

WHAT I THINK ABOUT WHEN I THINK ABOUT THE DEATH PENALTY

JOHN D. BESSLER*

I. ALL THE BARBARITY

The death penalty has been used for centuries. The methods of execution have been gruesome, even monstrous, ranging from crucifixion, drowning, drawing and quartering, burning at the stake, beheading, and sawing in half.¹ In prior centuries, public executions took place with considerable regularity in Asia, Africa, Europe, and the Americas, including during the Roman and Spanish Inquisitions.² Revolutionaries—opponents of tyrannous monarchs, or totalitarian or repressive regimes—were often beheaded, hanged, or shot by firing squad, with the heads of traitors sometimes displayed on spikes or publicly exhibited in cages as a terrifying example to others.³ Even today, authoritarian

* Associate Professor, University of Baltimore School of Law; Adjunct Professor, Georgetown University Law Center; Visiting Scholar, Human Rights Center, University of Minnesota Law School; Of Counsel, Berens & Miller, P.A., Minneapolis, Minnesota. The author's new book, *The Death Penalty as Torture: From the Dark Ages to Abolition*, was published in February 2017 by Carolina Academic Press. It won a Bronze Medal in the World History category of the Independent Publisher Book Awards. The title of this essay is inspired by Raymond Carver's short story, "What We Talk About When We Talk About Love," first published in 1981 as part of a collection with the same title, and the title of a 1999 book review in *The Journal of Criminal Law and Criminology*. RAYMOND CARVER, WHAT WE TALK ABOUT WHEN WE TALK ABOUT LOVE (1981); Leigh B. Bienen, *What We Write About When We Write About the Death Penalty—A Review of Recent Books and Literature on Capital Punishment*, 89 J. CRIM. L. & CRIMINOLOGY 751 (1999). Over the years, the author has taught a capital punishment seminar at the University of Minnesota Law School, The George Washington University Law School, the Georgetown University Law Center, the University of Baltimore School of Law, and Rutgers School of Law.

1. LILIAN CHENWI, TOWARDS THE ABOLITION OF THE DEATH PENALTY IN AFRICA: A HUMAN RIGHTS PERSPECTIVE 17 (2007); *see also* NIGEL CAWTHORNE, PUBLIC EXECUTIONS: FROM ANCIENT ROME TO THE PRESENT DAY 6 (2012).

2. *See, e.g.*, DANIEL FENNING & JOSEPH COLLYER, A NEW SYSTEM OF GEOGRAPHY: OR, A GENERAL DESCRIPTION OF THE WORLD 19 (S. Crowder 1766) (discussing public executions in Japan); PAUL F. GRENDLER, THE ROMAN INQUISITION AND THE VENETIAN PRESS, 1540–1605, at 57–60, 139, 208 (1977); HENRY KAMEN, THE SPANISH INQUISITION: A HISTORICAL REVISION 276–277 (4th ed. 2014); RICHARD WARD, *Introduction*, in A GLOBAL HISTORY OF EXECUTION AND THE CRIMINAL CORPSE 1 (Richard Ward ed., 2015); FRANCES LARSON, SEVERED: A HISTORY OF HEADS LOST AND HEADS FOUND 84–85 (2014).

3. IÑIGO FERNÁNDEZ, HISTORY OF MEXICO: A JOURNEY FROM PREHISTORIC TIMES TO THE PRESENT DAY 41, 53–54 (David B. Castledine trans., 2003).

governments around the globe encourage or force people, including small children, to watch public executions. “In Saudi Arabia,” one contemporary writer, Garrett Fagan, observes, “the condemned are beheaded, normally on Fridays, in one of the main squares in Riyadh, at the rate of about one a week.” “In Iran, China, North Korea, Thailand, and elsewhere,” Fagan emphasizes, “executions can be staged before large crowds.”⁴

The long, sordid history of the death penalty’s cruelty and torturous inhumanity is haunting. As one source—a history of the Middle Ages—emphasizes of the brutality of public executions that occurred in past centuries:

[T]he quartering of bodies and the posting of the resulting quarters in public places was taken up in the fifteenth century in Bologna, Siena, Foligno, Cesena, Naples and Rome and reached its most grotesque in eighteenth-century France, as illustrated by the case of Robert-François Damiens, would-be assassin of Louis XV. In 1757, Damiens was tortured with pincers, the wounds filled with a molten mixture of lead, oil, resin, sulphur and wax, and his body was then pulled apart—albeit with enormous effort, and only after the team of horses was increased from four to six and one of the executioners had cut deeply into the condemned man’s thigh and shoulder joints.⁵

Not only were thought-to-be witches burned at the stake throughout Europe, drowned in Iceland, and, in 1692, hanged in Salem, Massachusetts,⁶ but people like Jean Calas, a Frenchman later posthumously exonerated through Voltaire’s dogged efforts, were tortured and broken on the wheel.⁷

II. ALL THE WRONGFUL CONVICTIONS AND EXECUTIONS

It is impossible to catalog all of the wrongful convictions, death sentences, and executions associated with criminal justice systems around the world. Miscarriages of justice—once thought to be rare aberrations—are found throughout the ages, with the alleged victims of convicted murderers actually

4. GARRETT G. FAGAN, *THE LURE OF THE ARENA: SOCIAL PSYCHOLOGY AND THE CROWD AT THE ROMAN GAMES* 69 (2011). As Fagan continues:

In an echo of Medieval European practices, sentencing ceremonies are often staged in China as huge public rallies. In the North Korean city of Hamhung, the place of execution is located beside the town’s main bridge, and schoolchildren are brought along in groups to watch (the preferred method is firing squad). Schoolchildren attending for the first time are seated at the very front. Eyewitnesses report crowds in the thousands. As recently as 1988, a public hanging in Pakistan attracted 10,000 spectators.

Id.

5. Lila Yawn, *The Bright Side of the Knife: Dismemberment in Medieval Europe and the Modern Imagination*, in *WOUNDS IN THE MIDDLE AGES* 215, 227-28 (Anne Kirkham & Cordelia Warr eds., 2016).

6. JULIAN GOODARE, *THE EUROPEAN WITCH-HUNT* 217 (2016); DAVID LEFFMAN & JAMES PROCTOR, *THE ROUGH GUIDE TO ICELAND* 109 (2010); STACY SCHIFF, *THE WITCHES: SALEM, 1692*, at 3 (2015).

7. ROBERT K. MASSIE, *CATHERINE THE GREAT: PORTRAIT OF A WOMAN* 332–33 (2011).

sometimes *showing up alive* after the condemned individual's execution.⁸ The New York-based Innocence Project, founded in 1992 by Barry Scheck and Peter Neufeld, has shined considerable new light over the past twenty-five years on the causes and frequency of innocent people being unjustly imprisoned and sentenced to death.⁹ However, the phenomenon of wrongful convictions is not new; it spans centuries and societies around the world.¹⁰ "To date," the Innocence Project's website reports, "350 people in the United States have been exonerated by DNA testing, including 20 who served time on death row."¹¹ "These people," that website points out, "served an average of 14 years in prison before exoneration and release."¹² American death row inmates now spend an average of *more than fifteen years* between sentencing and execution,¹³ but it is, ironically, only because of such prolonged delays that, through newly discovered evidence, some exonerations are produced.¹⁴ Had executions been carried out more expeditiously after sentencing, scores of innocent people would have been put to death as a result of faulty eyewitness testimony, perjury by jailhouse snitches, false confessions, or for other reasons.¹⁵

8. ROBERT J. NORRIS, *EXONERATED: A HISTORY OF THE INNOCENCE MOVEMENT* 16 (2017); BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* xiii-iv, 222 (2000); ROB WARDEN, WILKIE COLLINS'S *THE DEAD ALIVE: THE NOVEL, THE CASE, AND WRONGFUL CONVICTIONS* 152-64 (2005) (discussing eleven wrongfully convicted defendants in "dead alive" cases known to have occurred in the United States, including that of William Marion and Charles Hudspeth, executed in Arkansas on December 30, 1892, before his supposed victim, George Watkins, was located alive and well in Kansas in June 1893); R. MICHAEL WILSON, *LEGAL EXECUTIONS IN NEBRASKA, KANSAS AND OKLAHOMA INCLUDING THE INDIAN TERRITORY: A COMPREHENSIVE REGISTRY* 19-21 (2012) (discussing the case of William J. Marion, executed on March 25, 1887, for the murder of John Cameron, who later showed up alive).

9. *About*, INNOCENCE PROJECT, <https://www.innocenceproject.org/about/> [<https://perma.cc/4MY4-4YJN>].

10. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 22-23 (1987).

11. *Exonerate the Innocent*, INNOCENCE PROJECT, <https://www.innocenceproject.org/exonerate> [<https://perma.cc/W9DW-RZ6S>].

12. *Id.*

13. Michael Johnson, *Fifteen Years and Death: Double Jeopardy, Multiple Punishments, and Extended Stays on Death Row*, 23 B.U. PUB. INT. L.J. 85, 86 (2014).

14. *E.g.*, *Anthony Ray Hinton Exonerated After 30 Years on Death Row*, EQUAL JUST. INITIATIVE, <https://eji.org/anthony-ray-hinton-exonerated-from-alabama-death-row> [<https://perma.cc/9UTV-WEMB>]; Lauriel Cleveland, *Glenn Ford, Exonerated After 30 Years on Death Row, Dies*, CNN (June 30, 2015), <http://www.cnn.com/2015/06/30/us/exonerated-death-row-inmate-glenn-ford-dies/> [<https://perma.cc/ED4F-K2MU>].

