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**Death Penalty**

**Nick Capodice:** [00:00:00] You're listening to Civics 101.

**Hannah McCarthy:** [00:00:02] And I'm Hannah McCarthy.

**Nick Capodice:** [00:00:03] And today we're talking about the death penalty otherwise known as capital punishment.

[00:00:08] Now to more breaking news from Utah where a convicted murderer Ronnie Lee Gardner was shot to death by a firing squad overnight. I want to turn to one of this week's biggest stories in Oklahoma are the execution of Clayton Lockett went horribly wrong.

**Hannah McCarthy:** [00:00:22] I've heard that we're the only Western nation that still has the death penalty. I want to know if that's true and if it is why.

**Nick Capodice:** [00:00:33] I want to know how policy towards the death penalty has changed as we've evolved as a nation. This is an issue that doesn't seem just relegated to politics. It could also extend to broader philosophical question can we kill other people because they've done the same. So we wanted to talk to someone who really knew about capital punishment.

**Carol Steiker:** [00:00:57] My name is Carol Staker. I am the Henry J. Friendly Professor of Law at Harvard Law School where I also am a faculty coach director of the Criminal Justice Policy Program.

**Nick Capodice:** [00:01:09] So to start do we have a national policy on the death penalty?

**Carol Steiker:** [00:01:15] No we do not have a national policy on the death penalty because the death penalty is primarily a state by state affair. That's one of the things that makes us different from most other countries is that we give individual states authority over the criminal justice system. So we do have a federal death penalty but the federal government is really a bit player in this field of the 1300 or so executions that have occurred in the last 40 years. Only three of them have been by the federal government.

**Hannah McCarthy:** [00:01:47] So the Supreme Court has ruled on definitions within the death penalty. But is the death penalty addressed in the Constitution.

**Carol Steiker:** [00:01:56] Well at the time the Constitution was drafted. Every one of the original 13 colonies had the death penalty and used it and the death penalty is mentioned in the Constitution a number of times. So many people argue that oh well therefore it must be constitutional because it's mentioned in the Constitution. But I think that's a little too simplistic. It's true that at the time the Constitution was drafted there was not any official questioning of the death penalty is permissibility but also mentioned in the Constitution is mutilation. The Fifth Amendment says you can't be held twice in jeopardy of life or limb because there were times in our colonial period where we cut off people's hands or branded them or otherwise mutilated their bodies as punishment. I don't think that many people would argue that because that phrase is in the Constitution that that means that today there's no constitutional problem with say cutting off limbs as punishment. So let's talk about the history. How has our nation's views towards the death penalty changed since the colonial days. Well you know what's really interesting is that when you ask people today why we have the death penalty they come up with a variety of arguments they say well maybe we have to deter other people from committing heinous crimes or maybe we just have it for what are called retributive purposes that is for punishing people in proportion to their dessert. The one thing nobody today would say we have the death penalty for is rehabilitation. I mean you don't rehabilitate someone by killing them. But actually in the colonial era that was the main purpose of capital punishment. That is it was thought at the time that we were overwhelmingly Christian country and people were overwhelmingly believers and they thought that if someone was sentenced to death they could be brought to a state of repentance by the knowledge of their impending execution and therefore their immortal soul could be saved. So the point of sentencing people to death was actually to rehabilitate their souls. I don't think you'd get that argument very often.

**Nick Capodice:** [00:04:22] Hannah and I are both sitting here with our mouths open. I had no knowledge that the death penalty would have been considered justifiable for religious reasons at that time like you're doing you're doing them a favor. So what's the first legal language about the death penalty the first time maybe the Supreme Court got involved with this death penalty case.

