanging began, his body was wrapped in warm blankets and subjected to “various experiments,” including electrocution. *Id.* Supposedly, Hicks returned to life but was unable to speak and lost the use of his left eye, arm, and leg. In this condition, he was “conveyed” to his sister’s home. *Id.* There is no way to assess the veracity of this story, but it seems nearly certain that however Hicks ultimately died, his death was hastened by the efforts of the federal marshal and his execution is therefore included in the database.

<sup>103</sup> The first federal execution is illustrative. For a detailed description of the case, see Jerry Genesio, *The Trial and Execution of Thomas Bird in Portland, Maine, 1790: The First Execution Under the United States Constitution*, 42 MAINE

the same time, there was a burgeoning abolitionist movement, driven at least in part by the public perception that the unpredictability of the death penalty undermined its penological goals.<sup>104</sup> States in the northeast began to reduce their use of the death penalty during this period. Massachusetts, for example, authorized fourteen capital offenses from 1736 until 1780,<sup>105</sup> but between 1805 and 1852, the state legislature reduced the number of capital offenses until it left only first-degree murder.<sup>106</sup> Efforts to carry out executions in these states became increasingly difficult and politically untenable.<sup>107</sup> Thus, as the threat of piracy receded,

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HIST. 199, 199 (2006). Briefly, Thomas Bird was indicted in the District of Maine for the “piratical murder” of Captain John Connor, the master of the English slave-trading ship *Mary*. *Id.* When authorities captured the ship off the coast of Maine, they arrested three men—Bird, a British citizen; Hans Hanson, a Norwegian citizen; and an American named Josiah Jackson. *Id.* Jackson was released, while Bird and Hanson were confined in the local jail for more than a year. *Id.* at 208. When the case finally came to trial, it lasted only five hours. *Id.* The jury, made up of residents of the southern Portland town of Cape Elizabeth, had nearly all survived a devastating British naval attack on their town during the Revolutionary War just fifteen years prior. *Id.* at 213. They convicted Bird, condemning him to hang, while acquitting his Norwegian codefendant, Hanson. *Id.* at 208–09. Less than a month before Bird was to die, he sent a letter to President Washington seeking executive clemency. Letter from Thomas Bird to President George Washington (June 5, 1790), <https://founders.archives.gov/documents/Washington/05-05-02-0299> [<https://perma.cc/6755-G9BW>]. Washington, unsure of how to approach the request, sought advice from John Jay, the first Chief Justice of the Supreme Court. Letter from Chief Justice John Jay to President George Washington (June 13, 1790), <https://founders.archives.gov/documents/Washington/05-05-02-0326> [<https://perma.cc/MYK6-YJNZ>]. But Chief Justice Jay was an unsympathetic audience, and he instructed Washington to allow the execution to proceed, noting that “[t]he Silence of the british [sic] cabinet on the Subject” could be a signal of “Doubts of what might be the opinion of Parliamt [sic] on some of the commercial, and perhaps other Points.” *Id.*

<sup>104</sup> Little, *supra* note 18, at 367–69 (discussing efforts by Newton M. Curtis, a Congressional representative, who pushed for the abolition of the federal death penalty using a report that highlighted the problems with the penalty’s administration, including his assessment that the conviction rate in federal capital cases fell from 85% in 1826 to less than 20% in 1897 and his claim that the failures of the statutory penalty included spill-over to “Judge Lynch’s Court”).

<sup>105</sup> They were: burglary; robbery; piracy; counterfeiting; arson; stealing; infanticide; rape; polygamy; sodomy/bestiality; dueling resulting in death; murder; treason; and being a Jesuit. Gabriele Gottlieb, *Theater of Death: Capital Punishment in Early America, 1750–1800*, at 81 (Dec. 7, 2005) (PhD dissertation, University of Pittsburgh) <https://d-scholarship.pitt.edu/10187/1/gottlieb.pdf> [<https://perma.cc/BBJ9-3XZ4>].

<sup>106</sup> *Id.* at 82.

<sup>107</sup> For example, Robert Crowe was sentenced to die in federal court in Rhode Island for piracy, but the state had abolished the death penalty in 1852 and local officials therefore could not identify a lawful location to carry out the execution. See *Sentenced to Be Hung—Accident on a Railroad*, PHIL. INQUIRER, Nov. 29, 1866, at 1A. Eventually, after several delays in Crowe’s execution date stemming from

and as the seats of power slowly began to reject the ultimate penalty, the number of federal executions dropped.

By the mid-1800s, however, westward territorial expansion heralded in a new era of the federal death penalty. As federal jurisdiction grew, so did the death penalty and its specific reverence for local practice. Territories that were previously under Spanish control retained elements of Spanish law, while territories that were previously under English rule retained elements of English law<sup>108</sup>—meaning many criminal trials in the territories in the early days of federal jurisdiction were informal and based less on federal statute than on local tradition.<sup>109</sup> Although debates continued about the scope of federal criminal law,<sup>110</sup> poverty, civil unrest, and an influx of newly emancipated Black people produced the most active period in the history of the federal death penalty.

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difficulties locating a suitable execution site, President Johnson commuted Crowe's sentence to life imprisonment. BUFFALO MORNING EXPRESS, Feb. 23, 1867, at 1A.

<sup>108</sup> This was in part due to the fact that the federal statutes that created new territories specifically provided for the continuity of local practice, wherever possible. For example, the act of Congress that created Alabama provided “[t]hat all laws which may be in force when this act shall go into effect, shall continue to exist and be in force until otherwise provided by law.” *Pollard v. Hagan*, 44 U.S. 212, 227 (1845) (quoting 3 Story's Laws, 1634, 1635). As a result, the law in Louisiana in 1804 was the law of Spain, see Henry P. Dart, *Influence of the Ancient Laws of Spain on the Jurisprudence of Louisiana*, 18 A.B.A. J. 125, 126 (1932), while English law predominated in the Dakota Territory. See Maurice E. Harrison, *The First Half-Century of the California Civil Code*, 10 CALIF. L. REV. 185, 187 (1922). In territories that had never before been subject to western legal traditions, written codes of laws (as opposed to the common law tradition) were especially popular because they provided some sense of structure to new systems of government. For example, in the Dakota Territory, “[a] young state, without any local legal tradition,” the Field Code offered a “welcome . . . legislative summary of the experience of the eastern states in reconciling the rules of the English common law to American conditions.” *Id.*

<sup>109</sup> For example, for several years after the Western District was established, there were no convictions for murder (although there were several acquittals). HARMAN, *supra* note 100, at 182. In 1857, however, Thomas Beard, a white man, was put on trial for the murder of a “forty-niner” from San Francisco, who went missing after spending time with Beard and whose bones were later discovered in a gulch. *Id.* at 183. The court appointed counsel for Beard and a trial took place, but the evidence produced was entirely circumstantial, and at the close of the case, the judge “hesitated at pronouncing sentence.” *Id.* at 184. Instead, he instructed the clerk of court to send notices to newspapers within a few hundred miles of the court, asking members of the public to come forward with any new evidence. *Id.* After a few months, the court received no responses, and federal authorities built a gallows on what would later become the county fairgrounds. Beard was hanged in May of 1857. *Id.*

<sup>110</sup> *E.g.*, *In re Wilson*, 140 U.S. 575, 575 (1891) (reaffirming that prior to 1885, district courts in the territories “had jurisdiction over the crime of murder, committed by any person other than an Indian upon an Indian reservation within its territorial limits”).