15. KENNETH WILLIAMS, *MOST DESERVING OF DEATH? AN ANALYSIS OF THE SUPREME COURT'S DEATH PENALTY JURISPRUDENCE* 63-76 (2016).

Men and women are wrongfully convicted everywhere, from the United States and Canada in North America to China and Japan in Asia,¹⁶ and there are plenty of examples of miscarriages of justice in death penalty cases, including in modern times.¹⁷ All one has to do is peruse the Internet—and look at websites for the Innocence Project,¹⁸ the Death Penalty Information Center,¹⁹ the National Registry of Exonerations,²⁰ and the Death Penalty Worldwide²¹—to read about all the horrifying circumstances that led jurors in particular cases to wrongfully convict men or women, convictions that show that justice systems regularly make mistakes and are hardly infallible.²² One recent headline, “Scalia Once Pushed Death Penalty for Now-Exonerated Inmate Henry Lee McCollum,” speaks volumes about the risk of executing those who were not, in fact, responsible for the crimes at issue.²³

Examples of miscarriages of justice are, in reality, incredibly easy to find—and they can often be found close to home. In Mankato, Minnesota, the place

16. NA JIANG, *WRONGFUL CONVICTIONS IN CHINA: COMPARATIVE AND EMPIRICAL PERSPECTIVES* 5 (2016); HÉLÈNE KATZ, *JUSTICE MISCARRIED: INSIDE WRONGFUL CONVICTIONS IN CANADA* 9 (2011); DANIEL S. MEDWED, *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT* 4 (2017); David T. Johnson, *An Innocent Man: Hakamada Iwao and the Problem of Wrongful Convictions in Japan*, 13 *THE ASIA-PACIFIC J.* 1, 1–26 (2015). *See generally* HE JIAHONG, *BACK FROM THE DEAD: WRONGFUL CONVICTIONS AND CRIMINAL JUSTICE IN CHINA* (2016) (outlining high-profile wrongful convictions in China); Kimberly A. Clow & Rose Ricciardelli, *Wrongly Convicted and Wrongly Incarcerated: Exoneree Experiences and Public Perceptions*, in *EXPERIENCING IMPRISONMENT: RESEARCH ON THE EXPERIENCE OF LIVING AND WORKING IN CARCERAL INSTITUTIONS* 264, 264–65 (Carla Reeves ed., 2016).

17. Bedau & Radelet, *supra* note 10, at 25. *See generally* JAMES S. LIEBMAN, ET AL., *THE WRONG CARLOS: ANATOMY OF A WRONGFUL EXECUTION* (2014) (telling the story of a man named Carlos DeLuna who was executed after being mixed up with another man named Carlos Hernandez); RICHARD A. STACK, *GRAVE INJUSTICE: UNEARTHING WRONGFUL EXECUTIONS* (2013) (arguing against the death penalty through the examination of eighteen individuals who were executed but were likely innocent).

18. *Cases*, INNOCENCE PROJECT, <https://www.innocenceproject.org/all-cases/#exonerated-by-dna> [https://perma.cc/BPT6-NCQV].

19. *The Innocence List*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/innocence-list-those-freed-death-row> [https://perma.cc/XRQ2-CVHZ].

20. NAT'L REG. OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> [https://perma.cc/VE3E-N7GA].

21. *Innocence and Wrongful Convictions*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, <http://www.deathpenaltyworldwide.org/wrongful-convictions.cfm> [https://perma.cc/H2ET-P8RP].

22. BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 173 (2011).

23. Ed Mazza, *Scalia Once Pushed Death Penalty for Now-Exonerated Inmate Henry Lee McCollum*, HUFFINGTON POST (Sept. 2, 2014), http://www.huffingtonpost.com/2014/09/02/scalia-death-penalty_n_5756362.html [https://perma.cc/9MG5-4M59] (“A North Carolina death row inmate exonerated by DNA evidence on Tuesday was once held up by Supreme Court Justice Antonin Scalia as an example of someone who deserved to die.”).

where I grew up, thirty-eight Dakota Indians were hanged simultaneously on December 26, 1862, from the same scaffold, in the midst of the Civil War.²⁴ At that mass execution, still the largest in U.S. history, it was freely acknowledged shortly afterwards that a man by the name of Chaska (confused for another man, Chaskaydon) was hanged by mistake.²⁵ Whereas Chaskaydon had killed a pregnant woman, Chaska had actually *protected* a woman, Sarah Wakefield, who had been held in captivity during what was then known as the Sioux Uprising. “In regard to the mistake, by which Chaska was hung, instead of another,” Rev. Stephen Riggs wrote to Mrs. Wakefield after the fact, “I doubt whether I can satisfactorily explain it.”²⁶ And the error happened despite the fact that President Abraham Lincoln, who wrote out the execution order by hand, gave express instructions that the hanging be carried out in accordance with his order.²⁷ Not wanting any miscommunication to occur, Lincoln had directed the telegraph operator: “[P]lease send this very carefully and accurately.”²⁸

III. ALL THE LYNCHINGS AND LACK OF DUE PROCESS

“The death penalty,” renowned lawyer, U.S. Supreme Court advocate, and Yale Law School professor Stephen Bright has declared, “is a direct descendant of lynching and other forms of racial violence and racial oppression in America.”²⁹ Human beings have long engaged in violent acts, revenge-seeking, and the practice of lynching, with premediated murders and other killings—whether illicit or state-sanctioned—taking place throughout the world.³⁰ A spate of lynchings took place in America’s Deep South after the Civil War, and black

24. JOHN D. BESSLER, *LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA* 59–62 (2003). *See generally* SCOTT W. BERG, *38 NOOSES: LINCOLN, LITTLE CROW, AND THE BEGINNING OF THE FRONTIER’S END* (2012). The mass execution, which inflicted horrendous pain and suffering and the reverberations of which can still be felt today, was recently in the news yet again. In 2017, after the erection in Minneapolis of a two-story “Scaffold” sculpture in the Walker Art Center’s Sculpture Garden, the sculpture—inspired in part by the mass hanging of the Dakota Indians—was taken down after vocal protests by Native-Americans. Liz Sawyer, *After Outcry and Protests, Walker Art Center Will Remove ‘Scaffold’ Sculpture*, STAR TRIBUNE (May 28, 2017), <http://www.startribune.com/walker-will-take-down-controversial-sculpture-after-protests/424820003/#1> [<https://perma.cc/7EP3-686P>].

25. BESSLER, *supra* note 24, at 61–62.

26. SARAH F. WAKEFIELD, *SIX WEEKS IN THE SIOUX TEEPEES: A FASCINATING FIRST-PERSON ACCOUNT OF A WOMAN’S SIX-WEEK CAPTIVITY BY THE SIOUX IN 1862*, at 85 (2016).

27. JOHN A. HAYMOND, *THE INFAMOUS DAKOTA WAR TRIALS OF 1862: REVENGE, MILITARY LAW AND THE JUDGMENT OF HISTORY* 108 (2016).

28. BESSLER, *supra* note 24, at 58; *see also* BERG, *supra* note 24, at 226.

29. Austin Sarat, *The Rhetoric of Race in the New Abolitionism*, in *FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA* 260, 280 n.34 (Charles J. Ogletree, Jr. & Austin Sarat, eds., 2006).

30. *See, e.g.*, DANIEL M. GOLDSTEIN, *THE SPECTACULAR CITY: VIOLENCE AND PERFORMANCE IN URBAN BOLIVIA* 183 (2004); COLIN KNOX & RACHEL MONAGHAN, *INFORMAL JUSTICE IN DIVIDED SOCIETIES: NORTHERN IRELAND AND SOUTH AFRICA* 19–20 (2002).

codes explicitly called for more severe punishments for blacks than for whites.³¹ As a recent report of Bryan Stevenson's Alabama-based Equal Justice Initiative observes: "During the period between the Civil War and World War II, thousands of African Americans were lynched in the United States. Lynchings were violent and public acts of torture that traumatized black people throughout the country and were largely tolerated by state and federal officials."³² The Equal Justice Initiative documented 4,084 racial terror lynchings in twelve Southern states between 1877 and 1950.³³

The adoption of the U.S. Constitution's Fourteenth Amendment guaranteed "equal protection of the laws" and, as American courts subsequently determined, applied the guarantees of the Eighth Amendment against the states.³⁴ But that didn't stop Ku Klux Klan lynchings and other extra-judicial killings throughout American states, including in northern locales.³⁵ One eminent scholar, David Garland, has defined *public torture lynchings* as "lynchings that were highly publicized, took place before a large crowd, were staged with a degree of ritual, and involved elements of torture, mutilation, or unusual cruelty."³⁶ For example, in 1893, one black man, Henry Smith, was tortured and burned alive in Paris, Texas, in front of a crowd of 15,000, following the rape and murder of a white, three-year-old child.³⁷ And in my home state of Minnesota, three African-American circus workers were lynched in 1920, with the three young men—Elias Clayton, Elmer Jackson, and Isaac McGhie—pulled out of Duluth's jail and lynched from a lamp post by a 5,000 to 10,000-member lynch mob.³⁸ Just as public executions still take place in Asia and many Islamic countries,

31. JOSEPH A. RANNEY, *IN THE WAKE OF SLAVERY: CIVIL WAR, CIVIL RIGHTS, AND THE RECONSTRUCTION OF SOUTHERN LAW* 51 (2006).

32. EQUAL JUST. INITIATIVE, *Lynching in America: Confronting the Legacy of Racial Terror* (3d ed. 2017), <https://lynchinginamerica.eji.org/report/> [<https://perma.cc/D9BL-KM39>].

