# [D]EVOLVING STANDARDS OF DECENCY? THE LEGACY OF LYNCH LAW LINGERS AS SOUTH CAROLINA TRAVELS BACK IN TIME

*Abigail Grise**

## I. INTRODUCTION

Whether capital punishment—the sentence of death for a criminal conviction[1]—is considered cruel and unusual punishment under the Eighth Amendment of the United States Constitution is not a new discussion, nor is the relationship between race and capital punishment a new concept. Debate on the propriety of capital punishment in the United States has, for centuries, generated controversy and division: many states have abolished it altogether, while others maintain the practice.[2] Though states embrace various approaches to the application of the death penalty, all the approaches are supposed to be undergirded by two essential maxims set forth by the U.S. Supreme Court: first, a sentence of death should be applied, if at all, even-handedly and without prejudice; and second, the methods of execution should reflect evolving standards of decency.[3] To appreciate the scope of these proscriptions, it is instructive to look to the long and objectionable history of capital punishment in the United States, the domestic and global sociopolitical factors that inform this history, and scientific evidence or statistics about its skewed application. While the last few decades have seen an emergence of states moving to eliminate the death penalty,[4] not all states have followed suit. In 2021, for example, South Carolina's legislature

*J.D. Candidate, 2023, Seton Hall University School of Law; B.A., 2020, University of North Carolina Wilmington. I would like to express my sincerest thanks to Professor Ndjuoh MehChu for his invaluable insight and guidance while writing this comment.

[1] *Capital Punishment*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[2] William O. Hochkammer, Jr., *The Capital Punishment Controversy*, 60 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 360, 360 (1969).

[3] Trop v. Dulles, 356 U.S. 86, 100–01 (1958).

[4] *See generally State by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Sept. 3, 2022).

amended its death penalty statute to resume executions[5] after the practice halted in 2011.[6] The amendment removed lethal injection as the state's primary method of execution and replaced it with electrocution[7]—a method that other states and countries around the world have long disfavored.[8]

This Comment examines the inextricable link between capital punishment and race in the South against the backdrop of South Carolina's Senate Bill 200, which made several amendments to the state's existing death penalty statute.[9] This Comment then argues that by maintaining death by electrocution as the primary means of capital punishment, South Carolina shamelessly embraces a symbol of lynch law that is out of lockstep with the Supreme Court's pronouncements regarding how states should approach the issue of capital punishment. Part II of this Comment recounts the origins of the racially discriminatory application of the death penalty, beginning with the colonial period, and tracing the proliferation of the practice through the Civil Rights Era. Part II then shifts its focus to the institution of lynching in the South, its interaction with Jim Crow laws, and Supreme Court challenges to the disparate application of capital punishment. Part III discusses the current national shift to reform or rethink the criminal justice system and abolish the death penalty. Part III then lays out South Carolina's recent legislative attempts to amend their capital punishment statutes—namely, the removal of lethal injection as the default method of execution and re-introduction of the firing squad—and argues that Senate Bill 200 has South Carolina going "back in time" for at least two reasons. First, it deprives incarcerated people in

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[5] S.B. 200, 124th Gen. Assemb., 1st Reg. Sess. (S.C. 2021).

[6] The last execution carried out by the State of South Carolina was in 2011. *See Death Row/Capital Punishment*, S.C. DEP'T CORR., https://www.doc.sc.gov/news/deathrow.html (last visited Sept. 4, 2022). South Carolina's supply of pentobarbital (one of the three drugs needed for lethal injection) expired in 2013. *See* Meg Kinnard, *South Carolina Doesn't Have Drugs for December Execution*, AP NEWS (Nov. 20, 2017), https://apnews.com/article/executions-south-carolina-columbia-160fb5cb68a141339f5654c9371b5a8e.

[7] S.B. 200, 124th Gen. Assemb., 1st Reg. Sess. (S.C. 2021).

[8] The United States is currently the only country to use electrocution as a method of execution. *See* Jorgenson, *infra* note 175; *see also Death Penalty: Key Facts About the Situation in Europe and the Rest of the World*, EUR. PARLIAMENT (July 28, 2020), https://www.europarl.europa.eu/news/en/headlines/world/20190212STO25910/death-penalty-in-europe-and-the-rest-of-the-world-key-facts. For a discussion on abolition of the electric chair within the United States, *see* text accompanying notes 120–144 *infra*.

[9] S.B. 200, 124th Gen. Assemb., 1st Reg. Sess. (S.C. 2021).

South Carolina of an option that is available to every other person on death row across the country. Second, by re-introducing death by firing squad as a mechanism for capital punishment, South Carolina runs afoul of the capstone provision of the Eighth Amendment, which says that punishment must be consistent with evolving standards of decency in a civilized society.[10] By changing the default method of execution to electrocution and allowing people convicted of crimes—sometimes erroneously—to be put to death by firing squad, South Carolina is reverting to its shameful history of executions when it should instead be making every effort to reconcile its ugly history. Although it is true that there is a floor of expectations governing the application of the death penalty in the United States, it is unclear how the current Court would respond to a challenge to South Carolina's laws given its handling of death penalty cases in recent years.[11] Part IV hypothesizes where the Supreme Court might stand on South Carolina's law and presents a proposal for what the state should do to confront its past and ameliorate its impact. Part V briefly concludes.

## II. HISTORY OF RACIALIZATION OF CAPITAL PUNISHMENT

It is important to situate any legal concept in its historical context. New legislation is built on what came before it, judges render decisions based on precedent, and social issues arise out of past injustices. Capital punishment is an established practice in American history, with the first execution in what would become the United States occurring in 1608.[12] The interaction between capital punishment and race in the United States is almost as established as the practice itself. It seems natural then that any discussion of capital punishment in America must begin with the origins discussed in this Part.

### A. *Capital Punishment in the Colonial and Antebellum Period*

The American colonies inherited an expansive practice of capital punishment from England.[13] Under that regime, people were put to

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[10] *See* Robinson v. California, 370 U.S. 660, 666 (1962); *Trop*, 356 U.S. at 101.

[11] The Court has taken a more hardened posture towards the death penalty in recent months. *See, e.g.*, Hamm v. Reeves, 142 S. Ct. 743 (2022) (granting Alabama's request to reinstate execution after the lower court blocked it).

[12] HOWARD W. ALLEN & JEROME M. CLUBB, RACE, CLASS, AND THE DEATH PENALTY: CAPITAL PUNISHMENT IN AMERICAN HISTORY 9 (State Univ. of N.Y. Press 2008).

[13] STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 6–7 (Harvard Univ. Press 2003) ("Over the course of the eighteenth century England's criminal code became the harshest in Europe." England's punitive governing became known as the "bloody code" in the American colonies).

death for a wide variety of offenses, many of which would shock the contemporary observer, such as robbery, arson, burglary, and counterfeiting.[14] Executions were also common for even the pettiest of crimes, such as smuggling tobacco, stealing five pounds from a house, and burning timber that was intended for use in housing frames.[15] The majority of early colonial-era executions took place in New England, but as the Revolutionary era drew closer, a higher proportion of executions began taking place in the Southern regions.[16] Furthermore, while the majority of those executed in colonial New England were white, over the course of the seventeenth century and into the eighteenth, white executions declined while Black executions remained stable.[17]

In the eighteenth century, as slave labor became the crux of the Southern economy, the majority of executions shifted to the Southern regions.[18] The colonial period is marked with a long history of violence, and this pattern of American behavior loomed large in the South.[19] Consistently throughout that region, capital punishment became a tool for "controlling large Black populations and discouraging rebellion" throughout the revolutionary era.[20] All over the South, fear of slave rebellion "ushered in institutionalized violence

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[14] *Id.* at 5.

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> Virginia imposed the death penalty for all sorts of crimes relating to the tobacco trade — including embezzling tobacco, fraudulently delivering tobacco, altering inspected tobacco, forging inspectors' stamps, and smuggling tobacco — as well as for stealing hogs (upon a third conviction), receiving a stolen horse, and concealing property to defraud creditors. Delaware made it a capital offense to steal £5 from a house, and then imposed the death penalty upon the third conviction of any theft, regardless of location or amount. South Carolina copied the English statute providing death for those convicted of burning the timber intended for house frames.

*Id.* at 8.

[16] ALLEN & CLUBB, *supra* note 12, at 33.

[17] Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 245 (2015).

[18] *See* ALLEN & CLUBB, *supra* note 12, at 33 ("While the number put to death increased . . . the largest growth was in the Southern colonies. . . . About 45% of all executions during the period 1696–1785 took place in the South.").

[19] RICHARD MAXWELL BROWN, STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM 39 (Oxford Univ. Press, Inc. 1975).

[20] NGOZI NDULUE, DEATH PENALTY INFO. CTR., ENDURING INJUSTICE: THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY 3 (Robert Dunham ed., 2020).

as the means of ensuring social stability."[21] In South Carolina, forty-six slaves were executed for slave revolts.[22] In 1822, thirty-five slaves were hanged as punishment for a "slave revolt"[23] that never actually happened. This insidious event is known as the Denmark Vesey Affair (the Affair).[24] The Affair involved Denmark Vesey, a formerly enslaved person, who had allegedly conspired to free several enslaved South Carolinians.[25] The plot was uncovered, and South Carolina hanged thirty-five men, including Vesey, for attempting to disrupt the slave system—conduct that was considered criminal.[26] In response to the Affair, South Carolina legislators warned that similar liberation efforts would occur, and thus passed laws further marginalizing *all* Black people, free and enslaved.[27] These laws also impacted white allies of abolition. Between 1838 and 1865, over 40 percent of white executions in South Carolina were for the crime of aiding runaway slaves.[28]

In the later part of the eighteenth century, states in the Northeast began to redefine which crimes were punishable by death.[29] Several

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[21] Adalberto Aguirre, Jr. & David V. Baker, *Slave Executions in the United States: A Descriptive Analysis of Social and Historical Factors*, 36 SOC. SCI. J. 1,11 (1999) (quoting Gary B. Nash, *Black People in a White People's Country*, *in* 2 PORTRAIT OF AMERICA 28, 51 (Stephen Oates ed., Houghton Miffin Co. 6th ed. 1995)).

