Part One:
Capital Punishment in the United States
Chapter I – The American History of the Death Penalty

1 – The Coming of the Death Penalty to the New World:

At the beginnings of colonization, the English colonists came to the new world with all their traditional values, their judicial system, and their laws. England was at that time a country where the death penalty was imposed for a wide variety of crimes: treason, murder, rape, manslaughter, robbery, burglary, arson, counterfeiting and theft. By the eighteenth century, there were 222 capital crimes. In other words, Britain influenced America's use of capital punishment more than any other country. Thus, the death penalty naturally appeared in the colonies and applied for the same reasons as in England. The first execution was performed on the American grounds in 1608, Jamestown. Captain George Kendall, a mutineer, was hanged for being a spy for Spain. There will be very rapidly early differences between the colonies, in which the death penalty would not be applied for the same reasons. Some of these differences still exist nowadays, as we will later observe.

Because of their religious beliefs, the settlers would extend the list of the crimes punishable by death, especially in the deep religious colonies such as the Puritan New England. Thus, blasphemy, idolatry, adultery (in Connecticut, Massachusetts, New Hampshire), sodomy and bestiality, “even for the animals involved,” were all capital crimes. Several of these offences come from the Bible, which also condemned prostitution, as well as homosexuality, incest and witchcraft as capital crimes. Thus, the Old Testament admitted the death penalty and the “Lex Talionis” rule as a means of retribution. The “eye for an eye” rule was already “the law of the land” in the early seventeenth century.

2 – The Purposes of the Death Penalty:

a – Deterrence:

Capital punishment, as it is still argued today, was supposed to have a deterrent effect. During the seventeenth and eighteenth centuries, public executions, for the most part hangings, were considered as if they were shows, and crowds of thousands of people gathered

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3 http://teacher.deathpenaltyinfo.msu.edu/e/about/history/contents.htm
5 Leviticus 24:20: “When a man causes a disfigurement in his neighbor, as he has done it shall be done to him, fracture for fracture, eye for eye, tooth for tooth...”
to attend an execution. Even children attended to public executions, so that they would be prevented to do wrong things very early. It had to give “a lasting impression on all ages, ranks and characters, particularly on children and youth.” 6 Deterrence was one of the main reason why executions were publicly carried out. During the “hanging days,” thousands of people attended executions, which were more and more criticized because of the attitude of the crowd: people were drunken, rowdy and irreverent. 7 Historian and jurist Stuart Banner, in The Death Penalty. An American History, draws a parallel between the fact that people in the nineteenth century attended to public executions in search of violence, with the current situation, in which violence has become commonplace, in movies for example. 8

b – Retribution:

A clear sense of justice justified the reason for retribution, or retaliation, as it is called in the Bible. In the Old Testament, the “Lex Talionis” rule comes from Genesis 9:6. 9 On the contrary, the New Testament is much less brutal and praises clemency. Even if the sentence did not always fit the crime, like the examples of theft or adultery, capital punishment was thought to bring “closure” to the victims, or the family of victims.

3 – Slavery and the Death Penalty:

During the seventeenth and eighteenth centuries, some states made more crimes capital offences, especially for offences committed by slaves. Early on, an England's bloody code was created. This type of code, which registered the crimes punishable by death, was imposed only to blacks and slaves. Slaves were not able to pay fines, and their only property was their body. The only way they could be punished was physically. Historians have demonstrated that blacks and slaves suffered from other methods of executions than white people. They were lynched, hanged and burnt in some cases. Burning was reserved for the slaves who murdered their masters or who plotted a revolt. When the authorities wanted the execution to have a greater impact and a deterrent effect, the corpses were sometimes beheaded, or dismembered: the limbs were displayed in different places in the village.

7 Ibid.
8 Ibid: “[executions were] a niche occupied today by TV movies, sports, video games and the likely people enjoy watching violence is a difficult question.” 31.
Burning alive was a method of execution reserved in England for crimes such as heresy or witchcraft. However, contrary to what many people think, the witches of Salem were not burnt but hanged.\(^{10}\)

Virginia provided the death penalty for slaves who committed any offence for which white people would be sent to prison for three years or more.\(^{11}\) In the South, rape, or even attempted rape, was punishable by death, but only if the offender was black and the victim was white.\(^{12}\)

Even until the 1970's, this type of racial discrimination was still enforced. The several differences (offences punishable by death, methods of execution) between North and South are the product of slavery.

4 – The Abolition Movement :
   
   \(a–\) Half death :

Some offences were being decapitalised, at first in 1718 in New England and New Hampshire, and in 1749 in Rhode Island.\(^{13}\) Capital executions were replaced by simulated executions, which were known in modern Europe and reserved for lesser offences such as adultery, blasphemy and bigamy.

In some cases, to stand on the gallows for a certain time, without inflicting death, was considered as a sort of death penalty, though the offender was still alive at the end of the execution. A method consisted in hanging a person with a halter around the neck during half an hour. This was more a “symbolic death penalty” than the death penalty in itself.\(^{14}\) These symbolic executions were further extended to burglary. A system was created so that the two first convictions were punished by a symbolic execution, whereas the third was a real execution. It provided a tremendous cut in the number of executions.

   \(b–\) Abolition and restoration :

\(^{9}\) Genesis 9:6 : “… Whoever sheds the blood of man, by man shall his blood be shed…”, or Leviticus 24 : 17-21 :

\(^{10}\) He who kills a man shall be put to death."


\(^{11}\) Ibid 113

\(^{12}\) Ibid.

\(^{13}\) Ibid. 66.

\(^{14}\) Ibid. 54.
Already in 1682, William Penn, then landowner of what would later become the state of Pennsylvania, limited capital punishment only to offenders convicted of murder and treason.\(^\text{15}\)

Though it is still a retentionist country, it was in the United States that there were the first abolitionist legislation. From the early 1840’s, a campaign in favor of the abolition of the death penalty was launched, led by the founder of the *New York Tribune*, Horace Greeley, and by the American society for the abolition of capital punishment, created in 1845.\(^\text{16}\) From that period there will be, throughout the whole country, an abolitionist wave, though most of the time closely followed by the restoration of the death penalty. But in more and more states, the capital crimes list was being reduced and avoided death sentences to lesser crimes such as adultery, theft or robbery.

