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ARTICLES

THE ABOLITIONIST MOVEMENT COMES OF AGE: FROM CAPITAL PUNISHMENT AS A LAWFUL SANCTION TO A PEREMPTORY, INTERNATIONAL LAW NORM BARRING EXECUTIONS

John D. Bessler*

ABSTRACT

The anti-death penalty movement is rooted in the Enlightenment, dating back to the publication of the Italian philosopher Cesare Beccaria's treatise, Dei delitti e delle pene (1764). That book, later translated into English as An Essay on Crimes and Punishments (1767), has inspired anti-death penalty

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advocacy for more than 250 years. This Article traces the development of the abolitionist movement since Beccaria's time. In particular, it highlights how the debate over capital punishment has shifted from one focused primarily on the severity of monarchical punishments, to deterrence, to one framed by the concept of universal human rights, including the right to life, human dignity, and the right to be free from torture and cruel and inhuman punishments. The Article describes the humble origins of the anti-death penalty movement and it discusses how that movement, which has seen many successes and setbacks, is now an international campaign led by multiple NGOs and scores of anti-death penalty activists. After looking at the history of the movement and where it has already been, the Article examines where the anti-death penalty movement is likely heading in the years to come. It concludes that, in light of the immutable characteristics of death sentences and executions, the death penalty should be classified under the rubric of torture. While capital punishment was once universally accepted as a lawful sanction, the majority of the world's nations no longer permit executions. The Article explores the cruel, inhuman, and torturous characteristics of the death penalty, and it encourages 21st-century opponents of capital punishment to continue their struggle to abolish the punishment of death.

I. INTRODUCTION

The anti-death penalty movement began more than 250 years ago with the publication of the Italian humanist and philosopher Cesare Beccaria's *Dei delitti e delle pene* (1764).¹ That book, one of the most important products of the Italian Enlightenment, took Europe and the Americas by storm, becoming the 18th-century equivalent of an Amazon.com or *New York Times* bestseller.² Translated into French and German and then into English as *An Essay on Crimes and Punishments* (1767), Beccaria's book—read by lawyers and non-lawyers alike, and ultimately translated into more than twenty languages³—opposed both torture and capital punishment, albeit in

1. JOHN D. BESSLER, *THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION* xi (2014).

2. In *The Celebrated Marquis: An Italian Noble and the Making of the Modern World*, I showcase Beccaria's global impact. Beccaria's book, *Dei delitti e delle pene*, was translated into all of the major European languages and it has also been translated into Arabic and Japanese and other languages. JOHN D. BESSLER, *THE CELEBRATED MARQUIS: AN ITALIAN NOBLE AND THE MAKING OF THE MODERN WORLD* 11, 16, 281–82 (2018).

3. ROGER HOPKINS BURKE, *AN INTRODUCTION TO CRIMINOLOGICAL THEORY* 35 (4th ed. 2014) (noting Beccaria's *Dei delitti e delle pene* “was translated into 22 languages and had an enormous impact” on European and U.S. legal systems); see also BARBARA POZZO, *Male Homosexuality in Nineteenth Century Italy: A Juridical View*, in *HOMOSEXUALITY IN ITALIAN LITERATURE, SOCIETY, AND CULTURE*, 1789–1919 at 103, 105–6 (Lorenzo Benadusi, Paolo L. Bernardini, Elisa Bianco & Paola Guazzo, eds., 2017) (“The influence of Cesare Beccaria, whose work *Dei delitti e delle pene* was translated very quickly into various languages, had a strong impact throughout European legal culture, which resulted in him being considered, along with Voltaire, as one of the great reformers of criminal law of the eighteenth century.”); *id.* at 105–6 (taking note of the book's translation into French in 1766, English in 1767, German in 1766 and 1767, Spanish in 1774, and Russian).

separate chapters.⁴ The first jurisdictions to abolish torture were Sweden in 1734⁵ and Prussia in the 1740s and 1750s,⁶ but it was only after the publication of Beccaria's book that Western European nations began doing away with the punishment of death.⁷

A now mostly obscure historical figure,⁸ Cesare Beccaria (1738-1794), the Jesuit-educated Italian *philosophe* and economist who studied law at the University of Pavia before penning his book, was once a much-celebrated figure who died in the late 18th-century.⁹ He became widely known in the 18th-century and 19th-century for promoting proportionality between crimes and punishments,¹⁰ for opposing runaway judicial discretion,¹¹ and for promoting laws and economic policies that would bring the greatest

4. BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 39, 44.

5. HISTORY AND HOPE: THE INTERNATIONAL HUMANITARIAN READER 71 (Kevin M. Cahill ed., 2013) ("Torture was first abolished in Sweden in 1734, and almost all European countries had abolished torture from the provisions of criminal procedure by the early nineteenth century.")

6. John H. Langbein, *The Legal History of Torture*, in TORTURE: A COLLECTION 97 (Sanford Levinson ed., 2004):

The European states abolished the system of judicial torture within about two generations. Frederick the Great all but abolished torture within a month of his accession to the Prussian throne in 1740; torture was used for the last time in Prussia in 1752 and was definitely abolished in 1754. In 1770, Saxony and Denmark abolished torture; in 1776, Poland and Austria-Bohemia; in 1780, France; in 1786, Tuscany; in 1787, the Austrian Netherlands (Belgium); and in 1789, Sicily. Early in the nineteenth century, abolition reached the last corners of the Continent.

7. Although the punishment of death was first abolished in one European legal code in 1786, non-lethal corporal punishments were retained in that code. JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME* 28 (2006):

The first comprehensive criminal code that completely abolished capital punishment was the *Leopoldina* of 1786, promulgated by the future German (Austrian) Emperor Leopold II for the state of Tuscany, the region around Florence and Pisa which was then a Hapsburg duchy. In the *Leopoldina* a few of the punishments are familiar—flogging, pillorying, and banishment. But the Carolina's blood sanctions have disappeared. The principal sanction that has displaced capital punishment is imprisonment.

8. Even recent compilations of famous Italians have overlooked Cesare Beccaria's contributions to the modern world. *See, e.g.*, STEPHEN J. SPIGNESI, *THE ITALIAN 100: A RANKING OF THE MOST INFLUENTIAL CULTURAL, SCIENTIFIC, AND POLITICAL FIGURES, PAST AND PRESENT* (2003) (in a ranking compiled in consultation with Michael Vena, Ph.D., failing to list Cesare Beccaria among the 100 most influential Italians in history and containing no mention of Beccaria); *Famous Italian Men*, THE FAMOUS PEOPLE, <https://perma.cc/VC3L-H4PL> (last visited Nov. 11, 2017) (failing to list Beccaria among famous people from Italy). *Compare* ARTURO BARONE, *THE ITALIAN ACHIEVEMENT: AN A-Z OF OVER 1000 'FIRSTS' ACHIEVED BY ITALIANS IN ALMOST EVERY ASPECT OF LIFE OVER THE LAST 1000 YEARS* 72 (2007) (taking note of the importance of Cesare Beccaria's *Dei delitti e delle pene* as "the first critical study of the criminal law").

9. MICHAEL KRONENWETTER, *CAPITAL PUNISHMENT: A REFERENCE HANDBOOK* 159 (2d ed. 2001) (noting of Cesare Beccaria: "The first prominent European to call for an end to the death penalty, Beccaria is considered the founder of the modern abolition movement."); *see also* AGAINST THE DEATH PENALTY: INTERNATIONAL INITIATIVES AND IMPLICATIONS 47 (Jon Yorke ed., 2008) (calling Beccaria "the father of the modern anti-death penalty movement").

10. ROBERT D. HANSER, *COMMUNITY CORRECTIONS* 18 (2d ed. 2010).

happiness to the greatest number of people.¹² Since Beccaria's death in Milan from a stroke,¹³ the anti-death penalty movement—the one begun by Beccaria, fueled by Voltaire and many others,¹⁴ and formerly known in the United States as the anti-gallows movement¹⁵—has gone through many

11. David Thomas Konig, *Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common-Law Adjudication*, in *THE MANY LEGALITIES OF EARLY AMERICA* 116, n.49 (Christopher L. Tomlins & Bruce H. Mann eds., 2001).

12. JOSEPH PERSKY, *THE POLITICAL ECONOMY OF PROGRESS: JOHN STUART MILL AND MODERN RADICALISM* 30 (2016); ALEX TUCKNESS & JOHN M. PARRISH, *THE DECLINE OF MERCY IN PUBLIC LIFE* 176–77 (2014).

13. ROBERT PANZARELLA & DANIEL VONA, *CRIMINAL JUSTICE MASTERWORKS: A HISTORY OF IDEAS ABOUT CRIME, LAW, POLICE, AND CORRECTIONS* 9 (2006) (“Beccaria died of a stroke on November 28, 1794.”).

14. In 1766, Voltaire wrote a famous commentary on Beccaria's treatise, a commentary that was frequently reprinted with Beccaria's *On Crimes and Punishments*, thus helping to catapult it to a wider audience. NICHOLAS CRONK, *VOLTAIRE: A VERY SHORT INTRODUCTION* 93 (2017); *THE CAMBRIDGE COMPANION TO VOLTAIRE* 43 (Nicholas Cronk ed., 2009); see also 2 PRESERVED SMITH, *A HISTORY OF MODERN CULTURE: THE ENLIGHTENMENT, 1687-1776* at 585 (1934):

Voltaire, finding in Beccaria many of his own humane and rational ideas, wrote a commentary illustrating and enforcing his arguments. Some years later, in 1777, he published an epoch-making tract called *The Prize of Justice and Humanity*. In this he advocated trial by jury instead of by the judges of the parlements; he protested against the infliction of death and other heavy penalties for small offenses; and he denounced punishing heresy, the expression of opinion, or most sexual vice; and he inveighed against the use of torture to extract confession.

Michel Forst, *The Abolition of the Death Penalty in France*, in *THE DEATH PENALTY: ABOLITION IN EUROPE* 105 (1999) (“Voltaire, who had initially been dubious about the abolition of capital punishment was won over in 1777, and other thinkers followed his lead. At the Constituent National Assembly, Louis-Michel de Saint Fargeau, rapporteur on the draft criminal code, made the first speech against the death penalty.”); cf. ANDREW HAMMEL, *ENDING THE DEATH PENALTY: THE EUROPEAN EXPERIENCE IN GLOBAL PERSPECTIVE* 19–20 (2010):

In the 18th century, the Berne Economic Society organized a competition inviting philosophers and officials to develop a ‘model’ European criminal code which would do away with brutal punishments and introduce order and coherence into penal policy. The subscription invited respondents to submit a ‘complete and detailed plan for legislation on criminal matters.’ Voltaire enthusiastically supported the proposal, and submitted his own critical commentary on the injustices of European criminal law, in which (explicitly following Beccaria) he advocated replacing executions with lifetime penal servitude (Voltaire 1999; 15–19). The ‘Prize of Justice and Humanity’ shows that European intellectuals were willing and eager to translate Enlightenment principles into concrete legislative proposals.

Compare W. KENRICK, 8 *THE LONDON REVIEW OF ENGLISH AND FOREIGN LITERATURE* 447 (1779) (emphasis in original):

This publication is imputed to the late celebrated M. de Voltaire, and was occasioned by a prize of fifty louis-d'ors, being offered by the economical society at Berne in Switzerland, to the author of the best essay on the “Composition of a complete plan of legislation relative to criminal cases.” M. de V. did not start for the prize, but hath here submitted his *doubts* on the subject to the society under the following heads; On the Proportion between crimes and Punishments—Theft—Murder—Dueling—Suicide—Mothers who kill their Children—Many Other Crimes . . . Torture . . .

15. MATTHEW J. GROW, “LIBERTY TO THE DOWNTRODDEN:” THOMAS L. KANE, *ROMANTIC REFORMER* 39 (2009); PHILIP E. MACKAY, *HANGING IN THE BALANCE: THE ANTI-CAPITAL PUNISHMENT MOVEMENT IN NEW YORK STATE, 1776-1861* at 107, 119, 150 (1982).

stages and seen numerous, multi-faceted developments.¹⁶ That movement, at one time driven by only a handful of highly committed individuals who suffered excommunication or risked scorn, derision, and ridicule from their contemporaries,¹⁷ is now an *international* one involving scores of highly respected anti-death penalty activists and organizations.¹⁸ The movement has only grown in strength as horrifying miscarriages of justice have been exposed¹⁹ and as skillful advocates of abolition have made persuasive calls for the death penalty's demise.²⁰

16. See, e.g., PAUL CHRISTIAN JONES, *AGAINST THE GALLOWES: ANTEBELLUM AMERICAN WRITERS AND THE MOVEMENT TO ABOLISH CAPITAL PUNISHMENT* (2011); STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (2002). A short summary of developments pertaining to the abolition movement can be found online at the Death Penalty Information Center's website. *Part I: History of the Death Penalty: Abolition Movement*, DEATH PENALTY INFO. CTR., <https://perma.cc/7BMD-NGTZ> (last updated 2017); *Part II: History of the Death Penalty: Recent Developments*, DEATH PENALTY INFO. CTR., <https://perma.cc/Y6PW-7WBA> (last updated 2017).

17. PAMELA J. SCHRAM & STEPHEN G. TIBBETTS, *INTRODUCTION TO CRIMINOLOGY: WHY DO THEY DO IT? 74–75* (2d ed. 2017) (noting that “the ideas Beccaria proposed were so revolutionary . . . that he published the book anonymously,” with Beccaria worrying that “the church would accuse him of blasphemy.” “Beccaria was right; the Roman Catholic Church excommunicated him when the book’s authorship became known. In fact, his book remained on the list of condemned works until relatively recently (1960s).”).

18. E.g., JOYCE DURIGA, HELEN PREJEAN: *DEATH ROW’S NUN* (2017) (a biography of Sister Helen Prejean); *THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 610* (Del Dickson ed., 2001) (noting the work of Tony Amsterdam and the NAACP’s Legal Defense Fund); *A HOWARD READER: AN INTELLECTUAL AND CULTURAL QUILT OF THE AFRICAN-AMERICAN EXPERIENCE 47* (Paul E. Logan ed., 2000) (taking note of the work of Bryan Stevenson and Stephen Bright). Anti-death penalty organizations include, among others, Amicus, Amnesty International, Anti-Death Penalty Asia Network, Centre for Capital Punishment Studies, Hands Off Cain, Human Rights Watch, Reprieve, and the World Coalition Against the Death Penalty. *Links to Death Penalty Organizations*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, <https://perma.cc/649S-RLTT> (last updated July 2, 2013). The Council of Europe and the European Parliament hosted the First World Congress Against the Death Penalty in Strasbourg from June 21 to 23, 2001. *THE DEATH PENALTY: BEYOND ABOLITION 198* (Council of Europe Publishing ed., 2004).

19. See generally FRANK R. BAUMGARTNER, SUZANNA L. DE BOEF & AMBER E. BOYDSTUN, *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE 42–43* (2008); *WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICAN AND EUROPEAN CRIMINAL JUSTICE SYSTEMS 16–17* (C. Ronald Huff & Martin Killias eds., 2013); BRENT E. TURVEY & CRAIG M. COOLEY, *MISCARRIAGES OF JUSTICE: ACTUAL INNOCENCE, FORENSIC EVIDENCE, AND THE LAW 276* (2014). See also MIKA OBARA-MINNI, *JAPANESE MORATORIUM ON THE DEATH PENALTY 153* (2016) (“Following the successive disclosure of wrongful conviction cases, newly formed anti-death penalty NGOs began to act on behalf of inmates who had been wrongfully convicted.”); FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 269* (2003) (“After *Gregg v. Georgia* approved the restarting of executions in 1976, a series of problematic death verdicts received some public attention, and one Texas case where an innocent defendant was sentenced to death was the subject of a much-noticed documentary film, *The Thin Blue Line*.”); *Id.* at 270 (“Hugo Bedau and Michael Radelet, two prominent anti-death penalty scholars, published their compendium of wrongful convictions and executions first as a law review article entitled ‘Miscarriages of Justice in Potentially Capital Cases’ in 1987, and then as a book, *In Spite of Innocence*, published in 1992.”).