[22] Espy. M. & O. Smykla. (1991). Executions in the U.S. 1608-2002: The Espy File Executions by State 340–44 [machine-readable data file]. Tuscaloosa, AL: John Smykla [producer], Ann Arbor, MI: InterUniversity Consortium for Political and Social Research [distributor]. [hereinafter Espy File].

[23] Espy File, *supra* note 22, at 343–44.

[24] *See generally* Stanley Harrold & Randall M. Miller, *Foreword* to THE DENMARK VESEY AFFAIR: A DOCUMENTARY HISTORY (Douglas R. Egerton & Robert L. Paquette eds., Univ. Press of Fla. 2017).

[25] *Id.* at xx.

[26] *Id.* at xxi.

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> The South Carolina Assembly passed laws prohibiting the reentry of free blacks into the state, and Charleston officials enforced ordinances against teaching slaves to read. The city council also voted to create a permanent force of 150 guardsmen to patrol the streets around the clock at an annual cost of twenty-four thousand dollars. To deal with the problem of black mariners bringing information about events around the Atlantic into the state's ports, the legislature in December 1822 passed the Negro Seamen Act, which placed a quarantine on any vessel from another state or foreign port that employed blacks.

*Id.*

[28] Espy File, *supra* note 22, at 345 (seven out of nineteen white executions were for the crime of aiding runaway slaves).

[29] ALLEN & CLUBB, *supra* note 12, at 60.

scholars have attempted to explain the efforts to reform capital punishment; early views emphasized intellectual trends and changing values, focusing on "man's improvability" and the "reformation of the criminal,"[30] while more recent views have credited utilitarian motives.[31] Regardless of what spurred this action, the existence of capital punishment reform during the eighteenth century is clear. Increasingly so, the death penalty was reserved exclusively for "lethal offenses:" those that led to the death of a victim.[32] For example, in 1794, homicide was the only crime that was considered a capital offense in Pennsylvania.[33] In some cases, rape, first-degree arson, and treason were exceptions.[34] Soon, however, Southern states also took action to reduce the number of capital offenses, but *only* for whites,[35] a point George M. Stroud captured in his 1856 book, *Sketch of the Laws Relating to Slavery: In the Several States of the United States of America*, when he observed that "[t]he penal codes of the slave-holding states bear much more severely upon slaves, than upon white persons."[36] Even with respect to offenses that applied to both whites and slaves, Stroud noted that "punishments of much greater severity are inflicted upon the latter than upon the former."[37]

In early America, hanging was the primary method of execution.[38] In response to crimes such as slave rebellions, murder, and arson, however, Black people were "burned at the stake, broken on wheels, gibbeted, decapitated, and dismembered."[39] For example, in Virginia, whites were sentenced to die for four offenses: treason, murder, and

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[30] *See* ALICE FELT TYLER, FREEDOM'S FERMENT: PHASES OF AMERICAN SOCIAL HISTORY FROM THE COLONIAL PERIOD TO THE OUTBREAK OF THE CIVIL WAR 265 (Harper & Row 1962) ("It was early recognized that there was a fundamental incompatibility between the social forces of the American Revolution and the criminal codes of the colonial era. . . . If American statesmen were to give more than lip service to the humane and optimistic idea of man's improvability, they must remove the barbarism and vindictiveness from their penal codes and admit that one great objective of punishment for crime must be the reformation of the criminal.").

[31] ALLEN & CLUBB, *supra* note 12, at 59.

[32] *Id.* at 60.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 63.

[36] GEORGE M. STROUD, SKETCH OF THE LAWS RELATING TO SLAVERY: IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 158 (2nd ed. 1856).

[37] *Id.* at 160.

[38] NDULUE, *supra* note 20, at 4.

[39] *Id.*

two types of arson.[40] In contrast, Blacks were condemned to die upon conviction for sixty-eight offenses, including the crimes just listed and practically any crime (committed or alleged) against a white female.[41] Worse yet, it was often the case that Black people would be executed for no crime at all; in essence, as remains the case today, Blackness itself was criminalized.[42] To better appreciate this point, consider that multiple states defined rape as a capital crime if committed by an African American male against a white woman. A white man raping a Black woman, however, did not trigger the state's punitive impulses; [43] after all, this practice was integral to the maintenance of the slave system that had the state's formal and informal approval.

B. *The Rise of Lynch Law*

Although there are various definitions of the term lynching, the practice is generally considered to entail the public killing of "a person without due process of the law".[44] Even in the 1800s, lynching was reputedly a criminal act; however, it was rarely treated that way.[45] Local governments and politicians in post-Civil War America accepted the practice at best, or tacitly encouraged its use at worst.[46]

The vast majority of lynchings took place in the South. Between 1882 and 1951, over 83 percent of lynchings occurred in the Southern

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[40] ALLEN & CLUBB, *supra* note 12, at 63.

[41] *Id.*

[42] *See generally* Tim Tyson, *White Dominion, Anti-Black Violence, and the Death Penalty in North Carolina: How the Myth of Black Criminality Has Always Justified Violence Against African Americans*, RACIST ROOTS, https://racistroots.org/section-1/white-domination-anti-black-violence-and-the-death-penalty-in-north-carolina (last visited Sept. 4, 2022).

[43] ALLEN & CLUBB, *supra* note 12, at 63.

[44] Geoffrey Abbott, *Lynching Definition*, ENCYC. BRITANNICA, https://www.britannica.com/topic/lynching (last visited July 24, 2022). *But see History of Lynching in America*, NAACP, https://naacp.org/find-resources/history-explained/history-lynching-america (last visited Jan. 10, 2021) (defining lynching as "the public killing of an individual who has not received any due process. These executions were often carried out by lawless mobs, though police officers did participate, under the pretext of justice. Lynchings were violent public acts that white people used to terrorize and control Black people in the 19th and 20th centuries, particularly in the South. Lynchings typically evoke images of Black men and women hanging from trees, but they involved other extreme brutality, such as torture, mutilation, decapitation, and desecration. Some victims were burned alive. A typical lynching involved a criminal accusation, an arrest, and the assembly of a mob, followed by seizure, physical torment, and murder of the victim. Lynchings were often public spectacles attended by the white community in celebration of white supremacy.").

[45] ALLEN & CLUBB, *supra* note 12, at 81.

[46] *Id.*

and border states, and African Americans were 85 percent of the victims.[47] White Southerners justified lynching on the theory that the gruesome practice was reserved for serious allegations—primarily the rape of white women or murder.[48] But in practice, the application was much broader. Lynching did not occur only for accusations of serious crimes such as rape and murder, although they were certainly the most frequent. In many cases, vigilante crowds lynched Blacks for a wide array of less-serious allegations like "white racial prejudice," bumping into a white woman, or even for no crime at all.[49] The implication of this observation is clear: the institution of lynching served as a method of social control to terrorize Black communities and enforce a racial caste system in Southern regions.

### C. *Lynching as a Spectacle*

Historian Richard Maxwell Brown identified three characteristics common among Southern lynching "rituals" of Blacks accused of rape or murder: (1) one or two days' notice before a lynching would occur, so that whites could witness the event; (2) "the lynching itself would become a mass spectacle with thousands of whites, in gathers up to as high as fifteen thousand persons, participating as spectators;" and (3) the victim was subjected to excruciating torture and mutilation.[50] These so-called rituals, reserved exclusively for Blacks, are known as "public torture lynchings," a type of mass mob lynching that involved abnormal cruelty as a spectacle in front of crowds of hundreds or even thousands.[51] Henry Smith, an African American man from Texas who allegedly assaulted and murdered the four-year-old child of a police officer who beat him during an arrest,[52] endured one of the first nationally covered "torture lynchings."[53] The *New York Times* reported in 1893 that the Texas man was to be "'burned alive at the scene of his crime to-morrow evening . . . . All the preparations are being made.'"[54]

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[47] *Id.*

[48] BROWN, *supra* note 19, at 215–16.

[49] *Id.*; NDULUE, *supra* note 20, at 6.

[50] BROWN, *supra* note 19, at 217–18.

[51] David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC'Y REV. 793, 803 (2005).

[52] Robert, McNamara, *1893 Lynching by Fire of Henry Smith*, THOUGHTCO (May 16, 2019), https://www.thoughtco.com/1893-lynching-of-henry-smith-4082215.

[53] Garland, *supra* note 51, at 804.

[54] *To Be Burned Alive: Henry Smith Captured at Paris, Texas*, N.Y. TIMES, Feb. 1, 1893, at 1.