**Carol Steiker:** [00:04:40] Well that's a really interesting question because it wasn't until the 20th century that the Supreme Court got involved. So let me just tell this story because it's a it's not a well-known one but it's very important to understand how today we understand everyone understands that the Supreme Court is the main player in America's Death Penalty drama. Like I said at the beginning of our country although all the original states had the death penalty although there were people who raised questions about it including some of our founding fathers like Thomas Jefferson and Benjamin Franklin. It was legal and it was practiced pretty much everywhere. But as the 19th century wore on there was a real divergence between the north and the south around the death penalty. That as a number of states in the north and in the Midwest either abolished the death penalty outright. Michigan was the first English speaking jurisdiction in the world to abolish the death penalty in the 1940s and has never had it since then. But in the American South none of the Southern states abolished the death penalty and were very very slow to restrict it in any way because after the Civil War Southern whites were petrified about the possibility of retaliatory violence from the large freed black populations that were in their myths. And they responded with really what was a reign of terror. Again blacks in the south what we now know was a 50 year period of lynching a period in which more than 4000 people were lynched in the United States. Now it wasn't lynching per se that brought the Supreme Court into the death penalty fray. It was the South's response to lynching. So Southern leaders didn't like lynching. It made them look weak. It made them look unable to control the angry mobs who conducted these lynchings in their states. And so they came up with an anti lynching policy that essentially had sheriffs standing on the front steps of courthouses facing down the mob that wanted to lynch a black person charged with a crime against a white person saying don't worry we're going to have a really fast trial and this person this defendant will be hanging by sunset. And that resulted in a kind of quick and dirty. What many people have now call a policy of legal lynching. And this is what brought the Supreme Court into the fray. Now I'm getting to specifically answering your question when did the Supreme Court start to regulate the death penalty under the Constitution. Like I said at the beginning of our country. All the original states had the death penalty although there were people who raised questions about it including some of our founding fathers like Thomas Jefferson and Benjamin Franklin. But the first time that the Supreme Court ever made a rule specific to death penalty cases under theU.S. Constitution was in 1932. In a famous case called Powell versus Alabama which many people today know as the Scottsboro Boys case the Scottsboro Boys case involved nine black boys and they were boys they were ages 12 to 19 who were riding the rails in the South in Alabama and two white women who were also riding the rails accused the nine boys of raping them. We now know that these charges were unfounded. In fact the state of Alabama eventually issued a complete pardon to all of the nine Scottsboro Boys The most recent was in 2013. But at the time they were tried convicted and sentenced to death at least eight of them were the 12 year old was not sentenced to death but eight of the others were sentenced to death after trials that were you know ridiculous incredibly fast and which they were essentially unrepresented by counsel. And the Supreme Court took this case and said For the first time in capital cases you have to have a lawyer. The Constitution requires that.

**Hannah McCarthy:** [00:09:05] So what have been some other major historic milestones involving the Supreme Court and the death penalty.

**Carol Steiker:** [00:09:13] Well the biggest was a very famous case in 1972 called Furman versus Georgia where the Supreme Court abolished the death penalty in the United States. Now you might say that's news to me. I thought we still had the death penalty in the United States and we do. And that's because the Supreme Court reversed itself four years later. But I'll get to that. But how did we get to a point in 1972 where the Supreme Court abolished the death penalty in the United States. And the answer is a sort of direct descendant of the Scottsboro Boys case in 1963 almost exactly 30 years after Scottsboro another black man convicted and sentenced to death for raping a white woman in Alabama. As the Supreme Court to take his case. Well there was a liberal justice on the court in the 1960s named Arthur Goldberg who was very much an opponent of capital punishment. He wrote a long what's called dissent from denial of Sir Sharara a dissent from the courts failure to take the case that basically announced to the world his thinking that it was time for the court to consider the constitutionality of capital punishment at least for the crime of rape. And it turns out that that dissent from denial of review caught the attention of the premier civil rights organization in the United States. The NAACP Legal Defense and Education Fund which people everyone calls LDS for short. This was the same organization that had brought and won the Brownvs. Board of Education in 1954 and desegregated America's schools. So it tells you something about the death penalty about its history that in the 1960s in the middle of the civil rights era the nation's preeminent civil rights and racial justice organization would think that the death penalty should become its most important project.

