

## **THE DEATH OF THE DEATH PENALTY**

Why the Era of Capital Punishment is Ending  
BY David Von Drehle

The case of Dzhokhar Tsarnaev absorbed Americans as no death-penalty drama has in years. The saga of his crime and punishment began with the shocking bloodbath at the 2013 Boston Marathon, continued through the televised manhunt that paralyzed a major city and culminated in the death sentence handed down by a federal jury on May 15 after a two-phase trial.

Justice was done, in the opinion of 70% of those surveyed for a Washington Post–ABC News poll in April. Support for capital punishment has sagged in recent years, but it remains strong in a situation like this, where the offense is so outrageous, the process so open, the defense so robust and guilt beyond dispute. Even so, Tsarnaev is in no danger of imminent death. He is one of more than 60 federal prisoners under sentence of execution in a country where only three federal death sentences have been carried out in the past half-century. A dozen years have passed since the last one.

The situation is similar in state courts and prisons. Despite extraordinary efforts by the courts and enormous expense to taxpayers, the modern death penalty remains slow, costly and uncertain. For the overwhelming majority of condemned prisoners, the final step—that last short march with the strap-down team—will never be taken. The relative few who are killed continue to be selected by a mostly random cull. Tsarnaev aside, the tide is turning on capital punishment in the U.S., as previously supportive judges, lawmakers and politicians come out against it.

Change is not coming quickly or easily. Americans have stuck with grim determination to the idea of the ultimate penalty even as other Western democracies have turned against it. On this issue, our peer group is not Britain and France; it's Iran and China. Most U.S. states authorize the death penalty, although few of them actually use it. We value tolerance and diversity—but certain outrages we will not put up with. Maybe it's the teenage terrorist who plants a bomb near an 8-year-old boy. Maybe it's a failed neuroscientist who turns a Colorado movie theater into an abattoir. We like to think we know them when we see them. Half a century of inconclusive legal wrangling over the process for choosing the worst of the worst says otherwise.

On May 27, the conservative Nebraska state legislature abolished the death penalty in that state despite a veto attempt by Governor Pete Ricketts. A parallel bill passed the Delaware state senate in March and picked up the endorsement of Governor Jack Markell, formerly a supporter of the ultimate sanction. Only a single vote in a House committee kept the bill bottled up, and supporters vowed to keep pressing the issue.

In February, Markell's neighboring governor, Tom Wolf of Pennsylvania, declared an open-ended moratorium on executions. That officially idles the fifth largest death row in America. The largest, in California, is also at a standstill while a federal appeals court weighs the question of whether long delays and infrequent executions render the penalty unconstitutional.

Even in Texas, which leads the nation in executions since 1976 (when the U.S. Supreme Court approved the practice after a brief moratorium), the wheels are coming off the bandwagon. From a peak of 40 executions in 2000, the Lone Star State put 10 prisoners to death last year and seven so far in 2015. According to the state's Department of Corrections, the number of new death sentences imposed by Texas courts this year is precisely zero. There, as elsewhere, prosecutors, judges and jurors are concluding that the modern death penalty is a failed experiment.

The shift is more pragmatic than moral, as Americans realize that our balky system of state-sanctioned killing simply isn't fixable. As a leader of the Georgia Republican Party, attorney David J. Burge, recently