The horrifying lynching of Sam Hose, accused of murder, was also detailed in the *New York Times*. The article emphasized the familiar torture lynching process, noting that Hose was "burned at the stake, in the presence of 2,000 people . . . . Before his death Hose's body was mutilated with knives, and the torture endured for half an hour. When the flames had ended his suffering, the mob cut the remains of the body into small fragments."[55]

The horrifying details of the lynchings of Henry Smith and Sam Hose were reported in a national newspaper and witnessed by thousands as a form of spectacle. Consistent with the ambition of the "rituals," these executions were often staged in public—or at the scene of the alleged crime—and the use of a stage or elevation of the victim's body assisted the visibility of the execution.[56] After the lynch victim's death, the body would be dragged to the victim's home or put on display in Black neighborhoods.[57] In the days following a public lynching, photographs were mass distributed, sold, and/or traded like souvenirs.[58]

Yet despite these facts, lynchers were rarely prosecuted for carrying out illegal, premeditated executions.[59] The *New York Times* noted in an 1899 article that "[i]n all the thousands who constituted the mob there was not a single effort made to disguise or conceal identity. No man wore a mask. All the leaders of the mob are well known and there are hundreds of witnesses who can testify to their participation in the [lynching]."[60] The article went on to note that there was "a strong feeling that no punishment will result from [the] tragedy."[61] In some instances, Southern judges and politicians explicitly condoned or encouraged the actions of lynch mobs. Ida B. Wells gave an account of South Carolina Governor Benjamin Tillman, declaring that he would personally "lead a mob to lynch a *negro* who raped a *white* woman."[62] The South, Wells argued, was "shielding itself behind the plausible screen of defending the honor of its women," and

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[55] *Negro Dies at the Stake*, N.Y. TIMES, Apr. 24, 1899, at 2.

[56] Garland, *supra* note 51, at 804–05.

[57] *Id.* at 806.

[58] *Id.* at 805–06.

[59] ALLEN & CLUBB, *supra* note 12, at 81.

[60] *Negro Burned at a Stake: Self-Confessed Murderer Put to Death in Kentucky*, N.Y. TIMES, Dec. 7, 1899.

[61] *Id.*

[62] IDA B. WELLS-BARNETT, SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES 11 (1892).

in doing so, "they do not see that by their tacit encouragement, their silent acquiescence, the black shadow of lawlessness in the form of lynch law is spreading its wings over the whole country."[63]

In this sense, the institution of non-sanctioned lynching converged with America's longtime use of legal capital punishment. As other states—primarily in the Northeastern regions—began to move toward abolition of capital punishment, the South grew concerned that the abolition of legal executions would lead the public to retaliate with increased vengeance in the form of lynching.[64]

Oddly enough, lynching in the south, with emphasis on public terror lynching which occurred in front of crowds of thousands of people, reached its peak in 1890—the year of the first electrocution.[65] The fact that public terror lynchings were at their all-time high at the same time that many people called for a transition to more humane levels of execution is peculiar, and perhaps only reconcilable alongside the discussion of the racialization of capital punishment. Given the depravity of the conduct that constitutes lynching, one might assume that the practice has been outlawed for decades; however, only mere months ago did Congress pass a bill that classifies lynching as a federal hate crime.[66]

### D. *Electrocution, Perceptions of Pain, and the Pursuit towards "Humane" Executions*

One theme that threads the Eighth Amendment is that capital punishment should strive to be humane.[67] But what does "humane" mean in the context of a state-sanctioned killing of a human being? Although it should be noted that executions of human beings are never "humane" per se, these discussions about *more* humane executions are deeply intertwined with ideas of what is "civilized" and, additionally, perceptions of pain. In the mid-eighteenth century, critics began to argue that executions should be less painful and that

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[63] *Id.* at 14.

[64] NDULUE, *supra* note 20, at 12.

[65] Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557, 572 (2003); BANNER, *supra* note 13, at 186.

[66] 18 U.S.C. § 249(a)(5).

[67] *See, e.g.*, Baze v. Rees, 553 U.S. 35, 62 (2008) ("The broad framework of the Eighth Amendment has accommodated this progress toward more humane methods of execution, and our approval of a particular method in the past has not precluded legislatures from taking the steps they deem appropriate, in light of new developments, to ensure humane capital punishment.").

the government should "kill kindly."[68] Towards the end of the century, news of botched executions via hanging spread in newspapers, with spectators reporting the "hideous and torturous process" as "scene[s] of horror," "sickening," and brutal.[69] Critics of execution by hanging compared the practice to a relic of barbarism, and spectators reported fear that hanging did not actually kill.[70] For the first time in the country's history, Americans widely perceived execution by hanging as deeply problematic. A columnist in an 1884 *New York Tribune* article summarized these concerns perfectly:

> [T]hat there has not been more effort to substitute for the gallows some less savage and rude form of execution. Science has abundant means of killing in the most swift and painless manner, yet we cling to a method which is often neither one nor the other. If human life is to be taken at all in the interest and for the protection of a society, it certainly ought to be taken as mercifully as possible. Anything that suggests torture is unworthy of modern civilization.[71]

This line of thought originally ignited support to replace hanging with electrocution, for the use of the electric chair symbolized scientific progress, modernity, and the goals of making capital punishment more uniform, and less painful.[72] Two weeks before the world's first scheduled execution by electrocution, however, the defendant's attorneys filed a writ of habeas corpus on the ground that electrocution violated New York's ban on cruel and unusual punishment.[73]

The efforts to halt death by electrocution proved unsuccessful. In the case of *In re Kemmler*, the Supreme Court held that the electric chair is constitutional and not violative of the Eighth Amendment's ban on cruel and unusual punishment because "a current of electricity of such known and sufficient force as certainly to produce instantaneous, and therefore, painless, death."[74] On August 6, 1890, twenty-five witnesses observed a seventeen-second dose of electricity that failed to kill William Kemmler.[75] During the over-one-minute long second dose,

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[68] BANNER, *supra* note 13, at 170.

[69] *Id.* at 172.

[70] Locals in Arkansas, North Carolina and Louisiana reported, on several occasions, seeing executed criminals walking around the day after their supposed executions. *Id.* at 173–75.

[71] *The Anglo-Saxon Gallows*, N.Y. TRIBUNE, Apr. 6, 1884, at 6.

[72] BANNER, *supra* note 13, at 183–84.

[73] *In re* Kemmler, 136 U.S. 436, 441–42 (1890).

[74] *Id.* at 443.

[75] BANNER, *supra* note 13, at 185–86.

witnesses watched blood appear on Kemmler's face, as if they were beads of sweat from ruptured capillaries.[76] They smelled burning flesh and saw the hairs on his head singe with the electric current.[77] The next day, newspaper headlines recounted the events of the first execution by electricity: "Far Worse than Hanging: Kemmler's Death Proves an Awful Spectacle," read a headline on the front page of the *New York Times*.[78] Despite the horrifying nature of the first electrocution, New York continued to use the new method as opposed to hanging, and later bungled electrocutions raised little more than sporadic concern.[79] By 1937, the federal government and twenty-five states had adopted electrocution as a more humane method of execution.[80]

In the midst of the movement to find more humane methods of execution, race continued to play a powerful role in the application of the death penalty. Although it was not exclusively imposed on African Americans, the electric chair was primarily reserved for them—a fact powerfully apparent in the minds of the populace.[81] In 1911, a white prisoner cut his own throat in opposition to being put on death row, explaining that "he would not be the first white man electrocuted in North Carolina."[82] Between 1910 and 1961, North Carolina "executed 362 people, of whom 283 [(78 percent)] were African American."[83] As columnist Nell Battle Lewis wrote, "the mob lynches, the State electrocutes."[84]

### E. *Capital Punishment in the Civil Rights Era*

Lynchings began to decrease in the early twentieth century; simultaneously, however, racial disparities in legal executions persisted.[85] Between 1930 and 1972, nearly 90 percent of the men

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[76] *Id.* at 186.

[77] *Id.*

[78] *Far Worse than Hanging*, N.Y. TIMES, Aug. 7, 1890, at 1.

[79] BANNER, *supra* note 13, at 188.

[80] *Id.* at 189.

[81] *See* Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2036 (2010).

[82] *Id.* at 2039.

[83] *Id.*

[84] *Id.* at 2065 n.172 (citing Nell Battle Lewis, *Incidentally*, NEWS & OBSERVER (Raleigh), Sept. 17, 1922, at 6.).

[85] NDULUE, *supra* note 20, at 16.

executed for rape across the United States were African American.[86] Unsurprisingly, an overwhelming proportion of these executions were in former Confederate states.[87] In the mid-twentieth century, in the wake of the Civil Rights Movement, the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP) joined efforts to deconstruct the South's racial caste system in areas such as education, employment, and voting rights.[88] In light of the interaction between race and capital punishment canvassed above and further developed below, the labors of the ACLU and NAACP were directed at dismantling the death penalty system.[89]

1. Racial Challenges at the Supreme Court

The Legal Defense Fund (LDF), armed with the goal of eradicating racial discrimination, became the face of legal opposition to capital punishment.[90] The legal claims brought forth by the LDF, including those advanced to the Supreme Court, focused on the racial dimensions of capital punishment and urged the Court to eradicate the practice.[91] The Court's opinions, however, consistently omitted discussions of racial discrimination and repeatedly "declined to use race as the lens for understanding or regulating the American death penalty."[92]

In *Furman v. Georgia*, the Supreme Court held that the death penalty, as applied, was unconstitutional under the Eighth Amendment's cruel and unusual punishment clause.[93] The Justices, however, could not agree on exactly why the death penalty was unconstitutional.[94] Each Justice wrote separately, with the five concurring opinions agreeing that the death penalty was unconstitutional when applied in an arbitrary or discriminatory

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[86] *Id.* (citing U.S. DEP'T OF JUST., BUREAU OF PRISONS, NAT'L PRISONER STATS., BULL. NO. 45, CAPITAL PUNISHMENT 1930–1968 (1969)).

[87] *Id.*

[88] *See ACLU History*, ACLU, https://www.aclu.org/about/aclu-history (last visited Sep. 23, 2022).

[89] *See Making the Case Against the Death Penalty*, ACLU, https://www.aclu.org/other/aclu-history-making-case-against-death-penalty (last visited Jan. 18, 2022).

[90] Steiker & Steiker, *supra* note 17, at 244.