33. *Id.* See generally KERRY SEGRAVE, *LYNCHINGS OF WOMEN IN THE UNITED STATES: THE RECORDED CASES, 1851-1946* (2010); JULIUS E. THOMPSON, *LYNCHINGS IN MISSISSIPPI: A HISTORY, 1865-1965* (2007).

34. See Thomas Y. Davis, *Incorporation Doctrine*, in *THE OXFORD COMPANION TO AMERICAN LAW* 416 (Kermit L. Hall ed., 2002); see also GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* (2006).

35. *Ku Klux Klan: A History of Racism and Violence*, SOUTHERN POVERTY L. CTR. (6th ed. 2011), <https://www.splcenter.org/sites/default/files/Ku-Klux-Klan-A-History-of-Racism.pdf> [<https://perma.cc/J99T-5RLX>].

36. David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 L. & SOC'Y REV. 793, 797 (2005).

37. CYNTHIA SKOVE NEVELS, *LYNCHING TO BELONG: CLAIMING WHITENESS THROUGH RACIAL VIOLENCE* 113 (2007); Christopher Waldrep, *Introduction*, in *LYNCHING IN AMERICA: A HISTORY IN DOCUMENTS* 23 (Christopher Waldrep, ed., 2006).

38. BESSLER, *supra* note 24, at 194–95. See generally MICHAEL FEDO, *THE LYNCHINGS IN DULUTH* (2d ed. 2016).

lynchings still occur in nations such as India and Pakistan.³⁹ In September 2015—as one news report relayed with horror—“a Muslim man, Mohammad Akhlaq, was lynched in Dadri near the Indian capital, over rumors that he had killed a local cow and stored its meat in his refrigerator.”⁴⁰

Death sentences themselves are often the result of poor lawyering and ineffective assistance of counsel, egregious misconduct or due process violations, and other legal infractions such as the failure to turn over exculpatory evidence.⁴¹ The error rate in death penalty cases, as a study led by James Liebman of Columbia Law School found, is an astonishing *sixty-eight* percent.⁴² Death sentences are frequently overturned in post-conviction proceedings through the determined efforts of volunteer, *pro bono* lawyers,⁴³ and oftentimes the inmates who get retrials are not sentenced to death at their second trials.⁴⁴ The death-qualification process, which allows prosecutors to systematically exclude death penalty opponents in a process still sanctioned by the U.S. Supreme Court,⁴⁵ is especially disturbing. It culls a disproportionate number of minorities, women, Democrats, Catholics, and Jews from sitting in judgment in

39. Beatrice Houser, *Beliefs, Culture, and Proliferation, and the Use of Nuclear Weapons*, in PREVENTING THE USE OF WEAPONS OF MASS DESTRUCTION 79 (Eric Herring ed., 2000); MICHAEL J. PFEIFER, *GLOBAL LYNCHING AND COLLECTIVE VIOLENCE VOL. 1*, at 126–127 (2017) (describing lynchings in Asia, Africa, and the Middle East); Haq Nawaz Khan & Pamela Constable, *In Pakistan, a Student's Lynching for Alleged Blasphemy Was a New Low—But No Surprise*, WASH. POST (Apr. 24, 2017), https://www.washingtonpost.com/world/asia_pacific/in-pakistan-a-students-lynching-for-alleged-blasphemy-was-a-new-low—but-no-surprise/2017/04/22/ce921790-2525-11e7-928e-3624539060e8_story.html?utm_term=.9c85e28c17e9 [<https://perma.cc/VM96-YDXW>].

40. Nilanjana Bhowmick, *As India's Muslims Are Lynched, Modi Keeps Silent*, WASH. POST (June 28, 2017), https://www.washingtonpost.com/news/global-opinions/wp/2017/06/28/as-india-muslims-are-killed-modi-keeps-silent/?utm_term=.70a586967d9f [<https://perma.cc/GRZ7-58QW>].

41. BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 7, 301 (2014); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1835–36 (1994).

42. FRANK R. BAUMGARTNER, SUZANNA L. DE BOEF & AMBER E. BOYDSTUN, *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* 36 (2008) (“In a comprehensive analysis of death sentences from 1973 to 1995, James Liebman and colleagues found that of all the cases that had been fully reviewed (i.e., not counting the cases still pending at the time of their research), only 32 percent of the death sentences were confirmed and carried out. Sixty-eight percent were ‘so seriously flawed that they had to be reversed and sent back for a new trial of guilt or punishment.’”).

43. Robin M. Maher, *Volunteer Lawyers and Their Extraordinary Role in the Delivery of Justice to Death Row Prisoners*, 35 UNIV. TOLEDO L. REV. 519, 521 (2004).

44. LEIGH BUCHANAN BIENEN, *MURDER AND ITS CONSEQUENCES: ESSAYS ON CAPITAL PUNISHMENT IN AMERICA* 87 (2010); Bryan Stevenson, *Close to Death: Reflections on Race and Capital Punishment in America*, in *DEBATING THE DEATH PENALTY* 116 n.105 (Hugo Adam Bedau & Paul G. Cassell, eds., 2004).

45. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

capital trials, and the process results in conviction-prone and death sentence-prone juries.⁴⁶ Not only that, it skews the Supreme Court's own evaluation of the "evolving standards of decency" because jury verdicts are one of the "objective" criteria for gauging those standards.⁴⁷ Jury verdicts cannot possibly be representative of societal views if death penalty opponents are routinely stripped from jury panels.⁴⁸

The death penalty is, at bottom, rooted in revenge. Although extra-judicial lynchings take place without any provision of due process whatsoever, both lynchings and state-sanctioned executions channel society's collective rage against an offender (or supposed offender). Indeed, they both lead to the exact same outcome, whether at the hands of a mob or the hands of the state: a death.⁴⁹ In America, lynch mob participants often escaped arrest or prosecution, with local officials and newspaper reporters announcing that the lynching victims had died "at the hands of persons unknown."⁵⁰ As the *Encyclopedia of Race and Crime* summarizes the state of affairs that once prevailed in American life: "Sympathetic sheriffs aided mobs by failing to adequately protect their prisoners and by revealing transportation routes and arranging abductions. In some instances, they directly coordinated and openly participated in the execution."⁵¹ Actual *state-sanctioned* killings—the facts show—suffer from a wholly different kind of lack of accountability. Whereas nineteenth and early twentieth-century prosecutors often failed to prosecute lynch mob participants, death-qualified jurors—in voting for death sentences—say they are just *following the law*.⁵² Meanwhile, in a kind of moral shell game, governors let executions go forward on the basis that they are just deferring to jurors or the law even though death penalty statutes, in many cases, were put in place decades earlier by *former*

46. SCOTT VOLLUM, ET AL., *THE DEATH PENALTY: CONSTITUTIONAL ISSUES, COMMENTARIES, AND CASE BRIEFS* 140 (3d ed. 2015); Logan A. Yelder, Monica K. Miller & Clayton D. Peoples, *Capital-izing Jurors: How Death Qualification Relates to Jury Composition, Jurors' Perceptions, and Trial Outcomes*, in 2 *ADVANCES IN PSYCHOLOGY AND LAW* 35–37 (Brian H. Bornstein & Monica K. Miller, eds., 2016).

47. *Furman v. Georgia*, 408 U.S. 238, 245 (1972); see also *Baze v. Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., concurring) (arguing the process of selecting a death-qualified jury has the purpose and effect of securing a jury in favor of death).

48. CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS SOCIAL PSYCHOLOGICAL SYSTEM* 318 (2005).

49. JOHN D. BESSLER, *KISS OF DEATH: AMERICA'S LOVE AFFAIR WITH THE DEATH PENALTY* 80–81 (2003).

50. PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* 227, 380 (2003).

51. HELEN TAYLOR GREENE & SHAUN L. GABBIDON, *ENCYCLOPEDIA OF RACE AND CRIME* 468 (2009).

52. ROBIN CONLEY, *CONFRONTING THE DEATH PENALTY: HOW LANGUAGE INFLUENCES JURORS IN CAPITAL CASES* 80 (2016).

legislators.⁵³ “Although death penalty statutes do remain on the books of many jurisdictions, and public opinion polls show opinion to be divided as to capital punishment as an abstract proposition,” the California Supreme Court once candidly assessed, “public acceptance cannot be measured by the existence of death penalty statutes or by the fact that some juries impose death on criminal defendants.”⁵⁴

IV. THE STRANGE CASE OF DR. JEKYLL AND MR. HYDE

In 1886, the Scottish novelist Robert Louis Stevenson published his famous novella, *The Strange Case of Dr. Jekyll and Mr. Hyde*.⁵⁵ The novella is about a London lawyer, Gabriel John Utterson, who investigates the case of Dr. Henry Jekyll—a respected doctor, client, and friend who is a pillar of the community known for his charitable works—and his alter ego, Mr. Edward Hyde, the violent and repugnant figure who commits cruel acts such as trampling a child and clubbing a man to death. In the story, the much-admired Dr. Jekyll develops a potion in his secret laboratory that allows the evil side of his personality to take over and transform him into the diabolical Mr. Hyde.⁵⁶ “The story,” one commentator has written, “depicted a murderer with a divided personality, and alluded to a latent barbarity in everyone, with the idea that ‘man is not truly one but truly two.’”⁵⁷ While the global push for recognition, observance, and protection of human rights is a positive force, the death penalty’s use is corrupting and corrosive. As Justice Anthony Kennedy once cautioned: “When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.”⁵⁸ Notably, many death row inmates themselves suffer from an array of intellectual disabilities and severe mental illnesses, with histories of head injuries, drug and substance abuse, brain damage, and childhood sexual abuse being commonplace.⁵⁹ Those sentenced to death—people typically convicted for the most despicable acts of their lives—have, all too often, been known to suffer

53. JOHN D. BESSLER, DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA 147–48 (1997); Steven J. Sherman, *The Capital Jury Project: The Role of Responsibility and How Psychology Can Inform the Law*, 70 IND. L.J. 1241, 1244–47 (1995).