Thus, in 1846, Michigan abolishes the death penalty, except for treason, and replaces it with life imprisonment. Rhode Island suppresses capital punishment in 1852, followed the next year by Wisconsin.\(^\text{17}\) But the abolition and the restoration of the death penalty depend very much on the ups and downs of criminality. Still nowadays, the public opinion is divided over the issue and is very much in favor of the death penalty just after a serious wave of criminality. Thus capital punishment was abolished in Iowa in 1872 and restored in 1878. Colorado abolished it in 1877 and restored it in 1901. Maine abolished the death penalty in 1876, restored it in 1883 and abolished it once again in 1887.\(^\text{18}\)

c – The origins of opposition to capital punishment:

Cesare Beccaria wrote in 1764 *Of Crimes and Punishments*, in which he criticizes capital punishment, mostly because of its ineffectiveness, and its use in modern societies. Translated in 1767, it did not take too much time to fall into the ends of American thinkers such as Thomas Jefferson and Benjamin Rush. The first attempted reform to abolish the death penalty occurred when Thomas Jefferson introduced a bill to revise Virginia's death penalty laws, which was defeated by only one vote. Dr Benjamin Rush, a signer of the Declaration of Independence and founder of the Pennsylvania prison society,\(^\text{19}\) is considered as the founder of the American abolition movement. Born in 1745, professor and physician, he would meet

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\(^\text{15}\) Isabelle Cesari *Les mineurs délinquants et la peine de mort aux Etats Unis* (Nîmes Philippe, 1998) 23.

\(^\text{16}\) Jean Marie Cabasse. *La peine de mort* (PUF, 2000) 97.

\(^\text{17}\) Ibid.

\(^\text{18}\) Ibid.

\(^\text{19}\) http://teacher.deathpenaltyinfo.msu.edu/c/about/history/contents.htm
Diderot in Paris. In 1787, he would declare his opposition to the death penalty. It was the first time that an American personality opposed to capital punishment.20

Cesare Berccaria also praised life imprisonment rather than the death penalty because:

\[
\text{[the] death of a criminal [is a] momentary spectacle, and therefore a less efficacious method of deterring others than the continued experience of a man deprived of his liberty.}^{21}
\]

Offenders considered as well life imprisonment as a "lesser cruel sentence". Through the early 1790's, eradication of the death penalty for lesser offences kept on spreading throughout the country, and was more and more replaced by "force labor", i.e. that the offenders were convicted for some period of time, or for the rest of their life, to do free labor for the states. It was thought to be an economic device.

The North begins in the 1830's to abolish the death penalty while the South retentions it, although it began to decapitalise many offences too, like burglary or arson. In fact, it is slavery which produced such a "cultural gap"22 between North and South.

\[d - \text{The end of public executions :}\]

Connecticut was the first state to abolish public executions, in 1830.23 Six years later, Rhode Island, Pennsylvania, New Jersey, New York, Massachusetts and New Hampshire followed the same example.

By 1860, the North had completely abolished hanging. It is only after the Civil War that new methods of execution emerged, especially the invention of the electric chair, that will rapidly lead to the complete abolition of public executions.

New York is the first state to abandon hanging for electrocution. Executions were carried into the jail yard and were attended by few people such as the families of victims and journalists. Nowadays, the offender's family can also attend to the execution, these two families being separated by a glass of Plexiglas. According to Stuart Banner, in *The Death Penalty. An American History*:

\[\text{By excluding the crowd [...]}, \text{the move into the jail yard changed the character of capital punishment. Executions lost their symbolic meaning.}^{24}\]

5 - *Early and Mid Twentieth Century* :

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22 Ibid. 143
23 Ibid. 154
24 Ibid. 168.
Some states abolished the death penalty in the mid nineteenth century, but it was
the first half of the twentieth century which represented the beginning of the “progressive
period” of reform of the death penalty.\footnote{http://teacher.deathpenaltyinfo.msu.edu/c/about/history/contents.htm} From 1907 to 1917, six states completely abolished
capital punishment, and three other states limited it to first degree murder and treason. But the
social and political environment, as well as the entrance of the United States into the first
World War led to class conflicts. As a consequence, by 1920, five of the six abolitionist states
reinstated the death penalty.

The next two decades would be marked by a resurgence in the use of the death penalty. This
was partly due to the fact that criminologists of that period claimed the social necessity of
capital punishment. The 1920’s decade was marked by the prohibition and the great
depression, the 1930’s was the decade during which there was the greatest number of
executions in the American history with an average of 167 per year.\footnote{http://teacher.deathpenaltyinfo.msu.edu/c/about/history/contents.htm} The 1930’s crisis
represented the darkest years of the American history concerning the death penalty.

It is during the 1950’s that there would be a shift in the public opinion’s mind, while other
nations either abolished or limited the use of the death penalty in their own justice system.
The Civil Rights movement of the 1960’s will give hope to abolitionists. Hawaii and Alaska
abolished the death penalty in 1957, Oregon in 1964, Iowa and Virginia in 1965. As a
consequence, the number of executions dropped dramatically: from 1,289 during the 1940’s,
the number of executions fell to 715 in the 1950’s, and it fell even further from 1960 to 1976,
to only 191 executions. This low number of executions is the result of a ten year moratorium,
from 1966 to 1976, during which the status of the death penalty would be completely revised
under the constitutional angle. Furthermore, in 1966, public opinion’s support for the death
penalty reached its lowest level, in a Gallup Poll, with only 42% of the people polled
favorable to the death penalty.\footnote{http://teacher.deathpenaltyinfo.msu.edu/c/about/history/contents.htm}

6 – The Moratorium Strategy :

\textit{a – The Legal Defense Fund and ACLU campaigns :}

We will rapidly introduce the facts leading to the controversy which led, just for
four years, to the abolition of capital punishment. We will analyze it much deeper in the next
chapter.