[91] *Id.* at 253.

[92] *Id.*

[93] Furman v. Georgia, 408 U.S. 238, 239–40 (1972).

[94] *See generally id.*

manner and had been "wantonly and so freakishly imposed."[95] Despite the glaring need to obviate the issue of the racially disparate application of the death penalty, *that* discussion was nowhere to be found. In fact, in his concurring opinion, Justice Stewart went so far as to mention that "[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual," alluding to the randomness of how the death penalty was applied in practice.[96] He went on to say that "racial discrimination has not been proved."[97] In *Furman*, the Supreme Court effectively invalidated the federal government's death penalty and statutes in forty states that had upheld the practice.[98] While the *Furman* decision sought to eradicate capital punishment, states quickly moved to re-enact new capital punishment statutes in view of the decision's effect.[99]

Four years after *Furman* was decided, the death penalty was all but fully resurrected: thirty-five states and the federal government had put forth new capital punishment statutes.[100] States crafted new legislation as work arounds to *Furman* to reinstate the death penalty.[101] One solution was to remove the jury's discretionary power by returning to the old practice of defining death as the mandatory sentence for certain crimes.[102] North Carolina, for example, made death the "mandatory sentence for first-degree murder and aggravated rape."[103] Louisiana further expanded mandatory death sentences for aggravated kidnapping.[104] If the "randomness" that Justice Stewart alluded to in *Furman* was a product of jury discretion, new legislation sought to eradicate it by establishing a clear rule.[105] Other states, guided by the Model Penal Code, legislated standards that narrowed the jury's discretion in determining who received the death penalty and who did not, such as holding sentencing proceedings separately and listing "aggravating" or "mitigating" circumstances that made a

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95 *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

96 *Id.* at 309.

97 *Id.* at 310 (footnote omitted).

98 *Id.* at 465 (Rehnquist, J., dissenting).

99 *See infra* notes 100–106 and accompanying text.

100 BANNER, *supra* note 13, at 268.

101 *Id.* at 269.

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

sentence of death more or less appropriate.[106] In *Gregg v. Georgia*, the Supreme Court addressed these new statutes and held that the "guided discretion" statutes—which set out particularized, aggravating factors to help guide the jury in sentencing—were constitutional;[107] however, the statutes which provided mandatory death sentences for specific crimes were not.[108]

Shortly after *Gregg*, the Supreme Court directly addressed the application of the death penalty to the crime of rape, deciding that the death penalty is unconstitutional for the crime of rape against an adult woman.[109] Consistent with norms in earlier times, the racial disparity in the application of capital punishment was most evident in cases involving rape. Between 1930 and 1972, 89 percent of people executed for rape were Black—97 percent of which took place in the South.[110] Execution of Black men for the rape of white women (or allegations of rape) was unquestionably the most conspicuous and extreme example of the racially discriminatory application of capital punishment. Yet when the Supreme Court revisited the propriety of the imposition of capital punishment one year after *Gregg* in *Coker v. Georgia*,[111] it did not even pretend to speak to these issues. The Court instead chose to intervene in a case in which a white defendant had been convicted and sentenced to death for rape, overlooking two cases in which Black men were convicted of rape against a white victim in Georgia just the year before.[112] This decision thus permitted the Court to sidestep the disparate use of the death penalty for rape in Georgia and throughout the South in cases involving Black defendants.[113] The practical effect

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[106] BANNER, *supra* note 13, at 269.

[107] Gregg v. Georgia, 428 U.S. 153, 206–07 (1976).

[108] *See e.g.*, Woodson v. North Carolina 428 U.S. 280, 305 (1976) ("[w]e conclude that the death sentences imposed upon the petitioners under North Carolina's *mandatory* death sentence statute violated the Eighth and Fourteenth Amendments and therefore must be set aside.") (emphasis added); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) ("[w]e find that the death sentence imposed upon the petitioner under Louisiana's mandatory death sentence statute violates the Eighth and Fourteenth Amendments and must be set aside.).

[109] *See generally* Coker v. Georgia, 433 U.S. 584 (1977).

[110] Brief for ACLU et al. as Amici Curiae Supporting Petitioner at 10, Kennedy v. Louisiana, 554 U.S. 407 (2008) (citing U.S. DEP'T OF JUST., BUREAU OF PRISONS, NAT'L PRISONER STATS., BULL. NO. 45, CAPITAL PUNISHMENT 1930–1968 (1969)).

[111] 433 U.S. 584 (1977).

[112] Carol S. Steiker, *Remembering Race, Rape, and Capital Punishment*, 83 VA. L. REV. 693, 708 n.113 (1997).

[113] *Id.* (citing RANDALL KENNEDY, RACE, CRIME AND THE LAW 324–25 (1998)).

of the *Coker* decision is that it ended the NAACP's campaign against the use of capital punishment for rape.

Approximately ten years after the *Furman* and *Coker* decisions, the petitioner in *McCleskey v. Kemp* alleged that his capital sentence was unconstitutional based on an advanced statistical study from Professor David Baldus.[114] In reviewing two thousand Georgia murder cases and considering some 230 variables that might legitimately influence a sentencing decision, Baldus and his colleagues found that Black defendants who kill white victims were over twenty-two times more likely to receive a sentence of death than Black defendants who kill Black victims.[115] Additionally, Black defendants who kill white victims were over seven times more likely to receive a sentence of death than white defendants who kill Black victims.[116] Despite a sharp division between the Justices, the Supreme Court ultimately decided that Baldus's findings were not relevant to the constitutionality of capital punishment, and the statutes were not violative of the Equal Protection Clause of the Fourteenth Amendment.[117] The Court reasoned that discriminatory impact (absent proof of discriminatory purpose) is not sufficient to show a violation of equal protection.[118]

*Furman*, *Gregg*, *Coker*, and *McClesky* tell the story of how the American death penalty came to be scrutinized in the 1960s, nearly abolished in the early 1970s, but then quickly resurrected in the 1980s. That story cannot be told without attention to race. Yet, in these foundational cases on the constitutionality of capital punishment, the Supreme Court addressed the American death penalty with a race-neutral focus on "randomness" and "arbitrariness,"[119] thereby avoiding the race issue that was central to the litigants' arguments.

## III. CAPITAL PUNISHMENT IN THE TWENTY-FIRST CENTURY

In light of challenges to capital punishment heard by the Supreme Court, states have begun to shift away from the practice.[120]

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[114] McCleskey v. Kemp, 481 U.S. 279, 286 (1987).

[115] Samuel R. Gross, *David Baldus and the Legacy of* McCleskey v. Kemp, 97 IOWA L. REV. 1905, 1919 (2012) (citing Callins v. Collins, 510 U.S. 1141, 1153–54 (1994) (Blackmun, J., dissenting)).

[116] *Id.*

[117] *McCleskey*, 481 U.S. at 312–13.

[118] *Id.* at 298.

[119] *See supra* text accompanying notes 92–95.

[120] *See generally State by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Sept. 3, 2022).

As of 2022, twenty-three states and the District of Columbia have abolished the death penalty, compared to only six states in 1960.[121] But it is important to note that many of the states that abolished the death penalty never reinstituted the it after *Furman v. Georgia* rendered it unconstitutional; for example, the Vermont legislature simply declined to re-introduce capital punishment.[122] Moreover, despite initial urgency to reinstate the death penalty,[123] in the four decades since the *Furman* decision, many state legislatures have been evaluating their stances on capital punishment.[124]

In June 2021, Virginia became the first southern state in United States history to abolish the death penalty.[125] In a joint statement after the shift, Virginia leaders, including Governor Ralph Northam, Senate Majority Leader Dick Salslaw, and House Speaker Eileen Filler-Corn, conveyed the significance of the move by noting that "[i]t is vital that our criminal justice system operates fairly and punishes people equitably. We all know the death penalty doesn't do that. It is inequitable, ineffective, and inhumane."[126] Another commentor expressed her approval of the abolition in similar terms, observing that, "[b]y voting for abolition, we are showing the way, that if Virginia—the state with the longest history and most people executed—if we can do it, so can other states."[127] Some lawmakers, including Kathleen Murphy, acknowledged the historically demonstrable fact that people are more often put to death "because of the color of their skin" rather than the nature of the crime committed

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[121] *Id.*

[122] *See State and Federal Info: Vermont*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/Vermont (last visited Sept. 3, 2022).

[123] *See supra* text accompanying note 100.

[124] *See infra* notes125–144 and accompanying text.

[125] H.B. 2263, 2021 Leg., Spec. Sess. I (Va. 2021); Samantha O'Connell, *Virginia Becomes First Southern State to Abolish the Death Penalty*, ABA (Mar. 24, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/virginia-death-penalty-repeal/#:~:text=On%20March%2024th%20at%20around,to%20eliminate%20capital%20punishment%20entirely.

[126] Denise Lavoie & Sarah Rankin, *Virginia Lawmakers Vote to Abolish the Death Penalty*, AP (Feb. 22, 2021), https://apnews.com/article/virginia-death-penalty-repeal-governor-c98c16a996037a4d1e1d497787b7e6f1.