20. E.g., HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972–1994* at 167–68 (1996); *AGAINST THE DEATH PENALTY*, *supra* note 9, at 47. Compare *CONFRONTING CAPITAL PUNISHMENT IN ASIA: HUMAN RIGHTS, POLITICS, AND PUBLIC OPINION*

Changes in the law pertaining to capital punishment have come in different countries at different times. There have been numerous advances—along with a number of setbacks—for the anti-death penalty movement since the 18th century. There have been a large number of prominent anti-death penalty advocates since Beccaria’s time, from Jeremy Bentham (1748-1832), Edward Livingston (1764-1836), U.S. Vice President George M. Dallas (1792-1864), Victor Hugo (1802-1885), and Clarence Darrow (1857-1938), to Anthony Amsterdam, Hugo Adam Bedau, Sister Helen Prejean, Robert Badinter, and Justices William Brennan and Thurgood Marshall.²¹ All of them—in their own unique ways—have had to grapple with different circumstances, opportunities, and challenges in their own lifetimes.²²

In the end, successful movements (and this was certainly true for the anti-slavery movement)²³ are about leadership, persuasive advocacy, and coalition building.²⁴ Today’s global anti-death penalty movement, which now has lots of coalition partners, has finally come into its own on the international stage (much as the anti-slavery movement did in the 19th-century)²⁵ in the last few decades.²⁶ Its modern successes to date come

1 (Roger Hood & Surya Deva eds., 2013); DAVID T. JOHNSON & FRANKLIN E. ZIMRING, *THE NEXT FRONTIER: NATIONAL DEVELOPMENT, POLITICAL CHANGE, AND THE DEATH PENALTY IN ASIA* 115 (2009); *THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVES* (Austin Sarat & Christian Boulanger eds., 2005).

21. KRONENWETTER, *supra* note 9, at 158–63, 168–70, 174–75; VICTOR HUGO, *LE DERNIER JOUR D’UN CONDAMNÉ* (1829) (translated into English as *The Last Day of a Condemned Man*).

22. *E.g.*, MARIO CUOMO, *REASON TO BELIEVE* 144–47 (1995) (former New York Governor Mario Cuomo describing his opposition to capital punishment and his vetoes of death penalty legislation).

23. BHARAT MALKANI, *SLAVERY AND THE DEATH PENALTY: A STUDY IN ABOLITIONISM* (forthcoming May 2018).

24. SANDRA J. JONES, *COALITION BUILDING IN THE ANTI-DEATH PENALTY MOVEMENT: PRIVILEGED MORALITY, RACE REALITIES* 2 (2010) (“Although the contemporary anti-death penalty movement is typically recognized as having its roots in the 1970s, organized collective action against the death penalty has been taking place as far back as the eighteenth century.”).

25. YVES BEIGBEDER, *THE ROLE AND STATUS OF INTERNATIONAL HUMANITARIAN VOLUNTEERS AND ORGANIZATIONS: THE RIGHT AND DUTY TO HUMANITARIAN ASSISTANCE* 181 (1991) (noting that the Anti-Slavery Society, described as “the world’s oldest international human rights NGO,” was founded in 1839 as the British and Foreign Anti-Slavery Society, organized the first anti-slavery convention in London shortly thereafter, and promoted international campaigns for the abolition of slavery between 1840 and 1890).

26. LOUIS J. PALMER, JR., *THE DEATH PENALTY IN THE UNITED STATES: A COMPLETE GUIDE TO FEDERAL AND STATE LAWS* 282 (2d ed. 2014) (“The World Coalition Against the Death Penalty was created in Rome in May 2002.”); *see also* MARIO MARAZZITI, *13 WAYS OF LOOKING AT THE DEATH PENALTY* ch. 4 (2015):

The French NGO Together Against the Death Penalty (*Ensemble contre la peine de mort*, or ECPM) was another group working hard to abolish capital punishment. ECPM promoted the first World Congress Against the Death Penalty in Strasbourg in 2001. Twenty-six representatives of as many international associations, including the Community of Sant’Egidio, signed the Strasbourg Declaration on June 22, 2001, committing to “create a worldwide coordination of abolitionist associations and campaigners, whose first goal will be to launch a worldwide

thanks in part to the advocacy of Amnesty International and an array of other non-governmental organizations (“NGOs”) such as Together Against the Death Penalty or, as it is known in French, *Ensemble contre la peine de morte* (“ECPM”).²⁷ From the 2002 creation of the World Coalition Against the Death Penalty in Rome,²⁸ to the 2010 founding of the International Commission against the Death Penalty in Madrid,²⁹ there is now a global infrastructure to fight capital punishment. Such organizations, and the individuals who lead them, have effectively raised awareness of all the human rights issues associated with the death penalty’s use.³⁰

While many public officials over the years have advocated for the death penalty’s abolition or even, in a few cases, to set aside death sentences *en masse*,³¹ the fear of crime is—and always has been and will be—real and palpable, creating a particular challenge for the abolitionist movement.³² Murderers and other violent offenders instill great fear

day for the universal abolition of the death penalty.” On May 13, 2002, they founded the World Coalition Against the Death Penalty in Rome, at the Community of Sant’Egidio’s headquarters in Trastevere. An executive committee of eleven associations and NGOs became the movement’s strategic nerve-center. Since its founding, the World Coalition has worked to abolish the death penalty by lobbying organizations and states and supporting local activists.

27. *Our History*, ENSEMBLE CONTRE LA PEINE DE MORTE, <https://perma.cc/4X9M-JRW6> (from main page, scroll over “2000: Creation of ECPM”) (last visited Nov. 11, 2017) (noting that, in 2000, Michel Taube and Benjamin Menasce wrote a book, *An Open Letter to Americans for the Abolition of the Death Penalty*, published by L’écart, that was followed by an anti-death penalty campaign called “*Together Against the Death Penalty in the USA*” that gathered 500,000 signatures in France, leading to ECPM’s creation. More information about this international campaign to abolish the death penalty is available at <https://perma.cc/2ESF-CMN6> (last visited Nov. 16, 2017)).

28. *History*, WORLD COAL. AGAINST THE DEATH PENALTY, <https://perma.cc/4QLC-5AGC> (last visited Nov. 11, 2017).

29. *About ICDP*, INT’L COMM’N AGAINST THE DEATH PENALTY, <https://perma.cc/MU3H-6SBC> (last updated 2013).

30. GLOBALIZING JUSTICE: CRITICAL PERSPECTIVES ON TRANSNATIONAL LAW AND THE CROSS-BORDER MIGRATION OF LEGAL NORMS 129 (Donald W. Jackson, Michael C. Tolley & Mary L. Volcansek eds., 2010):

In the case of the death penalty, human rights organizations played the central role in creating an unprecedented “norms cascade” beginning in the mid-1970s. Following intense internal debates and dissent on the issue of expanding its mandate, Amnesty International decided in 1976 to promote the abolition of the death penalty as one of its core goals. By 1989, the UN General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) calling on all member states to abolish the death penalty. In 1990, the Organization of American States (OAS) adopted a similar protocol to its human rights convention. In May 2002, the Council of Europe adopted Protocol 13 to the European Convention on Human Rights, which represents the first international treaty abolishing the death penalty with no exceptions.

31. *E.g.*, LEIGH BUCHANAN BIENEN, MURDER AND ITS CONSEQUENCES: ESSAYS ON CAPITAL PUNISHMENT IN AMERICA 44–45 (2010) (discussing a mass commutation of death sentences by Illinois Governor George Ryan).

32. *E.g.*, TERRORISM IN AMERICA 132 (Kevin Borgeson & Robin Valeri eds., 2009):

Keil and Vito (1991) tested fear of crime as a predictor of support for the death penalty among 619 residents in Kentucky who participated in a telephone survey. The researchers found di-

amongst societies, and for centuries, that fear—at times stoked by demagogues and populist politicians throughout the world—has driven criminal justice and sentencing policies.³³ People are creatures of habit, and old habits are hard to break. Indeed, the admirable quest for law and order has often, in direct derogation of basic human right principles, been perverted and involved the discriminatory or arbitrary imposition of death sentences and the carrying out of executions, often in an extremely invidious, random, or haphazard fashion.³⁴

The geographic, racial, and gender disparities now commonly associated with executions³⁵ and the recent spate of Arkansas executions—ones driven by the *expiration dates* of a drug, a sedative used in that state’s lethal injection protocol—show just how *ad hoc* the death penalty’s administration has become.³⁶ As one news story reported after Arkansas executed its fourth inmate in eight days: “The expiration is an issue because a resupply is uncertain as Arkansas and other states struggle with suppliers that don’t want their products used in executions. The sedative, midazolam, is a controversial replacement for anaesthetics that Arkansas and other states can no longer obtain.”³⁷ To have executions prompted by expiration dates, and to have Arkansas Governor Asa Hutchinson schedule dates for four double

rect and indirect effects of fear on this measure of punitiveness. The more fear a subject reported (as measured through neighborhood safety), the more likely the subject was to support the death penalty. Age, race, and victimization experience operated indirectly through fear of crime to translate into greater odds of supporting the death penalty.

33. SUSAN EASTON & CHRISTINE PIPER, *SENTENCING AND PUNISHMENT: THE QUEST FOR JUSTICE* 19, 104 (4th ed. 2016).

34. *E.g.*, THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 249 (Hugo Adam Bedau ed., 1997) (“If one reads through the five concurring opinions in *Furman v. Georgia*, searching for common threads holding together those otherwise independent opinions, one is likely to seize on the twin themes of *arbitrariness* and *discrimination*.” (emphasis in original)); *see also* LAWRENCE C. BECKER & CHARLOTTE B. BECKER, *ENCYCLOPEDIA OF ETHICS* 184 (2001):

Recent abolitionists, under the influence of the HUMAN RIGHTS doctrines advocated by the United Nations, have argued that the death penalty violates human rights because its administration inevitably entails arbitrary practices; erroneous executions are an irrevocable and irremediable violation of the right to life; and there are less severe and equally effective alternative punishments. In addition, it is argued that the death penalty, as it is actually used in contemporary criminal justice systems, is biased against certain races or classes, so much so that a self-respecting civilized society cannot afford to employ it.

35. JAMES R. ACKER, *QUESTIONING CAPITAL PUNISHMENT: LAW, POLICY, AND PRACTICE* ch. 6 (2014) (discussing racial discrimination and gender and geographic disparities); *see also* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 716 (Joan Petersilia & Kevin R. Reitz eds., 2012):

The vast majority of death penalty jurisdictions within the United States have elected rather than appointed prosecutors, and these prosecutors are usually autonomous decision makers in their own small locales (counties). Rarely is there any state or regional review of local decision making or coordination of capital prosecutions. These simple facts of institutional organization generate enormous geographic disparities within most death penalty jurisdictions.

36. Faith Karimi, Darran Simon & Jason Hanna, *Arkansas Executes Kenneth Williams, 4th Inmate in 8 Days*, CNN (Apr. 28, 2017), <https://perma.cc/NUV3-CJJH>.

37. *Id.*

executions over an eleven-day period based on that fact, is—as Justice Stephen Breyer later said—“close to random.”³⁸ Originally, the State of Arkansas had planned to carry out eight executions in eleven days, but the courts later blocked some of those executions.³⁹

The social and legal history of the anti-death penalty movement is, when viewed globally, a story of struggle against state power and prejudice. The efforts to abolish capital punishment are too numerous to recount in one place, but suffice it to say they have accelerated substantially in recent decades.⁴⁰ The death penalty itself, of course, is a centuries-old practice that dates back to the Dark Ages—indeed, to the very beginning of recorded human history.⁴¹ Though an exhaustive recitation of the history of the anti-death penalty movement is not feasible in one law review article, an examination of the stages and progress of the anti-death penalty movement to date—developments that have taken place in Europe, the Americas, Africa, and elsewhere—offers significant and promising clues as to what may lie ahead for the punishment of death, though naturally much uncertainty still remains.

The changes in law and practice that have occurred are many and varied, but certain themes emerge from a 30,000-foot view of the past. As one modern source reports, “With respect to the death penalty, there has been an evolution in sensibilities over the past 300 years, regarding views about appropriate and inappropriate methods of execution, which have triggered changes in policy, such as death by lethal injection rather than by public hangings.”⁴² “There has been,” that source emphasizes, taking note of the gradual (sometimes painfully slow) evolution of state practice, “a steady civilizing process in the administration of the death penalty.”⁴³ All of this,

38. Phil McCausland, *Arkansas Gov. Hutchinson on Executions: “I Absolutely Made the Right Decision”*, NBC NEWS (Apr. 29, 2017), <https://perma.cc/94UL-V3Z2>.

39. Dakin Andone, *Arkansas Plans to Execute 8 Men Over 11 Days*, CNN (Mar. 3, 2017), <https://perma.cc/SY7T-DA2Y>; Phil McCausland, *Arkansas Executions: State Kills Two Death Row Inmates in One Night*, NBC NEWS (Apr. 25, 2017), <https://perma.cc/Z23L-LZ2L>.

40. At the U.N. level, the U.N. Economic and Social Council adopted safeguards guaranteeing protection of the rights of those facing the death penalty in 1984, and the Second Optional Protocol to the International Covenant on Civil and Political Rights—seeking the death penalty’s abolition—was adopted by the U.N. General Assembly in 1989. *Death Penalty*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, <https://perma.cc/8YAG-PP46> (last visited Nov. 11, 2017); *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty* (May 25, 1984), <https://perma.cc/XR4S-H2LW>; *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty* (Dec. 15, 1989), <https://perma.cc/PMY4-4K5T>.

41. BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 187 (2009) (“The death penalty is one of the oldest forms of criminal punishment. Laws providing for the death penalty date from the eighteenth century B.C.E. in Babylonia. In seventh-century B.C.E. Athens, the Draconian Code made death the only punishment for all crimes.”).

42. CHRISTOPHER S. KUDLAC, *PUBLIC EXECUTIONS: THE DEATH PENALTY AND THE MEDIA* 15 (2007).

43. *Id.*

along with the various restrictions that have been placed on capital punishment since the 18th century, raises a vital question: Will the death penalty go the way of the stocks and the pillory, and be relegated (at some point down the road) to the history books?

Looking down and looking back, one can see more clearly. There was a time when death sentences and executions were almost universally embraced throughout the world⁴⁴ and when the punishment of death was the *mandatory* punishment for a wide array of felonies.⁴⁵ That has largely changed, with those changes in law and practice taking place in many nations.⁴⁶ There have also been many times in many different locales when anti-death penalty sentiment either led to the complete abolition of capital punishment⁴⁷ or in which, in the face of strong opposition from defenders of the Old Order, the number of death-eligible offenses was simply curtailed.⁴⁸ Unlike in the past, when the vast *majority* of countries made use of capital punishment,⁴⁹ today a clear *minority* of nations still actively use executions.⁵⁰ The first places to abolish the death penalty in the wake of the

44. *E.g.*, PAUL VELLELY, POPE FRANCIS: UNTYING THE KNOTS, THE STRUGGLE FOR THE SOUL OF CATHOLICISM 207 (2d ed. 2015) (“Once slavery, and the death penalty, were universally accepted as legitimate.”). The Quakers were a notable exception. MICHEL FOUCAULT, THE PUNITIVE SOCIETY: LECTURES AT THE COLLÈGE DE FRANCE, 1972–1973, at 86 (Bernard H. Harcourt ed. & Graham Burchell trans., 2015) (“[W]hen the Quakers became established in America, they wanted to escape the English penal system and develop a new penal code without the death penalty. They came up against the refusal of the English administrators and there was a muted struggle with the English administration up until Independence.”).