54. *People v. Anderson*, 493 P.2d 880, 893 (Cal. 1972).

55. ROBERT LOUIS STEVENSON, STRANGE CASE OF DR. JEKYLL AND MR. HYDE (Andrews UK Ltd. 2012) (1886).

56. DERRICK MCCARSON, FREE AT LAST: THE MESSAGE OF GALATIANS 133 (2015).

57. CLAIRE VALIER, CRIME AND PUNISHMENT IN CONTEMPORARY CULTURE 33 (2004).

58. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008).

59. MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES 1 (2013).

from bipolar disorder, split personalities, schizophrenia, hallucinations, and severe—even suicidal—depression.⁶⁰

In the United States, the U.S. Supreme Court's Eighth Amendment jurisprudence has an eerily similar Dr. Jekyll and Mr. Hyde quality to it. On the one hand, the Eighth Amendment's prohibition against "cruel and unusual punishments" has been read to bar prison officials from using excessive force and subjecting inmates to inhuman conditions of confinement. For instance, the Eighth Amendment was read back in 1968 by the U.S. Court of Appeals for the Eighth Circuit to bar the lashing of Arkansas prisoners.⁶¹ The Eighth Amendment prohibition against "cruel and unusual punishments" has likewise been read to require that prison officials feed, clothe, and shelter inmates and not subject offenders to overcrowded prisons or inhumane prison conditions.⁶² On the other hand, the Constitution's Cruel and Unusual Punishments Clause has not yet been read to bar the use of capital punishment, a much more draconian practice that inflicts far more suffering than *non-lethal* corporal punishments such as whipping.⁶³

While the majority of nations have moved away from capital punishment since Amnesty International began its anti-death penalty advocacy in 1977,⁶⁴ America's continued use of the death penalty continues to debase Eighth Amendment jurisprudence. Ironically, given the current state of affairs, the State of Arkansas is barred from subjecting inmates *to the lash*, but is still permitted by the law and the courts *to carry out executions*.⁶⁵ In 2017, Arkansas did just that, choosing to execute prisoners one after another in what can only be described as a deliberate and calculated effect to inflict severe psychological

60. *Id.* at 6; American Civil Liberties Union, *Mental Illness and the Death Penalty* (May 5, 2009), <https://www.aclu.org/report/report-mental-illness-and-death-penalty> [<https://perma.cc/F7XX-RNN7>]; Shaila Dewan, *Does the U.S. Execute People with Mental Illness? It's Complicated*, N.Y. TIMES (Apr. 11, 2017), <https://www.nytimes.com/interactive/2017/us/mental-illness-death-penalty.html> [<https://perma.cc/Y8XN-NCTH>].

61. *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

62. JOHN D. BESSLER, *CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT* 219–20, 296 (2012).

63. John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913, 1922–23 (2012); *see also* John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 BRIT. J. AM. LEG. STUDIES 297, 397–408 (2013).

64. KATHRYN SIKKINK, *EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY* 146 (2017) (noting that when, in 1977, Amnesty International included the abolition of capital punishment as one of its core mandates, "only sixteen countries had abolished it in law or practice"; "[t]oday . . . that number has increased to 140, nearly two-thirds of the countries of the world").

65. JOSEPH A. MELUSKY & KEITH A. PESTO, *CRUEL AND UNUSUAL PUNISHMENT: RIGHTS AND LIBERTIES UNDER THE LAW* 165–66 (2003).

torment.⁶⁶ Originally, when faced with an expiring supply of midazolam, a sedative used at lethal injections, Arkansas had planned to carry out eight executions—two inmates at a time on April 17, 20, 24 and 27—in an eleven-day period.⁶⁷ “The rapid schedule,” Allen Ault, a former commissioner of the Colorado, Georgia, and Mississippi Departments of Corrections warned, citing the risk of severe emotional trauma for the prison guards, “will put an extraordinary burden on the men and women required by the state to carry out this most solemn act, and it will increase the risk of mistakes in the execution chamber—which could haunt them for the rest of their lives.”⁶⁸

V. ALL THE RACISM, DISCRIMINATION, AND ARBITRARINESS

The death penalty has long been associated with the institution of slavery and with rampant discrimination. Revolting slaves throughout the Americas frequently were put to death,⁶⁹ and slave codes once punished blacks much more severely than whites (*e.g.*, for the crime of rape).⁷⁰ In a speech he gave in Rochester, New York in 1852, the great abolitionist and writer Frederick Douglass took note of the fact that, in Virginia, seventy-two offenses were then punishable by death for blacks while only two were punishable by death for whites.⁷¹ As award-winning author Lawrence Friedman writes in *A History of American Law* about laws in southern states designed to suppress slave riots: “Incitement to insurrection by free persons became a capital crime in Alabama in 1812; in 1832, the state authorized the death penalty even for those who published or distributed literature which might tend to arouse slave rebellion.”⁷²

66. Julie Turkewitz & Richard Pérez-Peña, *Arkansas Executes 2 Inmates, a First for Any State of One Day Since 2000*, N.Y. TIMES (Apr. 24, 2017), <https://www.nytimes.com/2017/04/24/us/arkansas-executions.html> [<https://perma.cc/Y8XN-NCTH>].

67. K.K. Rebecca Lai, *The Legal Battle Over Arkansas' Execution Plans*, N.Y. TIMES (Apr. 17, 2017), <https://www.nytimes.com/interactive/2017/04/13/us/arkansas-executions.html> [<https://perma.cc/RT7R-GA7E>]; Camila Domonoske, *Arkansas Readies for 8 Executions, Despite Outcry Over Pace, Method*, NPR (Mar. 31, 2017), <http://www.npr.org/sections/thetwo-way/2017/03/31/521967661/arkansas-readies-for-8-executions-despite-outcry-over-pace-method> [<https://perma.cc/W9A7-UBCB>].

68. Allen Ault, *Former Warden: Arkansas Execution Rush Is Dangerous and Risky*, TIME (Mar. 28, 2017), <http://time.com/4712443/arkansas-executions-midazolam-death-penalty/> [<https://perma.cc/F5BM-QSFK>].

69. RAFAEL MARQUESE, TÂMIS PARRON & MÁRCIA BERBEL, *SLAVERY AND POLITICS: BRAZIL AND CUBA, 1790-1850*, at 139 (Leonardo Marques, trans. 2016); M. S. GILL, *HUMAN RIGHTS HUMAN WRONGS* 162 (2004).

70. GREGG BARAK, PAUL LEIGHTON & JEANNE FLAVIN, *CLASS, RACE, GENDER AND CRIME: THE SOCIAL REALITIES OF JUSTICE IN AMERICA* at xxii (3d ed. 2010).

71. John D. Bessler, *Interpreted as It Ought To Be: Toward a Principled Eighth Amendment*, CONSTITUTION PROJECT (Oct. 29, 2014), <http://www.constitutionproject.org/documents/interpreted-as-it-ought-to-be-toward-a-principled-eighth-amendment/> [<https://perma.cc/4EBH-73N4>].

72. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 156 (3d ed. 2005).

Although the U.S. Constitution's Fourteenth Amendment was designed by its drafters to ensure "like punishment" for blacks and whites, as the Civil Rights Act of 1866 had explicitly done,⁷³ and although numerous international and regional human rights instruments, as well as domestic laws, call for equality of treatment under the law,⁷⁴ racial minorities still experience invidious discrimination in criminal justice systems around the world, including in the United States.⁷⁵ In fact, in American states that retain capital punishment, those who kill whites are much more likely to get the death penalty—and to be executed—than those who kill blacks.⁷⁶ The long-standing injustice and arbitrariness of who is selected to die, and who is actually executed, is only compounded by the fact that death sentences and executions have become increasingly sporadic and rare.⁷⁷ Very few American counties and local prosecutors actively utilize capital punishment, making death sentences more a function of geography—where the particular crime was committed—than anything else.⁷⁸ The title of Shirley Jackson's famous *New Yorker* short story, "The Lottery," provides an apt metaphor for America's death penalty and, for that matter, the capital punishment schemes of other countries around the world.⁷⁹

73. John D. Bessler, *The Inequality of America's Death Penalty: A Crossroads for Capital Punishments at the Intersection of the Eighth and Fourteenth Amendments*, 73 WASH. & LEE L. REV. ONLINE 487, 515–16 (2016).

74. See e.g., WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 197 (3d ed. 2002) (discussing the International Convention on the Elimination of All Forms of Racial Discrimination).

75. Stephen B. Bright, *Discrimination, Death and Denial*, in MACHINERY OF DEATH: THE REALITY OF AMERICA'S DEATH PENALTY REGIME 45, 69–70 (David R. Dow & Mark Dow eds., 2002); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 211, 241 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006); David P. Keys & R. J. Maratea, *McCleskey v. Kemp and the Reaffirmation of Separate v. Equal*, in RACE AND THE DEATH PENALTY: THE LEGACY OF MCCLESKEY V KEMP 7, 7–20 (David P. Keys & R. J. Maratea eds., 2015). See generally Charles V. Hamilton, *Not Yet "E Pluribus Unum": Racism, America's Achilles Heel*, in BEYOND RACISM: RACE AND INEQUALITY IN BRAZIL, SOUTH AFRICA, AND THE UNITED STATES 187 (Charles V. Hamilton et al., eds., 2001).