[127] *Id.*

and that, since "there are no do-overs" with capital punishment, abolition was informed by these concerns.[128]

But even in states where capital punishment is still on the books, the dialogue about the propriety of capital punishment also persists. More specifically, there is renewed attention to the methods of execution—an issue that had laid dormant for several decades.[129] Oklahoma, for example, became the first state to espouse lethal injection in 1977.[130] The state's electric chair needed repair, and the cost to make the repairs would have been substantial; thus, the motivation behind adopting lethal injection as a new measure was partially economic.[131] The public, however, also stressed the adoption of lethal injection in furtherance of the need to "eliminate the 'cruelty and inhumanity of electrocution.'"[132] As another example, Texas in 1977 followed Oklahoma's lead and became the second state to adopt lethal injection as a form of capital punishment.[133] Simultaneously, Texas ceased use of the electric chair based on "the belief that lethal injections were more humane than the physically traumatic and visually offensive electrocution."[134]

In addition to perspectives shifting in the legislatures, state courts have also addressed the constitutionality of the electric chair. In the 2008 case, *State v. Mata*, for example, the Nebraska Supreme Court ruled that use of the electric chair violated the state's ban on cruel and unusual punishment, holding that

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[128] Brendan O'Brien & Jonathan Allen, *Virginia Lawmakers Vote to Abolish Death Penalty*, REUTERS (Feb. 5, 2021), https://www.reuters.com/article/us-usa-executions-virginia/virginia-lawmakers-vote-to-abolish-death-penalty-idUSKBN2A51RZ.

[129] *See infra* text accompanying notes130–134.

[130] Jonathan S. Abernethy, *The Methodology of Death: Reexamining the Deterrence Rational*, 27 COLUM. HUM. RTS. L. REV. 379, 409 (1996); *see also* OKLA. STAT. tit. 22, § 1014 (effective Nov. 1, 2017).

[131] Abernethy, *supra* note 130, at 409.

[132] *Id.* (citing Martin R. Gardner, *Executions and Indignities: An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96, 126–27 n.228 (1978)).

[133] TEX. CODE CRIM. PROC. art. 43.14 (1977) ("Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time after the hour of 6 p.m. on the day set for the execution, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the director of the correctional institutions division of the Texas Department of Criminal Justice.").

[134] Abernethy, *supra* note 130, at 409 (citing JAMES W. MARQUANT ET AL., THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923–1990 132 (1994)).

> electrocution is unnecessarily cruel in its purposeless infliction of physical violence and mutilation of the prisoner's body. Electrocution's proven history of burning and charring bodies is inconsistent with both the concepts of evolving standards of decency and the dignity of man. Other states have recognized that early assumptions about an instantaneous and painless death were simply incorrect and that there are more humane methods of carrying out the death penalty. Examined under modern scientific knowledge, "[electrocution] has proven itself to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber" of state prisons. We conclude that death by electrocution as provided in § 29-2532 violates the prohibition against cruel and unusual punishment in Neb. Const. art. I, § 9.[135]

By the same token, the Supreme Court of Georgia determined death by electrocution to be a violation of the state's ban on cruel and unusual punishment with its 2001 decision *Dawson v. State*.[136] The court, in reaching its decision, relied on evidence from experts, survivors of electrocution, prison officials, and autopsy reports to support the proposition that death by electrocution "involves more than the 'mere extinguishment of life.'"[137] Thus, the court affirmed that "death by electrocution . . . inflicts purposeless physical violence and needless mutilation that makes no measurable contribution to accepted goals of punishment. . . . [D]eath by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition against cruel and unusual punishment . . . ."[138] Importantly, the *Dawson* court further emphasized that although the "existence and adoption of more humane methods . . . does not *automatically* render a contested method cruel and unusual,"[139] the fact that a more humane "method involving less pain and mutilation exists" clearly plays an important role in determining "whether an older method is cruel and unusual punishment."[140] In reaching this conclusion, "[c]omparison with existing methods is thus *required* to determine whether or not a

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[135] State v. Mata, 745 N.W.2d 229, 278 (Neb. 2008) (quoting Jones v. State, 701 So. 2d 76, 87 (Fla. 1997) (Shaw, J., dissenting)).

[136] *See* Dawson v. State, 554 S.E.2d 137, 144 (Ga. 2001).

[137] *Id.* at 143 (quoting *In Re* Kemmler, 136 U.S. 436, 447 (1890)).

[138] *Id.* at 143–44.

[139] *Id.* at 143 (quoting Hunt v. Nuth, 57 F.3d 1327, 1338 (4th Cir. 1995)).

[140] *Id.* at 143.

punishment involves the 'unnecessary cruelty' forbidden by . . . the Eighth Amendment . . . ."[141] In short, the Georgia Supreme Court utilized a comparison between the effects of electrocution and the effects of the newer method of lethal injection as a necessary factor in determining the constitutionality of the electric chair, highlighting the continuing theme that capital punishment should be measured using evolving standards of decency.[142]

By 2009, all pro-death-penalty states had adopted lethal injection.[143] The motivation behind courts' and legislatures' attempts to reform capital punishment is the idea that

> [t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[144]

### A. *South Carolina Legislation*

Starting in 1995, people on death row in South Carolina were given the option to choose between death by electrocution or lethal injection.[145] If the person failed to make a selection, lethal injection was the default method of execution.[146] Thus, in this respect, South Carolina was similar to the rest of the country in that it embraced lethal injection as the preferred means of execution, but people on death row could opt out of death by lethal injection. When the supply of South Carolina's lethal injection drugs depleted in 2013, the State was unable to perform executions because, per state law at the time, if a person on death row failed to affirmatively choose an alternative method, the default was lethal injection.[147] In response to these supply constraints, South Carolina acted quickly to amend its death penalty

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[141] *Id.* (emphasis added) (quoting *In Re* Kemmler, 136 U.S. 436, 447 (1890)).

[142] *Dawson*, 554 S.E.2d at 139–43.

[143] Deborah W. Denno, *Lethal Injection Chaos Post-*Baze, 102 GEO. L.J. 1331, 1342 (2014).

[144] Trop v. Dulles, 356 U.S. 86, 100–01 (1958).

[145] S.C. CODE ANN. § 24-3-530 (1995).

[146] *Id.*

[147] Michelle Liu, *SC Delays Execution, Citing Lack of Lethal Injection Drugs*, AP NEWS (Nov. 30, 2020), https://apnews.com/article/southcarolina-courts-executions-931bae9dd612fe341f3c09b0bcd8ff91.

statutes so that it might resume executing people without delay.[148] In 2015, the South Carolina Legislature introduced House Bill 4121, which attempted to eliminate the option of death by lethal injection entirely.[149] In 2017, the State again tried to pass a death penalty bill, House Bill 4852, to accomplish two things: (1) introduce death by firing squad; and (2) limit a person on death row's options to death by electrocution or firing squad if the state is unable to obtain the substances necessary to administer lethal injection.[150]

In 2019, the State reintroduced propositions similar to those suggested in House Bill 4852, and they failed again.[151] After several failed attempts, South Carolina finally achieved its objective in early 2021 to successfully amend its capital punishment statute.[152] The 2021 amendment ("Senate Bill 200"), originally proposed by Republican State Senator Greg Hembree, changed South Carolina's capital punishment statute by requiring those on death row to *expressly elect* lethal injection if that is their preferred method, whereas before it was the default.[153] Thus, if someone on death row does not expressly choose lethal injection, "then the penalty must be administered by electrocution."[154] Importantly, the option to choose lethal injection is qualified in that the lethal injection drugs must be "available at the time of election."[155] As mentioned earlier, lethal injection has not been available in South Carolina since 2013.[156] Further, even if the lethal injection drugs *do* become available, a person on death row would need to jump through hoops of electing death by lethal

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[148] *See infra* text accompanying notes 149–158.

[149] H.B. 4121, 2015 Gen. Assemb., 121st Sess. (S.C. 2015).

[150] *See* H.B. 4852, 2017 Gen. Assemb., 122d Sess. (S.C. 2017).

[151] *See* H.B. 3301, 2019 Gen. Assemb., 123d Sess. (S.C. 2019); S.B. 176, 2019 Gen. Assemb., 123d Sess. (S.C. 2019).

[152] S.B. 200, 2021 Gen. Assemb., 124th Sess. (S.C. 2021) ("A person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution or, at the election of the convicted person, by firing squad or lethal injection, if it is available at the time of election, under the direction of the Director of the Department of Corrections. The election for death by electrocution, firing squad, or lethal injection must be made in writing fourteen days before each execution date or it is waived. If the convicted person receives a stay of execution or the execution date has passed for any reason, then the election expires and must be renewed in writing fourteen days before a new execution date. If the convicted person waives the right of election, then the penalty must be administered by electrocution.").

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *See* Liu, *supra* note 147.

injection, which, at a minimum, would require the election to "be made in writing fourteen days before [the] execution date."[157] The practical effect of the new law at present is that there is really no *option* to choose lethal injection at all. Not only did Senate Bill 200 revert its primary method of execution back to electrocution from lethal injection—it also added an additional option for people on death row: death by firing squad.[158]

1. Implications

South Carolina's recent amendment to its capital punishment statute is problematic for a number of reasons. First, it deprives incarcerated people on death row in South Carolina an option that is available to every other death row inmate in the country.[159] From last meals to last words, people on death row get to exercise limited autonomy over their own execution; access to what is currently considered the most humane form of execution restores a small amount of decency to what is an already unbecoming practice. In South Carolina, that small consolation is now gone. Second, by re-introducing death by firing squad, South Carolina is disregarding the goal of the Eighth Amendment to adapt to evolving standards of decency in its evaluation of cruel and unusual punishment. Relatedly, by changing the default method to electrocution along with providing the option of death by firing squad, South Carolina is marching deliberately back towards its shameful history of executions and its "death belt" reputation,[160] when it should instead be making every effort to atone.

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[157] S.C. CODE ANN. § 24-3-530. For an expansive discussion on the difficulty of obtaining information regarding execution protocols and election methods in South Carolina *see* Brief for Plaintiff-Appellant at 27–46, Justice 360 v. Stirling, 42 F.4th 450 (4th Cir. 2022) (No. 21-2205).