\footnote{http://teacher.deathpenaltyinfo.msu.edu/c/about/history/contents.htm}

\footnote{Ibid. (155 executions in 1930 and 199 in 1935).}

\footnote{Ibid.}
In the early 1960’s, the Legal Defense Fund developed a strategy, named ‘the moratorium strategy’, which aimed to seek legal defense assistance for indigent inmates. Indigent people suffered, and still suffer, from discrimination and were in most cases badly defended. In many reported cases, appointed lawyers were inexperienced and had never faced a death penalty case before. The Legal Defense Fund is a branch of the National Association for the Advancement of Colored People (NAACP), which had first fought against the unequal treatment of the black criminal defendants in the South. The NAACP Legal Defence Fund was created in 1950 and is made of the association of lawyers and affiliates to the NAACP. Before working on the death penalty, the NAACP had won victories in Supreme Court cases like Brown v. Board of Education (1954), thus ruling out the notion of “Separate but equal.” It also won the Equal Protection Clause, which fought against discrimination, whether in capital and non-capital cases.

In 1961, the American Civil Liberties Union (ACLU) Los Angeles branch combined its effort with the NAACP to rule out the death penalty as a violation of the Eighth Amendment, according to which capital punishment was considered a “cruel and unusual punishment.” Their efforts were combined to save a black offender: Charles Hamilton. However it was a failure because Hamilton finally received a life sentence. Then, the Legal Defense Fund and ACLU began organized campaigns aiming at the abolition of the death penalty, though these two organizations have different goals: The Legal Defense Fund aimed at helping black people on the grounds of discrimination and racial disparities. The ACLU (capital punishment project branch), on the contrary, was founded to protect individual rights regardless of race.

During the 1950’s, the racial disparity argument was successful because it was right in the wave of the Civil Rights movement, but then it failed to be effective. The number of executions fell for decades before the Legal Defense Fund took up capital punishment (see Figure 1).

![Figure 1](source: Death Penalty Information Centre)
In 1967, the moratorium was finally imposed. However, that didn’t mean that capital punishment was abolished. Offenders were still being imposed death sentences, and as a result, the death row population increased by 277% in one decade: from 219 death row inmates in 1961 to 607 in 1971.28 (see Figure 2)

![Death Row Population 1968 to 2002](image.png)

Figure 2 (source: Death Penalty Information Centre)

In late 1968, the Legal Defense Fund brought a case to the Supreme Court, Maxwell v. Bishop. This case stated that a death sentence for rape on the basis of racial discrimination is a violation to the Constitution. This is the first important case of the Legal Defense Fund campaign.

The beginning of the 1970’s marked a period of serious doubts concerning the status of the death penalty in the United States, but also in other countries. The Legal Defense Fund, in a brief, challenged the death penalty on a constitutional basis:

[The death penalty] will sooner or later be condemned by this court and under the Constitution.29

Indeed, the racial disparity argument was better defended under the Fourteenth Amendment, according to which:

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No state [...] shall [...] deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protections of the laws.”

Before the 1970’s, it would have been impossible to challenge the death penalty the way it has been challenged, because during the 1960’s, people were reacting in terms of rights. Furthermore, during the 1970’s, death penalty cases were given a lot more of coverage. In opinion polls, the population’s support for capital punishment was declining.30

c – Furman v. Georgia: Capital Punishment becomes unconstitutional:

In 1972, in the case Furman v. Georgia, the Supreme Court ruled capital punishment as a “cruel and unusual punishment” because it was imposed in an arbitrary and discriminatory way. Furman v. Georgia was in fact representing three cases in which all the offenders, black men, were sentenced to death. In two cases, black offenders had raped white women. In the third, the black offender, named Furman, had killed a white man during a burglary. The way capital punishment has been imposed in these three cases was based on racial discrimination: a link was established between the race of the victim and that of the offender. A black offender killing or raping a white victim had more chances to be imposed a death sentence than if it was a black victim, or a white offender. In this 5-4 decision, the death penalty was considered immoral, and thus unconstitutional under the Eighth Amendment. The six hundred inmates around the country would have their execution vacated, and capital punishment had completely disappeared from the American landscape. However, such a situation would not last long.

d – Gregg v. Georgia: The Restoration of Capital Punishment:

From 1972 to 1976, death penalty states changed their legislations concerning capital punishment and finally restored it, concluding that it was no more a violation of the Constitution, nor a “cruel and unusual punishment.” According to some Justices, it is not the death penalty which was unconstitutional, but the way it was applied by the states. What they needed to reintroduce capital punishment into the U.S justice system was the repeal of the death penalty laws, but the complete abolition of capital punishment was not necessary.

“Do you believe in capital punishment, that is, the death penalty, or are you opposed to it?”
- 1965: 38% believed in it, 47% was opposed.
- 1970: 47% believed in it, 42% was opposed.
- 2001: 67% believed in it, 26% was opposed.
Finally, four years after *Furman v. Georgia*, another case was brought to the Supreme Court, *Gregg v. Georgia*, which allowed the death penalty to be restored. But what arguments were proposed in favor of the reintroduction of capital punishment? What was wrong with the death penalty in 1972 which became right in 1976? We will come back to the *Furman v. Georgia* and *Gregg v. Georgia* cases in the next part to analyze them more deeply.

The ten year moratorium ended in 1977, six months after the restoration of capital punishment, when Gary Gilmore, who refused to appeal his case, asked to be executed. In such a case, when an offender refuses to appeal his case (most of the time after a decade on death row), it is considered as a sort of suicide because the offender wants to die. In an interview several days before his execution, Gary Gilmore said:

> I fully accepted the sentence that was given to me. I accepted all the sentences all my life.\(^{31}\)

According to Don Cabana, a lawyer, when an offender renounces to appeal, it is because he wants to be executed. In most cases, it is because these offenders have already waited for over a decade on death row. So this is a form of suicide perpetrated by the state.