45. JOSEPH A. MELUSKY & KEITH A. PESTO, THE DEATH PENALTY: A REFERENCE HANDBOOK 79 (2017) (“From the Middle Ages forward, the punishment for all felonies was in theory a mandatory sentence of death, with any lesser sentence to be granted by a process of royal pardon. The penalty for misdemeanors was such punishment short of death as the judges decided.”).

46. LINDA E. CARTER, ELLEN S. KREITZBERG & SCOTT W. HOWE, UNDERSTANDING CAPITAL PUNISHMENT LAW § 26.04[A] (3d ed. 2012) (“Similar to the situation in the United States in which the U.S. Supreme Court held mandatory death sentences unconstitutional, national and international bodies around the world are taking the same position.”).

47. LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865 at 124–25, 158–59 (1989) (describing early anti-death penalty efforts and abolitionist successes in America).

48. *See, e.g.*, 2 THE EARLY REPUBLIC AND ANTEBELLUM AMERICA: AN ENCYCLOPEDIA OF SOCIAL, POLITICAL, CULTURAL, AND ECONOMIC HISTORY 554 (Christopher G. Bates ed., 2015) (noting that America’s “anti-death penalty movement was small at first,” but that “it picked up steam in the 1840s,” as newspaper editors, orators, and activists “joined the chorus,” and further observing: “the era’s primary spokesmen in favor of the death penalty were church leaders” whose arguments “were rooted in scripture,” but that “the anti-death penalty forces made a modicum of progress” and that “[t]hrough capital punishment remained legal and widely practiced, the number of capital offenses was reduced significantly in most states”).

49. THE DEATH PENALTY IN CHINA: POLICY, PRACTICE, AND REFORM 13 (Bin Liang & Hong Lu eds., 2016) (noting that in 1977, “less than four decades ago,” only sixteen nations “had abolished the death penalty for all crimes”).

50. LILIAN CHENWI, TOWARDS THE ABOLITION OF THE DEATH PENALTY IN AFRICA: A HUMAN RIGHTS PERSPECTIVE 30 n.97 (2007) (“At the international level, a majority of countries in the world have now abandoned the use of the death penalty.”); Roger Hood, *Introductory Review of the Current*

publication of Beccaria's landscape-changing text were Tuscany and Austria. Grand Duke Peter Leopold, also known as Leopold II, outlawed the death penalty's use in Tuscany in 1786; his brother, Holy Roman Emperor Joseph II, then barred the use of executions in Austria (except for crimes of revolt against the state) the following year.⁵¹

This Article traces the broad trajectory that the centuries-old crusade against capital punishment has taken since the publication of Beccaria's *Dei delitti e delle pene*. It begins, in Part II, by highlighting the origins of the anti-death penalty movement, and it then discusses some key moments in that movement's history in the decades and centuries that followed. In particular, it describes how the movement has matured through the decades, from executions imposed at the behest of monarchs to a series of restrictions on the use of death sentences. The movement began with Cesare Beccaria's modified conception of Jean-Jacques Rousseau's social contract theory.⁵² It then morphed from one focused, in large part, on whether severe punishments (i.e., death sentences and executions) were actually efficacious in *detering* or *preventing* crime, to one focused on *human rights*. The movement's foundation now rests on universal rights: the right to life, human dignity, and the now long-standing legal prohibitions against torture and cruel, inhuman or degrading treatment or punishments,⁵³ or—in the U.S.—against “cruel and unusual punishments.”⁵⁴ The death penalty debate—from one that originally focused on absolute power, the divine right of kings, and the asserted right of monarchs to take human life with impu-

Situation as Regards Progress Towards the Abolition of the Death Penalty and Possible Next Stages, in DEATH PENALTY: A CRUEL AND INHUMAN PUNISHMENT 19 (L. Arroyo Zapatero, W. Schabas & K. Takayama eds., 2013) (noting that 106 nations—or more than half of the world's 198 independent countries—have abolished the death penalty).

51. JOHN D. BESSLER, CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 46 (2012); see also CLIVE EMSLEY, CRIME, POLICE, AND PENAL POLICY: EUROPEAN EXPERIENCES 1750-1940, at 33 (2007) (“Joseph II in Austria and Grand Duke Leopold in Tuscany both abolished the death penalty in their new legal codes, but they maintained fearsome punishments. This was especially the case with Joseph's *Allgemeines Gesetz über Verbrechen und deren Bestrafung* (1787) which authorized public floggings, branding with hot irons, and lifelong periods of imprisonment, sometimes in chains in tiny cells.”); John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 Nw. J. L. & Soc. POL'Y 195 (2009) (tracing the influence of Beccaria on the abolitionist movement in the United States).

52. Rousseau's *The Social Contract* first appeared in print shortly before Cesare Beccaria began working on *Dei delitti e delle pene*. See JEAN-JACQUES ROUSSEAU, OF THE SOCIAL CONTRACT AND OTHER POLITICAL WRITINGS (Christopher Bertram ed. & Quintin Hoare trans., 2012).

53. E.g., Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment arts. 1, 16, June 26, 1987, 145 U.N.T.S. 85, <https://perma.cc/74J2-KPVB> [hereinafter Convention Against Torture]. Article 1 of the Convention Against Torture defines torture, which nations agree to criminalize as part of their treaty obligations, while Article 16 obligates states to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1.” *Id.*, arts. 1, 16.

54. U.S. CONST. amend. VIII.

nity, to one focused on whether it violates basic or fundamental human rights for the state to kill individual offenders—has thus been reframed in fundamental ways over the centuries.

If the past is prologue, as William Shakespeare once offered in one of his plays,⁵⁵ it is also true that history cannot be undone, but that the future is ours to freely shape. The Universal Declaration of Human Rights (1948), it is clear, set the tone for the recognition of various *universal* human rights,⁵⁶ and since the 1970s, Amnesty International and other human rights groups have publicly and vocally campaigned against capital punishment, leading to much progress in that regard.⁵⁷ Whereas punishments, in prior centuries, were frequently based on religious texts and seen as a response to *sin*, the rise of secular criminal justice systems that used Enlightenment-era principles like *proportionality* to set punishments inevitably altered anti-death penalty discourse. Both religious and secular arguments are still made today against capital punishment,⁵⁸ but these days, the 21st-century movement against the punishment of death is now being increasingly grounded in the notion of universal, non-derogable human rights, such as the right to be free from torture.⁵⁹ Although Thomas Jefferson, in the Declaration of Indepen-

55. “[W]hat’s past is prologue”—a quote from Act II of William Shakespeare’s *The Tempest*—is carved on the National Archives building in Washington, D.C. RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 245 (comp. by The Library of Congress 2010).

56. In the American Declaration of Independence (1776), Thomas Jefferson wrote “that all men are created equal.” At that time, women and minorities were still systematically excluded from society’s social compact and did not enjoy the same rights or freedoms as white property owners. The Universal Declaration of Human Rights, after the issue was debated, was drafted in a way to make sure it included women’s rights. As one source notes:

It is telling that even in the drafting of the Universal Declaration there was a debate about women’s voices. The initial version of the first article stated, “All men are created equal.” It took women members of the commission, led by Mrs. Hansa Mehta of India, to point out that “all men” might be interpreted to exclude women. Only after long debate was the language changed to say, “All human beings are born free and equal.”

Hillary Rodham Clinton, *On the Universal Declaration of Human Rights*, in 3 FREE AND EQUAL: THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AT 50 at 10–11 (Mark Smith ed., 1998).

57. REPORT OF AMNESTY INTERNATIONAL CONFERENCE ON THE DEATH PENALTY, STOCKHOLM, SWEDEN, 10–11 DECEMBER, 1977 (1978).

58. GARDNER C. HANKS, AGAINST THE DEATH PENALTY: CHRISTIAN AND SECULAR ARGUMENTS AGAINST CAPITAL PUNISHMENT (1997). *Compare* AMERICA’S DEATH PENALTY: BETWEEN PAST AND PRESENT 53 (David Garland, Randall McGowen & Michael Meranze eds., 2011) (“Over the course of the nineteenth century the Western death penalty lost much of its religious character and became predominantly secular in orientation and organization.”).

59. See JOHN D. BESSLER, THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION (2017) (documenting this trend and making the case that the death penalty should be classified as a form of torture); RHONA K. M. SMITH, TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS 183 (7th ed. 2016) (“The creation of a body of non-derogable rights within human rights law has sometimes been taken to add weight to the notion of a hierarchy of rights with the non-derogable rights being somehow higher than the others.”); Lisa Hajjar, *Rights at Risk: Why the Right Not To Be Tortured Is Important to You*, in 48 STUDIES IN LAW, POLITICS, AND SOCIETY: SPECIAL ISSUE: REVISITING RIGHTS 108 (Austin Sarat ed.,

dence (1776), wrote of the “unalienable” right to life,⁶⁰ and though Jefferson later effusively praised Beccaria’s keen intellect,⁶¹ the death penalty was still in use in Jefferson’s America as it is, if only sporadically, in modern America.⁶²

This Article—part history, part predictor of what is yet to come—then looks at the present state of affairs and what the next few years may bring in terms of the law. Part III thus details where we are now with respect to capital punishment—a sort of State of the State—as it describes how American executions are carried out now. In particular, it discusses the prolonged delays between sentencing and execution now so closely associated with capital punishment, and it shows how the United States has become increasingly isolated in the world community through its continued use of that punishment.⁶³ Although predictions are always notoriously difficult to make, Part IV then frankly assesses what the fate of the punishment of death will likely be in time. What Mother Nature and Father Time will bring (and when it will actually be brought) is unknowable, but the Article concludes that capital punishment in all of its many grotesque forms⁶⁴ will

2009) (noting that “the prohibition of torture is absolutely non-derogable because the law recognizes no exceptions, including in times of war or national emergency”).

60. GEORGE H. SMITH, *THE SYSTEM OF LIBERTY: THEMES IN THE HISTORY OF CLASSICAL LIBERALISM* 120 (2013). “Inalienable rights were regarded as fundamental corollaries of a person’s essential nature, especially his or her reason and volition, so these rights could never be surrendered or transferred to another person (including a government), even with the agent’s consent.” *Id.* at 20. The Scottish moral philosopher Francis Hutcheson—one of Beccaria’s major inspirations—put it this way: “Unalienable Rights are essential Limitations to all Governments.” *Id.* at 20.

61. In 1821, Thomas Jefferson wrote that, “Beccaria and other writers on crimes and punishments had satisfied the reasonable world of the unrightfulness and inefficacy of the punishment of crimes by death; and hard labor on roads, canals and other public works had been suggested as a proper substitute.” THOMAS JEFFERSON, *AUTOBIOGRAPHY DRAFT FRAGMENT* (July 27, 1821), available at <https://perma.cc/MF2H-AFU2>.

62. In a recent article in *TIME* magazine, one commentator wrote that Americans are coming to the realization that the country’s “balky system of state-sanctioned killing simply isn’t fixable.” “For the first time in the nearly 30 years that I have been studying and writing about the death penalty,” David von Drehle explained in that piece of his own viewpoint, “the end of this troubled system is creeping into view.” David von Drehle, *The Death of the Death Penalty: Why the Era of Capital Punishment Is Ending*, *TIME* (June 8, 2015).

63. At a recent U.N. session, two African nations—The Gambia and Madagascar—took major steps to commit themselves to abolish the death penalty. On September 21, 2017, The Gambia’s President, Adama Barrow, signed the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. And, on that same day, Madagascar completed the ratification process by depositing the instrument of ratification for that treaty with the U.N. Secretary-General. There are now 85 countries that have signed the Second Optional Protocol. *At United Nations Session, The Gambia and Madagascar Take Major Steps to Abolish the Death Penalty*, DEATH PENALTY INFO. CTR., <https://perma.cc/M5QK-EM5J> (last updated 2017).

64. Under the rubric of “Capital punishments,” one author—looking back at the history of executions from the vantage point of the mid-nineteenth century (before the electric chair, the gas chamber and lethal injections materialized)—listed this assortment of barbarous and brutal methods of execution that societies have witnessed:

end up being classified under the rubric of torture and will, in time, be absolutely prohibited under the existing *jus cogens* norm of international law that already bars torture.⁶⁵ International law already strictly forbids apartheid, slavery, genocide, piracy, torture, war crimes, and crimes against humanity,⁶⁶ and this Article concludes that the death penalty should be added to that list.

II. THE ANTI-DEATH PENALTY MOVEMENT: THE MATURATION OF THE MOVEMENT SINCE *DEI DELITTI E DELLE PENE* (1764)

Cesare Beccaria is considered the father or grandfather of the anti-death penalty movement. In two recent journal articles⁶⁷ and two books, *The Birth of American Law: An Italian Philosopher and the American Revolution* and *The Celebrated Marquis: An Italian Noble and the Making of the Modern World*, I meticulously documented Beccaria's considerable influence on the world's constitutions and laws.⁶⁸ Utilizing and adapting Rousseau's social contract theory, Beccaria concluded that the death penalty was neither a just nor necessary punishment.⁶⁹ As Lynn McDonald writes in *The Early Origins of the Social Sciences*: "Beccaria used social contract theory to limit the power of the state, specifically to exclude torture

Beheading, strangling, crucifixion, drowning, burning, roasting, hanging by the neck, the arm, or the leg; starving, sawing, exposing to wild beasts, rendering asunder by horses drawing opposite ways; shooting, burying alive, blowing from the mouth of a cannon, compulsory deprivation of sleep, rolling in a barrel stuck with nails, cutting to pieces, hanging by the ribs, poisoning, pressing slowly to death, by a weight laid on the breast; casting headlong from a rock, tearing out the bowels, pulling to pieces with red hot pincers, stretching on the rack, breaking on the wheel, impaling, flaying alive, cutting out the heart, &c. &c. &c.

THOMAS DICK, L.L.D., 3 THE PHILOSOPHY OF RELIGION, OR, AN ILLUSTRATION OF THE MORAL LAWS OF THE UNIVERSE 332 n.* (1847) (emphasis in original).

65. A *jus cogens* norm is a "peremptory" norm of international law that is non-derogable in nature. ROBERT KOLB, PEREMPTORY INTERNATIONAL LAW – *JUS COGENS*: A GENERAL INVENTORY ch. 1 (2015); see also SARAH JOSEPH ET AL., SEEKING REMEDIES FOR TORTURE VICTIMS: A HANDBOOK ON THE INDIVIDUAL COMPLAINTS PROCEDURES OF THE UN TREATY BODIES 488 (2006) ("The absolute nature of the prohibition of torture under treaty law is reinforced by its higher, *jus cogens* status under customary international law. *Jus cogens* status connotes the fundamental, peremptory character of the obligation, which is, in the words of the International Court of Justice, 'intransgressible.'").

66. 2 M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS 169 (3d ed. 2008).

67. See generally John D. Bessler, *The Italian Enlightenment and the American Revolution: Cesare Beccaria's Forgotten Influence on American Law*, 37 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 1 (2016); John D. Bessler, *The Economist and the Enlightenment: How Cesare Beccaria Changed Western Civilization*, Sept. 23, 2016, EUR. J. L. & ECON. (sub. req.), <https://perma.cc/WAT4-NQZ9>.