[158] *See* S.B. 200, 124th Gen. Assemb., 1st Reg. Sess. (S.C. 2021).

[159] *See generally State by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Sept. 3, 2022).

[160] *See generally* John H. Blume & Lindsey S. Vann, *Forty Years of Death: The Past, Present, and Future of the Death Penalty in South Carolina (Still Arbitrary After All These Years)*, 11 DUKE J. OF CONST. L. & PUB. POL'Y 183 (2016).

i. Deprivation of Choice

Of the twenty-seven states that still recognize capital punishment, twenty-six favor lethal injection as the primary method of execution.[161] For many of these states, lethal injection is the *only* method of execution.[162] By stipulating in Senate Bill 200 that incarcerated people on death row may only choose lethal injection if it is available, South Carolina is depriving those on its death row roster a method of execution that, prior to the amendments, was ubiquitously accepted as the superior method. By the same token, South Carolina has essentially made electrocution a mandatory method of execution because neither lethal injection nor firing squad are currently available in the state.[163]

In June 2021, two incarcerated persons on death row in South Carolina sought to stay their executions on the ground that permitting the executions to proceed with only one method of execution available violated the newly enacted amendment to the State's capital punishment statute.[164] The South Carolina Supreme Court granted their petition, with two separate orders vacating the execution notices on just those grounds.[165] Thus, for the time being, no executions will be held until the Department of Corrections "'has developed and implemented appropriate protocols and policies to carry out executions by firing squad.'"[166] The order is hardly a victory, however, because the incarcerated persons will still be forced to choose between death by electric chair or death by firing squad when it is made available.

All the more troubling, the thirty-five incarcerated persons sitting on South Carolina's death row were sentenced before the new legislation was passed—at a time when they reasonably would have

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[161] *States and Capital Punishment*, NCLS (Aug. 11, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx.

[162] *See id.*

[163] *See* Stay Order at 2, State v. Sigmon, No. 2002-024388 (S.C. June 16, 2021) ("[T]he Director of the South Carolina Department of Corrections has provided an affidavit certifying that, as of June 3, 2021, the only statutorily approved method of execution available in South Carolina is electrocution.").

[164] *South Carolina Supreme Court Halts Executions of Brad Sigmon and Freddie Owens*, DEATH PENALTY INFO. CTR. (June 17, 2021), https://deathpenaltyinfo.org/news/south-carolina-supreme-court-halts-executions-of-brad-sigmon-and-freddie-owens.

[165] *Id.* (The court ruled that "attempting to execute the men by electrocution without offering them the alternative of lethal injection or firing squad violated the 'statutory right of inmates to elect the manner of their execution.'").

[166] *Id.*

expected the option of lethal injection.[167] State representative Justin Bamberg, who opposed the amendments, stated that the new law would "force people to get electrocuted and give them the choice of getting shot instead when that wasn't even the law when they were convicted of their crime."[168] The law gives rise to several questions regarding choice: should incarcerated people have a choice in selecting a method of execution? More specifically, should incarcerated people at least have the option to choose lethal injection? Further, can the state deprive incarcerated people of an option available at the time of their sentencing?

Having access to lethal injection, or, having the choice *not* to be put to death via the electric chair, serves a dignity-enhancing function to people who have been pushed to society's margins—an outcome that is consistent with the evolving standards of decency maxim. People on death row are already given choices regarding their last meal, last words, execution witnesses, and, as recently as March 2022, the Supreme Court considered a minister's role at the time someone on death row is executed.[169] Although abolitionists may argue that it serves to validate an already irredeemable practice, giving people on death row choices regarding their execution is one last gesture of humanity.

ii. [D]evolving Standards of Decency

What constitutes cruel and unusual punishment should be tested against contemporary sensibilities, acting as a "mirror to society."[170] In *Trop v. Dulles*, the Supreme Court held that the Eighth Amendment did not permit Congress to take away an American's citizenship as punishment for a crime.[171] The Court reasoned that the words of the Eighth Amendment "are not precise, and that their scope is not static.

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[167] All thirty-five individuals categorized as death row inmates were listed in South Carolina Department of Corrections system prior to 2021, s*ee* S. C. DEP'T OF CORRS., DEATH ROW LIST 1 (2022), https://www.doc.sc.gov/news/death-row-report.pdf.

[168] Victoria Hansen, *Death Row Inmates Sue after They're Asked to Pick Firing Squad or Electric Chair*, NPR (May 20, 2021, 2:09 PM), https://www.npr.org/2021/05/20/998600135/south-carolina-reinstates-firing-squad-but-not-without-legal-challenges.

[169] *See* Ramirez v. Collier, 142 S. Ct. 1264, 1278, 1282 (2022) (holding that Ramirez is likely to succeed on his claim that Texas's policy forbidding Ramirez's pastor from laying his hands on his parishioner as he dies substantially burdens on exercise on religion. Specifically, the Court determined Ramirez would suffer irreparable harm if prohibited from engaging in religious practice in the final moments of his life).

[170] *See* BANNER, *supra* note 13, at 237–38.

[171] Trop v. Dulles, 356 U.S. 86, 103 (1958).

The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[172] By the time Nebraska abolished the use of the electric chair in 2008, it had been informally—but unanimously—decided that the practice of death by electrocution should be eradicated.[173] Only if a death row inmate specifically requested the electric chair would it be imposed, never to be involuntarily thrust upon another inmate again.[174] Now, however, South Carolina is the only place in the world where a person on death row is condemned to die by electric chair. The rest of the world has decided, with good reason, that electrocution no longer comports with modern standards of decency.[175]

To appreciate why this is so, consider the following: "For execution by the electric chair, the person is usually shaved and strapped to a chair with belts that cross his chest, groin, legs, and arms. A metal skullcap-shaped electrode is attached to the scalp and forehead over a sponge moistened with saline."[176] The prisoner is then blindfolded and given a jolt of electricity, lasting about thirty seconds, between 500 and 2000 volts.[177] The prisoner's hands may grip the chair and their arms and limbs may move violently, in some cases resulting in fractures or dislocations.[178] In the event that the person's heart is still beating, they are given a second jolt of electricity—"this process continues until the" person is dead.[179] United States Supreme Court Justice William Brennan described electrocution in gruesome detail in a lengthy dissent: "the prisoner's eyeballs sometimes pop out and 'rest on [his] cheeks.' The prisoner often defecates, urinates, and vomits

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[172] *Id.* at 100–01.

[173] *See supra* note 135 and accompanying text.

[174] Denno, *supra* note143, at 1342.

[175] Timothy J. Jorgensen, *Grave Consequences: How Banning Execution by Lethal Injection May Result in the Return of the Electric Chair*, PRINCETON UNIV. PRESS (July 20, 2022), https://press.princeton.edu/ideas/grave-consequences ("The United States is the only country in the world that uses electrocution as a method to execute condemned prisoners.").

[176] *Description of Each Execution Method*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/methods-of-execution/description-of-each-method (last visited Sept. 2, 2022).

[177] *Id.*

[178] Harold Hillman, *The Possible Pain Experienced During Execution by Different Methods*, 22 PERCEPTION 745, 747 (1993).

[179] *Description of Each Execution Method*, *supra* note176.

blood and drool."[180] Although the inventors of the electric chair had hoped it would service instantaneous and painless death through electrocution, witnesses of death by electrocution suggest this goal has not come to fruition.[181] For example, suffocation during electrocution is not uncommon, and in some instances people in the chair have even burned to death.[182] Compounding the harm, their cries of pain often go unheard because the electric chair is also known to cause respiratory failure, muscular paralysis, as well as cardiac arrest that precludes the person being executed from expressing any emotion.[183] So, although the electric chair was designed with humane considerations in mind at a time where crude forms of execution—such as hanging —were dominant, both scientific evidence and eyewitness accounts suggest that it is no less cruel than the methods it sought to replace. It is unquestionable that standards of decency have evolved in every aspect of modern-day human existence since the nineteenth century, yet South Carolina's new legislation turns a blind eye to the concept that punishment for crimes committed should mark the progress of a maturing society—not send us back in time.

To give people on death row a choice between electrocution and firing squad, while simultaneously denying them access to a better method, is an unconvincing attempt at bona fide decency. A choice between two equally offensive methods of execution is hardly a choice at all. The case against death by electrocution has been mounting for the last one hundred years, backed by scores of attestations that it is intensely painful and never instantaneous as it was originally publicized.[184] The alternative method of execution by firing squad does not measure up to the "evolving standards of decency" principle either. That there have only been three executions by firing squad in the post-*Gregg* era speaks to the understanding that lining someone up and shooting them with a gun is a barbarous relic of the past—not to

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[180] Glass v. Louisiana, 471 U.S. 1080, 1087 (1985) (Brennan, J., dissenting) (quoting *Hearings on S. 1760 before the Subcomm. on Crim. L. and Proc. of the S. Comm. on the Judiciary*, 90th Cong. 20 (1968) (statement of Clinton Duffy, former Warden of San Quentin)).

[181] *See, e.g.*, Philip R. Nugent, *Pulling the Plug on the Electric Chair: The Unconstitutionality of Electrocution*, 2 WM. & MARY BILL OF RTS. J., 185, 196–202 (1993); *see also* ANTHONY GALVIN, OLD SPARKY: THE ELECTRIC CHAIR AND THE HISTORY OF THE DEATH PENALTY (2015).

[182] John P. Rutledge, *The Definitive Inhumanity of Capital Punishment*, 20 WHITTIER L. REV. 283, 296 (1998) (citing Jacob Weisberg, *This is Your Death; Capital Punishment: What Really Happens*, NEW REPUBLIC, July 1, 1991, at 24).