From the end of the Civil War to the early 1900s, a single judge—Isaac C. Parker, who presided over the Western District of Arkansas from 1875 until its dissolution in 1896<sup>111</sup>—condemned 168 people to die and oversaw the executions of 88 people, a full quarter of all federal executions in the country's history.<sup>112</sup> During this period, there were 143 federal executions total, representing 41% of all federal executions ever, and nearly all of them took place in the western territories.

Notably, the crimes for which the ultimate penalty was carried out during this period of westward expansion were different in kind from the crimes that defined the early years of the federal death penalty. Most of the condemned were

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<sup>111</sup> The court was established by act of Congress in 1851. See Act of March 3, 1851, 9 Stat. 594, 595. The district's headquarters moved in 1871 to Fort Smith. See Act of March 3, 1871, 16 Stat. 471, 472. Judge Parker was appointed to the bench by President Grant in 1875, and he remained on the bench for more than twenty-one years, during which time he presided over 13,490 cases, entered judgment on 9,454 criminal convictions, and oversaw most of the 344 capital trials held at Fort Smith. HARMAN, *supra* note 100, at 26. Of the 344 capital trials, 174 produced convictions, with 168 death sentences that resulted in eighty-eight executions, one killing during the process of an attempted escape, five pre-execution deaths in prison, two pardons, and forty-three commutations by the president to terms ranging from ten years to life imprisonment. *Id.* Four people received new trials and were either acquitted or had charges against them dismissed, and the United States Supreme Court reversed the convictions of twenty-three other people, of whom nine were acquitted, thirteen were convicted of lesser charges, and one was returned to Choctaw Nation for prosecution in the Indian courts. *Id.*

<sup>112</sup> For a detailed and entertaining history of Judge Parker and the cases he heard, see generally HARMAN, *supra* note 100. Judge Parker was feared by litigants and attorneys, and Congress and the Supreme Court took note. First, Congress reduced the jurisdiction of Judge Parker's court in 1883, transferring authority over a significant tract of land occupied by Cherokee, Creek, and Seminole Indian tribes to the District of Kansas. See Act of Jan. 6, 1883, 22 Stat. 400. Second, Congress reduced the court's jurisdiction again in 1886, transferring authority over three counties to the Eastern District of Arkansas. See Act of June 19, 1886, 24 Stat. 83. And finally, in 1889, Congress amended the federal statute that granted Judge Parker jurisdiction to provide for an automatic right of appeal to the Supreme Court in cases resulting in death. See Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656. Interestingly, however, at first, no lawyers practicing in Judge Parker's court "had shown the bravery to take advantage of the new law, declining to do so, fearing to incur the displeasure of Judge Parker by reversing his decision, as was so frequently done in latter years by the Supreme Court at Washington." HARMAN, *supra* note 100, at 189-90. Later, after Judge Parker was effectively forced into retirement by a Congressional divestment of most of his court's jurisdiction, see Act of Mar. 1, 1895, 28 Stat. 693, he told a reporter that he favored abolishing the death penalty. HARMAN, *supra* note 100, at 451. Judge Parker—who by then "had condemned well-nigh two hundred men to the gallows"—reflected that the death penalty was not necessary, "provided, (there was remarkable stress upon the word provided) that there is a certainty of punishment, whatever that punishment may be." *Id.*



executed for murder on federal territory, which in practice meant murder as a product of local disputes over land, property, or women. From another perspective, however, the federal death penalty was meted out during this time as a means of establishing and securing federal sovereignty; without a court system willing to hand down rapid and harsh justice, lynching would have almost certainly filled the void and exacerbated the lawlessness that defined the period.<sup>113</sup> Of those executed in what is now the Eighth Circuit between 1865 and 1900, more than half were Native Americans, and many of them were hanged in groups, following brief trials with limited process and limited assistance from counsel. Commutations, executive clemency, and pardons were common—especially for white men.<sup>114</sup>

By the turn of the 20th century, the west had been carved up into states that were left to manage their own criminal dockets. The surge of federal executions subsided, even as the southern states in particular continued apace. During the four-decade period from 1900 to the end of World War II, the federal government carried out eighty-two executions (roughly half the number it carried out over the previous five decades, and fewer executions than Judge Parker alone handed down). Of those eighty-two executions, fifty-seven took place in Washington, D.C., and a substantial majority (fifty-one of eighty-two, or 62.2%) were carried out against Black men. In Washington, D.C., the race disparity was even more pronounced; forty-six of the fifty-seven executions, or 80.7%, were against Black men.

This is not surprising in light of the social upheaval and accompanying race-based social threat<sup>115</sup> that took place in the final decades of the 19th century and the first decades of

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<sup>113</sup> A contemporary observer, reflecting on the attitude of the family of a young man who had been murdered by his travelling companion, noted as follows:

Strange as it may seem to residents of certain States I need not name, no desire was evidenced for a lynching, the father and his friends seeming to have absolute confidence in the tribunal which had jurisdiction of the crime. It is a fact, proven by the history of this court, that sure and speedy justice meted out by law, is not only a barrier against primary crime, but it also acts as a preventative of that which may be styled secondary crime, wholesale lynching.

HARMAN, *supra* note 100, at 102.

<sup>114</sup> For example, in early 1878, a group of ten men who “were fortunate in gaining the assistance of able counsel and the ear of the president,” received commutations to terms in the penitentiary. *Id.* at 125–26.

<sup>115</sup> For a discussion of social threat and the factors that contribute to it, including rapid changes in race demographics, see Unnever, Cullen & Jonson, *supra* note 96.

the 20th century. Specially, during the Great Migration, hundreds of thousands of Black families fled racial violence and poverty in the southeast and resettled in cities like Washington, D.C.<sup>116</sup> By 1919, Washington, D.C., had the largest Black population of any American city.<sup>117</sup> As the Black migrants made their homes in northern cities, whites often reacted with violence. In Washington, D.C., for example, a bloody race riot erupted in 1919, after a white woman alleged that Black men had harmed her.<sup>118</sup> White mobs assaulted Black residents, who fought back, and military forces were eventually called in to quash the racial unrest.<sup>119</sup> At the same time, Black soldiers were starting to return from the First and Second World Wars, and they were less inclined to adhere to the pre-war social order, prompting violent reactions from the white majority.<sup>120</sup>

As had been true in the south, the perceived threat of displacement by Black families probably drove the uptick in executions of Black men in Washington, D.C. Again, victim race provides additional support for the idea that the federal death penalty was used as a tool of local social control during this period; from 1900 to 1945, in the fifty-three executions for single-victim offenses, 58.5% (thirty-one of fifty-three) were for crimes against white victims. Twenty-three Black men were executed for crimes against white victims, while zero white