68. See generally BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 58–218; BESSLER, THE CELEBRATED MARQUIS, *supra* note 2, at 3–327.

69. In 1765, right after the publication of *Dei delitti e delle pene*, Cesare Beccaria was pejoratively labeled "the Rousseau of the Italians" by a Dominican friar, Ferdinando Facchinei. DARIO MELOSSI, CONTROLLING CRIME, CONTROLLING SOCIETY: THINKING ABOUT CRIME IN EUROPE AND AMERICA 30 (2008).

and capital punishment. People could not give away such powers over their lives, nor indeed did they give away any liberty for the good of others.”⁷⁰ “The sovereign’s authority,” McDonald explains of Beccaria’s conception of the social contract, “consisted of the sum of all the portions of liberty sacrificed by each person for that person’s own good.”⁷¹ As Beccaria himself put it: “The aggregate of these least possible portions constitutes the right to punish; all that exceeds this is abuse and not justice.”⁷² An assortment of enlightened monarchs, while not conceding their absolute power, were themselves almost magnetically drawn to Beccaria’s reform-minded ideas.⁷³

Cesare Beccaria’s many admirers included scores of penal reformers and revolutionaries the likes of Jeremy Bentham, William Blackstone, John Adams, Thomas Jefferson, and Dr. Benjamin Rush, as well as a host of other prominent intellectuals throughout Europe and the Americas, including Voltaire, the French *Encyclopédistes*, and William Bradford, the second Attorney General of the United States.⁷⁴ A close friend of James Madison, Bradford penned an influential legislative report, *An Enquiry How Far the*

70. LYNN McDONALD, *THE EARLY ORIGINS OF THE SOCIAL SCIENCES* 155 (1993).

71. *Id.* at 155.

72. *Id.* Before the publication of Beccaria’s treatise, despotic monarchs frequently invoked scriptural passages and the “divine right of kings” to justify the imposition of death sentences. The Enlightenment changed the whole conversation. See, e.g., HAMMEL, *supra* note 14, at 116:

By the late 18th century, the debate about the death penalty in France had achieved recognizably modern form. Explicitly religious arguments, like invocations of the divine right of kings, were largely absent. Beccaria, in introducing the idea of complete abolition of capital punishment for ordinary crimes, drew on social contract theory, utilitarian thinking, and insights into the psychology of criminal offenders.

73. SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 40 (1980) (“Beccaria’s ideas helped to stimulate criminal-law reform throughout Europe, beginning in the 1770s. Frederick II of Prussia ordered his chancellor to begin drafting a new criminal code in 1779. According to Frederick, ‘Beccaria has left nothing to glean after him; we need only to follow what he has so wisely indicated.’”); see also 14 *THE BIBLICAL REPERTORY AND PRINCETON REVIEW FOR THE YEAR 1842* at 338–39 (1842) (reprinting a legislative report on capital punishment):

Whoever will take the pains to compare the sixteenth chapter of Beccaria’s work on Punishment, with sect. 4, art 10, of the Instructions of Catharine, will be at no loss to discover the probable motives which led to the institution of her Criminal Code. She has borrowed the ideas, and sometimes the very words of Beccaria, taking good care, however, to leave out every thing touching the social compact, the surrender of the “*minime porzioni*” of personal rights and the limitations of the sovereign authority.

The work of Beccaria had been recently published, and was attracting much attention. Its doctrines had been espoused by the French school of Infidels, who were at that time the savans of Europe. Catharine, who was in close correspondence with them, was ambitious of establishing a reputation in philosophy, as well as war; and, to this end, she issued her “Instructions pour dresser la Code de Russie,” in which she is philosophically clement, so far as the punishment of wrongs between man and man is concerned

74. See generally 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 (Lill Scherdin ed., 2014); Bessler, *The Economist and the Enlightenment: supra* note 67.

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Punishment of Death Is Necessary in Pennsylvania, shortly after the ratification of the U.S. Bill of Rights.⁷⁵ In the United States, Beccaria's writings were repeatedly invoked by lawyers, politicians, and prominent anti-death penalty reformers, and Beccaria's name shows up multiple times in congressional and state legislative debates over issues pertaining to crimes and punishments.⁷⁶ For example, before the Eighth Amendment's ratification in 1791, Representative James Jackson of Georgia, a lawyer and member of the U.S. House of Representatives, spoke at length about Beccaria's ideas in August 1789 during a debate on "the bill for establishing the Judicial Courts of the United States."⁷⁷ Another member of the House of Representatives, William Vans Murray of Maryland, referenced Beccaria in Decem-

75. William Bradford, *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania* (1793).

76. E.g., ANNUAL REPORT OF THE INSPECTORS OF THE PHILADELPHIA COUNTY PRISON, MADE TO THE LEGISLATURE 54 (1791) (noting that Beccaria's "opinions have the force of axioms in the science of penal law"); see also MR. WARD OF WARREN, REPORT OF THE SELECT COMMITTEE ON THE SUBJECT OF CAPITAL PUNISHMENT 1-2 (1853):

We do not claim to present any new arguments or facts. All that we say has been better said before, and we only present the subject in this form to bring the death penalty under the consideration of those who would not see and examine what others have so well said. We have derived great assistance from, and have in many instances only repeated the arguments and considerations which have been so ably set forth in other reports and works upon this subject. We call attention particularly to Robert Rantoul's report to the House of Representatives of Massachusetts, February 22, 1836; John L. O. Sullivan's report to the House of Assembly of New York, April 14, 1841; Essays on the Punishment of Death by Charles Spear; Thoughts on the Death Penalty by Charles Burleigh; Purrington's report to the Maine Legislature in 1836; Livingston's Argument to the Legislature of Louisiana; Gould's report to the New York Legislature, March 5, 1847; and the works of Beccaria, Montesquieu, Bentham and Cheever.

77. *The Judiciary*, 1 ANNALS OF CONG. 820, 830 (Aug. 31, 1789):

The accurate Marquis Beccaria points out a danger which it behooves us to guard against. In every society, he says, there is an effort continually tending to confer on one part the height of power and happiness, and to reduce the other to the extreme of weakness and misery. The intent of good laws is to oppose this effort, and diffuse their influence universally and equally. But men generally abandon the care of their most important concerns, to the uncertain prudence and discretion of those whose interest it is to reject the best and wisest institutions; and it is not till they have been led into a thousand mistakes in matters the most essential to their lives and liberties, and are weary of suffering, that they can be induced to apply a remedy to the evils with which they are oppressed. It is then they begin to conceive and acknowledge the most palpable truths which, from their simplicity, commonly escape vulgar minds, incapable of analyzing objects, accustomed to receive impressions without distinction, and to be determined rather by the opinions of others than by the result of their own examination.

This celebrated writer pursues the principle still further, and confirms what we urge on our side against the unnecessary establishment of inferior courts. He asserts, with the great Montesquieu, that every punishment which does not arise from absolute necessity is tyrannical; a proposition which may be made more general thus, every act of authority of one man over another for which there is not an absolute necessity is tyrannical. It is upon this, then, that the Sovereign's right to punish crimes is founded; that is, upon the necessity of defending the public liberty entrusted to his care, from the usurpation of individuals; and punishments are just, in proportion as the liberty preserved by the Sovereign is sacred and valuable.

ber 1791 in a debate over a post office bill relating to whether postal employees who robbed the mail should be put to death.⁷⁸

The Italian philosopher from Milan was often referred to as “[t]he celebrated Beccaria.”⁷⁹ His ideas led to the death penalty’s ephemeral abolition in Tuscany and Austria, but they also shaped penal practices around the globe.⁸⁰ Indeed, Cesare Beccaria’s expressed goal of ending resort to the punishment of death was whole-heartedly embraced by Dr. Benjamin Rush (a signer of the Declaration of Independence) before the U.S. Constitution’s ratification.⁸¹ And Beccaria continued to be cited or quoted by many American civic leaders and public officials before the Civil War,⁸² in its immediate aftermath,⁸³ and in the many decades to come.⁸⁴ For example, Bec-

78. *Post Office Bill*, 3 ANNALS OF CONG. 282, 283–84 (Dec. 23, 1791):

The section which makes it death for persons employed in the Post Office Department to rob the mail, occasioned considerable debate. The words “shall suffer death,” were struck out, and it was then moved to insert imprisonment for life, or for a term which the Court may think proper. This motion occasioned further debate, on its being moved to amend it by striking out imprisonment for life.

Mr. Murray entered into a general consideration of the subject. He was clearly of opinion that if the punishment was not loss of life, it ought to be the next in point of severity. He enlarged on the enormity of the crime, and inferred that a person who was so depraved as to be guilty of it, ought to be forever deprived of the power of injuring society again. He adverted to the principles advanced by Montesquieu, Beccaria, and others, who had written so ably on crimes and punishments; but, with all their refinements, they were obliged to acknowledge that as there were grades in guilt, so there should be degrees of punishment. He adverted to the regulations of Pennsylvania; he said their jail was more properly a school of morality than a place of punishment. It may reform, but it will never deter the abandoned from the perpetration of crimes. It might answer the present state of society in the Commonwealth, but he doubted whether it would not invite to the commission of crimes, and accelerate the period when they must have recourse to a more severe system of jurisprudence. He concluded by saying, that, as imprisonment for life was the next severest punishment to loss of life, he should vote against the last amendment.

79. *E.g., Speech of Hon. G. M. Hamilton of Florida, in the House of Representatives*, 40 APP’X TO THE CONG. GLOBE 700, 701 (Jan. 29, 1869).

80. WILLIAM A. SCHABAS, *THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD’S COURTS* 18 (1996); BESSLER, *THE CELEBRATED MARQUIS*, *supra* note 2 (discussing Cesare Beccaria’s global influence).

81. Benjamin Rush, *An Enquiry into the Effects of Public Punishments Upon Criminals and Upon Society*, Read at the Society for Promoting Political Enquiries, convened at the house of Benjamin Franklin (Mar. 9, 1787) (available at <https://perma.cc/U7ZW-SKHL>).

82. *Speech of Mr. Walker, of Mississippi*, 11 APP’X TO THE CONG. GLOBE 611, 619 (June 21, 1842):

Here, in most of the States, but a single crime (willful and deliberate murder) forfeits the life of the prisoner; and the onward march of our mild institutions is hastening under the lead of an illustrious Democrat (O’Sullivan) to adopt the principles of Beccaria and Livingston—to abolish the punishment of death, and to sweep the hangman’s scaffold from American soil.

83. *Punishment of Treason*, 37 CONG. GLOBE 68, 69 (Dec. 11, 1866) (noting the following remarks of Mr. Stevens: “I should be very glad to see condign punishment inflicted upon many of these men, not capital punishment; for in my youth I read Beccaria, and adopted to a great extent the principles which he maintains.”); *see also Trial of Jefferson Davis*, 36 CONG. GLOBE 2264, 2284 (Apr. 30, 1866):

Beccaria, in his celebrated *Essay on Crimes and Punishments*, says that “clemency is a virtue which belongs to the legislator, and not to the executor of the laws; a virtue which ought to

caria's ideas pervaded the public debate that led to Pennsylvania dividing murder into degrees and restricting the death penalty's use to first-degree murder.⁸⁵ Three American states—Michigan, Rhode Island and Wisconsin—abolished the death penalty for murder in antebellum America.⁸⁶

shine in the code, and not in private judgment. To show mankind that crimes are sometimes pardoned, and that punishment is not the necessary consequence, is to nourish the flattering hope of impunity, and is the cause of their considering every punishment inflicted as an act of injustice and oppression. The prince, in pardoning, gives up the public security in favor of an individual, and by ill-judged benevolence proclaims a public act of impunity."

84. *E.g., Capital Punishment Should Be Abolished – Extension of Remarks of Hon. George E. Shipley of Illinois in the House of Representatives*, 112 CONG. REC. A3489 (June 29, 1966):

Mr. SHIPLEY. Mr. Speaker, in the long history of justice there has never been more devoted concern than now. While we may disagree with some of the conclusions, we must recognize the herculean efforts in speaking "sense" on the important issue of capital punishment. This is coming from all parts of our great Nation. One example is the article by Dr. and Mrs. George S. Reuter, Jr. of Alton, Ill., entitled "Capital Punishment Should Be Abolished." I believe that my colleagues should also have an opportunity to read it, hence I include it herewith in the RECORD:

CAPITAL PUNISHMENT SHOULD BE ABOLISHED
(By Dr. and Mrs. George S. Reuter, Jr.)
Introduction

The death penalty, one of the oldest of all punishments, has long been under attack. Returning to the days of ancient Greece, we find that Thucydides' "Peloponnesian War" records a debate on the utility of the death penalty. Enlightenment philosophers, such as Montesquieu and Voltaire, were critical of such a punishment. Cesare Beccaria, the Milan criminologist and economist, published . . . his influential essay, "On Crimes and Punishments." Beccaria, the first modern writer to subject the death penalty to fundamental criticism, envisioned present day criminological advances in the treatment of crime. He condemned the savage criminal procedures and penalties of his day, and asserted that prevention of crime is of greater importance than its punishment. Beccaria advocated the abolition of capital punishment, replacing it with life imprisonment.

See also Capital Punishment: Extension of Remarks of Hon. Abraham J. Multer of New York in the House of Representatives, 106 CONG. REC. 17105, A6284 (Aug. 22, 1960) (quoting Yale Law School professor Richard C. Donnelly, retired member of the Connecticut Board of Parole):

The massive literature of capital punishment—commencing with Beccaria's influential essay 'On Crimes and Punishment' published in 1764—present special difficulties and frustrations. It is a curious fact that the main arguments against the death penalty have remained remarkably unchanged since the beginning of the debate.

85. 1 ENCYCLOPEDIA OF CRIME AND PUNISHMENT 153 (David Levinson ed., 2002) (noting that, in 1794, the Pennsylvania legislature passed a law that abolished the death penalty for all crimes except the newly created offense of first-degree murder, with Pennsylvania being the first American jurisdiction to distinguish between different degrees of murder); *see also* GUYORA BINDER, FELONY MURDER 128 (2012):

The most popular legislative reform involved dividing murder into degrees. This new and distinctively American approach to homicide jurisprudence originated with Pennsylvania's 1794 reform statute, which restricted capital punishment to first-degree murder. The Pennsylvania statute was an outgrowth of a protracted movement to reduce and differentiate penalties inspired by such Enlightenment figures as Montesquieu and Beccaria and promoted by James Wilson, Benjamin Rush, and Pennsylvania Supreme Court Justice William Bradford.

86. ALAN W. CLARKE & LAURELYN WHITT, THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO THE DEATH PENALTY 78 (1939):

In another example, in 1892, General Newton Martin Curtis, a reformer from New York, gave a speech in the U.S. House of Representatives in support of a bill to abolish the punishment of death.⁸⁷ In that speech, General Curtis began by saying that “[t]he simple statement of the fact that the criminal code of the United States has stood for more than an hundred years without revision or amendment should be enough to convince this House of the necessity for proceeding promptly to discharge a duty which all preceding Congresses have neglected, that of remodelling the criminal code to make it conform to the spirit of the age in which we live.”⁸⁸ In a section of his speech titled “Advocates of Abolition,” General Curtis stressed:

The advocates of this principle include the greatest names in European and American history. But to Beccaria, Sir William Meredith, Sir Samuel Romilly, Sir James McIntosh, Basil Montagu, Jeremy Bentham, Edward Livingston, and Robert Rantoul Jr., whose writings and active exertions have done so much to promote this reform, will be given the greatest credit when this principle shall have been adopted, as it surely will be, by the Christian nations of the earth. Hundreds of others deserve to be mentioned with honor in this connection for their labors in enlightening and instructing their fellows.⁸⁹

After setting forth a host of thinkers who had expressed doubts about the efficacy of executions or sentiments in opposition to capital punishment, General Curtis ended his 1892 speech with these words:

Michigan abolished the death penalty in 1846. Rhode Island followed in 1852, and Wisconsin did so in 1853. Although little was made of the deterrence argument in Michigan’s successful abolition, by 1868, arguments made before the Minnesota legislature included the statement that crime had not increased in Michigan, Rhode Island, or Wisconsin since abolition.