[183] *Id.*

[184] *See* Hillman, *supra* note178, at 747–48.

mention the statistics of botched executions or the mental health consequences on executioners.[185] Giving people on death row a choice between death by electrocution and death by firing squad is neither decent nor evolved; it is a dramatic backslide towards a territory contrary to modern conceptions of decency.

a. Electrocution and Capital Punishment as a Symbol of Racial Prejudice

Not only is death by electrocution contrary to evolving standards of decency, but it also serves as a symbol of capital punishment's disproportionate and prejudicial impact on African Americans. The practice of capital punishment as a whole has a troubling history in the United States, but the Southern regions have a particularly dark entanglement with the discriminatory features of the American criminal justice system. The South's history of slavery, lynch mob violence, and racial division is intertwined with capital punishment. Death by electrocution, although administered "legally," had perhaps a less disturbing application, but an equally disparate impact. In South Carolina, for example, the state has executed a total of 244 people via electrocution, 194 of which (80 percent) were Black.[186] This trend repeats itself in nearly every southern state. In Alabama, 80 percent of people the state put to death by electrocution were Black.[187] In Mississippi, that figure was 73 percent.[188] In Georgia, 79 percent.[189] And in Texas, 70 percent were Black, Hispanic, or Native American.[190] One does not need to be a statistician to grasp and understand how egregiously disproportionate capital sentences by electric chair were imposed in the South. In a reality that rings true today, these disparities reveal that the criminal justice system was not a system of "justice;" rather, it was an apparatus that the lynch mob used to exercise social control and fear. Today, of the thirty-five people on

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[185] *See, e.g.*, PENAL REFORM INT'L, PRISON GUARDS AND THE DEATH PENALTY 1–2 (2015); Semon Frank Thompson, *What I Learned from Executing Two Men*, N.Y. TIMES (Sept. 15, 2016), https://www.nytimes.com/2016/09/18/opinion/sunday/what-i-learned-from-executing-two-men.html?WT.mc_id=2016-SEPT-FB-HIGHMC-AUD_DEV-0916-0930&WT.mc_ev=click&ad-keywords=AUDDEVGate.

[186] Espy File, *supra* note 22, at 351–58.

[187] *Id.* at 17–22 (141 of 177 total executions by electrocution were Black).

[188] *Id.* at 206–08 (46 of 63 electrocutions were Black).

[189] *Id.* at 101–14 (In Georgia, 348 of 439 electrocutions were Black).

[190] *Id.* at 381–91 (In Texas, 254 of 361 incarcerated people on death row executed by electrocution were either Black, Hispanic, or Native American).

South Carolina's death row roster,[191] 49 percent are Black, despite the fact that Black people represent only 27 percent of the general South Carolina population.[192] Even though the racial disparities in capital sentencing have decreased significantly over the last century, there is much work to be done.[193]

Although the numbers are revealing in and of themselves, the electric chair is also a haunting relic of death as a public spectacle. Just as public terror lynchings drew crowds and the attention of reporters in the latter half of the nineteenth century and early twentieth century, the electric chair similarly drew the attention of the spectating public. Take, for example, the case of George Stinney—the youngest person executed in the United States in the twentieth century.[194] In 1944, a South Carolina jury took only ten minutes to render a guilty verdict for a fourteen-year-old boy who had been accused of murder, and would soon be sentenced to die by the electric chair.[195] On the day of Stinney's execution, fifty witnesses crowded the execution room to observe the "procession."[196] The majority of the witnesses were from the county in which the murders allegedly took place.[197] Witnesses of electrocutions in the nineteenth and twentieth centuries ranged from family members of the convicted, family members of the victim, prison officials, politicians, medical professionals, and the press.[198]

Movements to remove executions from the public eye began in the early twentieth century; however, this did little to curb the sensationalism and "morbid curiosity" that accompanied executions.[199]

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[191] S. C. DEP'T. OF CORRS., DEATH ROW LIST 1 (2022), http://www.doc.sc.gov/news/death-row-report.pdf (last visited Sept. 24, 2021).

[192] *Id.*; *QuickFacts: South Carolina*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/SC# (last visited Aug. 21, 2022).

[193] *See Arrests by Race and Ethnicity, 2016*, FBI: UCR, https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-21 (last visited Sept. 24, 2021).

[194] ELI FABER, THE CHILD IN THE ELECTRIC CHAIR: THE EXECUTION OF GEORGE JUNIUS STINNEY JR. AND THE MAKING OF A TRAGEDY IN THE AMERICAN SOUTH 2 (2021).

[195] Lindsey Bever, *It Took 10 Minutes to Convict 14-year-old George Stinney Jr. It Took 70 Years After His Execution to Exonerate Him*, WASH. POST (Dec. 18, 2014, 5:24 AM), https://www.washingtonpost.com/news/morning-mix/wp/2014/12/18/the-rush-job-conviction-of-14-year-old-george-stinney-exonerated-70-years-after-execution.

[196] FABER, *supra* note 194, at 5.

[197] *Id.*

[198] *See* Annulla Linders, *The Execution Spectacle and State Legitimacy: The Changing Nature of the American Execution Audience, 1833–1937*, 36 LAW & SOC'Y REV. 607, 612 (2002).

[199] *See id.* at 643.

Today, that morbid curiosity is perpetuated through the press. While lethal injections still attract public attention, it has become less of a spectacle: "You just don't see much," a professor of anesthesiology and surgery at Emory University said, "you see a person lying there" creating the impression that they are "falling asleep and dying."[200] In contrast, death by the electric chair creates a much more emotionally compelling sight.[201] Electrocution draws more attention in the media, as exemplified by the slew of articles covering the recent decisions of incarcerated persons in Tennessee who chose to die by electric chair rather the lethal injection, which is the norm.[202] The request is a "surprising one," one article wrote, with another adding that the electric chair is "a method of the past."[203] Additionally, online articles covering news about the execution by electrocution often include a photograph of the electric chair—giving the reader a mental impression of what it might look like to see someone strapped inside.[204] While a discussion of why the three inmates chose the electric chair over lethal injection—and other concerns about the safety of lethal injection—is beyond the scope of this Comment, the press coverage of the matter reflects the presumption that death by electric chair attracts public attention in a way that lethal injection does not.

The symbolism tied to the electric chair can be traced back to the spectacle of public executions. Both legal executions and illegal lynchings in the nineteenth and twentieth centuries, which drew up to thousands of public spectators, involved the deaths of African American men.[205] The symbolism of the electric chair can be paralleled with that of Confederate statues. For years, Confederate

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[200] Rick Rojas, *Why This Inmate Chose the Electric Chair Over Lethal Injection*, N.Y.TIMES (Feb. 19, 2020), https://www.nytimes.com/2020/02/19/us/electric-chair-tennessee.html.

[201] *See supra* text accompanying notes 176–183.

[202] *See, e.g.*, Rojas, *supra* note 200; *Why Inmates on Death Row are Choosing the Electric Chair*, THE WEEK (Dec. 7, 2018), https://www.theweek.co.uk/98375/why-inmates-on-death-row-are-choosing-the-electric-chair; Travis Loller, *In Tennessee, Inmates Opt for Electric Chair Over Injection*, AP NEWS (October 25, 2019), https://apnews.com/article/d837753cdd954bab86a9fa59ab640d25.

[203] Loller, *supra* note 202; Rojas, *supra* note 200.

[204] *See e.g.*, Jeffrey Collins, *New Law Makes Inmates Choose Electric Chair or Firing Squad*, AP NEWS (May 17, 2021), https://apnews.com/article/sc-state-wire-government-and-politics-d5fb523db482da233e1f081a63a80cf4; Austin Sarat, *South Carolina Case Puts the Electric Chair and the Firing Squad on Trial*, VERDICT (Aug. 8, 2022), https://verdict.justia.com/2022/08/08/south-carolina-case-puts-the-electric-chair-and-the-firing-squad-on-trial.

[205] *See supra* text accompanying notes 47–56.

monuments, controversial due to their connection to slavery and racial injustice, have been the subject of intense debate. In the wake of the death of George Floyd, a Black man who died as a result of police brutality in 2020,[206] protesters and supporters of the Black Lives Matter movement have passionately urged the removal of Confederate statues.[207] In summer 2020, Charleston City Council in South Carolina voted unanimously to approve the removal of a statute of John C. Calhoun—a former vice president and slavery advocate.[208] One councilman said that statue "served as a symbol of division in our community . . . ."[209] In summer 2021, the City of Charlottesville, Virginia removed a statue memorializing Confederate General Robert E. Lee erected in the early 1920s, a period when "Klu Klux Klan membership was at its peak."[210] Then-Vice Mayor Wes Bellamy stated that some residents believed the City erected the statue as a "psychological tool to show dominance of the majority over the minority."[211]

The removal of Confederate statues displays recognition of the power of symbols and how they serve to perpetuate historic themes of racial hierarchy and violent repression of African Americans in the United States. In September of 2021, the South Carolina Supreme Court upheld a state law that prohibits the relocation or removal of certain historical monuments but struck down the qualification that the statute could only be amended by a supermajority vote.[212] Associate Justice Few noted in his opinion that the removal of the Confederate flag from the dome of the State's capitol was "one of the greatest achievements in the political history of South Carolina . . . ."[213]

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[206] Evan Hill et al., *How George Floyd was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

[207] *See* Rachel Treisman, *Nearly 100 Confederate Monuments Removed in 2020, Report Says; More Than 700 Remain*, NPR (Feb. 23, 2021, 5:48 PM), https://www.npr.org/2021/02/23/970610428/nearly-100-confederate-monuments-removed-in-2020-report-says-more-than-700-remai.