The last words of Gary Gilmore were:

> Let’s do it.\(^{32}\)

From the 1980’s up to now (see Figure 1), executions seem to have been carried with a vengeance, and more particularly because of the use of lethal injection, which ‘sanitizes’ the whole vision of capital punishment. Thanks to the use of the lethal injection, the death penalty has become “*clean, clinical and undisturbing.*”\(^{33}\) The offender does not show any sign of pain, but the reason is that he is completely paralyzed, as we will later observe. From 1976 to 2003, among the 880 executions that had been carried in the United States, 713 offenders have been executed by lethal injection, 151 have been executed by electrocution, eleven have been executed by gas, three have been executed by hanging and two by firing squad.\(^{34}\)

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**Chapter II – The United Sates and the Death Penalty**

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\(^{32}\) Ibid.


\(^{34}\) Death Penalty Information Center. http://www.deathpenaltyinfo.org/article.php?scid=8&did=245
1 – Death Penalty States and Non-Death Penalty States:

The United States is the only occidental industrialized country where the death penalty is still legal. Among the other countries are Saudi Arabia, China, Iran, Iraq and the Democratic Republic of Congo. All these countries, including the United States, represent 85% of all the executions. Today still eighty seven countries use the death penalty as a part of their judicial system.

Among the fifty states, thirty eight have the death penalty in their legislation, and only twelve states have abolished it. The army and the US government also have the death penalty. However, the fact that a state has capital punishment in its legislation doesn’t mean that this state effectively makes use of it. Some states, like Connecticut, New Jersey or New York do have the death penalty but yet haven’t recorded executions since 1976.

### States With The Death Penalty

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<tr>
<th>Alabama</th>
<th>Florida</th>
<th>Louisiana</th>
<th>N. Hampshire*</th>
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<td>Nevada</td>
<td>Oklahoma</td>
<td>Utah</td>
<td>U.S. Military*</td>
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* Indicates jurisdiction with no executions since 1976.

**Figure 3** (source: Death Penalty Information Centre)
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States Without The Death Penalty

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<thead>
<tr>
<th>Alaska</th>
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<th>West Virginia</th>
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<td>Massachusetts</td>
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<td>Puerto Rico</td>
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Figure 4 (source: Death Penalty Information Centre)

2- The Different Methods of Execution:

Currently there are five methods of execution in the United States. These different methods all have a story of their own. Each one results from human inventions and new technological discoveries. Although lynching has been in use during a major part of the American history of the death penalty, it will not be evoked in this part, because we will rather focus on the methods of execution still in force nowadays. However, in the United States, throughout the eighteenth and nineteenth centuries, lynching was often used as a method of execution against slaves and black offenders.

Figure 5: hanging of the murderers John Taylor and Robert Fortune in 1900 (Nash County, NC)

a – Hanging:
Probably the oldest method of execution still in force in the United States today is hanging. Hanging was very popular in the medieval times in European countries, and was famous in the British colonies as well. At first, hanging caused a long and painful strangulation, and sometimes ended about fifteen minutes after the beginning of the execution. In the worst cases, the offender was sometime beheaded when the fall of the body was too violent. As time passed on, a strategy was found: by a mathematical device, the size of the rope was reduced in accordance with the height of the offender, so that he would have his neck broken once the trap door was open. In fact, death is caused by the dislocation of the third or fourth cervical vertebrae, causing instant death. Executions were at first public exhibitions which were intended to deter others from crime, as we previously observed. The last public hanging took place in 1937 in Missouri. Since then all the executions (of any type) have taken place inside the prisons, hidden from the public. Only members of the victim’s family, as well as members of the offender’s family, can attend the execution.35 Executions began to be held in private because of “more humane instincts,”36 but also because they were found not to be a “powerful deterrent.”37 Hanging is still in use in New Hampshire and Washington but this method of execution is not so much used. These two states have lethal injection as an alternative method of execution. Since 1976 there have been three executions by hanging.38

b – Firing Squad:

The firing squad has been used most of the time in military executions. It involves a five-man team who will use a blank bullet. Thus, none of them knows who is the real executioner. The firing squad is in use in three states: Idaho, Oklahoma and Utah. These states have Lethal Injection as an alternative method. Since 1976, there have been two executions39 by firing squad, the first one being Gary Gilmore in 1977.

37 Ibid.
39 Ibid.
c – Electrocution:

The electric chair appeared thanks to the new technological progress, industrialization and the discovery of electricity by Thomas Edison in 1882, in New York. In 1886, the Governor of New York State, David Hill, was seeking a "‘humane alternative to hanging.’" In 1888, Harold Brown invented the electric chair, and the first man to be executed by electrocution was William Kemmler in April 1890. Kemmler was a white offender convicted of murdering his girlfriend. He suffered agonies, didn’t die from the first electric shock and began to burn. The autopsy revealed that his brain was cooked and that his blood was like pitch black coal. In fact electrocution makes the internal organs burn, leading the offender to "defecate, urinate or vomit blood.” In fact, electrocution inflicts useless and painful sufferings. From 1890 to 2003, 4,459 people have been electrocuted in the United States.