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<sup>116</sup> See Stewart E. Tolnay & E. M. Beck, *Black Flight: Lethal Violence and the Great Migration, 1900–1930*, 14 SOC. SCI. HIST. 347, 349–50 (1990). From 1900 to 1930, for example, more than 300,000 Black people left South Carolina and Georgia each. *Id.* Over the same time period, the number of racially motivated lynchings in both states fell, as did the number of judicial executions, and counties in which there were more than five racially motivated lynchings experienced a much higher rate of Black migration than did counties with at most one racially motivated lynching. *Id.* at 360. As a result, the Black population in Washington, D.C., grew from approximately 14,000 in 1860 to nearly 87,000 by 1900. *African American History in Washington*, NAT'L PARK SERV. (Apr. 17, 2020), <https://www.nps.gov/articles/african-american-history-in-washington.htm>. [<https://perma.cc/CM4P-PUEH>]; U.S. CENSUS BUREAU, POPULATION OF THE UNITED STATES IN 1860, at xiii (1864).

<sup>117</sup> See Patrick Sauer, *One Hundred Years Ago, a Four-Day Race Riot Engulfed Washington, D.C.*, SMITHSONIAN MAG. (July 17, 2019), <https://www.smithsonianmag.com/history/one-hundred-years-ago-four-day-race-riot-engulfed-washington-dc-180972666/> [<https://perma.cc/47UC-LK2V>].

<sup>118</sup> *Id.* Just weeks before, President Wilson had screened the movie *Birth of a Nation* at the White House, and there were reports that the Ku Klux Klan rode through Montgomery County, just outside Washington, D.C., for the first time in fifty years. *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

people were executed for crimes against Black victims.<sup>121</sup> The average age of a Black man executed for killing a white victim during this period was only twenty-six years, while the average age for a white man executed for killing a white victim over the same time period was 33.5 years. This period, thus, was characterized by the use of the federal death penalty almost entirely in Washington, D.C., largely against young Black men for crimes against white victims.<sup>122</sup>

This trend continued through the 1950s, but from the end of World War II until the Supreme Court's decision in *Furman v. Georgia* in 1972, there were only thirty-one federal executions. Half of those (sixteen) took place in Washington, D.C., and nearly all (thirteen of sixteen) of those executed in Washington, D.C., were Black. Notably, there were a disproportionate number of federal executions for rape during this period—five of the thirteen executions for that crime in the country's history.<sup>123</sup> Perhaps the most significant feature of this period in the history of the federal death penalty, however, is the steady decline in the number of federal executions and the decline in the use of the federal death penalty for crimes of national significance. The following table shows the number of executions per year, from 1790 to 2021, by period.

	Executions/ year
Pre Civil War	0.97
Civil War to 1900	4.09
1900 to WWII	1.82
WWII to Furman	1.15
Modern Era	0.01

When the Supreme Court decided to take up the question of the death penalty's constitutionality in 1972,<sup>124</sup> there had

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<sup>121</sup> Although it is beyond the scope of this Article, there is almost certainly additional evidence for the race effects in federal capital prosecutions in the presidents' pardon and commutation files.

<sup>122</sup> Details about some of the trials from this period provide additional support. For example, William Henry Campbell, who was only twenty-years-old, was sentenced to death in Washington, D.C., for killing a white woman after the jury deliberated only thirty minutes. See *Convicted in 30 Minutes*, NEGRO STAR, Mar. 11, 1921, at 4.

<sup>123</sup> All but four of the federal executions for rape took place in Washington, D.C., and all but four of those executed were Black. Only three of the victims were not white.

<sup>124</sup> See *Furman v. Georgia*, 408 U.S. 238, 240 (1972) (plurality opinion).

only been one federal execution in the previous fifteen years.<sup>125</sup> This was a marked change from the years immediately following the end of the Second World War, when the federal government executed several people every year, and an even more marked change from the fifty years following the end of the Civil War, when the federal government carried out more than four executions a year, on average. Since then, the rate of federal executions has dropped to less than one every decade. Also, in the years following the Second World War, the federal death penalty was no longer limited to the same geographic distribution as it had in the past, with cases originating in five different modern judicial circuits.<sup>126</sup>

Additionally, this period of the federal death penalty is characterized by the adoption of new methods of execution. From 1790 to 2021, 274 federal executions (77.7%) were carried out by hanging, a stark reminder of the fact that the federal death penalty was almost exclusively used before the modern era. Starting in the 1920s and 30s, the states, and therefore the federal government,<sup>127</sup> changed how they carried out executions, as the realities of death by hanging became increasingly distasteful for the American public. By 1945, most jurisdictions had entirely abandoned hanging in favor of electrocution or gas. Thus, between 1945 and the 1990s, the

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<sup>125</sup> Victor Harry Feguer was hanged in Iowa in 1963, for what is known as Lindbergh kidnapping and murder. See *Feguer v. United States*, 302 F.2d 214, 253 (8th Cir. 1962). Feguer kidnapped a physician named Edward Roy Bartels, apparently with the intention of robbing him, and took him across state lines into Illinois. *Id.* at 220. Either Feguer or his accomplice shot the doctor; Feguer shot and killed his codefendant and left his body in the Mississippi River. *Id.* at 221. Aspects of Feguer's tragic childhood and upbringing, as well as the fact that he suffered serious mental health issues, were known at the time of his trial. See *id.* at 218, 229.

<sup>126</sup> They are: the District of Columbia (sixteen executions); the Second Circuit (Gerhard Puff, electrocuted in New York in 1954 for killing a federal agent, see *Puff v. United States*, 214 F.2d 821 (2d Cir. 1954)); the Eighth Circuit (Feguer, in Iowa; Arthur Ross Brown, in Missouri in 1956; and Carl Austin Hall and Bonnie Brown Heady in Missouri in 1953, for kidnapping and murder); the Ninth Circuit (Austin Nelson and Eugene LaMoore, both Black and both executed in Alaska, in 1948 and 1950, respectively); and the Eleventh Circuit (David Joseph Watson in Florida in 1948, for murder on the high seas; and brothers George and Michael Krull, executed in 1957 in Georgia for rape). See *Capital Punishment*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/history/federal\\_executions.jsp](https://www.bop.gov/about/history/federal_executions.jsp) [<https://perma.cc/DP8W-LSS2>] (last visited Sep. 21, 2022).

<sup>127</sup> By statute, the method of execution for federal executions has always been, and remains, "the manner prescribed by the law of the State in which the sentence is imposed"—another reminder of the original concern for local preferences in criminal sentencing. See 18 U.S.C. § 3596(a).

federal government carried out three executions by hanging,<sup>128</sup> seven by gas, and twenty-two by electrocution. After Victor Feguer's execution in 1963, the federal government did not carry out another execution until 2001.