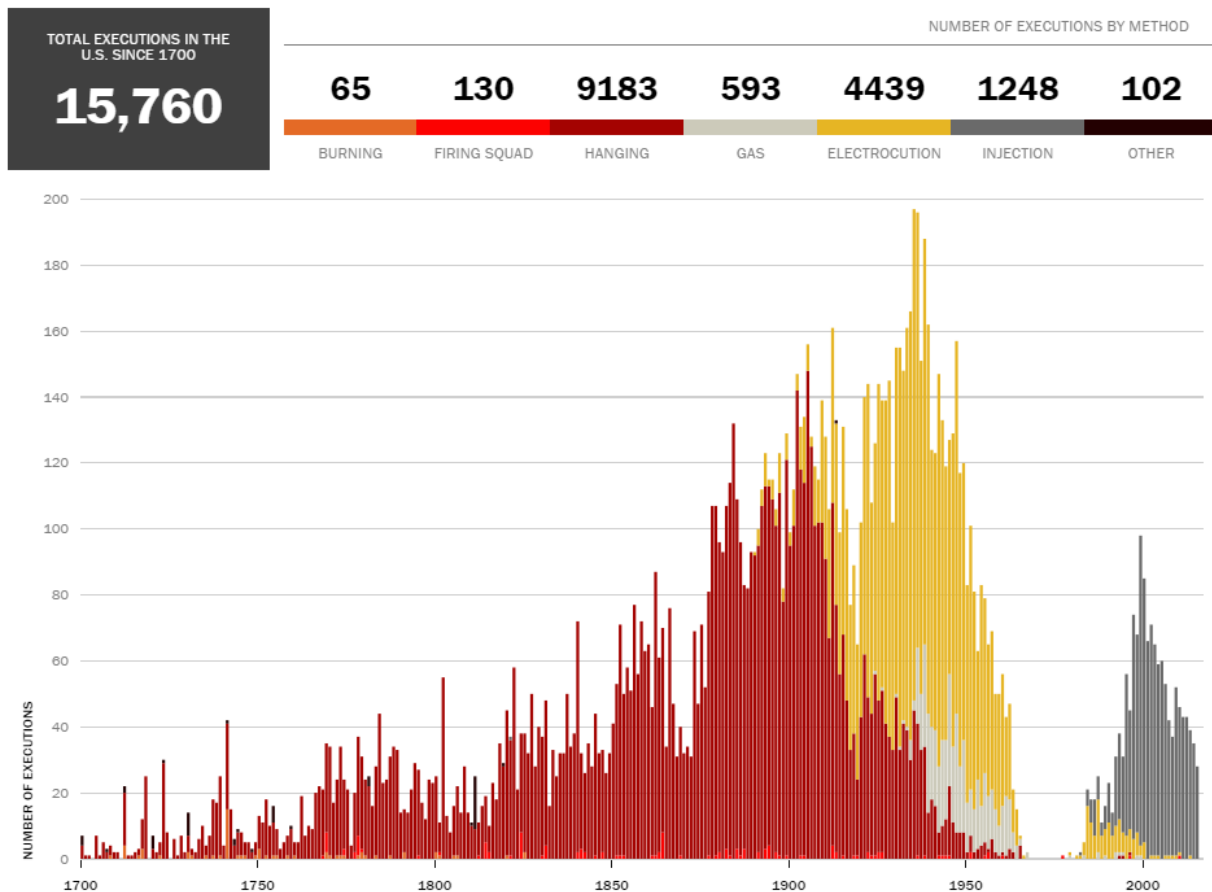
put it, "Capital punishment runs counter to core conservative principles of life, fiscal responsibility and limited government. The reality is that capital punishment is nothing more than an expensive, wasteful and risky government program."

This unmistakable trend dates back to the turn of the century. The number of inmates put to death in 2014 was the fewest in 20 years, while the number of new death sentences imposed by U.S. courts—72—was the fewest in modern American history, according to data collected by the Death Penalty Information Center. Only one state, Missouri, has accelerated its rate of executions during that period, but even in the Show Me State, the number of new sentences has plunged.

Thirty-two states allow capital punishment for the most heinous crimes. And yet in most of the country, the penalty is now hollow. Since the start of 2014, all but two of the nation's 49 executions have been carried out by just five states: Texas, Missouri, Florida, Oklahoma and Georgia.

For the first time in the nearly 30 years that I have been studying and writing about the death penalty, the end of this troubled system is creeping into view.

And I'll give you five reasons why.



# 1

## **Reason 1: Despite decades of effort, we're not getting better at it.**

In Arizona on July 23, prison officials needed nearly two hours to complete the execution of double murderer Joseph Wood. That was not an aberration. In April 2014, Oklahoma authorities spent some 40 minutes trying to kill Clayton Lockett before he finally died of a heart attack. Our long search for the perfect mode of killing—quiet, tidy and superficially humane—has brought us to this: rooms full of witnesses shifting miserably in their seats as unconscious men writhe and snort and gasp while strapped to gurneys.

Lethal injection was intended to be a superior alternative to electrocution, gassing or hanging, all of which are known to go wrong in gruesome ways. But when pharmaceutical companies began refusing to provide their drugs for deadly use and stories of botched injections became commonplace, the same legal qualms that had turned courts against the earlier methods were raised about lethal injections.