Although it was supposed to be a more humane and softer alternative to hanging, the electric chair created a controversy because reports and cases of failed executions in which several

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41 “Willie Kemler was the first man to die in the new fangled electric chair and the agonies he suffered changed the history of progress in the U.S and around the world.” Stephen Trombley. L’Et à meurtir. 1996.
electric shots were needed before the offender died. For example, in Georgia, it took forty-five minutes to Larry Lonchar to die. After the first electric shock, he was not dead yet.\textsuperscript{46} The constitutionality of the use of the electric chair was challenged on October 20, 1997, by the Florida Supreme Court, after a fiery execution in March 1997. Finally, in the 4-3 vote, the dissenting justices wrote:

Execution by electrocution is a spectacle whose time has passed… Florida’s electric chair, by its own track record, has proven itself to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber of Florida State Prison.\textsuperscript{47}

Justice Brennan, one of the most liberal justice of the US Supreme Court under the Warren, Burger and Rehnquist Courts, and a harsh opponent of the death penalty, went even further in drawing the comparison between the electric chair and the stake:

\[\text{[Electrocution is]} \text{ nothing less than the contemporary technological equivalent of burning people at the stake.}^{48}\]

Electrocution is still in use in ten states: Alabama, Arkansas, Florida, Illinois, Kentucky, Nebraska, Oklahoma, South Carolina, Tennessee and Virginia.\textsuperscript{49} All these states, except for Nebraska, have lethal injection as an alternative method of execution. Since 1976, 151 offenders have been executed by electrocution.

\textit{d – Gas Chamber}:

\textsuperscript{45} The electric chair. http://www.geocities.com/trctl11/chair.html
\textsuperscript{47} Death Penalty Information Center. http://www.deathpenaltyinfo.org/article.php?scid=8&did=245
\textsuperscript{48} Ibid.
\textsuperscript{49} Death Penalty Information Center. http://www.deathpenaltyinfo.org/article.php?scid=8&did=245
The gas chamber was invented in 1926, thirty four years after the tortures inflicted by the electric chair has been tested. The gas chamber was thought to be better because the effects on the body were not visible, though it was much longer and painful. This method of execution was inspired from the gas used during World War I. The principle of the gas chamber results from the combination of cyanide pills into sulphuric acid, which produces a gas that pervades the whole chamber. This chamber is hermetic. Once the execution is finished, the gas is evacuated so that medical experts can declare the time of death. According to the authorities, only 15 seconds elapse from the combination of cyanide pills into the sulphuric acid, and the first inspiration that makes the offender immediately unconscious.\textsuperscript{50} However, according to some comments and reports, some offenders who were in the gas chamber remained conscious and suffered for several minutes before dying.\textsuperscript{51}

The gas chamber is still in use in five states: Arizona, California, Maryland, Missouri, Wyoming. These states have lethal injection as an alternative method of execution. There have been eleven executions by gas since 1976.\textsuperscript{52}

\textbf{Figure 9 :} This gas chamber has two seats which allow two executions at the same time.

e – \textit{Lethal Injection :}

Lethal injection is also the result of scientific progress, and it has been considered by experts to be the most “\textit{humane}” and modern way to kill an offender. In fact the execution is

\textsuperscript{50} Martin Monestier, Des peines à mort. Histoires et techniques des exécutions capitales des origines à nos jours (Le cherche midi éditeurs, 1994) 259.

\textsuperscript{51} Marshall Dayan (lawyer) reports that it took eighteen minutes to David Lawson to die in the gas chamber, instead of three minutes. According to him, this represents a ‘\textit{cruel and unusual punishment}’. Stephen Trombley. L’État meurtrier, 1996.

\textsuperscript{52} Death Penalty Information Center. http://www.deathpenaltyinfo.org/article.php ?scid=8&did=245
rendered more humane, and also easier to the executioner, because it is cleaner than the previous methods, and it sterilizes the notion of the death penalty. Despite the controversy over the “cruel and unusual punishment.” the fact that lethal injection considerably reduces the sufferings inflicted is not the only factor that led the vast majority of the death penalty states to use lethal injection (and among these states, the majority has lethal injection as the sole method of execution). Lethal injection is also less expensive than the electric chair, or the gas chamber, that need large amounts of money to be well-maintained. Death by lethal injection is given by the administering of one or two injections of a lethal barbituric dose, combined to a chemical agent which paralyses the whole body. This solution is in fact composed of three chemical agents: the first is sodium thiopental, a barbiturate which makes the patient unconscious, the second is pancuronium bromide, which stops the diaphragm, and thus the breathing movements. Finally the potassium chloride, which must provoke a heart failure. Yet, many reports tend to demonstrate that in fact the physical pain is hidden under the lifeless and passive face of the offender, who is totally paralyzed. The offender’s pain is masked, and the latter cannot even scream.

The first offender to be executed by lethal injection was a black offender, Charles Brooks, in 1982 in Texas. Soon after Oklahoma used it in 1983, and finally all the other states followed the same example, except Nebraska, where electrocution is mandatory. It is in use in the thirty seven other death penalty states.

55 Martin Monestier, Des peines à mort, Histoires et techniques des exécutions capitales des origines à nos jours (Le cherche midi éditeurs, 1994) 277.
56 Ibid.
57 'To Die or not to Die’. Newsweek, October 17 1983. 34.
58 Martin Monestier, Des peines à mort, Histoires et techniques des exécutions capitales des origines à nos jours (Le cherche midi éditeurs, 1994) 277.
3 - Life on Death Row:

a – “Cruel and unusual” living conditions:

Many international organizations which are fighting for the defense and respect of human rights, such as Amnesty International, denounce not only the death penalty as a violation of human rights, but also the conditions in which live the inmates who are put on death row. In a report done by Jacques Jarlegan, French coordinator for Amnesty International, US, the living conditions of death row inmates are depicted to let the reader envision how harsh and cruel they are. But Dean Carter, a San Quentin (California) death row inmate, who started some years ago to depict his everyday life on death row, may have done the most probative description of the living conditions on death row. Here is a brief description of what is life on death row.

b – What is “life on death row”?

Once an offender is convicted and imposed the death penalty, he is put on death row, where he has to wait for a lawyer to take his case if he is indigent. 99% of the offenders on death rows are indigent, i.e. they have no money, so they can’t afford a lawyer. They have thus appointed lawyers. The notion of time is considerably extended on death row. Some offenders have sometimes to wait for several years just until an appointed lawyer accepts to review their case.