### C. The Current Status of the Federal Death Penalty

What is commonly considered the modern era of the death penalty started in 1972, when the Supreme Court announced in *Furman v. Georgia* that all then-existing death penalty statutes were unconstitutional.<sup>129</sup> Although multiple states enacted new statutes and began carrying out executions over the next decade, the federal government did not have a workable death penalty statute until 1988,<sup>130</sup> when Congress passed the Continuing Criminal Enterprise (CCE) statute.<sup>131</sup> Since then, the network of statutory offenses authorizing the federal death penalty has ballooned.<sup>132</sup>

Two major features of the modern era of the federal death penalty are particularly relevant to this Article. First, only two modern-era presidents have carried out any executions: Trump's thirteen executions and George W. Bush's

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<sup>128</sup> Two of the hangings took place in Alaska, which was not yet a state and which therefore did not have a method of execution. See *Capital Punishment*, *supra* note 126. The third was Feguer, who was executed in Iowa, making his execution the last federal execution by hanging. *Feguer*, 302 F.2d at 253. Feguer was also the last person executed in the state of Iowa before it abolished the death penalty in 1965, until the Trump administration executed Dustin Lee Honkin in 2020. *Infamous Iowa Murderer Dustin Honkin to Be Executed in 2020*, DES MOINES REGISTER (July 25, 2019), <https://www.desmoinesregister.com/story/news/crime-and-courts/2019/07/25/dustin-lee-honken-angela-johson-federal-death-penalty-murders-william-barr-executions/1825891001/> [<https://perma.cc/FWR4-794U>].

<sup>129</sup> 408 U.S. 238 (1972) (plurality opinion). Each of the Justices wrote separately, but the Justices in the 5–4 majority agreed that the death penalty as it was administered before 1972 violated the Eighth Amendment's prohibition on cruel and unusual punishment.

<sup>130</sup> For a history of federal post-*Furman* statutory developments, see Little, *supra* note 18, at 373–79.

<sup>131</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4181, 4387 (codified at 21 U.S.C. § 848(e)).

<sup>132</sup> When Congress amended the statute again in 1991, some legal historians noted that “[n]ot since the height of slavery or the reign of England’s George III has a common-law country added crimes to the executioner’s catalogue in such large numbers.” David Von Drehle, *A Broader Federal Death Penalty: Prelude to Bloodbath or Paper Tiger?*, WASH. POST (Nov. 29, 1991), <https://www.washingtonpost.com/archive/politics/1991/11/29/a-broader-federal-death-penalty-prelude-to-bloodbath-or-paper-tiger/0c2e752b-4d07-47a8-b4a9-83b21847cca7/> [<https://perma.cc/8RJE-XXZA>].

three executions.<sup>133</sup> Federal executions are rarer now than they were in the past, despite the fact that more conduct is subject to the death penalty now than ever before.

Second, most people who land on federal death row will never be executed, and the people against whom the federal government seeks and obtains death sentences are disproportionately poor, non-white, young, and accused of killing white victims.<sup>134</sup> Since 1988, the federal government has pursued the death penalty against 305 defendants in 239 different trials.<sup>135</sup> Of those, only sixteen have been executed.<sup>136</sup> Much has been said about the role of race in the modern federal death penalty, but it is worth noting that the 72% of capital defendants approved for prosecution by the federal government since 1988 are non-white<sup>137</sup> and 57% of the forty-four men currently on federal death row are non-white.<sup>138</sup> Most federal death sentences come from a small number of jurisdictions.<sup>139</sup> Occasionally, these sentences are handed down in states that have abolished the death penalty, and five

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<sup>133</sup> Timothy McVeigh in 2001, the only person ever executed for domestic terrorism; Juan Raul Garza in 2001, for CCE murder; and Louis Jones in 2003, for Lindbergh kidnapping and murder. *See Capital Punishment*, *supra* note 126.

<sup>134</sup> *E.g.*, U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY 8, 15–17 (1988–2000) (2000) [hereinafter DOJ SURVEY], <http://www.justice.gov/dag/pubdoc/dpsurvey.html> [<https://perma.cc/7K98-2GDR>] (describing patterns of race discrimination in the pursuit and administration of the federal death penalty, including the fact that 80% of all cases in which a federal prosecutor requested permission to seek the death penalty, the defendant was non-white, and the Attorney General approved prosecutions against non-white defendants in 72% of cases); *Current Statistics re Use of Federal Death Penalty*, FED. DEATH PENALTY RES. COUNS. (Sept. 29, 2021), <https://fdprc.capdefnet.org/doj-activity/statistics/current-statistics-re-use-of-federal-death-penalty-february-2017#FN1> [<https://perma.cc/83HY-86WW>] [hereinafter *Death Penalty Statistics*]; *Executions by Race and Race of Victim*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim> [<https://perma.cc/TBR9-DXAA>] (last visited July 25, 2022); *see* Blume, Freedman, Vann & Hritz, *supra* note 12; Dunham, *supra* note 12. For a detailed discussion of race and geographic effects in federal death sentencing, *see* G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425 (2010).

<sup>135</sup> *Death Penalty Statistics*, *supra* note 134.

<sup>136</sup> *See id.*

<sup>137</sup> *Id.*

<sup>138</sup> *See List of Federal Death Row Prisoners*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners> [<https://perma.cc/C8XB-2QSA>] (last visited July 25, 2022).

<sup>139</sup> *See* Cohen & Smith, *supra* note 134 at 436.

people currently on federal death row received their sentences in abolitionist states.<sup>140</sup>

This Part ends where it began, with the observation that the federal death penalty today bears almost no resemblance to the federal death penalty in existence at the time of the Founding. Instead of becoming more constrained and predictable, the federal death penalty has—by virtue of disuse and misuse—been converted into an unpredictable political tool. Where it once served a role in helping secure the integrity of the federal government, it now operates, at best, as surplusage in states that retain the death penalty, and at worst, as an anti-democratic appendage in abolitionist states.

### III

#### THE MODERN FEDERAL DEATH PENALTY: A CRUEL AND UNUSUAL PUNISHMENT

Part I of this Article traced the historical origins of the federal death penalty and concluded that the current administration of the federal death penalty is inconsistent with original understanding. Part II described the history of the federal penalty through numbers. Loosely speaking, Part I forms the basis for an argument that the federal death penalty does not serve any valid penological purpose when it is imposed for crimes in abolitionist jurisdictions, for murders not committed on federal property or in exclusively federal enclaves, or for any other offenses that threaten national sovereignty. Part II forms the basis for an argument that there is a national consensus against the use of the federal death penalty. And Part III now makes a doctrinal argument, based on the Supreme Court's evolving standards of decency jurisprudence, that the federal death penalty is

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<sup>140</sup> See *List of Federal Death Row Prisoners*, *supra* note 138. Between 2005 and 2021, the federal government obtained thirty-nine death sentences. *Id.* Of those, ten were from jurisdictions that are now abolitionist: Donald Fell, Vermont; Angela Johnson, Iowa; Kenneth Lighty, Maryland; Ronald Mikos, Illinois; Alfonso Rodriguez, North Dakota; Ronell Wilson, New York in 2007 and again in 2013; Azibo Aquart, Connecticut; Dzhokhar Tsarnaev, Massachusetts; and Gary Lee Sampson, Massachusetts. *Id.* Of those, only Lighty, Mikos, Rodriguez, and Tsarnaev remain on federal death row. *Id.* Tsarnaev's sentence and conviction were vacated on appeal in 2020, but the Department of Justice obtained certiorari review from the Supreme Court, which reinstated his death sentence. See *United States v. Tsarnaev*, 142 S. Ct. 1024 (2022). The only other person in the modern era to be sentenced to death in an abolitionist state is Marvin Gabrion, who was sentenced in Michigan in 2002. See *Case Summaries for Modern Federal Death Sentences*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/case-summaries-for-modern-federal-death-sentences> [<https://perma.cc/K9VP-33ZD>] (last visited July 25, 2022).

unconstitutional in nearly all of its modern applications, because it is cruel and unusual and there is a national consensus against it.