87. *Speech of Gen. Newton Martin Curtis, of New York, in the House of Representatives*, 23 CONG. GLOBE 427 (June 9, 1892) (“To Define the Crime of Murder, Provide Penalty Therefor, and to Abolish the Punishment of Death”) [hereinafter *Speech of Gen. Newton Martin Curtis*]. General Curtis was interested in penal reform. *E.g.*, N. M. CURTIS, CAPITAL CRIMES AND THE PUNISHMENTS PRESCRIBED THEREFOR FOR FEDERAL AND STATE LAWS AND THOSE OF FOREIGN COUNTRIES, WITH STATISTICS RELATING TO THE SAME 5 (1894):

The chief object of this publication is to present the facts collected in a convenient form to the Committee on the Judiciary of the House of Representatives, which has under consideration a bill (H. R. 273, Fifty-third Congress) to define the crimes of murder in the first and second degree, and manslaughter, and providing punishment therefor, and to abolish the punishment of death.

88. *Speech of Gen. Newton Martin Curtis, supra* note 87, at 428:

Sir William Blackstone, in his treatise on crimes and punishments, stated that the criminal codes of England and continental countries were crude and imperfect in comparison with their civil codes; and this criticism is doubtless as true to-day as when it was made, and will apply with peculiar force to the relative condition of the civil and criminal laws of the United States. While many countries in Europe have made successful efforts to remedy some of these defects, Congress has done nothing in that direction.

89. *Id.* at 434; *see also id.* at 435, 437–39 (noting Beccaria’s opposition to torture, Pastoeret and Victor Hugo’s invocation of Beccaria, and that Jeremy Bentham had once said: “The more we examine the punishment of death, the more we shall be induced to adopt the opinion of Beccaria.”).

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The fundamental truths underlying the opinions of the distinguished men above quoted, were stated by Marquis Beccaria, of Milan, at a time when codes were promulgated by the edicts of princes, in many countries, instead of by acts of parliaments or congresses. He sent his philosophical treatise forth with promises which have been realized in many countries, by the enactment of beneficent laws based upon the principles he advocated. Shall this nation, at an early day, enjoy the blessings which these principles have in their adoption, conferred upon others? I quote his words: "If these truths should happily force their way to the thrones of princes, be it known to them that they come attended by the secret wishes of all mankind. Tell the king who deigns them a gracious reception that his fame shall outlive the glory of conquerers, and that equitable posterity will exalt his peaceful trophies above those of a Titus, an Antonius, or a Trajan."⁹⁰

The abolitionist movement has made significant inroads as regards public opinion on capital punishment since America's founding in 1776,⁹¹ since General Curtis's time, and especially in the last several decades as many nations have abandoned the death penalty's use.⁹² Except in parts of

90. *Id.* at 441.

91. America's leading founding fathers were highly conversant with Beccaria's ideas. *Hail to Italy and Its Great People – Extension of Remarks of Hon. Philip J. Philbin of Massachusetts*, 107 CONG. REC. 6703 (Apr. 25, 1961) ("[T]he book 'On Crimes and Punishments,' by the Italian humanist Cesare Beccaria was read and annotated by Jefferson, who knew and spoke Italian, and was cited by John Adams in his defense of the English soldiers who were tried for the Boston massacre."); *The Threat to Individualism – Hon. John R. Rarick of Louisiana in the House of Representatives*, 118 CONG. REC. 6150 (Feb. 29, 1972) ("More than 200 years ago, the Italian penologist Cesare Beccaria was urging the unwisdom of capital punishment. His views attracted the support of eminent Americans such as Franklin and Paine." (quoting James J. Kilpatrick)). William Bradford—a close friend of James Madison from their time together at the College of New Jersey (now Princeton)—long ago invoked Beccaria's name and ideas as he argued for reform of Pennsylvania's criminal justice system. In much later times, at least a few political leaders have taken note of that fact. *See, e.g., How the Court Martial Works Today: Extension of Remarks of Hon. Andrew J. May of Kentucky in the House of Representatives*, 87 CONG. REC. A4546-A4548 (Oct. 7, 1941):

In 1776 in England over 200 offenses were punishable by death—among them larceny of 12 pence from a person, poaching, and consorting with a gypsy. Children of tender years were not exempt from capital punishment. In the Royal Services the punishments were, if possible, more severe, and soldiers and sailors were sometimes flogged to death. In the colonies, generally speaking, the assemblies had in many cases softened the English system, but it was still a ferocious code ferociously administered with retribution publicly made that the Pennsylvania Constitution of 1776 and its implementing statutes reformed. That reformation set an example followed sooner or later by the rest of the country.

I shall digress by a moment to pay tribute to the men who, appalled by 'man's inhumanity to man,' were principally instrumental in that reformation. The father of the humane Pennsylvania codes was William Bradford, attorney general of Pennsylvania, and later Attorney General of the United States. Bradford freely acknowledges the influence of Beccaria and of Montesquieu. Beccaria published his *Essay on Crimes and Punishments* in 1764. In that essay he clearly stated the principles of punishment which most of us today believe to be true ones. Those principles are: (1) The purpose of punishment is to deter, not to wreak vengeance; (2) deterrence is obtained not by undue severity but by the certainty and promptness of the punishment; and (3) 'the measure of punishment is the damage to society caused by the crime.'

92. THE POLITICS OF THE DEATH PENALTY IN COUNTRIES IN TRANSITION 29 (Madoka Futamura & Nadia Bernaz eds., 2014) ("One of the most significant global trends of the last few decades has been

Africa, Asia, and the Middle East,⁹³ the death penalty has largely disappeared for economic crimes.⁹⁴ In the United States itself, it is essentially premeditated homicides and felony murders that are still punishable by death. As Victor Streib, Sam Kamin, and Justin Marceau write in *Death Penalty in a Nutshell*: “[M]ost jurisdictions reserve capital punishment for first-degree murderers. Many states limit capital killings even further, requiring additional findings before even a first degree murderer is eligible to be put to death.”⁹⁵ “In fact,” they write, “over the last decade throughout the United States, only about 5% of all persons arrested for homicide have been sentenced to death and only about 1% of them have actually been executed.”⁹⁶ “In practice,” they emphasize, “this sole remaining capital crime usually takes on one of two forms, either the traditional common law premeditated murder or felony-murder.”⁹⁷

Moreover, since the 1800s, the way in which death sentences and executions are imposed and carried out (in America and elsewhere) has changed dramatically. For example, in the U.S., what were once automatic or mandatory death sentences upon convictions gradually became the product of *discretionary* decisions. Now, in the post-*Gregg v. Georgia*⁹⁸ world, the decision-making of American juries is characterized by a legal process known as “guided discretion.”⁹⁹ A number of U.S. Supreme Court decisions, issued from the 1970s onward, have also expressly restricted the death penalty’s use as regards certain categories of offenders. The insane, juveniles, the intellectually disabled, non-homicidal rapists, and those who neither killed nor intended to kill are exempt from execution as a matter of

the movement towards ending the death penalty. Describing this as the ‘age of abolition’, Garland observes that, ‘what was once an unproblematic institution, universally embraced, is fast becoming a violation of human rights, universally prohibited.’”).

93. CHENWI, *supra* note 50, at 47; FRANÇOIS GODEMENT, CONTEMPORARY CHINA: FROM MAO TO CAPITALISM 69 (Rhoda B. Miller trans., 2016); SECURITY RELATIONS BETWEEN CHINA AND THE EUROPEAN UNION: FROM CONVERGENCE TO COOPERATION? 95 (Emil J. Kirchner, Thomas Christiansen & Han Dorussen eds., 2016); THE STATESMAN’S YEARBOOK 2015: THE POLITICS, CULTURES AND ECONOMIES OF THE WORLD 663 (Barry Turner ed., 2014).

94. *E.g.*, ANTONY TAYLOR, LORDS OF MISRULE: HOSTILITY TO ARISTOCRACY IN LATE NINETEENTH- AND EARLY TWENTIETH-CENTURY BRITAIN 171 (2004) (noting the nineteenth-century abolition of the death penalty for thefts, shoplifting, forgery, sheep stealing, and for men who blackened their faces in night robbery).

95. VICTOR STREIB, SAM KAMIN & JUSTIN MARCEAU, DEATH PENALTY IN A NUTSHELL 71 (5th ed. 2017).

96. *Id.*

97. *Id.*

98. 428 U.S. 153 (1976).

99. ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 717 (Paul Finkelman ed., 2006) (“Guided discretion statutes restrict the otherwise unbounded discretion of judges and juries during non-capital and capital sentencing.”).

constitutional law.¹⁰⁰ Whereas the antiquated religious doctrine of *benefit of clergy* once exempted certain offenders from execution,¹⁰¹ the secular concept of disproportionality between crimes and punishments—one embraced by the U.S. Supreme Court itself—now excludes various categories of offenders from being put to death. Even in its decision in *Gregg* that brought back America’s death penalty, the U.S. Supreme Court made clear that “the punishment must not involve the unnecessary and wanton infliction of pain” and that “the punishment must not be grossly out of proportion to the severity of the crime.”¹⁰²

The abolitionist movement is a history of successive restrictions on the use of executions. People were once executed for a whole host of offenses, from murder to scores of much less serious offenses. As one source notes of the English “Bloody Code” that once contained over two hundred offenses for which a death sentence could be meted out and bring a public execution: “There were an astonishing number of trivial capital crimes. People could be hanged for damaging Westminster Bridge, for damaging trees, for stealing five shillings and for ‘taking away a maid or a widow for the sake of her fortune.’”¹⁰³ And whereas death sentences were once parsed out in a mandatory fashion upon the conviction of criminals,¹⁰⁴ the social move-

100. Bessler, *The American Enlightenment*, *supra* note 74, at 94–95 (describing the U.S. Supreme Court cases that bar the execution of non-homicidal rapists and kidnappers, the insane, the intellectually disabled, juvenile offenders, and those who neither took nor intended or attempted to take a life).

101. LAWRENCE F. TRAVIS III & BRADLEY D. EDWARDS, *INTRODUCTION TO CRIMINAL JUSTICE* 389 (8th ed. 2015) (internal citations omitted):

The benefit of clergy was a practice that developed during the medieval period so that members of the clergy were accountable to ecclesiastic (church) courts rather than civil courts. The accused could claim the benefit of clergy to have his or her case moved from the civil courts to the church courts. The test for benefit of clergy came to be one of literacy, in which the court required the accused to read the text of the fifty-first Psalm. In due time, illiterate common criminals committed the psalm to memory so that they could pretend to read it and thus avoid the punishments of the king’s courts.

The fifty-first Psalm, because it allowed many offenders to avoid hanging as the penalty for their crimes, came to be known as the “neck verse.” After a period of expansion of the benefit of clergy (from the fourteenth through the eighteenth centuries), the practice was disallowed by statute in 1827. No longer was it possible to escape in this way to the less severe sanctions of the church courts.

102. CLAIR A. CRIFE, MICHAEL G. PEARLMAN & DARYL KOSIAK, *LEGAL ASPECTS OF CORRECTIONS MANAGEMENT* 262 (3d ed. 2013) (internal citation omitted).

103. GRAHAM ELLISON & JIM SMYTH, *THE CROWNED HARP: POLICING NORTHERN IRELAND* 1–2 (2000).

104. *E.g.*, JEFFREY L. FORGANG, *DAILY LIFE IN ELIZABETHAN ENGLAND* 36 (2d ed. 2010):

The most serious crimes were treason, murder, and a range of crimes classed as felonies, including manslaughter, rape, sodomy, arson, witchcraft, burglary, robbery, and grand larceny (theft of goods worth at least 12 pence). All of these offenses carried a mandatory death sentence, making juries sometimes reluctant to convict in felony cases: one Justice complained that “most commonly the simple countryman or woman, looking no further into the loss of their own goods, are of opinion that they would not procure a man’s death for all the goods in

ment calling for discretionary sentencing—and in favor of egalitarian, non-arbitrary applications of the law—gradually swept across the civilized world, thereby curtailing death sentences in such locales.¹⁰⁵ Likewise, the international community came to a consensus in the aftermath of World War II that the right to life had to be better protected and that the death penalty should be restricted to very serious crimes. The International Covenant on Civil and Political Rights (“ICCPR”), adopted by the U.N. General Assembly in 1966 and which entered into force in 1976,¹⁰⁶ itself states that “[n]o one shall be arbitrarily deprived of his life” and that the death penalty may only be used in cases involving “the most serious crimes.”¹⁰⁷ Other restrictions on the death penalty, whether for pregnant women, children, or others, have also been adopted from time to time in various regions or jurisdictions.¹⁰⁸ In general, women are only rarely sentenced to death,¹⁰⁹ a fact that has been true throughout history, and that is increasingly the case in modern times.¹¹⁰

The imposition of death sentences on one group of offenders while others are exempted from executions (either in law or in practice) begs the question as to why, in a world of *universal* human rights, executions are not *absolutely* prohibited, not just for some, but for all? In my recently released

the world,” so that “upon promise to have their goods again [they] will give faint evidence, if they be not strictly looked into by the Justice.”

105. E.g., JEFFREY L. KIRCHMEIER, *IMPRISONED BY THE PAST: WARREN McCLESKEY AND THE AMERICAN DEATH PENALTY* 58 (2015):

[T]he movement away from mandatory death sentences helped limit the use of capital punishment. When the Eighth Amendment’s ban on cruel and unusual punishments was ratified with the rest of the Bill of Rights in 1791, all states followed the common law practice of making the death penalty the automatic sentence for anyone convicted of certain crimes. But the states eventually discovered that mandatory death sentences often resulted in jurors acquitting sympathetic guilty defendants because the jurors did not want to impose the automatic death sentence. So, the states responded with new laws that gave jurors discretion in imposing capital punishment. Once jurors found a defendant guilty of a capital offense, the jurors then had discretion whether or not to impose a punishment of death.

106. ANNE F. BAYEFSKY, *HOW TO COMPLAIN TO THE UN HUMAN RIGHTS TREATY SYSTEM* 6 (2003).

107. Timothy J. Schorn, *The Death Penalty and the International Community: Evolving Norms or Persistent Differences?*, in *THE LEVIATHAN’S CHOICE: CAPITAL PUNISHMENT IN THE TWENTY-FIRST CENTURY* 302 (J. Michael Martinez, William D. Richardson & D. Brandon Hornsby eds., 2002).

108. *Id.* at 302; see also UNITED NATIONS OFFICE ON DRUGS AND CRIME, *HANDBOOK ON PRISONERS WITH SPECIAL NEEDS* 167 (2009) (“The American Convention on Human Rights prohibits the imposition of the death penalty on children, on persons over 70 years of age and on pregnant woman (article 4(5)).”).