Death row cells do not let the offender have a minimum of intimacy. In an individual 2m30 / 4m70 cell, there is an iron bed, a sink and a toilet next to it. There is no table, so when the prisoner has to eat, or to write, he has to sit on his bed and eat or write upon his knees.

The prisoners on death row are not allowed to work. They stay 23 hours a day in the cell, and can only spend an hour in a high security courtyard where they can play games, walk and talk. They are not allowed to get out of their cells during the week end. They have a shower which last five minutes twice a week. Their meals are served very early: 3 AM is breakfast, 10 AM is lunch and 16PM is dinner. Because these meals are served for large amounts of people, meals are often composed of the same things: “bean, rice or noodle dish of some sort.”

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59 Jacques Jarlegan. La peine de mort aux Etats Unis. 2003
Prisoners on death row are constantly under pressure and checked each time they have a visit, take a shower or just get out of their cell. First they have to undress completely, then they are checked in the hair, the mouth, the anus and behind the testicles. Once done that they can get dressed and move on, always well attached.

The only ties with the outside world that death row prisoners keep are their relation (visits, correspondence) they still have with their families and friends, the phone calls (fifteen minutes every two weeks), TV, newspapers and radio (when they can afford one). Everything has to be bought in prison, which means that the most indigent prisoners who can’t afford TV, radio or books do almost nothing of their time and have no contact with the “real world.”

In most of the states, the place where the visits take place is a small cell, behind a glass of Plexiglas that prevents any human contact like touching or kissing.

Death row inmates cannot have any professional activity, as it is the case in ordinary prisons. According to the authorities, because death row inmates are to be executed, no social reinsertion is planned, and so a job or a manual activity would be completely useless and time-wasting.

It may happen that an inmate on death row goes crazy and commits suicide. It may also happen that security guards do not do their job properly. Many Amnesty International reports have denounced examples of violence and ill-treatments of prison guards on death row inmates.

4 – Geographical Factors :

   a – Disparities :

   In the United States, the way the death penalty is imposed depends very much on geographical factors. Each state has its own legislation, which means that crimes punishable by death will not be automatically the same in every state but will probably differ from one state to another. It is not the federal government that decides over death penalty issues, but the states. For that reason, there may be several disparities among death penalty states. In some states, an offender could be imposed a death sentence automatically, whereas in another state it would be life imprisonment without parole. The whole conception of capital punishment in the United States is thus so complex because of the multiplicity of legislation and jurisdictions. In fact, there are almost as many legislation modes in the United States as there are states.

   b – Crimes punishable by death :
There are several types of offences that are considered as capital crimes, but the imposition of a death sentence for these offences depends very much on the state in which the crime has been committed. Generally, in the majority of the death penalty states, first degree murder is the very first offence which is punishable by death (Florida, Kansas, California, Arizona, Louisiana, Montana, Oklahoma, North Carolina, …). First degree murder means that it is a deliberate murder, it is intentional. But again there is a difference between the states: some states have it with more or less aggravating factors. Aggravating factors can represent several situations, which will aggravate the case of the offender, and more particularly which will lead to a death sentence. It can be a murder in the course of a robbery, a rape, a kidnapping…

The other difference among these states is the number of aggravating circumstances, which also may vary from state to state. For example, South Dakota and Arizona have first degree murder with one of ten aggravating circumstances punishable by death, Illinois and Colorado have first degree murder with one of fifteen aggravating circumstances punishable by death, while Missouri has first degree murder, regardless of aggravating circumstances.63

However, in 1972, the American Law Institute elaborated a “Model Penal Code”64 in order to erase the various disparities among the death penalty states. This code is divided into two parts. The first part defines four criteria of culpability:

- Intentional murder.
- When the criminal and the victim knew each other.
- Foolishness.
- Negligence.

The second part of this Model Penal Code defines three categories of homicides:

- Murder.
- Involuntary homicide.
- Homicide done by negligence.

When the crime has been intentionally committed, it is a first degree murder. When there was no intention, then it is considered as a secondary murder. Yet, a secondary murder can be punishable by death if there are aggravating factors such as the age or the qualification (such as a police officer for example) of the victim. When a crime is punishable by death, we then speak of a capital murder, or “felony.”

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Some capital crimes are considered as “malum in se,” i.e. that the prosecution automatically require a death sentence. In such a case, the death sentence is thus mandatorily imposed.

In some states, sex or drug-related offences are also considered as capital crimes. For example, in Louisiana, aggravated rape of victim under age twelve, and in Montana, sexual capital assault are punishable by death. In New Jersey, “solicitation by command or threat in furtherance of a narcotics conspiracy” is also considered as a capital crime.

This presentation of the capital crimes clearly shows that the several disparities between the states demonstrate that a death sentence first depends on the state in which the offence has taken place. To draw a map of the death penalty in the United States is complex because several and various factors have to be taken into account. We have to make the difference between death penalty states and non death penalty states at first, but we have also to differentiate among the death penalty states, between those who actually execute offenders, and those who admit capital punishment, but did not yet record any execution since 1976. The size of death row, the number of juveniles on death row, the race of the offender and that of the victim, are also factors that need to be taken into account in order to better analyze the situation.

![Figure 12](source: Death Penalty Information Center)

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65 Ibid. 17.
A gap between the North and the South:

Figure 12 presents the current map of capital punishment in the United States and demonstrates that there are strong disparities between the north and the south. On this map we can clearly see the “death belt” 67 which draws a clear cut and places the south apart. The map which covers the period from January 1977 to June 2003 demonstrates the harsh disparities among death penalty states: Although Texas is the state with the highest number of executions with the overwhelming number of 305 executions since 1976, the second place, held by Virginia, is “only” 88 executions, followed then by Oklahoma with 64 executions. These disparities are also due to the fact that many northern states, like New York, South Dakota, Kansas or New Jersey, which have the death penalty in their legislation, never carried out any execution since 1976. Moreover, the south has its history deeply rooted with the struggle of slavery, to which the death penalty has always been closely linked. Profoundly conservative, the south seems to be attached to capital punishment as it was previously attached to slavery.