76. HOWARD W. ALLEN & JEROME M. CLUBB, RACE, CLASS, AND THE DEATH PENALTY: CAPITAL PUNISHMENT IN AMERICAN HISTORY 179 (2008).

77. STEPHEN BREYER, AGAINST THE DEATH PENALTY 76–77 (John D. Bessler ed., 2016) (reprinting Justice Breyer's dissent in *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting)).

78. Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 230–38 (2012); Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, DEATH PENALTY INFO. CTR. (2013), <https://deathpenaltyinfo.org/documents/TwoPercentReport.pdf> [<https://perma.cc/ER72-R5C9>].

79. SHIRLEY JACKSON, THE LOTTERY AND OTHER STORIES 281 (1976). As one source describes this short story:

VI. ALL THE TYRANNY, AUTHORITARIANISM, AND TOTALITARIANISM

Death sentences were once justified on the basis of the “divine right of kings,” and iron-fisted monarchs made frequent use of executions to quash uprisings or rebellions.⁸⁰ Dictators such as Stalin, Hitler, and Pol Pot all made use of arbitrary killings, death sentences, and executions,⁸¹ and the death penalty is still employed by a number of totalitarian, autocratic, or one-party regimes. The People’s Republic of China—the country that ruthlessly squelched pro-democracy demonstrators in Tiananmen Square—is the world’s top user of executions,⁸² but other countries that make regular use of executions constitute a rogues’ gallery of human rights violators. Among the countries that top Amnesty International’s list of most frequent users of executions are Iran, Saudi Arabia, Iraq, and Pakistan.⁸³ “Often,” scholar Franklin Zimring writes in *The Contradictions of American Capital Punishment*, tracing the movement of Western representative democracies away from executions, “state killings in totalitarian regimes did not involve even the pretense of judicial process.”⁸⁴

The death penalty is an outlier, especially for modern-day Western democracies. When I was a kid, I used to go to a dental office in Mankato, Minnesota, that had copies of *Highlights* magazines in the waiting room. One popular activity, as I remember it, was to circle the object that did not belong in a grouping.⁸⁵ If one examines the countries of the world that still use death

First published in *The New Yorker* on June 26, 1948, “The Lottery” is considered one of the most haunting and shocking short stories of modern American fiction and is one of the most frequently anthologized. The story takes place on a June morning in the town square of a small village. Amidst laughter and gossip, families draw slips of paper from a ballot box until housewife Tessie Hutchinson receives a slip with a black mark on it. The villagers then stone her to death as a ritual sacrifice despite her protests about the unfairness of the drawing.

THE GALE GROUP, *SHORT STORIES FOR STUDENTS: A STUDY GUIDE FOR SHIRLEY JACKSON’S “THE LOTTERY”* (1997).

80. ANDREW HAMMEL, *ENDING THE DEATH PENALTY: THE EUROPEAN EXPERIENCE IN GLOBAL PERSPECTIVE* 116 (2010); KATHERINE J. LEWIS, *KINGSHIP AND MASCULINITY IN LATE MEDIEVAL ENGLAND* 93–94, 157 (2013).

81. DANIEL JONAH GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 135–36 (1996); BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975–79*, at 207, 456 (3d ed. 2008); EVAN MAWDSLEY, *THE STALIN YEARS: THE SOVIET UNION, 1929–1953*, at 99–100, 108 (1998); COLIN PATEMAN, *BEHEADED BY HITLER: CRUELTY OF THE NAZIS, CIVILIAN EXECUTIONS AND JUDICIAL TERROR 1933–1945*, at 9, 66 (2014).

82. *Death Sentences and Executions 2016*, AMNESTY INT’L, 19 (2017), <https://www.amnesty.org/en/documents/act50/5740/2017/en/> [<https://perma.cc/DM4W-UFM8>].

83. *Id.* at 4.

84. FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 18 (2003).

85. Barbara A. Davey, *Wisdom at the Water’s Edge*, in *CHICKEN SOUP FOR THE SOUL: FROM LEMONS TO LEMONADE: 101 POSITIVE, PRACTICAL, AND POWERFUL STORIES ABOUT MAKING*

sentences and executions, it quickly becomes clear that a Western representative democracy like the United States should have abandoned capital prosecutions, death sentences, and executions long ago. Iran is still hanging people from construction cranes,⁸⁶ and North Korea's despotic ruler has ordered numerous executions by hanging, firing squad, and even anti-aircraft guns.⁸⁷ But America's next-door neighbors, Canada and Mexico, have abolished and long ago abandoned the death penalty,⁸⁸ and the whole of Europe no longer uses capital punishment and now advocates its abolition worldwide.⁸⁹

When it comes to human rights, the United States of America should be a leader, not a follower or a violator. The Declaration of Independence, containing the historic proclamation that "all men are created equal, that they are endowed

THE BEST OF A BAD SITUATION 229, 230 (Jack Canfield, Mark Victor Hansen & Amy Newmark comps., 2013).

86. Mark D. Wallace, *Iran's Execution Binge*, L.A. TIMES (July 6, 2011), <http://articles.latimes.com/2011/jul/06/opinion/la-oe-wallace-cranes-iran-20110706> [<https://perma.cc/6AE5AT38>].

87. MORSE TAN, NORTH KOREA, INTERNATIONAL LAW AND THE DUAL CRISES: NARRATIVE AND CONSTRUCTIVE ENGAGEMENT 47–48 (2015); *see also* Euan McKirdy, *North Korea Executed 5 Security Officials, South Korea Says*, CNN (Feb. 28, 2017), <http://www.cnn.com/2017/02/28/asia/north-korea-officials-executed/index.html> [<https://perma.cc/7ZG5-4NP3>] ("Five North Korean officials have been executed by anti-aircraft guns, according to South Korean lawmakers. . . . A report released at the end of 2016 claims Kim has ordered 340 people to be executed since he came to power in 2011 . . . The gruesome method of execution has also been used by the regime before—in May 2015, Kim had his Defense Minister Hyon Yong Chol killed with an anti-aircraft gun at a military school in Pyongyang, in front of an audience.").

88. RITA J. SIMON & DAGNY A. BLASKOVICH, A COMPARATIVE ANALYSIS OF CAPITAL PUNISHMENT: STATUTES, POLICIES, FREQUENCIES, AND PUBLIC ATTITUDES THE WORLD OVER 19 (2007) ("Canada officially abolished the death penalty for ordinary crimes in 1976 and for all crimes in 1998."); DAVID KILGOUR & DAVID T. JONES, UNEASY NEIGHBO(U)RS: CANADA, THE USA AND THE DYNAMICS OF STATE, INDUSTRY AND CULTURE 180 (2007) ("The last instance of capital punishment in Canada took place in 1962, when two men were hanged in Toronto."); ANDREA D. LYON, THE DEATH PENALTY: WHAT'S KEEPING IT ALIVE 137 (2015) (noting that Mexico abolished the death penalty for all crimes in 2005); HONG LU & TERANCE D. MIETHE, CHINA'S DEATH PENALTY: HISTORY, LAW, AND CONTEMPORARY PRACTICES 190 n.39 (2007) ("The last execution in Mexico was in 1947.").

89. On European opposition to the death penalty:

Outside the UN system, the Council of Europe and the European Union have been endorsing the abolition of the death penalty and expressing their belief that abolition would contribute to the promotion and protection of human rights. In 1973, the issue of the abolition of the death penalty was tabled at the Parliamentary Assembly of the Council of Europe, which gradually led to Protocol 6 to the European Convention on Human Rights concerning the abolition of the death penalty, adopted in 1983. Ever since, their position that the death penalty is a violation of fundamental human rights has been clearly stated. The European Union has been strongly committed to the worldwide abolition of the death penalty through diplomatic measures.

Madoka Futamura & Nadia Bernaz, *Introduction*, in THE POLITICS OF THE DEATH PENALTY IN COUNTRIES IN TRANSITION 1, 2 (Madoka Futamura & Nadia Bernaz eds., 2014).

by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness,” was a milestone in the annals of human rights.⁹⁰ It is time for the United States to outlaw the death penalty throughout the country—and to reclaim its leadership position in the world. Steven Pinker, writing of the U.S. Supreme Court and capital punishment in *Enlightenment Now: The Case for Reason, Science, Humanism, and Progress*, suggests how that might actually happen: “Court watchers believe it is only a matter of time before the Justices are forced to confront the caprice of the whole macabre practice head on, invoke ‘evolving standards of decency,’ and strike it down as a violation of the Eighth Amendment’s prohibition of cruel and unusual punishment once and for all.”⁹¹

VII. THE LAW’S EVOLUTION

The Italian philosopher Cesare Beccaria was the first writer to make a comprehensive case against capital punishment.⁹² In his 1764 book, *Dei delitti e delle pene*, translated into French in 1766 and then into English in 1767 as *An Essay on Crimes and Punishments*, Beccaria sought proportionality between crimes and punishments.⁹³ He also argued against both torture and capital punishment, albeit in separate chapters. “By what right,” Beccaria wrote, “can men presume to slaughter their fellows?”⁹⁴ Beccaria’s book was admired by a host of intellectuals—from Voltaire in France, to William Blackstone and Jeremy Bentham in England, to John Adams, Dr. Benjamin Rush and Thomas Jefferson in America.⁹⁵ In the more than 250 years that have passed since that book’s initial release in Livorno, *mandatory* death sentences for various felonies have largely given way to *discretionary* sentences.⁹⁶ Moreover, the number of

90. A. BELDEN FIELDS, *RETHINKING HUMAN RIGHTS FOR THE NEW MILLENNIUM* 22 (2003) (listing the American Declaration of Independence and the U.S. Constitution and its Bill of Rights as among “the ‘grand documents’ of human rights”).