#### A. The Supreme Court's Evolving Standards of Decency Jurisprudence

The Eighth Amendment proscribes “all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.”<sup>141</sup> This “flows from the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense.”<sup>142</sup> Although the two questions—whether a punishment is excessive and whether it is cruel and unusual—are distinct, they inform each other. And as the Court has recognized, the words “cruel” and “unusual” must have meanings different from one another.<sup>143</sup> A punishment therefore becomes “cruel and unusual” for Eighth Amendment purposes either when there is a general societal consensus against its imposition or if the punishment affronts “the basic concept of human dignity at the core of the Amendment” because it is disproportionate to the offender’s moral culpability.<sup>144</sup> Both of these principles are recognitions of the fact that the imposition of any punishment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>145</sup>

When the Supreme Court assesses whether a punishment categorically violates the Eighth Amendment, it engages in two distinct inquiries. First, the Court determines if the punishment has become “unusual,” a question that “depends, in common usage, upon the frequency of its occurrence or the magnitude of its acceptance.”<sup>146</sup> To measure the extent of unusualness, the Court looks to “objective indicia of society’s

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<sup>141</sup> *Atkins v. Virginia*, 536 U.S. 304, 311 n.7 (2002) (citing *Harmelin v. Michigan*, 501 U.S. 957, 997–98 (1991)).

<sup>142</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (internal quotations and alterations omitted) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)); see also *Solem v. Helm*, 463 U.S. 277, 284 (1983) (“The final clause [of the Eighth Amendment] prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.”).

<sup>143</sup> See *Trop v. Dulles*, 356 U.S. 86, 100-01 n.32 (1958) (plurality) (“If the word ‘unusual’ is to have any meaning apart from the word ‘cruel,’ however, the meaning should be the ordinary one, signifying something different from that which is generally done.”).

<sup>144</sup> *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (plurality opinion) (citing *Trop*, 356 U.S. at 100).

<sup>145</sup> *Trop*, 356 U.S. at 101.

<sup>146</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 822 n.7 (1988) (plurality opinion).



standards, as expressed in legislative enactments and state practice” with respect to the punishment at issue.<sup>147</sup> Although legislative enactments constitute the “clearest and most reliable objective evidence of contemporary values,”<sup>148</sup> “[a]ctual sentencing practices are [also] an important part of the Court’s inquiry into consensus.”<sup>149</sup> And in reviewing actual sentencing practices, what matters is not only the raw numbers, “but the consistency of the direction of change” away from society’s use of the punishment at issue.<sup>150</sup>

Second, a punishment violates the Eighth Amendment if it is “cruel,” and while “the standard of extreme cruelty . . . itself remains the same [over time], . . . its applicability must change as the basic mores of society change.”<sup>151</sup> In deciding whether a punishment is cruel, the Court considers “[t]he penological justifications for the sentencing practice” at issue and whether the punishment is proportionate to the offense and offender,<sup>152</sup> because although “[c]riminal punishment can have different goals, and choosing among them is within a legislature’s discretion[,] . . . [a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.”<sup>153</sup> The Court has identified four valid penological justifications for punishment: retribution, deterrence, incapacitation, and rehabilitation.<sup>154</sup> If a capital sentence does not serve those objectives with respect to a class of offenders, the sentence is disproportionate. Additionally, when the Court evaluates the justifications for a capital sentence, it applies a special standard, in recognition of the fact that “the death penalty is the most severe punishment,” and the Eighth Amendment therefore “applies to it with special force.”<sup>155</sup> Thus, a sentence of death violates the Eighth Amendment if it is a product of a process in which the sentencer’s discretion is insufficiently

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<sup>147</sup> *Roper v. Simmons*, 543 U.S. 551, 563 (2005); *see also Coker v. Georgia*, 433 U.S. 584, 593–97 (1977) (plurality opinion) (considering the sentencing behavior of juries as well as legislative decision-making); *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (looking to “historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made”).

<sup>148</sup> *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

<sup>149</sup> *Graham v. Florida*, 560 U.S. 48, 62 (2010).

<sup>150</sup> *Atkins*, 536 U.S. at 315.

<sup>151</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Burger, C.J., dissenting)).

<sup>152</sup> *Graham*, 560 U.S. at 71.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* (citing *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality opinion)).

<sup>155</sup> *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

channeled “toward nonarbitrary results.”<sup>156</sup> Over the last two decades, the Supreme Court has applied these principles to gradually restrict the classes of defendants who may be exposed to the possibility of capital punishment and the classes of offenses for which the penalty may be imposed.<sup>157</sup>

## B. The National Consensus Against the Federal Death Penalty

The Supreme Court has embraced various baselines against which to measure the existence of a national consensus. Although it has described legislative action as “the ‘clearest and most reliable objective evidence of contemporary values,’”<sup>158</sup> legislative action does not always offer a clear

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<sup>156</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 822 n.7 (1988) (plurality opinion); see *Zant v. Stephens*, 462 U.S. 862, 874 (1983).

<sup>157</sup> For example, in *Coker v. Georgia*, the Court held that the death penalty is categorically “an excessive penalty for the rapist who, as such, does not take human life” and is therefore less culpable than a murderer. 433 U.S. 584, 598 (1977) (plurality opinion). Likewise, in *Enmund v. Florida*, the Court held that the death penalty is a categorically disproportionate punishment for individuals convicted of murder who did not directly participate in a killing because of their diminished culpability relative to that of the direct participants. 458 U.S. 782, 797–99 (1982). *But see* *Tison v. Arizona*, 481 U.S. 137, 151–52 (1987) (finding that the death penalty may be imposed for felony murder when the defendant’s participation is major and the mental state is one of reckless indifference to the value of human life).

More recently, the Court held in *Atkins v. Virginia* that a sentence of death is a categorically disproportionate punishment for offenders with intellectual disability because of their diminished culpability. 536 U.S. 304, 318, 320 (2002). In *Atkins*, the Court identified specific deficiencies shared by people with intellectual disabilities that reduce their culpability as a class, regardless of their crimes, stating:

[T]hey have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. . . . they often act on impulse rather than pursuant to a premeditated plan, and . . . in group settings they are followers rather than leaders.