[208] Madeline Holcombe, *Charleston Removes a Statue of Slavery Defender and Former Vice President John C. Calhoun*, CNN (June 24, 2020, 6:01 PM), https://www.cnn.com/2020/06/24/us/charleston-statue-removal-calhoun-trnd/index.html.

[209] *Id.*

[210] *Charlottesville Removes Confederate Statues,* EQUAL JUST. INITIATIVE (July 13, 2021), https://eji.org/news/charlottesville-removes-confederate-statues/.

[211] *Id.*

[212] Pinckney v. Peeler, 862 S.E.2d 906, 920 (S.C. 2021).

[213] *Id.*

In short, Southern regions have started to confront history and commence efforts to remove symbols of racial injustice, presumably as means to ameliorate the effects of continuing discrimination. Standing alone, the effort to remove symbols of racial injustice is surely a step in the right direction towards systemic change, as symbols are powerful. But what is the practical effect of removing a statue of John C. Calhoun while the South Carolina legislature is actively contorting their own statutes to ensure the state-imposed death of the seventeen black men that sit on death row?

## IV. PROPOSALS

South Carolina's amendment to its death penalty statute has received national attention for reviving death by electrocution, just as it was seemingly becoming outdated. Not only has the law been criticized in the media;[214] it has also been the topic of legal challenges by people on death row.[215] The Supreme Court granted certiorari to review the constitutionality of electrocution as Florida's sole method of execution once before in *Bryan v. Moore*, but it was dismissed as improvidently granted because the Florida legislature subsequently amended their legislation to give people on death row the option of lethal injection.[216] In *Fierro v. Gomez*, the Ninth Circuit affirmed the district court's decision that execution by lethal gas as a default method in California violated the Eighth Amendment.[217] Soon thereafter, the Supreme Court granted certiorari to review the decision.[218] Similar to the Florida legislature's action amidst *Bryan*, the California legislature hurriedly changed its statute so that those who failed to elect a method would be executed by lethal injection as a default.[219] As a consequence, the Supreme Court vacated the Ninth Circuit's holding in light of the legislature's amendment to its death

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[214] *See, e.g.*, Sam Spence, *South Carolina Develops a New Method of Execution . . . Again*, CHARLESTON CITY PAPER (July 14, 2021), https://charlestoncitypaper.com/south-carolina-develops-a-new-method-of-execution-again; Shawna Mizelle, *South Carolina Governor Signs Bill Adding Firing Squad as an Option for Executions*, CNN (May 17, 2021, 9:11 PM), https://www.cnn.com/2021/05/17/politics/south-carolina-death-row-firing-squad-electrocution/index.html.

[215] *See, e.g.*, Brief for the Plaintiff, Sigmon v. Stirling, (D.S.C. 2021) (No. 01651).

[216] *See* 528 U.S. 960, 960 (1999), *cert. dismissed as improvidently granted*, 528 U.S. 1133, 1133 (2000).

[217] Fierro v. Gomez, 77 F.3d 301, 309 (9th Cir. 1996).

[218] Gomez v. Fierro, 519 U.S. 918, 919 (1996).

[219] CAL. PENAL CODE § 3604(b) (Deering 2022).

penalty statute.[220] These decisions suggest that states are quick "to change their method of execution when they" believe their current methods may be vulnerable to a constitutional challenge.[221]

Thus, it may be only a matter of time before the Supreme Court decides to reconsider the constitutionality of death by electrocution, or rather, the lack of access to the more humane method of lethal injection. In that case, South Carolina will be forced to wait out and succumb to a ruling by the courts, or, in the alternative, the State will once again amend their death penalty statutes on its own prerogative. It seems the State may be on this path; a trial court has recently determined that South Carolina's updated statute is unconstitutional on multiple grounds.[222]

Ideally South Carolina could elect to abolish the death penalty altogether. Because Confederate statues came down so recently in the state, there may even be political support for the abolition. Failing this, however, the state should take guidance from the other states that maintain the death penalty by reinstating lethal injection as the primary method of execution and discontinuing the use of the electric chair once and for all.

If the Supreme Court were to decide the constitutionality of South Carolina's recently amended death penalty statute under the Eighth Amendment, it would apply the standard set forth in *Baze v. Rees* and adopted in *Glossip v. Gross*.[223] Under this standard, to establish an Eighth Amendment method-of-execution claim, prisoners must establish that the method presents a substantial risk of serious harm compared to known and available alternatives.[224] In the case of *In Re*

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[220] *Gomez*, 519 U.S. at 919.

[221] Deborah W. Denno, *The Firing Squad as "A Known and Available Alternative Method of Execution" Post-*Glossip, 49 U. MICH. J.L. REFORM 749, 759 (2016).

[222] In September 2022, a South Carolina Circuit judge declared that "carrying out executions by electrocution and by firing squad violates the Constitution of the State of South Carolina [] and its prohibition on cruel, corporal, or unusual punishments [and S.C. Code Ann. § 24-3-530], as amended in 2021, is unconstitutional and is, therefore, invalid." The judge reached her decision by analyzing, among other things, advances in scientific research, decisions by other state courts, violations of ex post facto clauses in both the United States and South Carolina Constitutions, and the vague meaning of the word "available" as used in the statute. The Governor of South Carolina, Henry McMaster, has appealed the decision to the state's Supreme Court. Owens v. Stirling, Civil Action No. 2021CP4002306, slip op. at 37–38, 20–34 (S.C. Cir. Ct., 5th Jud. Cir. 2022), *appeal docketed*, No. 2022-001280 (S.C. Sept. 15, 2022).

[223] *See* Baze v. Rees, 553 U.S. 35, 50–52, 61 (2008); Glossip v. Gross, 576 U.S. 863, 877–78 (2015).

[224] *Glossip*, 576 U.S. at 877–78.

*Kemmler*, the Supreme Court upheld the constitutionality of the electric chair per se.[225] But more than a century's worth of electrocutions later, there is overwhelming evidence to suggest that death by electrocution goes beyond "mere extinguishment of life."[226] Frankly, it is time for the Supreme Court to revisit and confront the sordid practice of electrocution as a means of capital punishment in the United States. Society's perception of what constitutes cruel and unusual punishment has changed drastically, leaving open questions about the precedential value of the 1890 decision in *Kemmler*. Under the more modern *Glossip* standard, it is unclear where the Supreme Court would land on the issue.

It is quite possible, likely even, that the Court would determine electrocution to be a substantial risk of serious harm—especially in light of current knowledge about the physiological effects of electrocution. With regard to the second prong, the water is muddied. The South Carolina amendment and South Carolina Supreme Court's stay on two executions in June 2021[227] clouds the analysis on the "known and available alternative" front. On the one hand, lethal injection is a known alternative and available to other states, but not available to South Carolina.[228] The Court could interpret lethal injection as a much safer known and available alternative to electrocution, or it could determine that the lethal injection drugs are "unavailable" given South Carolina's inability to acquire them in nearly ten years. Further, the legislature cleverly crafted the law to include firing squad as an alternative to electrocution. The Supreme Court upheld an execution by firing squad in the 1878 case *Wilkerson v. Utah*, however it never specifically addressed whether death by firing squad is cruel and unusual punishment.[229] Given significant societal changes, the decision may face the same precedential challenges and critiques as *Kemmler*, and under the *Glossip* standard, firing squad may be less painful and less risky than electrocution.[230] In short, the Supreme

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[225] *In re* Kemmler, 136 U.S. 436, 447 (1980).

[226] *Id.*

[227] *South Carolina Supreme Court Halts Executions of Brad Sigmon and Freddie Owens*, DEATH PENALTY INFO. CTR. (June 17, 2021), https://deathpenaltyinfo.org/news/south-carolina-supreme-court-halts-executions-of-brad-sigmon-and-freddie-owens.

[228] For an overview of each state's method of execution, see *Authorized Methods by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/methods-of-execution/authorized-methods-by-state (last visited Sept. 4, 2022).

[229] Wilkerson v. Utah, 99 U.S. 130, 130 (1878).

[230] *See Glossip*, 575 U.S. at 977 (Sotomayor, J., dissenting) ("there is evidence to suggest that the firing squad is significantly more reliable than other methods . . . .").

Court should determine that electrocution as a sole method of execution is unconstitutional under the Eighth Amendment. Alongside the firing squad alternative, however, the statute could pass constitutional muster under *Glossip*.

Nonetheless, just because the legislature *can* maintain its current death penalty statute does not mean that it should. Not only is electrocution contrary to the notion that perceptions of cruel and unusual punishment should be measured alongside evolving standards of decency; it also serves as a symbol of the historically rooted, racially disparate application of capital punishment in the South that continues to this day—a tradition that the region should be working affirmatively to eradicate.

## V. CONCLUSION

The purpose of this Comment is to examine South Carolina's newly enacted Senate Bill 200 against the backdrop of the interaction between capital punishment and race throughout the United States. Senate Bill 200, which amended South Carolina's existing capital punishment statute, replaced lethal injection as the state's default method of execution with the electric chair.[231] By tracing the development of capital punishment in the United States, particularly in the Southern regions, the most troubling characteristic is the extent to which the death penalty in America is "soaked" in racism.[232] Historically, capital punishment was a mechanism used to perpetuate historic themes of racial hierarchy and violent repression of African Americans in the United States—a theme which is still present as death row statistics continue to reflect disproportionate impact on Black Americans. Not only is the electric chair a remnant of the historically destructive role of racial discrimination in capital punishment in the United States, but it is also irreconcilable with the "evolving standard of decency" principle intended to guide Eighth Amendment challenges.

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[231] S.B. 200, 124th Gen. Assemb., 1st Reg. Sess. (S.C. 2021).

[232] Steiker & Steiker, *supra* note 17, at 294 (quoting Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, *in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 96, 97 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006)).