91. STEVEN PINKER, *ENLIGHTENMENT NOW: THE CASE FOR REASON, SCIENCE, HUMANISM, AND PROGRESS* 213 (2018).

92. JOHN D. BESSLER, *THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION* 38–39 (2014) [hereinafter BESSLER, *THE BIRTH OF AMERICAN LAW*]; JOHN D. BESSLER, *THE CELEBRATED MARQUIS: AN ITALIAN NOBLE AND THE MAKING OF THE MODERN WORLD* 103 (2018) [hereinafter BESSLER, *THE CELEBRATED MARQUIS*].

93. BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 92, at 35.

94. *Id.* at 39; ARTHUR SHUSTER, *PUNISHMENT AND THE HISTORY OF POLITICAL PHILOSOPHY: FROM CLASSICAL REPUBLICANISM TO THE CRISIS OF MODERN CRIMINAL JUSTICE* 91 (2016).

95. *See* BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 92, at 4–6; BESSLER, *THE CELEBRATED MARQUIS*, *supra* note 92, at 11, 81–82.

96. LINDA E. CARTER, ELLEN S. KREITZBERG & SCOTT W. HOWE, *UNDERSTANDING CAPITAL PUNISHMENT LAW* 449–50 (3d ed. 2012); LOUIS J. PALMER, JR., *THE DEATH PENALTY: AN AMERICAN CITIZEN’S GUIDE TO UNDERSTANDING FEDERAL AND STATE LAWS* 14–16 (1998). *See generally* ANDREW NOVAK, *THE GLOBAL DECLINE OF THE MANDATORY DEATH PENALTY:*

death-eligible offenses—more than two hundred at one time under England’s notorious “Bloody Code”—have shrunk dramatically throughout the civilized world.⁹⁷ In many places, death sentences and executions are no longer used at all.⁹⁸ In Kenya, the country’s president recently commuted the death sentences of more than 2,700 inmates, thereby completely clearing that nation’s death row.⁹⁹

The death penalty has gone from being a *lawful* punishment to being an *unlawful* one throughout the continent of Europe, as well as in a number of non-European countries and states.¹⁰⁰ As Oxford criminologist Roger Hood—a prominent scholar on the use of capital punishment throughout the world—has recently written:

Although the death penalty has yet to be declared unlawful throughout the world, concern for protecting human rights has become a powerful dynamic over the past quarter of a century since the Berlin Wall came down and the UN added Protocol Number 2 to the ICCPR, which banned the death penalty and committed ratifying states not to reintroduce it.¹⁰¹

The Second Optional Protocol to the International Covenant on Civil and Political Rights provides in Article 1(1) and Article 1(2), respectively: “No one

CONSTITUTIONAL JURISPRUDENCE AND LEGISLATIVE REFORM IN AFRICA, ASIA, AND THE CARIBBEAN 163–64 (2014). The English Bloody Code once had more than 200 capital offences. MARK ESSIG, *EDISON AND THE ELECTRIC CHAIR: A STORY OF LIGHT AND DEATH* 80 (2003).

97. John D. Bessler, *The American Enlightenment: Eliminating Capital Punishment in the United States*, in *CAPITAL PUNISHMENT: A HAZARD TO A SUSTAINABLE CRIMINAL JUSTICE SYSTEM?* 93, 97 (Lill Scherdin, ed., 2014).

98. *Abolitionist and Retentionist Countries*, AMNESTY INT’L (Dec. 19, 2016), <https://www.amnesty.org/en/documents/act50/3831/2016/en/> [<https://perma.cc/3KU8-C9WY>] (“More than two-thirds of the countries in the world have now abolished the death penalty in law or practice . . .”).

99. Matt Payton, *Kenya Commutes Sentences of All Death Row Inmates*, THE INDEPENDENT (Oct. 25, 2016), <http://www.independent.co.uk/news/world/africa/kenya-death-row-inmates-spare-live-commute-sentence-a7378751.html> [<https://perma.cc/HP49-GVTK>].

100. Bharat Malkani, *The Judicial Use of International and Foreign Law in Death Penalty Cases: A Poisoned Chalice?* in *IS THE DEATH PENALTY DYING?* 163, 182–83 (Austin Sarat ed., 2008); see also ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 14–15 (5th ed. 2015). The queasiness and squeamishness that many people feel about capital punishment is reflected in the shift in methods of executions over time, from hanging and firing squads, to the electric chair and gas chambers, to what we mostly have today: lethal injection. See, e.g., JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 87 (1997) [hereinafter BESSLER, *DEATH IN THE DARK*]; Deborah W. Denno, *Lethally Humane? The Evolution of Execution Methods in the United States*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 705–06 (James R. Acker, Robert M. Bohm, & Charles S. Lanier, eds., 2d ed. 2003); Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 124 (2002).

101. Roger Hood, *Striving to Abolish the Death Penalty: Some Personal Reflections on Oxford’s Criminological Contribution to Human Rights*, in *CHANGING CONTOURS OF CRIMINAL JUSTICE* 182, 184 (Mary Bosworth, Carolyn Hoyle & Lucia Zedner eds., 2016).

within the jurisdiction of a State Party to the present Protocol shall be executed”¹⁰² and “[e]ach State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.”¹⁰³ Hood emphasizes of the current state of affairs:

The point has been reached where there is now a decreasing number of countries that defy the majority view that the death penalty cannot be practised without a breach of the principles embraced by almost all nations after the Second World War; namely that states should protect the right to life and human dignity of all persons and ensure that their criminal justice systems are free from torture and cruel, inhuman, and degrading punishments.¹⁰⁴

Although public executions are still used in places like Iran to terrify the populace,¹⁰⁵ other countries, including the United States, have moved executions behind thick prison walls to shield the activities of state officials from scrutiny.¹⁰⁶ Instead of confronting the sheer brutality of state-sanctioned executions, American states have attempted to hide what is going on and to mask the death penalty’s inherent cruelty.¹⁰⁷ For example, in 2013, Georgia passed the Lethal Injection Secrecy Act, a law that—in the words of one scholar—“shields the identities of lethal-injection-drug suppliers from disclosure to the public, the media, and possibly the courts, on the grounds that the information is a ‘state secret.’”¹⁰⁸ “Other death penalty states (e.g., Oklahoma),” that scholar, Robert Bohm, explains, “have such state secrecy laws as well.”¹⁰⁹ As the *New York Times* aptly opened a scathing editorial in 2014 about such new laws: “It is bad enough that the death penalty is barbaric, racist and arbitrary in its application, but it is also becoming less transparent as the dwindling number of death-penalty states work to hide the means by which they kill people.”¹¹⁰

102. G.A. Res. 44/128, Second Optional Protocol to the International Covenant on Civil and Political Rights, art. 1(1) (Dec. 15, 1989).

103. G.A. Res. 44/128, Second Optional Protocol to the International Covenant on Civil and Political Rights, art. 1(2) (Dec. 15, 1989).

104. Hood, *supra* note 101, at 194.

105. *Annual Report on the Death Penalty in Iran 2016*, IRAN HUM. RTS. 7–8 (Apr. 3, 2017), <https://iranhr.net/en/reports/18/> [<https://perma.cc/HGL7-LQBL>].

106. BESSLER, *DEATH IN THE DARK*, *supra* note 100, at 76.

107. BURKART HOLZNER & LESLIE HOLZNER, *TRANSPARENCY IN GLOBAL CHANGE: THE VANGUARD OF THE OPEN SOCIETY* 155 (2006) (“There is a conviction among EU members that the death penalty is an unacceptable barbarism.”).

108. ROBERT M. BOHM, *DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES* 221 (5th ed. 2017).

109. *Id.*

110. The Editorial Board, *Secrecy Behind Executions*, N.Y. TIMES, Jan. 29, 2014, <https://www.nytimes.com/2014/01/30/opinion/secrecy-behind-executions.html> [<https://perma.cc/FP4Q-9388>].

VIII. ALL THE TORTURE

The definition of *torture* in international law makes clear that torture can be either physical *or* psychological in nature.¹¹¹ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is a widely-ratified treaty that entered into force in 1987 and which the United States itself ratified in 1994.¹¹² That convention specifically defines “torture” to mean “any act by which severe pain or suffering, *whether physical or mental*, is intentionally inflicted on a person” for a prohibited purpose, such as to obtain information or a confession or to punish.¹¹³ In the past, the death penalty and torture have largely been treated in separate legal silos, with the death penalty—a punishment—treated *as something other than* torture.¹¹⁴ Although certain methods of execution (*e.g.*, crucifixion and drawing and quartering) have long been considered as being torturous in nature, and although courts have insisted that methods of execution not prolong human suffering or carry the risk of excruciating *physical* pain,¹¹⁵ many jurists have yet to grapple with the *psychological* torment associated with death sentences and executions. Only a few courts, beginning with a 1989 judgment of the European Court of Human

111. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1987, 1465 U.N.T.S 85.

112. Michael John Garcia, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, in *THE TREATMENT OF PRISONERS: LEGAL, MORAL OR CRIMINAL?* 207, 211 (Ralph D. McPhee ed., 2006) (“The United States signed CAT on April 18, 1988, and ratified the Convention on October 21, 1994, subject to certain declarations, reservations, and understandings. Perhaps most significantly, the United States included a declaration in its instruments of ratification that CAT Articles 1 through 16 were not self-executing.”).

113. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, 26 June 1987, 1465 U.N.T.S 85; *see also* David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 *LAW & INQ.* 343, 354 (2011).