*Id.* at 318. Over the past decade, the Court has extended *Roper* and *Atkins* to prohibit sentences of life with the possibility of parole for juveniles convicted of non-homicide offenses, *Graham*, 560 U.S. at 80, and to prohibit sentences of life without the possibility of parole for all but the most “irreparably corrupt” juveniles convicted of homicide offenses. *Miller v. Alabama*, 567 U.S. 460, 465 (2012); *Montgomery v. Louisiana*, 577 U.S. 190, 200 (2016) (holding that *Miller* applies retroactively, effectively granting new sentencing hearings to hundreds of juvenile offenders). *But see* *Jones v. Mississippi*, 141 S. Ct. 1307, 1313, 1324 (2021) (declining to extend *Montgomery* to require resentencing where the sentencing judge did not make a factual finding of “irretrievable depravity”).

<sup>158</sup> *Atkins*, 536 U.S. at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

picture, and it can sometimes “present a distorted view.”<sup>159</sup> Thus, while the Court’s typical legislative analysis involves a “compar[ison between] the sentences imposed for commission of the same crime in other jurisdictions,”<sup>160</sup> when such a comparison does not offer insight into a national consensus, the Court looks to actual sentencing practices, the frequency with which the challenged punishment is administered, and changes in the frequency with which the punishment is administered.<sup>161</sup>

That is the case here; there is no way to do a one-to-one comparison by jurisdiction because there is only one United States government. Nevertheless, by any measure of actual sentencing practices, a national consensus exists against the federal death penalty in abolitionist states; against people convicted of murder not on federal property; and against people convicted of murder when the victim is not a federal agent on the job.

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<sup>159</sup> *Miller*, 567 U.S. at 485; see also *Kennedy v. Louisiana*, 554 U.S. 407, 425, 433–34 (2008) (where legislative enactments did not paint a clear picture, looking to state-court decisions interpreting the statutes, to new legislative developments and the direction of legislative change, and to actual sentencing practices).

<sup>160</sup> *Solem v. Helm*, 463 U.S. 277, 291–92 (1983). Under this approach, the Court has invalidated punishments that were endorsed by state statute in thirty-seven states, *Graham*, 560 U.S. at 62, 82 (unconstitutional to sentence a juvenile to life without parole for a non-homicide offense); twenty states, *Roper*, 543 U.S. at 564 (unconstitutional to sentence a juvenile to death); less than a majority of states, *Coker*, 433 U.S. at 593 (unconstitutional to sentence a person to death for the rape of an adult woman); nine states, *Kennedy*, 554 U.S. at 413 (unconstitutional to sentence a person to death for the rape of a child); and eight states, *Enmund*, 458 U.S. at 792 (striking down a non-homicide death penalty statute).

<sup>161</sup> *Miller*, 567 U.S. at 482–83; *Graham*, 560 U.S. at 62; Robert J. Smith, Bidish J. Sarma & Sophie Cull, *The Way the Court Gauges Consensus (and How to Do It Better)*, 35 CARDOZO L. REV. 2397, 2451–52 (2014). In *Graham*, the Court began its analysis by noting that six jurisdictions at that time barred life sentences for people under eighteen and seven jurisdictions that permitted life without parole sentences for people under eighteen, but only for homicide crimes. *Graham*, 560 U.S. at 62. The Court stated that the State’s argument—that because only thirteen states explicitly banned the sentencing practice at issue, there was no national consensus—was “incomplete and unavailing” because “[a]ctual sentencing practices are an important part” of the inquiry. *Id.* Similarly, the *Miller* Court rejected the States’ argument that because a majority of jurisdictions statutorily authorized life-without-parole-sentences for juveniles, there could be no consensus against it. *Miller*, 567 U.S. at 482–83. In *Miller*, the Court concluded that “the States’ argument on this score [was] weaker than the one we rejected in *Graham*” because the outcome was not based solely on consensus, but instead “flow[ed] straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law’s most serious punishments.” *Id.*

### 1. *Actual Sentencing Practices*

When the Court looks at sentencing practices, it compares the number of people against whom a particular sentence might be imposed to the number of people against whom the sentence is in fact carried out.<sup>162</sup> By this measure, there is a strong consensus against the use of the federal death penalty:

- From 1995 to 2000, DOJ attorneys sought approval from the Attorney General to pursue the death penalty in 183 cases.<sup>163</sup> Over that same time period, federal judges and juries only sentenced fourteen people to die, a rate of just over 7%.<sup>164</sup>
- At the time of the founding, approximately 85% of people capitally prosecuted by the federal government were executed.<sup>165</sup> In the modern era of the death penalty, less than 1% of people capitally prosecuted by the federal government were executed.<sup>166</sup>
- Jury verdicts—“a significant and reliable objective index of contemporary values”<sup>167</sup>—illustrate the same point. From 1988 to 2021, the federal government took 239 federal capital cases to trial, but juries have returned

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<sup>162</sup> In *Graham*, for example, the Court found a national consensus against the use of life without parole for juveniles convicted of non-homicide offenses based on the fact that only 123 people in the country were serving that sentence. *Graham*, 560 U.S. at 64. The Court contextualized those numbers by comparing them to the much larger category of teenaged offenders who were arrested for nonhomicide crimes that might have exposed them to life without parole. *Id.* at 65–66. The Court concluded that, given the small number of juvenile nonhomicide offenders serving life without parole, “[t]he sentencing practice now under consideration is exceedingly rare. And ‘it is fair to say that a national consensus has developed against it.’” *Id.* at 67 (quoting *Atkins*, 536 U.S. at 316).

<sup>163</sup> DOJ SURVEY, *supra* note 134, at T-2. I use this number as a rough—and generous—proxy for the number of cases in which the federal death penalty could apply. Of course, given how broadly the Supreme Court has defined the scope of the Commerce Clause, the actual number is almost certainly much larger; even assuming that only one-quarter of murder and non-negligent homicide cases could be subject to federal capital jurisdiction puts the number at approximately 30,000 from 1995 to 2000. See Statista Rsch. Dept., *Number of Reported Murder and Nonnegligent Manslaughter Cases in the United States from 1990 to 2020*, STATISTA (Sept. 29, 2021), <https://www.statista.com/statistics/191134/reported-murder-and-nonnegligent-manslaughter-cases-in-the-us-since-1990/> [<https://perma.cc/N79R-8YHF>].

<sup>164</sup> DOJ SURVEY, *supra* note 134, at T-2.

<sup>165</sup> Little, *supra* note 18, at 368 (quoting H.R. REP. NO. 54-108 at 3). Although the death penalty was mandatory at the time of the founding, not every death sentence was carried out, and the rate of executive clemency was markedly higher than it is today. See *id.* at 87 (citing H.R. EXEC. NO. 20-146 (1829), *reprinted in* H.R. REP. NO. 53-545, app. at 6 tbl. 1).