**Hannah McCarthy:** [00:11:17] So why was the death penalty then reinstated.

**Carol Steiker:** [00:11:20] That's a very good question. Well it turns out that although LDS won a big victory in 1972 it was a very fragile victory. There are nine justices on the Supreme Court. The decision was 5 to 4 and each of the five justices wrote his own opinion and none of them joined each other so it was kind of hard to know exactly what was wrong with the death penalty in 1972. But the sort of two key swing justices who had rejected such a challenge the year before but changed their minds and accepted it. And Ferman had a kind of narrow view of what was wrong with the death penalty. They said what was wrong was that jurors who did death sentencing in the United States were not given sufficient guidance on how to apply it. They had too wide ranging discretion. The death penalty was widely authorized and there were no standards to help them decide who should get it. So of course states that wanted to keep the death penalty decided to redraft their capital statutes in an attempt to provide the very guidance that these swing justices said were missing. And in 1976 the Supreme Court granted review on five of these new statutes from. And you won't be surprised by this list. Texas Georgia Florida North Carolina and Louisiana. And they upheld a new generation of statutes that provided what the court called guided discretion and the death penalty was back in business.

**Hannah McCarthy:** [00:12:59] Is the death penalty currently considered an effective deterrent.

**Carol Steiker:** [00:13:06] I don't think it is. I don't think it is fairly considered to be there. There's been a real cottage industry trying to figure out whether the death penalty deters better than other punishments. You know life without parole or long prison terms. And while other studies that come out on both sides in 2012 a blue ribbon panel of you know the National Institute of Science did a meta analysis of all the studies and concluded that there is no evidence that the death penalty deters. Now they also said there is no evidence that it doesn't deter. In other words the absence of evidence that it deters is not evidence of absence of deterrence. So we're sort of stuck in a who knows situation however just kind of using common sense there about you know 10 to 15000 homicides in the United States every year. Last year we executed around 30 people most people who commit crimes serious homicides have every reason to think that they will not be executed because even the majority of people who have been sentenced to death have not been executed. So just in terms of what you think might contribute to deterrence the way we actually practice the death penalty makes it exceedingly unlikely that it deters.

**Nick Capodice:** [00:14:38] This may be a strange question but seeing as we have so many people who are on death row in states that have had people on death row for years without executions, what is the justifiable point of keeping the death penalty.

**Carol Steiker:** [00:14:52] Well it's a really good question. I think in some of the states that keep people on death row for years and years California is case in point. They have you know 700 ish people on death row but between in the last 40 years they've executed only 13 people. I think it's it's kind of a symbolic statement by returning the sentence of death they get to say we take this really seriously but then they don't actually follow through with executions. If you want a really cool analogy to the founding era again occasionally in colonial times people were sentenced to stand at the gallows with the rope around their neck. And often they weren't told that they weren't really going to be hanged. But the actual sentence was you just go to the gallows and they put the rope around your neck. And that was your punishment. And I guess it was a symbolic way of saying what you did was really really bad. And it's enough to make that symbolic statement without actually killing you. And that's what some states I think are doing with the death penalty.

**Nick Capodice:** [00:16:03] So can you tell me about the arguments moral or legal or civics related against having the death penalty.

**Carol Steiker:** [00:16:13] Well I think the strongest argument against the death penalty is not so much about what it does to the people who are executed. About whether they deserve it. But what it says about us as a community as a society I often debate the death penalty with people who are very much for it and they always start their debate with an example of some heinous crime. So one person that I debated once started with a description of a crime I'm not even sure that this was a real crime but he described a case in which the defendant had been involved with a woman who broke up with him and he was very angry and he kidnapped her two children from a previous relationship and took those two children and staked them out alive in an alligator patch and let them be eaten by alligators. And he rhetorically said to the audience in our debate how could we think that anything less than death is what this heinous and atrocious murderer deserves. My answer to him is why would we think that a single relatively painless death by lethal injection is what this heinous and atrocious murderer deserves. Why don't we stake him out in an alligator patch and let him get eaten alive by alligators. Always a few people who think well that's a pretty good idea. But most people say no we don't do that. That's uncivilized. And once they admit or acknowledge that there are things that people might be said to deserve because of the heinousness of their own behavior that we don't do because of our civilization humanity. If you want then I think you know you're on my page. If you believe that. And you know I think death should be one of those things that we don't do because that's not what civilized societies do that we have plenty of serious punishments that take seriously wrong doing without taking the awesome step of ending people's lives.