114. *See, e.g.*, HOUSE OF LORDS & HOUSE OF COMMONS JOINT COMM. ON HUM. RTS., *Nineteenth Report of Session 2005–06: The UN Convention Against Torture, Vol. II*, at 107 (May 26, 2006) (capturing written testimony from Amnesty International, “Unlike torture or other ill-treatment, the death penalty is not *per se* prohibited under international law, and states carry it out openly as a punishment, under their own laws. Amnesty International opposes the death penalty absolutely, but as long as the death penalty is a lawful sanction under international law, diplomatic assurances with respect to the death penalty simply acknowledge the different legal approaches of two states and make an exception to one state’s declared policies to accommodate the concerns of the other.”).

115. *Compare* WILLIAM A. SCHABAS, *THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD’S COURTS* 161 (1996) (“Generally, the courts have insisted that methods of execution be instantaneous and painless, to the extent possible given the nature of the process.”) *with* Adam Liptak, *Supreme Court Allows Use of Execution Drug*, *N.Y. TIMES* (June 29, 2015), <https://www.nytimes.com/2015/06/30/us/supreme-court-execution-drug.html> [<https://perma.cc/7SHL-TXBT>] (“The Supreme Court ruled on Monday against three death row inmates who had sought to bar the use of an execution drug they said risked causing excruciating pain.”).

Rights,¹¹⁶ have recognized the “death row phenomenon,”¹¹⁷ a concept which is associated with prolonged delays between sentencing and execution coupled with harsh conditions of confinement on death row.

But the vast majority of countries have moved away from the death penalty,¹¹⁸ and what was once lawful in many places is no longer so.¹¹⁹ For example, after a number of European countries abandoned the death penalty, the Council of Europe developed a policy opposing it.¹²⁰ Protocol No. 6 to the European Convention on Human Rights, in which member states agreed to abolish the death penalty’s use in peacetime, entered into force in March 1985 when five states had ratified it.¹²¹ And Protocol No. 13 to the European Convention on Human Rights, which extends that bar to times of war, came into force in July 2002 when ten states had ratified that protocol.¹²² According to the latest statistics from Amnesty International, there are 141 countries that are abolitionist in law or practice versus fifty-seven retentionist countries.¹²³ Indeed, *threats* of death (*e.g.*, obtaining confessions by playing Russian roulette) and a host of *non-lethal* bodily punishments (*e.g.*, the thumbscrew or pulling out one’s

116. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (1989).

117. Jordan M. Steiker, *The American Death Penalty: Constitutional Regulation as the Distinctive Feature of American Exceptionalism*, 67 U. MIAMI L. REV. 329, 343 (2013); Mark V. Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 U. BALT. L. REV. 299, 303 (2006).

118. *The Death Penalty in 2016: Facts and Figures*, AMNESTY INT’L (Apr. 11, 2017), <https://www.amnesty.org/en/latest/news/2017/04/death-penalty-2016-facts-and-figures> [<https://perma.cc/PU7H-73X5>]; G.A. Res. 44/128, Second Optional Protocol to the International Covenant on Civil and Political Rights, art. 1 (Dec. 15, 1989).

119. JEROEN GUTTER, THEMATIC PROCEDURES OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS AND INTERNATIONAL LAW: IN SEARCH OF A SENSE OF COMMUNITY 168 (2006) (“[T]he Special Rapporteur concluded that ‘lawful sanctions’ under national law (*e.g.* mutilation or other corporal punishments) may not be lawful under international law, including the Convention, and may be considered as torture.”).

120. ALASTAIR MOWBRAY, CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 128 (2d ed. 2007).

121. *Id.*

122. *Id.*

123. *Abolitionist and Retentionist Countries*, *supra* note 98 (listing 104 countries as “Abolitionist for all crimes,” seven countries as “Abolitionist for ordinary crimes only,” thirty countries as “Abolitionist in practice,” and fifty-seven “Retentionist” countries). “Abolitionist for all crimes” means the countries’ laws “do not provide the death penalty for any crime.” *Id.* “Abolitionist for ordinary crimes only” means the countries’ laws “provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances.” *Id.* “Abolitionist in practice” includes: (1) “[c]ountries which retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions,” and (2) “countries which have made an international commitment not to use the death penalty.” *Id.*

fingernails) are already considered to be torturous acts.¹²⁴ “Mock” or simulated executions, as well as other acts that create intense fear and *awareness of one’s impending death* and a *helplessness to prevent* it, are, likewise, already considered classic examples of “psychological torture.”¹²⁵

In my new book, *The Death Penalty as Torture*, I argue that death sentences and executions should be classified as acts of torture. If a *fake* execution is an act of torture, then surely a *real* one must also qualify. Death sentences and executions have immutable characteristics, and the psychological torment associated with threats of death (be they made by non-state actors or as part of a judicial process) should lead jurists to categorize the death penalty under the rubric of torture.¹²⁶ The “lawful sanctions” clause of Article 1 of the Convention Against Torture may have been placed there—in the words of one scholar—“to eliminate imprisonment and the death penalty from inclusion” as acts of torture “in countries where such things are lawfully employed.”¹²⁷ But the law—and

124. *Compare* Hilao v. Estate of Marcos, 103 F.3d 789, 790–91, 795 (9th Cir. 1996), and *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1332–40, 1345–46 (N.D. Ga. 2002), and *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22–23 (D.D.C. 2001), and *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64–66 (D.D.C. 1998), with NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 180 (2010) (“In addition to the ‘classic’ examples of torture such as electric shocks, examples of acts which have been determined as torture or other prohibited ill-treatment, include methods such as severe beatings; mock executions and mock amputations; sensory manipulation and deprivation, and forced positions causing severe pain; rape and other sexual violence.”).

125. *Poyner v. Commonwealth of Virginia*, 329 S.E.2d 815, 832 (Va. 1985) (“Poyner’s conduct in shooting a defenseless woman in the back of the head, a woman begging for her life after she had complied with all his demands, showed a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. He engaged in psychological torture of Baldwin. He made her know that her fate dangled from the end of his trigger finger.”); RONALD J. COMER, ABNORMAL PSYCHOLOGY 162 (8th ed. 2013) (listing “threats of death” and “mock executions” as forms of “psychological torture”); GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 668 (Cambridge: Cambridge University Press, 2d ed. 2016) (“The U.N. Human Rights Committee and the Inter-American Commission on Human Rights consider mock executions torture.”); J. L. Thomsen, *Clinical and pathological assessment of war crimes*, in FORENSIC MEDICINE: CLINICAL AND PATHOLOGICAL ASPECTS 47, 62 (Jason Payne-James, Anthony Busuttill & William Smock eds., 2003) (listing “[t]hreats” and “[m]ock executions” as “[s]ome of the commonly used psychological torture methods”).

126. JOHN D. BESSLER, THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION 152 (2017) [hereinafter BESSLER, THE DEATH PENALTY AS TORTURE]; see also *Ex parte Key*, 891 So.2d 384, 390 (Ala. 2004) (“One factor this Court has considered particularly indicative that a murder is ‘especially heinous, atrocious or cruel’ is the infliction of psychological torture. Psychological torture can be inflicted where the victim is in intense fear and is aware of, but helpless to prevent, impending death.”); *State v. Bonney*, 405 S.E.2d 145, 156 (N.C. 1991) (describing “the infliction of psychological torture” as “placing the victim in agony, aware of but helpless to prevent impending death”).

127. J. JEREMY WISNEWSKI, UNDERSTANDING TORTURE 6 (2010).

state practice—has changed dramatically in the last few decades. “Today,” death penalty expert William Schabas writes, “the death penalty no longer exists within the territory of the Council of Europe.”¹²⁸ The law rarely remains static, and courts should recognize the psychological torture associated with capital punishment.

The conclusion that *threats of death*—and capital prosecutions and death sentences would certainly qualify—should be classified as torturous in nature seems almost self-evident when one examines existing legal principles and modern-day definitions of torture. In *Ex parte Deardorff* and other cases, the Supreme Court of Alabama—in issuing rulings in the *non-state actor* context—has, in fact, already determined that “psychological torture” occurs where a victim of torture “is in intense fear and is aware of, but helpless to prevent, impending death.”¹²⁹ That definition is, not surprisingly, consistent with how others think of psychological torture.¹³⁰ In 1972, the California Supreme Court, in declaring the state’s death penalty unconstitutional (before it was brought back via a constitutional amendment), itself once ruled: “The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out.”¹³¹ “Penologists and medical experts agree,” that court determined, “that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.”¹³²

128. WILLIAM A. SCHABAS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY 140 (2015).

129. BESSLER, THE DEATH PENALTY AS TORTURE, *supra* note 126, at 152 (citing *Ex Parte Deardorff*, 6 So.3d 1235, 1240 (Ala. 2008)); *see also Ex parte Key*, 891 So.2d at 390.

130. *See Mohammed v. Obama*, 704 F. Supp. 2d 1, 27 (D.D.C. 2009) (“Torture and ‘enhanced interrogation techniques’ employed by the Government during the War on Terror have been shown to be ‘geared toward creating anxiety or fear in the detainee while at the same time removing any form of control from the person to create a state of total helplessness.’”); *Bonney*, 405 S.E.2d at 156 (describing “the infliction of psychological torture” as “placing the victim in agony, aware of but helpless to prevent impending death”). *See generally* PAU PÉREZ-SALES, PSYCHOLOGICAL TORTURE: DEFINITION, EVALUATION AND MEASUREMENT (2017) (discussing the fear, terror, uncertainty, attacks on dignity and identity, and helplessness associated with psychological torture).