Alex Kozinski, the conservative chief judge of the federal Ninth Circuit Court of Appeals, recently wrote that Americans must either give up on capital punishment or embrace its difficult, brutal nature. Rather than pretend that execution is a sort of medical procedure involving heart monitors and IV lines—a charade that actual medical professionals refuse to be part of—we should use firing squads or the guillotine. (Utah, which abandoned execution by firing squad in 2004, restored the option in April. No other U.S. jurisdiction has used rifles for an execution in more than 50 years.)

"Of course, it does raise the question of whether we are really comfortable with having a death penalty that literally sheds blood," Kozinski allowed in an interview with the Los Angeles Times. "The thing about the drugs is that it's a mask."

The legal machinery of capital punishment—the endless process of appeals and reviews—is equally miserable to ponder.

Consider this: Last year, Florida executed Askari Muhammad, a man known as Thomas Knight when he was sent to death row in 1975 after kidnapping, robbing and murdering a couple from Miami Beach. Five years later he stabbed a prison guard to death with a sharpened spoon.

To detail all the reasons it took nearly 39 years to execute Knight/Muhammad would require a chapter of a book, not a paragraph of an essay. Suffice it to say, a legal system that requires half a lifetime to conclude the case of a proven lethal recidivist is not a well-functioning operation.

Nor is that case unusual. In Florida alone, three other men who arrived on death row in 1975 are still there, marking their 40-year anniversaries—part of a total death-row population in that state of 394. (In those 40 years, Florida has carried out 90 executions. At that rate, the Sunshine State would need about 175 years to clear out its death row.)

Of the 14 inmates executed so far this year in the U.S., five spent from 20 to 30 years on death row, five more languished from 15 to 19 years, and not one spent less than a decade awaiting execution. On May 24, Nebraska death-row inmate Michael Ryan died of cancer, nearly 30 years after he was sentenced to be executed by the state.

State and federal courts are so backlogged with capital cases that they can never catch up. Roughly half of California's 750 condemned inmates have not even begun their appeals because they are waiting for the state's underfunded defense bureaucracy to give them a lawyer.

Moving faster creates its own problems. The risks involved in trying to speed executions are apparent in the growing list of innocent and likely innocent death-row prisoners set free—more than 150 since 1975. In Ohio, Wiley Bridgeman walked free 39 years after he was sentenced to death when the key witness at his

trial—a 12-year-old boy at the time—admitted that he invented his story to try to help the police. In general, scientific advances have undermined confidence in the reliability of eyewitness testimony and exposed flaws in the use of hair and fiber evidence. DNA analysis, meanwhile, has offered concrete proof that the criminal justice system can go disastrously wrong, even in major felony cases. In North Carolina last year, two men sentenced to death as teenagers were released after DNA evidence proved they weren't guilty. The exoneration came after 30 years in prison.

Incompetent investigators, using discredited science, sent two men to death row in Texas for alleged arson murders. One of them, Ernest Willis, was freed in 2004 after his attorneys commissioned a review by an expert in fire science, who concluded that neither blaze was caused by the suspects.

But the findings came too late for the other man, Cameron Todd Willingham, who was executed that same year. In this instance, and perhaps in others, Texas may have killed an innocent man.

## 2

### **Reason 2: The crime rate has plunged.**

Public support for capital punishment ebbs and flows. During the low-crime years of the late 1950s and early '60s, surveys by Gallup charted a fairly steady drop in support—down to a nadir of 42%. That trend contributed to the brief abolition of the death penalty by order of the Supreme Court in 1972. But by then, a new crime wave was building, and states rushed to restore capital punishment by passing laws meant to eliminate arbitrary results and racial discrimination. After the Supreme Court approved the modern penalty in 1976, support for the death penalty skyrocketed in lockstep with the murder rate. By the time New York City recorded more than 2,200 murders in the single year of 1990, 4 of 5 Americans were pro-death-penalty, according to Gallup.

Now crime rates have fallen back to levels unseen since the placid early 1960s. In New York City alone, there are roughly 1,900 fewer murders per year now compared with the goriest days of the early 1990s. Although pockets of violence remain in cities, the vast majority of Americans are much safer today than a generation ago.

Gallup has measured the result: support for capital punishment has hovered in recent years at just above 60%, lower than at any time since 1972. It's a big number, but not as big as before. Shifting public opinion makes it easier for judges and legislators to train a skeptical eye on a dysfunctional system of punishment. Former Virginia attorney general Mark Earley supported the death penalty while presiding over the execution of 36 inmates from 1989 to 2001. In March he published an essay calling for an end to capital punishment. He had "come to the conclusion that the death penalty is based on a false utopian premise. That false premise is that we have had, do have, and will have 100% accuracy in death penalty convictions and executions."