<sup>166</sup> See *Death Penalty Statistics*, *supra* note 134. In the modern era of the death penalty, the federal government has tried 208 capital cases, and only sixteen of those produced executions. *Id.*

<sup>167</sup> *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (plurality opinion).

death sentences only 86 times,<sup>168</sup> or 36% of cases. This is a dramatically lower rate than what is common for capital prosecutions in the states.<sup>169</sup>

By any objective indicator, the number of death sentences imposed and carried out by the federal government reflects a national consensus against the practice as a whole, but looking at the geography of the federal death penalty makes clear that there is an even stronger national consensus against imposing and carrying out federal death sentences in abolitionist states: since the founding, federal juries in abolitionist states have only sentenced ten people to die, and only two of those sentences were ever carried out.<sup>170</sup> By this metric, it is highly unusual for a federal jury to sentence a person to death for a crime that could not have been punished with a death sentence in the state where it occurred.

## 2. *Law in Peer Nations and in Indian Territory*

Occasionally, the Court has also considered sentencing law and practices in jurisdictions other than the United States.<sup>171</sup> But compared to the law in peer nations and in Indian territory, the federal death penalty is still an outlier. More than seventy-five countries in the world have abolished the death penalty at a national level.<sup>172</sup> Only fifty-five countries retain the death penalty, and of those, only China, India, and Japan are similar to the United States in terms of their international power, and only India is considered a

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<sup>168</sup> *Death Penalty Statistics*, *supra* note 134.

<sup>169</sup> In Texas, for example, juries have returned death verdicts in 60% of capital trials since 2015. See *Texas Death Penalty Developments in 2020: The Year in Review*, TCADP (Dec. 2020), <https://tcadp.org/wp-content/uploads/2020/12/Texas-Death-Penalty-Developments-in-2020-FINAL.pdf> [<https://perma.cc/P84X-7GG9>].

<sup>170</sup> See Michael J. Zydney Mannheimer, *The Coming Federalism Battle in the War Over the Death Penalty*, 70 ARK. L. REV. 309, 312 (2017) (noting that between 1791 and 1993, only one federal jury ever handed down a death sentence in an abolitionist state). For a list of modern-era death sentences imposed for crimes in states that today do not have the death penalty, see *supra* note 142 and accompanying text.

<sup>171</sup> *E.g.*, *Roper v. Simmons*, 543 U.S. 551, 604 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316–17 n.21 (2002); *Miller v. Alabama*, 567 U.S. 460, 511 (2012) (Alito, J., dissenting); *Graham v. Florida*, 560 U.S. 48, 114 n.12 (2010) (Thomas, J., dissenting).

<sup>172</sup> *Countries That Have Abolished the Death Penalty Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976> [<https://perma.cc/MA6D-ZBLR>] (last visited July 25, 2022).

democracy.<sup>173</sup> By this measure, too, the American federal death penalty is unusual and an outlier.

Compared to the sentencing practice and law of Indian tribes, the same is true. Although Indian tribes are generally considered “domestic dependent nations,”<sup>174</sup> the federal government has jurisdiction over Indian land.<sup>175</sup> Nevertheless, although the federal government may prosecute violations of federal law “within the sole and exclusive jurisdiction of the United States, except the District of Columbia,” it may not prosecute crimes on Indian territory, committed by one member of a tribe against another member of a tribe,<sup>176</sup> in some recognition of Indian sovereignty. This exception, however, does not apply when the crime qualifies as a major crime, as enumerated in 18 U.S.C. § 1153(a). And still, the federal government may never sentence a member of an Indian tribe to death for the murder of another Indian if the crime in question was committed on Indian land, “unless the governing body of the tribe has elected” to apply the death penalty.<sup>177</sup> Only one tribe has ever “opted in” to the death penalty, despite aggressive lobbying from law enforcement,<sup>178</sup> and no Indian has been sentenced to death under this provision. This fact both highlights the extent to which federal law recognizes the importance of local practice and preference and highlights the fact that the federal death penalty is, by any objective measure, unusual.

An obvious response is that the number of federal death sentences and executions is small by design; given the country’s federalist system of government, the United States government should not be the primary source of death sentences. And although that is, of course, correct, it misses the larger point: the federal death penalty is rarely sought, even more rarely imposed, and only vanishingly rarely carried out. The fact that the federal government only occasionally steps into a space that has, for nearly all of the country’s history,

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<sup>173</sup> *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/international/abolitionist-and-retentionist-countries> (last visited Sept. 21, 2022). Russia technically retains the death penalty, but it is considered “abolitionist in practice” because it has not carried out any executions in more than a decade. *Id.*

<sup>174</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

<sup>175</sup> *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020).

<sup>176</sup> 18 U.S.C. § 1152; *see also McGirt*, 140 S. Ct. at 2459.

<sup>177</sup> 18 U.S.C. § 3598.

<sup>178</sup> Ken Murray & Jon M. Sands, *Race and Reservations: The Federal Death Penalty and Indian Jurisdiction*, 14 FED. SENTENCING REP. 28, 28 (2001). Only the Sac and Fox of Oklahoma “opted in.” *Id.*

been reserved for the states, is not a product of strong principles of federalism, but of prosecutorial discretion—another important indicator of national consensus.<sup>179</sup> Moreover, even if federalism were responsible, that cannot address the question of whether a punishment so rare and so loosely connected to enforcing the interests of the federal government serves any penological objective.

### C. The Federal Death Penalty, in Nearly All of Its Modern Applications, Lacks Any Valid Penological Basis

The death penalty serves, at most, “two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.”<sup>180</sup> But the federal death penalty, as it is most commonly implemented,<sup>181</sup> fails those purposes for two related reasons.

First, imposing the death penalty in a state that also retains the death penalty serves no additional retributive or deterrent purpose—a dead person cannot be executed a second time. And in abolitionist jurisdictions, the federal death penalty does not accomplish the goal of retribution because in those jurisdictions, the punishment is not “an expression of society’s moral outrage at particularly offensive conduct.”<sup>182</sup>

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<sup>179</sup> See *Enmund v. Florida*, 458 U.S. 782, 796 (1982) (“[I]t would be relevant if prosecutors rarely sought the death penalty for [the crime at issue], for it would tend to indicate that prosecutors, who represent society’s interest in punishing crime, consider the death penalty excessive for [that crime].”).

<sup>180</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 836 (1988) (plurality opinion) (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion)).

<sup>181</sup> Before I lay out this argument, however, a caveat is warranted. Although there is a national consensus against the federal death penalty in all of its applications, that fact alone does not answer the question of whether the death penalty may be warranted or constitutional for some federal crimes. Because this Article is concerned with giving effect to original understanding, I do not address the constitutionality of the federal death penalty when applied in circumstances that would have been recognized as warranting the federal death penalty at the founding: murders on federal property; murders of federal agents or employees; and traditional capital offenses like treason. The death penalty for these kinds of offenses may well be immoral or unconstitutional for other reasons, but they do, at a minimum, serve the goal of retribution for crimes specifically targeted at the federal government. Moreover, of the modern era executions, only six involved such crimes, and a similar pattern is true for the forty-four men currently on federal death row. See *List of Federal Death Row Prisoners*, *supra* note 138.