109. Victor L. Streib, *Rare and Inconsistent: The Death Penalty for Woman*, 33 *FORDHAM URB. L.J.* 609, 609–10 (2006).

110. Celesta A. Albonetti, *Women, Law, and the Legal System*, in 1 *WOMEN CRIMINALS: AN ENCYCLOPEDIA OF PEOPLE AND ISSUES* 220 (Vickie Jensen ed., 2012):

Capital punishment is rarely imposed on women in the United States. Segrave’s (2008) research on execution of women in the United States between 1632 and 2005, reveals that only 2.8 percent of approximately 20,000 executions involved women. His research further indicates that the percent of women executed has declined over the years.

book, *The Death Penalty as Torture: From the Dark Ages to Abolition*, I argue that capital punishment and torture should no longer be treated in separate legal silos, but that death sentences and executions, because of their immutable characteristics, should be classified under the rubric of torture.¹¹¹ The U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment—ratified by the United States—in fact expressly prohibits “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for a prohibited purpose (*e.g.*, obtaining a confession, punishment, intimidating or coercing someone).¹¹² It is high time that the U.S. live up to its obligations under the Convention Against Torture, not just as regards preventing acts of torture by *non-state* actors but also with respect to eliminating *state* actions and conduct that have the clear indicia of torture, be they physically or mentally torturous, such as state-sanctioned executions. Governments must be allowed to punish criminals and have the clear right to do so, but the punishments themselves should not be torturous in nature.

For centuries, the death penalty was seen and justified as a lawful sanction. At the time the U.N. Convention Against Torture entered into force in 1987, it is certainly true that the death penalty was still in widespread use in many places, although the anti-death penalty movement was, by then, gaining strength.¹¹³ Ten years earlier, in 1977, Amnesty International’s Stockholm Conference on the Abolition of the Death Penalty—composed of more than 200 delegates and participants from Africa, Asia, the Caribbean, Europe, the Middle East, North America, and South America¹¹⁴—had specifically called upon “[a]ll governments to bring about

111. See generally BESSLER, *THE DEATH PENALTY AS TORTURE*, *supra* note 59.

112. Convention Against Torture, *supra* note 53, at art. 1.

113. *E.g.*, OBARA-MINNITT, *supra* note 19, at 113 (2016) (“Regarding the international anti-death penalty movement, the UN’s initiative can be cited as an example. Recalling Article 3 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Civil and Political Rights (ICCPR), the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, was adopted on 15 December 1989 and entered into force on 11 July 1991. In the voting, 59 states voted for, 26 voted against and 48 abstained; Japan and the USA voted against the protocol.”). In the United States, the 1960s and 1970s witnessed much public controversy surrounding capital punishment, including in American courts and in the nation’s highest court in particular. Although the U.S. Supreme Court *invalidated* the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972), that same body—just four years later—*upheld* the death penalty’s constitutionality in *Gregg v. Georgia*, 428 U.S. 153 (1976). The U.S. Supreme Court has confronted many legal issues surrounding the death penalty’s administration since capital punishment was reinstated in 1976. See generally CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* (2016) (containing an excellent treatment of the subject).

114. HAINES, *supra* note 20, at 63 (“More than 200 delegates from 50 nations took part, including Hugo Bedau, Henry Schwarzschild, Deborah Leavy, and Ramsey Clark from the United States. At the conclusion of the meeting, the conferees issued ‘The Declaration of Stockholm,’ which condemned the death penalty as ‘the ultimate cruel, inhuman and degrading punishment,’ as a violation to the right to life that is inherently vulnerable to political abuse and that serves no legitimate purpose.”).

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the immediate and total abolition of the death penalty.”¹¹⁵ The Declaration of Stockholm, dated December 11, 1977, called the death penalty “the ultimate cruel, inhuman and degrading punishment.”¹¹⁶ “Abolition of the death penalty,” it declared, “is imperative for the achievement of declared international standards.”¹¹⁷ Human dignity and the right of life, like the prohibitions against cruelty and torture, are concepts long enshrined in core international and regional human rights instruments,¹¹⁸ with torture itself considered to be the *aggravated form* of cruel, inhuman, and degrading treatment or punishment.¹¹⁹

Arguments against capital punishment have taken many forms in the past two and a half centuries.¹²⁰ In Sweden, those who produced the Declaration of Stockholm announced their “commitment to work for the universal abolition of the death penalty” and called upon “[t]he United Nations unambiguously to declare that the death penalty is contrary to international law.”¹²¹ Though it took several decades, the U.N. General Assembly—as well as the leaders of the United Nations itself—have lately and admirably

115. Declaration of Stockholm, Dec. 11 1977, *reprinted in* WHEN THE STATE KILLS . . . THE DEATH PENALTY: A HUMAN RIGHTS ISSUE 255–56 app. 12 (1989).

116. *Id.*

117. *Id.*

118. *See, e.g.*, AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 37–38 (Daniel Kayros trans., 2015) (“Human dignity has developed in international law since the end of the Second World War. Human dignity is seen today as one of the general principles of international law. Its first appearance in international law was . . . in the preamble to the Charter of the United Nations (1945) and the Universal Declaration of Human Rights (1948). It was from these documents that human dignity spread to additional documents, including conventions prepared by the United Nations and its specialized agencies”); THE RIGHT TO LIFE IN INTERNATIONAL LAW 2–3 (B.G. Ramcharan ed., 1985) (“Basic international standards on the right to life are contained in Article 3 of the Universal Declaration of Human Rights, Article 6 of the International Covenant on Civil and Political Rights, Article 2 of the European Convention on Human Rights, Article[] 4 of the American Convention on Human Rights and Article 4 of the African Charter on Human and People’s Rights.”).

119. J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 114–15 (1988) (emphasis added); P. VAN DIJK & G.J.H. VAN HOOFF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 309 n.61 (3d ed. 1998).

120. The arguments—and the evolution of them—are detailed in a number of Anglo-American histories and collections of documents. *E.g.*, HARRY POTTER, HANGING IN JUDGMENT: RELIGION AND THE DEATH PENALTY IN ENGLAND FROM THE BLOODY CODE TO ABOLITION (1993); JAMES GREGORY, VICTORIANS AGAINST THE GALLOWS: CAPITAL PUNISHMENT AND THE ABOLITIONIST MOVEMENT IN NINETEENTH CENTURY BRITAIN (2012); NEVILLE TWITCHELL, THE POLITICS OF THE ROPE: THE CAMPAIGN TO ABOLISH CAPITAL PUNISHMENT IN BRITAIN 1955–1969 (2012); JAMES E. CRIMMINS, THE DEATH PENALTY: DEBATES IN BRITAIN AND THE US, 1725–1868 (2004); GARY P. GERSHMAN, DEATH PENALTY ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS (2005). A number of histories of American states in relation to the death penalty have also been written. *E.g.*, DICK HAWS, IOWA AND THE DEATH PENALTY: A TROUBLED RELATIONSHIP 1834–1965 (2010); MICHAEL L. RADELET, THE HISTORY OF THE DEATH PENALTY IN COLORADO (2017); JOHN D. BESSLER, LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA (2003).

121. Declaration of Stockholm, *supra* note 115, at 255–56.

joined the fray, along with figures such as Pope Francis, by advocating for a complete halt to executions.¹²² Led by Italy, the place of Beccaria's birth, the U.N. General Assembly has adopted a series of resolutions since 2007 that seek a moratorium on the death penalty.¹²³ Those resolutions—adopted in 2007, 2008, and every other year (2010, 2012, 2014, and 2016) since then—have sent a clear signal that the world is moving away from capital punishment.¹²⁴ A recent United Nations publication—*Moving Away from the Death Penalty: Arguments, Trends and Perspectives*—makes that message explicit. As then-U.N. Secretary-General Ban Ki-moon forcefully announced in that book's preface: "The death penalty has no place in the 21st century. Leaders across the globe must boldly step forward in favour of abolition."¹²⁵

III. DEATH SENTENCES AND EXECUTIONS: THE CURRENT STATE OF AFFAIRS

The United States and a handful of other countries—mostly totalitarian or authoritarian, it must be said of the nations in Asia and the Middle East that commonly resort to death sentences—continue to execute people. In its report on the death penalty's use in 2016, Amnesty International recorded executions in 23 countries, two fewer nations than in 2015 and constituting

122. See, e.g., JONES, *supra* note 24, at 278 (2010) ("In 2000, AI [Amnesty International], together with the Community of Sant'Egidio and Sister Helen Prejean of the Moratorium 2000 project, presented more than three million signatures to the United Nations Secretary-General Kofi Annan supporting a moratorium on the death penalty with a view to total abolition worldwide."); HUMAN RIGHTS REPORTING 93 (Prmod Mishra ed., 2006) ("Kofi Annan, Secretary-General of the UN says, 'The forfeiture of life is too absolute, too irreversible, for one human being to inflict it on another, even when backed by legal process.'"); HEINER BIELEFELDT, NAZILA GHANEA & MICHAEL WIENER, FREEDOM OF RELIGION OR BELIEF: AN INTERNATIONAL LAW COMMENTARY 513 (2016) ("The Secretary-General's 2014 report on a moratorium on the use of the death penalty noted that '[a]pproximately 160 of the 193 Member States of the United Nations have abolished the death penalty or introduced moratoriums, either in law or in practice.' Secretary-General Ban Ki-moon stressed that the death penalty has no place in the twenty-first century.");

123. Italy and France have both been heavily involved in the modern campaign against capital punishment. Jeffrey Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 COLO. L. REV. 1, 85 n.456 (2002). Both countries claim many prominent writers and leaders who, together, seek to abolish the death penalty—what, in French, is called *ensemble contre la peine de mort*. MARAZZITI, *supra* note 26, at 57; ROBERT BADINTER, ABOLITION: ONE MAN'S BATTLE AGAINST THE DEATH PENALTY (Jeremy Mercer trans., 2008); UNITED NATIONS SOC. DEFENCE RESEARCH INST., THE DEATH PENALTY: A BIBLIOGRAPHICAL RESEARCH 893 (1988).

124. Elise Guillot & Aurélie Plaçais, *The UN General Assembly Voted Overwhelmingly for a 6th Resolution Calling for a Universal Moratorium on Executions*, WORLD COALITION AGAINST THE DEATH PENALTY (Dec. 20, 2016), <https://perma.cc/2DBY-NZVM>; Roger Hood & Carolyn Hoyle, *Roger Hood and Carolyn Hoyle Reflect on the Movement Towards Worldwide Abolition of the Death Penalty*, DEATH PENALTY WORLDWIDE BLOG (Jan. 8, 2015), <https://perma.cc/H7XR-6ZLK>.

125. UNITED NATIONS, MOVING AWAY FROM THE DEATH PENALTY: ARGUMENTS, TRENDS AND PERSPECTIVES 7 (2014).

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a clear minority of nations.¹²⁶ The death penalty's decline has occurred gradually (not surprising given its centuries-old pedigree and people's habit-forming tendencies),¹²⁷ but it has lately come under increasing scrutiny. In particular, concerns have been expressed about the *psychological* torture associated with death sentences and inmates' prolonged stays on death row. "Although delay is usually welcomed by the condemned individual," death penalty expert William Schabas wrote back in the mid-1990s of such lengthy death-row stays while taking note of so-called death row *volunteers*, the condemned inmates who abandon their appeals, "there are some who refuse all remedies against their sentence and plead to be executed promptly."¹²⁸ Referring to the agony of being on death row for extended periods and the ever-present risk of a botched execution, Schabas emphasized at that time: "This agony haunts those sentenced to death, who are condemned not only to lose their lives, but also to contemplate their fate."¹²⁹ "If conditions on death row are and are likely to continue to be a real form of psychological torture," another writer has argued, "then it must be admitted that the death penalty is in practice not merely a penalty of death—it is a penalty of torture until death."¹³⁰

Under existing law, methods of torture can be either physical or psychological in nature.¹³¹ Ironically, in today's world, "mock" or *simulated* executions are already considered classic examples of *psychological* tor-

126. *The Death Penalty in 2016: Facts and Figures*, AMNESTY INT'L (Apr. 11, 2017), <https://perma.cc/2VSK-KD45>.

127. The anti-death penalty movement—earlier known as the anti-gallows movement—has ebbed and flowed through the centuries and decades. See, e.g., David Brion Davis, *The Movement to Abolish Capital Punishment in America, 1787–1861*, 63 AM. HIST. REV. 23 (1957); Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643 (2010).

128. SCHABAS, *supra* note 80, at 98.

129. *Id.* Those who waive their appeals and voluntarily seek to be executed after spending time on death row are called "volunteers." Such waivers of appellate rights can be driven by mental illness and overwhelming feelings of hopelessness. 11 HANDBOOK OF PSYCHOLOGY: FORENSIC PSYCHOLOGY 1, 431 (Alan M. Goldstein & Irving B. Weiner eds., 2003) ("The depressive experience of feelings of hopelessness and futility may result in the death row inmate not accurately perceiving the chances of eventually securing relief from a death sentence. Conscious and unconscious suicidal ideation can be expressed through volunteering for death via waiver of appeals.")

130. LAWRENCE M. HINMAN, *CONTEMPORARY MORAL ISSUES: DIVERSITY AND CONSENSUS* 160 (4th ed. 2013).

131. JOHN N. BRIERE & CATHERINE SCOTT, *PRINCIPLES OF TRAUMA THERAPY: A GUIDE TO SYMPTOMS, EVALUATION, AND TREATMENT* 17 (2d ed. DSM-5 Updated 2015):

Regardless of function or context, methods of torture involve both physical and psychological techniques, including beatings, near strangulation, electrical shock, various forms of sexual assault and rape, crushing or breaking of bones and joints, water-boarding, sensory deprivation, threats of death or mutilation, mock executions, being made to feel responsible for the death or injury of others, sleep deprivation, exposure to extreme cold or heat, stress positions, mutilation, and being forced to engage in grotesque or humiliating acts.

ture.¹³² In other words, although a simulated or *fake* execution currently qualifies as an act of torture, state-sanctioned executions, which result in *actual* deaths, have yet to be categorized as acts of torture by modern jurists.¹³³ And this is true despite the fact that many executions have, themselves, been labeled as torturous (whether from a physical standpoint, a psychological one, or both) by eyewitnesses and media outlets.¹³⁴ For example, a majority of U.S. Supreme Court Justices have, to date, explicitly rejected the argument that the death penalty constitutes a “cruel and unusual” punishment, by implication precluding a determination that the death penalty constitutes an *aggravated form* of cruelty.¹³⁵ Four members of the Supreme Court—Justices Sonia Sotomayor, Elena Kagan, Stephen Breyer and Ruth Bader Ginsburg—dissented from the Court’s 2015 decision in *Glossip v. Gross*,¹³⁶ a 5-4 ruling that approved the State of Oklahoma’s three-drug lethal injection protocol. But that dissent, which expressed con-

132. DAVID LUBAN, TORTURE, POWER, AND LAW 166 (2014); *see also* PAU PÉREZ-SALES, PSYCHOLOGICAL TORTURE: DEFINITION, EVALUATION AND MEASUREMENT 308, 333 (2017) (noting that “[t]hreats of death” and “mock executions,” along with “[p]sychological techniques to break down the individual,” are classified as torture under the Istanbul Protocol (1985), and listing mock executions as a form of psychological torture).