- Figure 13 clearly shows the sharp contrast between the south and the rest of the country.
- Figure 14 demonstrates how much Texas is involved in the American death penalty current history. During ten years, Texas executed 38% of all US offenders.

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So the South (and more particularly Texas) executes most of the offenders in the country (85%). However, these harsh disparities between the North and the South can be explained by the fact that "the southern states had more extensive lists of capital statutes than did the others." 68 As they seek capital punishment for more criminal offences than northern states, it is logical that, as a result, they execute more offenders.

Another explanation of the reason why Texas is the state which executes the highest number of inmates in the United States is that judges are not nominated but elected for the most part, 69 which represent 80%. 70 This is also the case for twelve other southern states. 71 In order to be elected (or reelected), a judge, like a politician, has to show himself "tough on crime," because this is the best way to satisfy the public opinion, which in the South is very supportive to capital punishment. Moreover, to be "soft on crime" 72 is considered as to be politically dead (and it is true for judges as well as for politicians such as governors or senators).

Contrarily to several northern states, Texas does not have any public service defender, which takes indigent inmates' cases and appoints them competent lawyers. This type of service has public funds which allow to pay these lawyers decently. So in Texas, lawyers are not only

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70 Christine-Paule Trocellier, Système Judiciaire et Procédure Pénale aux Etats Unis (Document ACAT, octobre 2002) 22.
71 Ibid.
72 Ibid. 45.
inexperienced in capital cases, but they also receive basically no money to do their job seriously. 
Finally, it is not until the beginning of the 1990’s that members of the jury take into account extenuating factors such as age, the offender’s background or mental deficiency. Thus, many inmates who are currently on death row would not be there if these factors would have been taken into account.73

Chapter III – The Mechanics of the Death Penalty

1 - How Does the US Justice System Work with the Death Penalty ?

a – Judicial powers :

Each state has its own legislation and autonomy, i.e. its own constitution, a government which is elected, its own laws, courts whose judges and public prosecutors are elected by the people, and they also have their own penitentiaries.74 Each state can choose its own laws, but these laws must not violate the basic rights guaranteed by the federal Constitution.
The Supreme Court is the highest judiciary power and its role is to interpret the federal Constitution. Nine justices are appointed for life by the President, and approved by the Senate. The Governor has the power to grant his pardon to an offender who may be imposed the death penalty. His sentence is thus commuted into Life Imprisonment Without Parole.

b - The role of the jury :

The jury has various functions. Its first role, in the phase called “trial,” is to evaluate whether an offender is guilty or not. If the offender is guilty, during the second phase called “sentencing hearing,” it will determine what kind of punishment it will impose on the offender by analyzing what the aggravating and extenuating circumstances are.75 Here again the aggravating as well as the extenuating circumstances vary from one state to another. To impose the death penalty, there must be at least one aggravating circumstance :  in the course

74 Jacques Jarlegan. La peine de mort aux Etats-Unis. 2003.
of another felony, to kill someone while committing a burglary, a rape. The extenuating factors can be age (too young or too old), mental retardation, a difficult childhood, etc…

There are no prerogatives to be part of a jury, and yet some people have been removed from the jury because of their position on the death penalty. If someone is unwilling to impose capital punishment in a death penalty case because he is opposed to it, he can simply be erased from the jury. Needless to say that in order to impose the death penalty on an offender, the decision has to be approved unanimously. If there is the slightest doubt, or if a member disagrees with the rest of the jury, the offender is imposed Life Imprisonment Without Parole. Moreover, the juries are often composed of older people who are most of the time retired. It is recognized that older people favor the death penalty. Younger people who would be less keen on imposing the death penalty barely have the time to be part of a jury because of their work. Besides, black people, who are also less keen on seeking the death penalty, are often removed from the juries. This is also part of another problem that we will study later on: the relationship between race and sentencing.

Austin Sarat, in *When The State Kills*, \textsuperscript{76} focuses on the role of the jury and the importance it has in whether or not they will seek the death penalty for an offender. But it shows that somehow the jury can be easily influenced by several devices, and that they do not have much experience\textsuperscript{77} in the judicial field. Thus they can be easily wronged.

Sarat finds it shocking that “ordinary citizens” are given the right, in the name of the community that they represent, to punish someone else and to decide upon his or her life.\textsuperscript{78} He describes the mechanics of the jury selection and clearly explains what happens to those who are unwilling to impose the death penalty.

\textit{c - Appointed lawyers in death penalty cases :}

When the offender is indigent (like 99.9% in death penalty cases), he is assigned an appointed lawyer. In most of the cases these lawyers are underpaid and have almost no experience. So it is hard for an indigent person to be very well represented and defended. In some cases, some lawyers only spent a few hours on a case that would have needed at least a hundred. Some lawyers even fall asleep during the trial. We will also study these elements much more in detail in the following chapters.

\textsuperscript{75} Isabelle Cesari. *Les mineurs délinquants et la peine de mort aux Etats-Unis* (Nicolas Philippe, 1998)


“members of a jury will have had little, if any, previous experience in sentencing.” 133.
2 - Criminality and the Death Penalty:

a – Criminality in the United States:

The United States is the world’s leading economic power (GNP per inhabitant: 31500 $ / 26318 : France), but they have yet to face some social problems: unemployment, social inequalities, violent crime rates (in the most part because of the free circulation of handguns), drug abuse, a decrease in the number of police officers, etc… Again, there are disparities between the states, that is why the crime rates are not the same for every state.

The incarceration rate is 600 per 100,000 inhabitants (the highest rate behind Russia, which is 635/ 100,000). In France it is 95 per 100,000 inhabitants.

Every year there are approximately 25,000 murders that are committed in the United States. Yet, only one per cent of the offenders is sent on death row, which means that only one per cent will be executed. Figure 16 shows the gap between the United States and Europe in terms of criminality between 1997 and 1999.