<sup>182</sup> *Gregg*, 428 U.S. at 183. The federal government appears to recognize this, at least to some extent. In 1995, the United States Attorneys’ Manual made it more difficult for U.S. Attorneys to receive permission to seek the death sentence in abolitionist states by providing as follows: “In states where the imposition of the death penalty is not authorized by law the fact that the maximum federal penalty is death is insufficient, standing alone, to show a more substantial interest in federal prosecution.” Eric A. Tirschwell & Theodore Hertzberg, *Politics and*

Instead, it is merely an expression of the fact that a federal court enjoys jurisdiction over the case.

This, in turn, is a product of the Supreme Court's expansive understanding of the Commerce Clause. But a person's engagement with interstate commerce was not enough, at the time of the founding, to justify the exercise of federal criminal jurisdiction. To the contrary, for the first decades of the country's existence, the federal government sought and imposed the death penalty almost exclusively in cases where no other sovereign had jurisdiction.<sup>183</sup> That is to say, at the time of the founding, the federal death penalty was reserved for crimes that would otherwise go unprosecuted, because no state had jurisdiction, or for crimes that threatened national sovereignty. Interstate drug trafficking, carjacking, kidnapping, and the majority of the other offenses for which the federal death penalty is authorized do not serve those goals, and they do not provide a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."<sup>184</sup>

Second, the federal death penalty does not deter crime. The amount of time that passes from crime to execution removes the "association of the two of ideas of *crime* and *punishment*, so that they may be considered, one as the cause, and the other as the inevitable and unavoidable effects which follow."<sup>185</sup> The modern death penalty, however, is not applied quickly. The people executed by the Trump administration, for example, sat on death row for an average of more than twenty years before their sentences were carried out.

Moreover, in states that retain the death penalty, the threat of a second capital trial is of no added benefit—a person undeterred by the threat of the death penalty is, simply, a person undeterred by the threat of the death penalty, regardless of which jurisdiction imposes it. And in abolitionist states, the possibility of a federal death sentence is far too rare

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*Prosecution: A Historical Perspective on Shifting Federal Standards for Pursuing the Death Penalty in Non-Death Penalty States*, 12 U. PA. J. CONST. L. 57, 79 (2009). Between 1995 and 2000, the Attorney General considered the death penalty for 588 defendants and, in only twelve of these cases (2%) did the Attorney General request the death penalty in an abolitionist state. *Id.* In five of those twelve cases, the government offered a plea deal. *Id.* at 80.

<sup>183</sup> See Parts I.B. and II.B., *infra*.

<sup>184</sup> *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

<sup>185</sup> JACOB D. WHEELER, 2 REPORTS OF CRIMINAL LAW CASES WITH NOTES AND REFERENCES; CONTAINING, ALSO, A VIEW OF THE CRIMINAL LAWS OF THE UNITED STATES xiv (1851)



to offer any meaningful deterrence.<sup>186</sup> Only five of the approximately 2,455 people on death row in the United States (less than one percent) face the death penalty for crimes committed in an abolitionist jurisdiction.<sup>187</sup> For people who commit death eligible crimes in abolitionist states, the small possibility of receiving the death penalty will not measurably deter crime. As was the case in 1976, “[s]tatistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate” and “[t]he results simply have been inconclusive.”<sup>188</sup> Or, in the words of a 19th century attorney, “[t]he operations of sanguinary laws, instead of preventing crime, increases it. . . . [T]he jury, who may have more feeling than [the victim], will, upon the ground of humanity or law, acquit him.”<sup>189</sup>

In the absence of any measurable deterrent effect, and without any robust retributive effect, the death penalty “makes no measurable contribution to acceptable goals of punishment,” and is therefore “nothing more than the purposeless and needless imposition of pain and suffering.”<sup>190</sup> Under our evolving standards of decency, it violates the prohibition on cruel and unusual punishments.

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<sup>186</sup> See *Graham v. Florida*, 560 U.S. 48, 72 (2010) (noting that “when that punishment is rarely imposed,” the death penalty’s deterrence effect is weak).

<sup>187</sup> See *Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/overview> [<https://perma.cc/GA3L-LF2P>] (last visited July 25, 2022).

<sup>188</sup> *Gregg v. Georgia*, 428 U.S. 153, 184–85 (1976) (plurality opinion).

<sup>189</sup> WHEELER, *supra* note 185, at xiii. One modern example supports this view. Although the federal government is authorized to, and occasionally does, seek the death penalty in Puerto Rico, the Puerto Rican Constitution prohibits the death penalty. P.R. CONST. art. II, § 7 (“The death penalty shall not exist.”). In 1999, the U.S. Attorney sought the death penalty for a series of crimes committed in Puerto Rico. See *United States v. Acosta-Martinez*, 252 F.3d 13, 15 (1st Cir. 2001). Because the Constitution of Puerto Rico prohibits the death penalty, the district court granted the defendants’ motion to strike the death penalty on both statutory and due process grounds. *United States v. Acosta Martinez*, 106 F. Supp. 2d 311, 311 (D.P.R. 2000), *rev’d*, 252 F.3d 13 (1st Cir. 2001). The First Circuit reversed the statutory and constitutional holdings by comparing Puerto Rico’s status to that of a state. On the statutory issue, it held that “[t]he death penalty is intended to apply to Puerto Rico federal criminal defendants just as it applies to such defendants in the various states.” *Acosta-Martinez*, 252 F.3d at 20. On the constitutional question, it held that “[i]t cannot shock the conscience of the court to apply to Puerto Rico, as intended by Congress, a federal penalty for a federal crime which Congress has applied to the fifty states.” *Acosta-Martinez*, 252 F.3d at 21. On remand, the federal jury acquitted the defendants. Abby Goodnough, *Acquittal in Puerto Rico Averts Fight Over Government’s Right to Seek Death Penalty*, N.Y. TIMES (Aug. 1. 2003), <https://www.nytimes.com/2003/08/01/us/acquittal-puerto-rico-averts-fight-over-government-s-right-seek-death-penalty.html> [<https://perma.cc/CHD6-KXEB>].

<sup>190</sup> *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

## CONCLUSION

The federal death penalty today would be unrecognizable to the founders, who saw the ultimate penalty as a means of protecting sovereign interests and who therefore carefully guarded the practice at English common law of yielding national interests to local ones. Over the course of time, the geographic distribution and substantive basis for the penalty changed, but until the modern era, its underlying purpose did not. As the Trump era executions made painfully clear, however, the federal death penalty today is different. It is disproportionately imposed for crimes that could have readily been prosecuted by other jurisdictions and that have little obvious connection to federal sovereignty, and it is disproportionately imposed against non-white people. By any rational measure, it is vanishingly rare, and it serves no valid penological goal. Simply put, federal death sentences today are, in most cases, “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”<sup>191</sup>

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<sup>191</sup> *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).