133. The debate about how to classify executions—and whether they are legitimate or illegitimate exercises of state power—has led to heated and intense debates over the years. *Compare* HANS GÖRAN FRANCK, THE BARBARIC PUNISHMENT: ABOLISHING THE DEATH PENALTY 35 (William A. Schabas ed., 2003) (“The conditions surrounding the execution itself and the period between the sentence and the carrying out of the sentence, which is frequently quite long, make it possible to compare the death penalty to torture.”) and Andrew Fiala, *Waterboarding, Torture, and Violence: Normative Definitions and the Burden of Proof*, in TORTURE, TERRORISM, AND THE USE OF VIOLENCE 160 (J. Jeremy Wisniewski ed., 2008) (“It might be odd to claim that the death penalty is a variety of torture. But opponents of the death penalty claim as much—since the victim is defenseless and suffers significant psychological harm even before being executed.”) with Ernest van den Haag, *Death but Not Torture*, in THE DEATH PENALTY: A DEBATE 13 (1983) (containing Ernest van den Haag’s views on the death penalty in a “Pro”/“Con” debate between Ernest van den Haag and John P. Conrad).

134. *E.g.*, SISTER HELEN PREJEAN, DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES (1993) (discussing her view of the death penalty as torture); Dahlia Lithwick, *When the Death Penalty Turns into Torture*, SLATE (Apr. 30, 2014) <https://perma.cc/HWY3-K276>; *see also* Fiala, *supra* note 133, at 160 n.13 (“The idea that execution is psychological torture goes back at least to Dostoevsky’s discussion of the guillotine in *The Idiot*.” (quoting Dostoevsky, *The Idiot* (New York: Signet Classics, 1969), p. 43)). Botched and extremely painful executions are commonplace—and that has, in reality, always been the case. AUSTIN SARAT ET AL., GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY (2014). Meanwhile, the post-World War II development of human rights principles has led others to question the death penalty’s viability or legitimacy under international law or to reframe the debate over capital punishment as one involving the violation of basic human rights. *E.g.*, JUAN E. MÉNDEZ, *The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment*, 20 HUM. RTS. BRIEF art. 1 (2012).

135. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976); *Baze v. Rees*, 553 U.S. 35, 62–63 (2008). There have been dissenting views, of course. Justices William Brennan and Thurgood Marshall famously dissented in case after case in voting against the use of executions. MICHAEL MELLO, *AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL* (1996).

136. 135 S. Ct. 2726 (2015).

cern about the risk of inmates' torturous deaths if the first drug in the protocol, midazolam, was not administered properly, focused solely on the substantial risk of death row inmates experiencing excruciating *physical* pain at the moment of their deaths.¹³⁷

From a personal standpoint, I have been writing about the death penalty for more than 20 years now, exploring both the history and the current state of affairs of capital punishment. My first book, *Death in the Dark: Midnight Executions in America*, traced America's transition in the 19th-century and 20th-century from public, daytime executions to private, nighttime executions.¹³⁸ In researching that book, I discovered that the vast majority of American executions took place at night, with executions often scheduled for one minute after midnight. Along with American executions moving into the private sphere from the 1830s to the 1930s, the historical trend that led to nighttime executions in many places reflects a queasiness—and a sense of shame—about executions themselves. From 1977 to 1995, there were 313 American executions, with 82 percent of them carried out between 11:00 p.m. and 7:30 a.m.¹³⁹ More than half of those executions occurred between midnight and 1:00 a.m.¹⁴⁰ My next books, *Legacy of Violence: Lynch Mobs and Executions in Minnesota* and *Kiss of Death: America's Love Affair with the Death Penalty*, recounted the sordid history of extra-judicial lynchings and state-sanctioned killings in my home state and articulated why I am so opposed to capital punishment.¹⁴¹ In documenting the racial prejudice so often associated with lynchings, death sentences and executions, I tried to document—as I have more recently—how state-sanctioned killings violate both the Eighth Amendment's Cruel

137. *Id.* at 2788–92 (Sotomayor, J., dissenting). Although a majority of Supreme Court Justices in *Glossip* ignored the *psychological* torment associated with death sentences, the risk of excruciating *physical* pain at executions clearly remains, especially in light of the increasing unavailability of lethal injection drugs. Jennifer L. Culbert, *The Time It Takes to Die and the Death of the Death Penalty: Untimely Meditations on the End of Capital Punishment in the United States*, in FINAL JUDGMENTS: THE DEATH PENALTY IN AMERICAN LAW AND CULTURE 65 (Austin Sarat ed., 2017) (“At the end of 2010, manufacturers of sodium thiopental in Europe refused to allow it to be used in capital punishment, and in 2011, the European Commission imposed new restrictions on the export of anesthetics used to execute people. Most recently, the pharmaceutical company Pfizer imposed controls on the distribution of its drugs to ensure that none are used in lethal injections.”). A planned execution in Ohio, that of 69-year-old convicted murderer Alva Campbell, recently had to be called off after prison officials were unable to place a needle in a vein of the inmate due to his multiple health problems. According to a news report: “The team tried for about 30 minutes to find an injection site before the execution was called off, according to media witnesses.” Tracy Connor, *Ohio Cancels Execution of Alva Campbell after Failing to Find Vein*, NBC News (Nov. 15, 2017, 4:55 PM ET), <https://perma.cc/UH8K-XHED>.

138. JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* (1997).

139. *Id.* at 81.

140. *Id.* at 81, app.

141. BESSLER, *LEGACY OF VIOLENCE*, *supra* note 120; JOHN D. BESSLER, *KISS OF DEATH: AMERICA'S LOVE AFFAIR WITH THE DEATH PENALTY* (2003).

and Unusual Punishment Clause and the Fourteenth Amendment's Equal Protection Clause.¹⁴²

Death sentences and executions, whenever they are imposed or take place, always occur in a particular legal context. In the United States, the U.S. Constitution's Eighth Amendment—a mere sixteen words—provides in full: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹⁴³ The Eighth Amendment thus prohibits not only “excessive” bail and fines, but it prohibits punishments that violate a certain moral standard (*i.e.*, that are *cruel*) and that are (or have become) uncommon or rare (*i.e.*, *unusual*). In *Cruel and Unusual: The American Death Penalty and the Founders' Eighth Amendment*, I explored in detail the history of the adoption of the U.S. Constitution's Cruel and Unusual Punishments Clause, gathering together whatever information I could locate as to that clause's meaning and purpose. In that book, I pointed out that the Eighth Amendment is already read by the U.S. Supreme Court to *bar* torture.¹⁴⁴ I also argued the death penalty, because of its inherent characteristics, should be classified as a “cruel and unusual” punishment.¹⁴⁵ The clear failure of America's criminal justice system to implement the death penalty even-handedly also makes it a violation of the Fourteenth Amendment's Equal Protection Clause.¹⁴⁶

Abolitionists approach the death penalty in their own way in light of their own experiences and outlook on life. Though I have spent a lot of time in the world of academia and civil litigation, much of my own professional life has been spent advocating for the death penalty's abolition—a cause that, in my judgment, would greatly further the development of human rights principles and the universality of rights. The death penalty is, as I

142. John D. Bessler, *The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments*, 73 WASH. & LEE L. REV. ONLINE 487, 542–554 (2017).

143. U.S. CONST. amend. VIII.

144. In its late nineteenth-century cases upholding the constitutionality of public firing squads and the electric chair, the U.S. Supreme Court announced in *Wilkerson v. Utah* (1878) and *In re Kemmler* (1890) that punishments involving “torture,” “unnecessary cruelty,” or “a lingering death” were prohibited. *Wilkerson v. Utah*, 99 U.S. 130, (1878); *In re Kemmler*, 136 U.S. 436 (1890). As the Supreme Court ruled in 1890 at a time when notions of psychological torture were not yet being adequately explored or fully vetted in the debate over the death penalty: “Punishments are cruel when they involve torture or a lingering death: but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies that there is something inhuman and barbarous,—something more than the mere extinguishment of life.” SCHABAS, *supra* note 80, at 21 (internal quotations and citation omitted); *In re Kemmler*, 136 U.S. at 447. In *Wilkerson*, the Supreme Court observed: “Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden . . .” 99 U.S. at 135–36.

145. BESSLER, *CRUEL AND UNUSUAL*, *supra* note 51, at 296–318.

146. *See* U.S. CONST. amend. XIV.

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often tell my students, just the tip of iceberg when it comes to America's administration of criminal justice.¹⁴⁷ In 2016, I had the honor to serve as the editor for Justice Stephen Breyer's *Against the Death Penalty*, published by Brookings Institution Press in Washington, D.C.¹⁴⁸ That book reprints, annotates, and contextualizes the separate dissent of Justice Breyer in *Glossip*, an extremely well-reasoned dissent in which he was joined by Justice Ginsburg.¹⁴⁹ I personally hope that more people will read Justice Breyer's dissent in that case. In it, Justices Breyer and Ginsburg announced that the death penalty is "highly likely" to be pronounced a cruel and unusual punishment in violation of the U.S. Constitution's Eighth Amendment.¹⁵⁰ In detailing the numerous problems associated with capital punishment, Justice Breyer wrote: "Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose."¹⁵¹ "Perhaps as a result," Justice Breyer wrote in his *Glossip* dissent, "(4) most places within the United States have abandoned its use."¹⁵² Justices Breyer and Ginsburg, staking out their position in the public arena and expressing their own concerns about prolonged stays on death row, specifically asked the full Court to take up the question of whether capital punishment is unconstitutional, asking for a "full briefing" on that "basic question."¹⁵³

When the U.S. Supreme Court finally takes up that fundamental question, a question it has not wrestled with since the 1970s, its members should also consider whether death sentences and executions qualify as acts of torture. Although the definition of *torture* in Article 1 of the Convention Against Torture has a "lawful sanctions" exception¹⁵⁴ (and many countries once classified the death penalty as lawful and, in effect, as *something other than torture*),¹⁵⁵ the death penalty—once the *mandatory* punishment for

147. *E.g.*, MARIE GOTTSCHALK, *GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 23 (2006) ("The United States is distinctive not only because of the existence of a vast punitive carceral state, but also because of the vast gap between criminal justice policies and politics on the one hand and empirical knowledge about crime and punishment on the other.").

148. JUSTICE STEPHEN BREYER, *AGAINST THE DEATH PENALTY* (2016).

149. *See Glossip v. Gross*, 135 S. Ct. 2726, 2755–78 (2015) (Breyer, J., dissenting).

150. *Id.* at 2776–77.

151. *Id.* at 2755–56.

152. *Id.* at 2756.

153. *Id.* 2755.

154. Convention Against Torture, *supra* note 53, at art. 1.

155. In the 18th century, when countries began doing away with judicial torture, the death penalty—not considered at the time under the rubric of torture—was restricted but stubbornly persisted, even in places where torture was abolished. *E.g.*, TIM BLANNING, *FREDERICK THE GREAT: KING OF PRUSSIA* 422 (2016) ("In 1748 [Frederick the Great] confirmed the death penalty for two members of a Silesian bandit gang, but complained that they were the ninth and tenth he had dispatched already and yet there were said to be fifty-odd more waiting his verdict."); 6 *THE CAMBRIDGE MODERN HISTORY* 728 (A. W. Ward,

murder and other crimes—is no longer lawful in Europe and in a number of countries and American states.¹⁵⁶ When the death penalty *is* imposed in retentionist states, often in a highly discretionary and *ad hoc* manner, it has the clear *indicia* and *immutable characteristics* of torture (*i.e.*, the infliction of severe pain, whether physical or mental, for purposes of punishment). It is also typically imposed in the most arbitrary fashion imaginable—something that, in and of itself, runs afoul of America’s equal protection and due process values¹⁵⁷ and the provision of the International Covenant on Civil and Political Rights (a treaty the U.S. has ratified) prohibiting one from being “arbitrarily deprived of his life.”¹⁵⁸

The modern death penalty must also be seen in the context of history and the abandonment of corporal punishments, such as lashing, within prisons. *Non-lethal* corporal punishments, history shows, were once lawful in

G. W. Prothero & Stanley Leathes eds., 1909) (“Frederick William II laid it down that, though the death penalty could not be abolished, there must under no circumstances be any deliberate increase of the physical pain necessary in its application. But the King’s gentleness of disposition was such that he was very imperfectly obeyed; and almost half a century passed before Prussian justice absolutely ceased, in certain cases, to direct that the bones of criminals should be broken on the wheel.”); LANGBEIN, *supra* note 7, at 27 (“Writing to Voltaire in 1777, Frederick the Great boasted that in the whole Prussian realm executions had been occurring at the rate of only fourteen or fifteen per year.”); G. W. F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 420 § 100 n.2 (Allen W. Wood ed. & H. B. Nisbet trans., 1991) (“The Emperor Joseph II of Austria (reigned 1765–1790) promulgated a new penal law in 1787 which substituted life imprisonment for the death penalty, but the death penalty was reinstated in 1795. The death penalty was retained in the French Penal Code of 1791, but only with restrictions and after a long and searching debate.”); WALTER W. DAVIS, *JOSEPH II: AN IMPERIAL REFORMER FOR THE AUSTRIAN NETHERLANDS* 110–11 (1974) (internal footnotes omitted):

[I]n his determination to abolish torture and restrict capital punishment, Joseph followed closely the precepts of Beccaria, onetime Tyrolean Chancellor Baron Hormayr von Hortenberg, and Sonnenfels. The latter, in fact, who had agitated ever since the appearance of the *Nemesis Theresiana* in 1768 for an end to torture, had seen his efforts succeed in 1776, thanks to Joseph’s decisive assistance. The death penalty was not completely abrogated during Joseph’s ten-year rule, but death sentences imposed on those convicted of capital crimes were commuted, in all cases but one, to consignment to the galleys or to chain gangs drawing heavily-laden barges up the Danube. These changes were not effected because of any soft-headed humanitarianism on the part of the Emperor but due to economic considerations coupled with the belief that the threat of lifelong suffering could be a great deterrent to crime than the fear of death.

156. ANDREW NOVAK, *THE GLOBAL DECLINE OF THE MANDATORY DEATH PENALTY: CONSTITUTIONAL JURISPRUDENCE AND LEGISLATIVE REFORM IN AFRICA, ASIA, AND THE CARIBBEAN*, ch. 1 (2014); ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 49 (5th ed. 2015).

157. E. THOMAS SULLIVAN & TONI M. MASSARO, *THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW* 41 (2013) (“When government policies or practices literally end a human life, procedural concerns are the most profound and the procedural protections are the most elaborate. The high-water mark for procedural protection therefore is triggered in cases that involve capital punishment.” (internal citation omitted)).

158. International Covenant on Civil and Political Rights art. 6(1), Mar. 23, 1976, 999 U.N.T.S. 171 (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”).

Western societies.¹⁵⁹ As Julius Ruff writes in *Violence in Early Modern Europe 1500–1800*:

Corporal punishment was routine for nonaristocratic perpetrators of relatively minor offenses like petty larceny, minor sexual offenses, swindling, and blasphemy; it might also be the fate of offenders deemed by their judges to be worthy of mercy in capital offenses. Often judges combined corporal punishments with other penalties such as banishment, but a large number of corporal punishments were possible.¹⁶⁰

Such antiquated punishments (*e.g.*, amputation, branding, whipping), however, are no longer permitted within the confines of prisons or judicial sentencing proceedings, at least in civilized societies.¹⁶¹ Just as various acts falling *short of death* have already appropriately earned the *torture* moniker,¹⁶² it is now time to reclassify capital punishment using the same

159. *E.g.*, THE OXFORD HANDBOOK OF THE HISTORY OF CRIME AND CRIMINAL JUSTICE 617 (Paul Knepper & Anja Johansen eds., 2016) (“Whipping, the stocks, branding, and amputation were all performed in public and mingled suffering with shame and humiliation.”); ELAINE PATRICIA JACKSON-RETONDO, PERCEPTIONS, EXPERIENCE AND MEANING OF A NINETEENTH CENTURY PRISON: THE MASSACHUSETTS STATE PRISON AT CHARLESTOWN, 1780–1850 at 94 (2001) (“Non-lethal corporal punishments were inflicted at two additional sites, both located on State Street A brightly painted whipping post distinguished one site while the other was identifiable by a pillory.”).