The reduced political pressure has made it possible for six states to abolish the death penalty since 2007; Nebraska makes it seven. In a number of other state capitals, the energy is also moving in that direction. New Hampshire's legislature came within a single vote of abolition in 2014, while governors of Washington, Oregon and Colorado have indicated that they will not allow executions.

## 3

### **Reason 3. Dwindling Justifications.**

The death penalty has been made to serve three kinds of purposes. One was highly practical. For most of American history, governments did not have secure prisons in which violent criminals could be safely housed for long periods of time. A town or county jail was suitable for short stays only, and the state prison wasn't much better. There was little alternative to killing prisoners who could not be set free.

That has changed. Improvements in staffing and technology have given us so-called supermax facilities where life-without-parole sentences can

be served in relative safety. The fact that this alternative to capital punishment is now a practical possibility has fed the shift in public opinion, for most people realize that being locked in a solitary cell forever is a terrible punishment. Indeed, some argue it is a fate worse than death. Whatever deterrent capital punishment provides can likely be matched by the threat of permanent lockup.

The second historical purpose has been discredited by time: the death penalty was a powerful tool of white supremacy. The antebellum South was haunted by the possibility of slave uprisings; capital punishment was used to tamp down resistance. You can see it in the early Virginia law that made it a capital offense for slaves to administer medicine—it might be poison! Or the early Georgia statute that invoked the death penalty if a slave struck his master hard enough to leave a bruise.

The late Watt Espy, an eccentric Alabaman whose passion for this topic produced the most complete record ever made of executions in the U.S., documented nearly 15,000 sanctioned killings from 1608 to 1972. The racial disparity is arresting. In a mostly white America, significantly more blacks than whites were put to death. Whites were almost never executed for crimes—even murder—involving black victims. But blacks were so frequently executed for sexual assault that newspapers could report that a prisoner was hanged or electrocuted “for the usual crime” and everyone would know what that meant.

Some analysts still find vestiges of racial bias in the modern system, but the overt racism of the old order is now plainly unconstitutional. If there is a bias propping up today’s death penalty, it is one of class rather than race. The best defense lawyers cost a lot of money. As a favorite saying on death row goes: Those without the capital get the punishment.

This leaves only the question of justice, which is a visceral and compelling force. It’s the force that has kept the death penalty going as long as it has. Capital punishment is an expression of the principle that certain extreme boundaries cannot be crossed—that some crimes are so terrible that death is the only punishment sufficient to balance the scales. It shows how seriously we take our laws and the moral traditions underlying them.

Anti-death-penalty thinkers have tried to knock down this idea for hundreds of years. Perhaps you’ve seen the bumper sticker that goes, “Why do we kill people who kill people to show that killing people is wrong?” But they haven’t had much success in winning the philosophical battle. Momentum is moving away from the death penalty not because it offends the sense of justice but because it is a system that costs too much and delivers too little.

Which brings us to ...



#### **Reason 4. Governments are going broke.**

Across the country, governments are wrestling with tight budgets, which are likely to get tighter. Aging populations mean a rising demand for health care and retirement benefits. When more is spent to meet those commitments, less is available for everything else.

The American death-penalty system is so slow, inconsistent and inefficient that it costs far more than the life-without-parole alternative. This fact may puzzle many Americans. But think of it this way: as the country recently saw in the Tsarnaev case, a death sentence involves not one trial but two. The first procedure decides guilt or innocence, and the second weighs the proper punishment. This doubly burdensome

process is followed by strict appellate review that consumes hundreds if not thousands of billable hours on the part of lawyers, clerks, investigators and judges. Compared with the cost of a complicated lawsuit, the cost of incarceration is minimal.

When I examined the cost of Florida’s death penalty many years ago, I concluded that seeing a death sentence through to execution costs at least six times as much as a life sentence. A more recent study by a

federal commission pegged the difference in the costs of the trials at eight times as much. Duke University professor Philip J. Cook studied North Carolina's system and concluded that the Tar Heel State could save \$11 million per year by abolishing the death penalty. California's system incurs excess costs estimated at some \$200 million per year. From Kansas to Maryland, Tennessee to Pennsylvania, studies have all reached similar conclusions.