Figure 16 and 17 (Source: Death Penalty Information Center)

b- Is there a correlation between homicide rates and the death penalty?

Figure 17 and 18 show the disparities in 1998 between death penalty states and non death penalty states’ homicide rates. Many politicians have strongly defended the death penalty, with the deterrence argument, claiming that the death penalty deters “would-be”
killers and criminals to commit crimes themselves. So, logically, the states that have the death penalty in their legislation should have lower homicide rates than non death penalty states, where criminals cannot be effectively deterred. However, figure 18 demonstrates that ten of the twelve non death penalty states have a lower homicide rate than some states which have the death penalty. Moreover, these ten states have homicide rates below the national average.

However, we have to be careful when we deal with the disparities among the states, and here with the homicide rates, because many factors have to be taken into account (size of the state, density of population, unemployment and poverty rates among others). It seems that the deterrent effect of the death penalty does not work so much in some death penalty states, such as Louisiana, Mississippi, Maryland or Nevada.

Again, this demonstrates how strong are the disparities among the states, and even more among death penalty states. Compare, for example, the two extremities of the death penalty states: South Dakota and Louisiana. This is another piece of evidence of the “cultural gap” between the North and the South.

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82 George Pataki. *Death Penalty is a Deterrent*. August 30, 1996. Available online at: [www.prodeathpenalty.com/Articles/Pataki.htm](http://www.prodeathpenalty.com/Articles/Pataki.htm)
c – The deterrence argument:

Deterrence is one of the main arguments used by pro-death penalty people to defend capital punishment. But it seems that those who use the most the deterrence argument are politicians. In American politics, politicians’ opinions and views are fundamental in whether they will be elected or not, and more particularly their opinions concerning the death penalty. Nowadays, still 69% of the American population is in favor of capital punishment, which means that an anti-death penalty politician has fewer chances of being elected, than a pro-death penalty one. So in order to be elected, politicians have to be “tough-on-crime,” and capital punishment is almost the first on the “tough-on-crime” priority issues.

In a speech entitled “Death Penalty is a Deterrent,” done on August 30, 1996, Governor of New York State George Pataki supported and defended the restoration, almost a year before, of the death penalty in the state of New York:

I know, as do most New Yorkers, that by restoring the death penalty, we have saved lives. Somebody’s mother, somebody’s brother, somebody’s child is alive today because we were strong enough to be tough enough to care enough to do what was necessary to protect the innocent. Preventing a crime from being committed ultimately is more important than punishing criminals after they have shattered innocent lives.

So what is deterrence? Its aim is to avoid the same kind of situation to happen once again. Deterrence can act in two different directions: whether it will deter one to do the same things again, whether it will deter others to do the things one did. We will not go against the first case, because it is obvious that it works, it is logical: once executed, one is not supposed to commit crimes again. But is Life Imprisonment Without Parole also a deterrent? It seems that it is another way to punish a convicted person, and here the level of efficiency is strictly the same as capital punishment. Furthermore several studies have demonstrated that executing an inmate was much more costly than keeping a prisoner in a cell for a lifetime.

d – Inside the mind of a criminal:

But what is happening in the mind of a criminal? In order to be deterred, a criminal would have to be fully aware of the laws, which types of crimes are punishable by death, what

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83 Polling Report.com. 6/03 69% are in favor of the death penalty, only 23% are opposed.
84 George Pataki. Death Penalty is a Deterrent. August 30, 1996. Available online at: www.prodeathpenalty.com/Articles/Pataki.htm
85 George Pataki. Death Penalty is a Deterrent. August 30, 1996. Available online at: www.prodeathpenalty.com/Articles/Pataki.htm
are the aggravating factors, to weigh the risks he takes... But in reality, most of the time, crimes are "committed in the heat of passion, and/or under the influence of alcohol or drugs," 86 which means that in fact they do not think at all about the consequences of their acts. Most homicides are unplanned and impulsive acts done by a person against another. The emotionally charged environment in which these crimes take place does not suggest a cool, calculating murderer weighing his options. Furthermore, when a criminal commits a crime, he does not want to be caught, and does its best not to be. So when Pataki says "while giving criminals good cause to fear arrest and conviction," 87 in fact criminals already fear arrest and conviction, and however it does not prevent them from keeping on committing robberies or rapes and so on... We call these people recidivists, and it seems there is no way to deter these people.

e – Polls, statistics and deterrence:
Polls and statistics demonstrate that in fact the American population do not think much that the death penalty acts as a deterrent:
- The first obvious example is the size of death row and its evolution from 1968 to 2000. (see Figure 2 above).
- Then there are the polls. The Harris poll shows an evolution from 1976 (the year capital punishment has been restored in the United States) to 2000, with a drop from 59 to 44% of the people who think it is actually a deterrent. Others, who do not think as such, represent now 50%, whereas they were only 34% in 1976. 88
- The ABC News/Washington Post poll of 2001 shows an increase, with 52% of the people convinced that death penalty is not a deterrent. So more than half of the population assumes it is not a deterrent. 89
- According to 84% of the criminologists who were surveyed, the death penalty is not a deterrent (see Figure 18).
- According to the police chiefs, capital punishment comes last in reducing violent crime, which means that it has no efficiency as a deterrent (see Figure 19).

86 "Capital punishment is not a deterrent to murder." ACLU Briefing Paper / Spring 1999
87 George Pataki. Death Penalty is a Deterrent. August 30, 1996. Available online at : www.prodeathpenalty.com/Articles/Pataki.htm
The purpose of this first part, which is very descriptive, was to set up the basis for this research. It is an introduction that presents the death penalty in the United States, from the beginning of its history, up to nowadays, the methods of execution and the constitutional problems that capital punishment entailed during the last decades. This last point is precisely what we will study in the following part: the constitutionality (or the limits of the constitutionality) of the death penalty, from the analysis of the two landmark ruling cases: *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976), but also from the study of the Constitution and of the Framers’ original intent, and of the offender’s constitutional rights which, as we will see, are not always respected.

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