131. *People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972).

132. *Id.* In the wake of the issuance of the *People v. Anderson* decision on February 18, 1972, California’s constitution was amended to reinstate the death penalty. As one source notes: “An initiative measure was quickly proposed to amend the California constitution to abrogate the *Anderson* ruling by declaring the death penalty was neither cruel nor unusual. Proposition 17 was adopted by a 67 percent margin in the statewide election of November 7, 1972.” JACQUELINE R. BRAITMAN & GERALD F. UELMEN, JUSTICE STANLEY MOSK: A LIFE AT THE CENTER OF CALIFORNIA POLITICS AND JUSTICE 160 (2013). The 1972 constitutional amendment provided that the state’s death penalty statutes in effect prior to the California Supreme Court’s ruling “are in full force and effect” and further declared that “[t]he death penalty provided for under those statutes

A recent, botched execution attempt in Alabama, that of Doyle Lee Hamm, helps illustrate the point.¹³³ Hamm, a convicted murderer but also a cancer survivor, was slated to be executed in Alabama in February 2018 after spending thirty years on death row. Before the execution, Hamm's lawyer, Bernard Harcourt, had warned that due to Hamm's prior illnesses and his history of drug abuse, it would be extremely problematic to find veins to deliver the lethal injection drugs. That, in fact, is exactly what happened after the U.S. Supreme Court, with three justices dissenting, declined to stop Hamm's execution. In an NBC News article, the reporter began the news story, headlined "Lawyer describes aborted execution attempt for Doyle Lee Hamm as 'torture,'" this way: "An Alabama execution team left a death-row inmate with more than a dozen puncture marks in his legs and groin and may have penetrated his bladder and femoral artery before the lethal injection was called off, the prisoner's attorney said Sunday." "This was clearly a botched execution that can only be accurately described as torture," Doyle Lee Hamm's lawyer, Columbia Law School professor Bernard Harcourt, said after state officials, after two and a half hours of efforts to find veins in Hamm's feet, legs and groin, were unable to find a good vein before the expiration of the death warrant's midnight deadline.¹³⁴ In civil actions subsequently filed in state and federal court, Hamm asserted that the execution was called off after "hours of physical and psychological torture, forcing needles into his lower extremities" and "causing severe bleeding and pain."¹³⁵

shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments." THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 883 (Mark Tushnet, Mark A. Graber & Sanford Levinson, eds., 2015).

133. Tracy Connor, *Lawyer Describes Aborted Execution Attempt for Doyle Lee Hamm as 'Torture,'* NBC NEWS (Feb. 25, 2018), <https://www.nbcnews.com/storyline/lethalinjection/lawyer-calls-aborted-execution-attempt-doyle-lee-hamm-torture-n851006> [https://perma.cc/L8B3-6ZC8].

134. The Alabama "intravenous team" at the execution repeatedly punctured Doyle Lee Hamm's legs before a medical worker unsuccessfully tried to put a central line in through Hamm's groin. "During this time Mr. Hamm began to hope that the doctor would succeed in obtaining IV access so that Mr. Hamm could 'get it over with' because he preferred to die rather than to continue to experience the ongoing severe pain," Dr. Mark Heath, retained by Harcourt to examine Hamm, wrote in a report of what occurred. Tracy Connor, *Doyle Lee Hamm Wished for Death during Botched Execution, Report Says,* NBC NEWS (Mar. 5, 2018), <https://www.nbcnews.com/storyline/lethal-injection/doyle-lee-hamm-wished-death-during-botched-execution-report-says-n853706> [https://perma.cc/WZP4-PADV].

135. Sandee LaMotte, *Death Row Inmate Sues after 'Botched' Execution,* CNN (Mar. 7, 2018), <https://www.cnn.com/2018/03/07/health/alabama-execution-lawsuit/index.html> [https://perma.cc/5ZP5-VD6S].

IX. THE UNIVERSALITY OF RIGHTS

The Universal Declaration of Human Rights states: “*No one* shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹³⁶ If nations are forbidden to torture ordinary citizens but are allowed to torture convicted offenders or prisoners, then what the world really has is the *Almost Universal* Declaration of Human Rights not the Universal Declaration of Human Rights. Rulings of courts themselves have confirmed that *no one*—not even heinous offenders—should be subjected to acts of cruelty or torture. For example, in 2012, the Grand Chamber of the European Court of Human Rights emphasized and reiterated in discussing the European Convention on Human Rights: “The Court has confirmed that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, *irrespective of the conduct of the person concerned*.”¹³⁷ In other words, consistent with the idea that freedom from torture is a universal, non-derogable right, no one is to be subjected to torturous practices.

To date, the U.S. Supreme Court has been narrowly focused on whether executions carry a risk of excruciating *physical pain at the very moment of an inmate’s death*. In *Baze v. Rees* and *Glossip v. Gross*, the U.S. Supreme Court upheld the constitutionality of lethal-injection protocols in Kentucky and Oklahoma.¹³⁸ In both of those decisions, the members of the Court focused on whether there was a substantial risk of a physically painful execution if the first drug in a three-drug cocktail was not administered properly at an execution.¹³⁹ That narrow focus, however, totally ignores the severe *psychological* torment associated with confinement on death row¹⁴⁰ and that associated with death

136. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. V (Dec. 10, 1948).

137. Case of El-Masri v. The Former Yugoslav Republic of Macedonia, Eur. Ct. H. R. (App no. 39630/09) (2012).

138. *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015); *Baze v. Rees*, 553 U.S. 35, 41 (2008).

139. BREYER, *supra* note 77, at 12–15.

140. *Compare* Valle v. Florida, 564 U.S. 1067, 1067 (2011) (Breyer, J., dissenting from denial of stay) (“I have little doubt about the cruelty of so long a period of incarceration under sentence of death.”), and *Furman v. Georgia*, 408 U.S. 238, 288 (1971) (Brennan, J., concurring) (“[T]he prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.”), and Elle Klein, *Flying Over the Cuckoo’s Nest: How the Mentally Ill Landed into an Unconstitutional Punishment in South Carolina*, 68 S.C. L. REV. 571, 590–91 (2017) (“Like most states, South Carolina enforces restrictions on death row inmates that isolate them from human interaction. These restrictions vary from facility to facility, but can include: confinement to a single-person cell with a steel bed, steel toilet, and small writing table, in an area ranging from thirty-six feet to one hundred feet for up to twenty-three hours a day; isolation during meal times (eaten in the same cell); isolation during exercise time; denial of access to religious services; denial of access to work or employment opportunities; and no-contact visitations with family members and loved ones.”), *with* Chad

sentences and executions (*e.g.*, the issuance of multiple death warrants in individual cases).¹⁴¹ Capital charges and death sentences involve definitive and clear-cut *threats of death*, and condemned inmates clearly experience tremendous fear and anxiety and have an awareness of their impending deaths, a critical aspect of declarations of “psychological torture” in the *non-state actor* context (*e.g.*, pertaining to “torture-murder” determinations).¹⁴²

X. THE FUTURE

I think about a world without capital punishment—a world in which human rights are honored and protected, not denigrated and violated. I think about a world in which jurists around the globe would not, as part of their jobs, have to decide whether to put people to death. I think about a world in which the United States no longer resorts to state-sanctioned killing, and in which the United States and other retentionist countries finally decide to reject the use of executions. If the United States and Japan (the other highly industrialized country that still uses executions) would get rid of capital punishment, that would put more concerted pressure on authoritarian and rogue regimes, whether in China, North Korea, Yemen, or Sudan, to abandon executions, too. In time, what was once a universally accepted, lawful sanction would thus become an unlawful practice—and the world would be rid of it once and for all.¹⁴³

Flanders, *Time, Death, and Retribution*, 19 U. PA. J. CONST. L. 431, 439 (2016) (“Waiting to be executed, or rather, waiting a *long time* to be executed exacts a terrible physical and psychological toll on the prisoner, to the point where just waiting is enough for his punishment to be ‘cruel and unusual.’”) (emphasis in original).

141. JESSICA WOLFENDALE, TORTURE AND THE MILITARY PROFESSION 102 (2007) (“[A] Danish study found that 83 per cent of victims who had experienced mock executions (a common torture ‘lite’ technique) developed psychiatric symptoms, 20 per cent more than those who had not experienced that particular torture. It is therefore completely untenable to conclude that psychological torture techniques such as mock executions, hooding, noise bombardment, sleep deprivation, and forced standing do not constitute ‘real’ torture just because they do not involve much immediate or long term *physical* damage.”) (emphasis in original); Linda A. Malone, *The Death Knell for the Death Penalty and the Significance of Global Realism to Its Abolition from Gossip v. Gross to Brumfield v. Cain*, 11 DUKE J. CONST. L. & PUB. POL’Y 107, 132 (2016) (“Given the long delays between entry of a death sentence and executions during which inmates on death row are kept in solitary confinement as well as the torment that the appeals process often causes, in which a prisoner might on multiple occasions have an execution date set only to have it delayed, it can be argued that the United States is imposing psychological abuse.”).

142. *Shanklin v. State*, 187 So.3d 734, 808 (Ala. Crim. App. 2014) (“Psychological torture can be inflicted where the victim *is in intense fear and is aware of, but helpless to prevent, impending death*. Such torture ‘must have been present for an appreciable lapse of time, sufficient enough to cause prolonged or appreciable suffering.’” (quoting *Norris v. State*, 793 So.2d 847, 861 (Ala. Crim. App. 1999) (emphasis in original))).

143. John D. Bessler, *The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norm Barring Executions*, 79 MONT. L. REV. 7 (2018).