Rising pressure to cut wasteful spending will cause more and more legislators and law-enforcement officials to look hard at these findings—especially in a climate of low crime rates and secure prisons. It's happening even in Texas, where Liberty County prosecutor Stephen Taylor told a reporter last year that cost is a factor in deciding whether to pursue the death penalty. "You have to be very responsible in selecting where you want to spend your money," he said. And if Texas has reached that point, imagine what is going through the minds of governors, lawmakers and prosecutors in states that rarely see an execution—which is the vast majority.

As more states consider joining Nebraska in abolishing capital punishment, they may create a momentum that will, in time, sway the U.S. Supreme Court.



### **Reason 5. The Justices.**

Few issues have caused the U.S. Supreme Court more pain over the past half-century than the death penalty. The subject is never far from the court's docket. This year's biggest capital case involves the possible risks in a lethal-injection formula. And yet the many opinions issued since 1972 form such a tangled thicket that the late Justice Harry Blackmun ultimately dismissed the entire enterprise as "tinker[ing] with the machinery of death." Several other Justices have turned against the process after leaving the court, including two of the three architects of the system, Lewis Powell and John Paul Stevens.

Amid the confusion, one principle has remained clear: death is different.

The main reason the court abolished the old death penalty was that there were no standards for deciding who would live or die. Even among murderers, the chance of being executed was as random as being struck by lightning, as Justice Potter Stewart observed. The modern death penalty was designed to guide prosecutors, judges and juries toward the criminals most deserving of death.

But after four decades of tinkering, capital punishment is still a matter of occasional lightning bolts. And judges are taking notice. Last July, a federal judge in Southern California—a Republican appointee named Cormac J. Carney—issued an explosive ruling that the death penalty in America's largest state has become unconstitutionally random. History is on his side.

In 1972, when the Supreme Court found the death penalty to be "arbitrary and capricious," there were about 600 prisoners condemned to die in the U.S., and fewer than 100 had been executed in the previous 10 years. Today in California, the numbers are far worse: 750 death-row inmates, three executions in the past 10 years. "For the rest, the dysfunctional administration of California's death-penalty system has resulted, and will continue to result, in an inordinate and unpredictable period of delay preceding their actual execution," Carney argued. "Indeed, for most, systemic delay has made their execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been transformed into one no rational jury or legislature could ever impose: life in prison, with the remote possibility of death."

Such a sentence, the judge concluded, violates the Eighth Amendment ban on cruel and unusual punishments.

It is a long way from one district judge's ruling to a decision by the Supreme Court. But Carney's reasoning follows a path already blazed in dissenting opinions by Justice Stevens when he was still a member of the high court and Justice Stephen Breyer. They too have noticed that a system that produces these bizarre and unpredictable results makes a mockery of the legal system at a cost of billions of dollars.

Carney's decision is currently under review by the Ninth Circuit Court of Appeals. It is one more sign that the end of this failed experiment is beginning to emerge. One by one, states will abandon their rarely used death penalty. At the same time, other judges will follow Carney's lead. Here's Judge Tom Price of the Texas Court of Criminal Appeals—a red-state Republican member of what is probably the toughest court in the land when it comes to the death penalty: "Having spent the last 40 years as a judge for the state of Texas, of which the last 18 years have been as a judge on this court, I have given a substantial amount of consideration to the propriety of the death penalty as a form of punishment for those who commit capital murder, and I now believe that it should be abolished."

Actions of the legislatures, lower-court judges and governors can all be read by the Supreme Court as signs of "evolving standards of decency" in society, a doctrine dating from 1958 that has been used by the court to ban executions of juveniles, mentally retarded inmates and rapists who did not kill their victims. No step or statement is decisive in itself. But when five or more of the Justices decide the time has come to put an end to this fiasco, they will use these signs of "evolving standards" as their justification to end capital punishment for good.

Critics complain that the idea of "evolving standards" is a mere pretense to wrap personal preferences in a scarf of constitutional law. But more than half a century after the concept was coined, "evolving standards" is deeply woven into Supreme Court tradition. The Justices all know that the modern death penalty is a failure. When they finally decide to get rid of it, "evolving standards" is how they will do it.

The facts are irrefutable, and the logic is clear. Exhausted by so many years of trying to prop up this broken system, the court will one day throw in the towel.

\*\*\*\*\*

David Von Drehle, a TIME editor-at-large, is the author of *Among the Lowest of the Dead*, an award-winning history of the modern death penalty.

*This story was originally published in the June 8, 2015, issue of TIME.*