160. JULIUS R. RUFF, *VIOLENCE IN EARLY MODERN EUROPE 1500–1800* at 96 (2001). As Ruff adds of corporal punishments in early modern Europe:

The most severe of these, reserved for grave crimes, was physical mutilation, often applied to the body part associated with the crime, and so stigmatized the offender as to exclude him from respectable society. Some courts even ordered blinding of offenders, although by the sixteenth century the enforcement of this penalty seems to have been rare. More common was the amputation by ax of an offender’s hand, or perhaps fingers, by the public executioner.

161. *E.g.*, DREW D. GRAY, *CRIME, POLICING AND PUNISHMENT IN ENGLAND, 1660–1914* at 317 (2016) (taking note of “the abolition of public whipping and other physical non-lethal punishments” and the rise of the penitentiary system); DONALD R. CRESSEY, *Prison Organizations*, in *HANDBOOK OF ORGANIZATIONS* 1027 (James G. March ed., 2013) (“Prisons soon abandoned harsh corporal punishments and punitive labor as a regime for supplementing the suffering which mere incarceration was expected to produce.”).

162. *E.g.*, CHARLES FRIED & GREGORY FRIED, *BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR* 65 (2010) (“Waterboarding, in which the subject is tied to a board and either dunked in a tub of water or has water poured on a cloth covering his face so that he feels like he is drowning, is the most infamous of these practices. Waterboarding induces panic and for some the sense of near death, but properly controlled it has no injurious physical effects.”); *see also* MIRKO BAGARIC & JULIE CLARKE, *TORTURE: WHEN THE UNTHINKABLE IS MORALLY PERMISSIBLE* 12 (2007) (“Various methods of torture have and continue to be applied in a multitude of countries. The most common methods are beating, electric shock, rape and sexual abuse, mock execution or threat of death, and prolonged solitary confinement.”); TERANCE D. MIETHE & HONG LU, *PUNISHMENT: A COMPARATIVE HISTORICAL PERSPECTIVE* 41 (2005) (“As nonlethal corporal punishment, electric nodes are attached to sensitive body parts (*e.g.*, genitals) and volts of electricity are passed through the body. Torture through electric shock is most commonly used by military and quasi-military organizations, law enforcements personnel, and prison authorities for extracting confessions, maintaining discipline, and dispensing ‘justice.’”). *Compare id.* at 34 (“The particular means of inflicting corporal punishment are virtually limitless, restricted only by the imagination and standards of human decency. However, the methods of choice for torture and inflicting pain are also linked to customs, rituals, and the availability of technology within particular countries at particular times.”).

terminology.¹⁶³

The death penalty is, certainly, a more draconian punishment than non-lethal acts already properly classified as acts of torture. The U.S. Supreme Court, in failing to acknowledge and recognize the physical and psychological torture associated with death sentences and executions, has thereby created an unprincipled and unsustainable jurisprudence (1) whereby *non-lethal* punishments are prohibited, but *lethal* ones are not; and (2) in which the U.S. Constitution's Eighth Amendment, normally read to *protect* prisoners from torture and other harms, then *permits* their execution through torturous means.¹⁶⁴ In fact, the Constitutional Court of South Africa declared the death penalty unconstitutional *more than twenty years ago* in *State v. Makwanyane*.¹⁶⁵ And the Connecticut Supreme Court, in *State v. Santiago*,¹⁶⁶ took that step in 2015 in a decision explicitly recalling Cesare Beccaria's early American influence.¹⁶⁷ In Europe, Protocols No. 6 and No. 13 to the European Convention on Human Rights have expressly outlawed the death penalty's use *in both peacetime and wartime*, making capital punishment unlawful *in all circumstances* there.¹⁶⁸ Those protocols, adopted in 1983 and 2002 respectively, have made Europe a death penalty-free zone, except for scattered executions carried out by firing squad in Belarus.¹⁶⁹ The United States of America is an exceptional and extraordinary country, but there is nothing admirable about putting to death anyone through torturous means, be that torture physical or psychological in nature.

163. In the U.S., the death penalty's use is already outlawed for the insane, juvenile offenders, the intellectually disabled, and—at least in certain circumstances—those who did not kill or intend to kill. It is time for the U.S. Supreme Court to prohibit the death penalty's use in *all* circumstances, not just in *limited* circumstances. The right to be free from torture is a *universal* human right, and offenders—like everyone else—should be protected against acts of torture.

164. In *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court held that the government must provide for a prisoner's "basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety . . ." 489 U.S. 189, 200 (1989). In *Hope v. Pelzer*, the Court also described an inmate's mistreatment as an "obvious" Eighth Amendment violation where the inmate had been shackled to a hitching post for several hours in the hot sun without water, likely becoming dehydrated and sunburned. 536 U.S. 730, 731, 735 n.2 (2002).

165. Republic of South Africa v. Makwanyane 1995 (2) SA 1 (CC).

166. 122 A.3d 1, 31–32 (Conn. 2015).

167. As the Connecticut Supreme Court observed in its opinion: "Throughout the first half of 1786, the *New Haven Gazette* had reprinted Cesare Beccaria's entire 1764 treatise 'On Crimes and Punishments,' a seminal Enlightenment era work that condemned torture and the death penalty, and that led to widespread questioning of the latter throughout Europe and the United States." *Id.* at 38.

168. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Jan. 3, 1985, E.T.S. No. 114; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, Jan. 7, 2003, E.T.S. No. 187.

169. Rikard Jozwiak, *Belarus Carries Out First Execution This Year; EU Urges Moratorium*, RADIO FREE EUROPE/RADIO LIBERTY (May 6, 2017) <https://perma.cc/XSE6-NQNF>; Basia Cummings, *Belarus Resumes Executions After EU Sanctions Dropped*, THE GUARDIAN (Oct. 12, 2016) <https://perma.cc/7QYE-YDH5>.

IV. WHERE WE'VE BEEN, WHERE WE MIGHT BE GOING?

In the post-Enlightenment world, but especially since the end of World War II, lawyers and judges have struggled with how to classify executions and various methods of execution.¹⁷⁰ Back in the 19th-century, in *Wilkinson v. Utah* and *In re Kemmler*, the U.S. Supreme Court—in the face of legal challenges—upheld the constitutionality of public firing squads and the electric chair.¹⁷¹ But in 1963, as the number of American executions declined, U.S. Supreme Court Justice Arthur Goldberg tried to convince his colleagues that the death penalty was unconstitutional. He circulated a conference memo in that vein,¹⁷² and he managed to convince Justices William O. Douglas and William Brennan to join him in a dissent against the death penalty for non-homicidal rape. As Justice Goldberg began his 1963 dissent from the denial of certiorari in *Rudolph v. Alabama*:¹⁷³ “I would grant certiorari in the case . . . to consider whether the Eighth and Fourteenth Amendments to the United States Constitution permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life.”¹⁷⁴ While Justice Goldberg opened a conversation about capital punishment in the 1960s, he did not accomplish his goal of ridding America of the punishment of death. Still, the modern American dialogue began, just as Beccaria—the Italian *philosophe*—had opened up the death penalty for global discussion a full two centuries earlier.

In the 1970s, the U.S. Supreme Court actually *struck down* the death penalty as a violation of the Eighth and Fourteenth Amendments. The Supreme Court took that step in its historic ruling in *Furman v. Georgia*,¹⁷⁵

170. The cataclysmic events of World War II produced the U.N. Charter and the Universal Declaration of Human Rights—the foundations of modern international law and international human rights law. JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT* 1–4 (1999); *see also* SEYMOUR ROSSEL, *THE HOLOCAUST: THE WORLD AND THE JEWS, 1933–1945* at 16 (1992) (“As many as six million Jews died between 1939 and 1945, the years of the Holocaust.” (internal citation omitted)). The end of World War II, however, also produced the Nuremberg trials, which ended with ten men being hanged on October 15, 1946, from a gallows erected in a Nuremberg high school auditorium. JOHN RODDEN, *THE WALLS THAT REMAIN: EASTERN AND WESTERN GERMANS SINCE REUNIFICATION* 196 (2008); NORMAN J.W. GODA, *TALES FROM SPANDAU: NAZI CRIMINALS AND THE COLD WAR* 19–23 (2007); *see also* RICHARD E. HARWOOD, *NUREMBERG AND OTHER WAR CRIMES TRIALS: A NEW LOOK* 34 (1978) (“The executions took place in virtual secrecy, for they were deliberately bungled. The prisoners were given a short drop so that their necks would not be instantaneously broken and they would strangle slowly. The official timing between the springing of the trap and the extinction of life in the ten victims were Minutes 18, 24, 13, 10, 10½, 12, 14, 14, 16 and 11.”).

171. *Wilkinson v. Utah*, 99 U.S. 130, 134–35 (1878); *In re Kemmler*, 136 U.S. 436, 443–44 (1890).

172. Arthur J. Goldberg, *Memorandum to the Conference Re: Capital Punishment*, 27 S. TEX. L. REV. 493, 493–506 (1986); *see also* Arthur Goldberg & Alan Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1818–19 (1970).

173. 375 U.S. 889, 889 (1963) (Goldberg, J., dissenting).

174. GERSHMAN, *supra* note 120, at 117.

175. 408 U.S. 238, 239–40 (1972).

although the Court regrettably reversed course just a few years later, upholding the death penalty's constitutionality once more in *Gregg v. Georgia*¹⁷⁶ and leading to hundreds of more executions.¹⁷⁷ The U.S. Supreme Court has yet to take up whether prolonged stays on death row violate the Eighth Amendment prohibition against "cruel and unusual punishments."¹⁷⁸ But non-U.S. judicial systems have found that long sojourns on death row are extremely problematic (and violative of legal protections/human rights) in cases such as *Soering v. United Kingdom*,¹⁷⁹ the landmark judgment of the European Court of Human Rights. At the U.S. Supreme Court, Justices Stephen Breyer and Ruth Bader Ginsburg have themselves openly called upon the full Court to take up the question of whether prolonged delays on death row—the so-called "death row phenomenon"—make carrying out executions unconstitutional and unlawful.¹⁸⁰ While those calls have to date fallen on deaf ears, it only seems like a matter of time before the U.S. Supreme Court will feel compelled to take up that important legal issue.¹⁸¹ The sooner it does, the sooner it will be able to examine all the hard-and-fast evidence on that particular point.

If one examines the death penalty and its administration, the *psychological* torture associated with capital punishment is self-evident and undeniable. Even before *Furman*, the California Supreme Court—in a telling admission—itsself opined in its 1972 decision in *People v. Anderson*¹⁸²: "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." "Penologists and medical experts agree," that court determined, "that the process of

176. 428 U.S. 153, 186–87 (1976).

177. The Death Penalty Information Center has tracked the number of American executions that have taken place since *Gregg*. *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR., <https://perma.cc/7WGV-K6J9> (last updated Nov. 9, 2017).

178. U.S. CONST. amend. VIII.

179. [1989] 11 E.H.R.R. 439 (Eur. Ct. H.R.).

180. Chad Flanders, *Time, Death, and Retribution*, 19 U. PA. J. CONST. L. 431 (2016) (discussing the history of claims raising issues pertaining to lengthy confinement on death row); see also Michael Johnson, *Fifteen Years and Death: Double Jeopardy, Multiple Punishments, and Extended Stays on Death Row*, 22 B.U. PUB. INT. L.J. 85, 95 (2014) ("Almost every state with the death penalty, in fact, makes it mandatory to set an execution date within a few months after each appeal is lost. This results in multiple execution dates for most death row inmates and no way for them to know which will be their last.").

181. In the United States, legal claims based on the "death row phenomenon" have come to be called *Lackey* claims based on a 1995 memorandum respecting the denial of certiorari written by Justice John Paul Stevens. *Lackey v. Texas*, 514 U.S. 1045, 1045–46, n.* (1995) (Stevens, J., respecting denial of certiorari). Justice Stevens, who also wanted the full Court to consider the implications of the death row phenomenon, is now retired from the Supreme Court. Johnson, *supra* note 180, at 87–88.

182. 493 P.2d 880, 894 (Cal. 1972).

carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.”¹⁸³ Long before that, in the late-19th century case of *In re Medley*, the U.S. Supreme Court also emphasized in a moment of candor that “when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it”¹⁸⁴ A recent report of the Human Rights Clinic of the University of Texas School of Law, *Designed to Break You: Human Rights Violations on Texas’ Death Row*, specifically documents this cruelty and inhumanity as it lays out what it calls the “harsh and inhumane” conditions of confinement on that state’s death row.¹⁸⁵

Frankly, the death penalty—a vestige of the Dark Ages and medieval times—can no longer be seen as a legitimate criminal justice tool in the 21st century. *Non-lethal* corporal punishments have already been abandoned in Western penal systems, and maximum-security prisons now exist to protect society from violent offenders.¹⁸⁶ In *The Death Penalty as Torture*, I point out that *psychological torture* has already been found in the *non-state actor* context (including in existing death penalty states like Alabama) where a victim of torture “is in intense fear and is aware of, but helpless to prevent, impending death.”¹⁸⁷ If that exact same standard is applied in the *state actor* context, the death penalty does not withstand scrutiny—and it quickly becomes apparent that death sentences should be classed as a form of psychological torture. Clearly, the use of death sentences and death warrants put inmates in intense fear of death, not to mention the agony and uncertainty they create as to one’s ultimate fate.¹⁸⁸

183. *Id.*

184. *In re Medley*, 134 U.S. 160, 172 (1890).

185. Jacey Fortin, *Report Compares Texas’ Solitary Confinement Policies to Torture*, N.Y. TIMES, Apr. 26, 2017 (citing Human Rights Clinic, The University of Texas School of Law, *DESIGNED TO BREAK YOU: HUMAN RIGHTS VIOLATIONS ON TEXAS’ DEATH ROW* 5 (April 2017)); see also Corinna Barrett Lain, *Following Finality: Why Capital Punishment Is Collapsing under Its Own Weight*, in *FINAL JUDGMENTS: THE DEATH PENALTY IN AMERICAN LAW AND CULTURE*, at 40 (Austin Sarat ed., 2017) (“On death row, each condemned prisoner spends at least 22 hours a day, typically 23, within the confines of a windowless cell the size of a standard parking lot space Most are not allowed contact visits from family or friends. Death row inmates are typically allowed an hour or less of exercise each day, and typically that takes place in caged exercise pens akin to dog runs.”).

186. John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 BRIT. J. AM. LEGAL STUD. 297, 311 (2013).

187. See, e.g., *Shanklin v. Alabama*, 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.’” (emphasis in original; quoting *Norris v. Alabama*, 793 So.2d 847, 861 (Ala. Crim. App. 1999))).

188. E.g., Kathleen M. Flynn, *The “Agony of Suspense:” How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV.

When inmates are strapped down on lethal-injection gurneys, they are likewise utterly helpless to prevent their impending deaths.¹⁸⁹

The right to be free from torture is a *universal, non-derogable* right, and prisoners—like everyone else—should thus be protected from torturous acts. Both the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966—entered into force in 1976), in fact, clearly state: “*No one* shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹⁹⁰ If governments are permitted to torture offenders by subjecting them to threats of death, then what the world has is the *Almost Universal* Declaration of Human Rights, not the *Universal* Declaration of Human Rights. Human rights groups have long focused on ridding the world of torture, with Amnesty International citing the torture of prisoners of conscience in the opening sentence of a public appeal that launched the organization in 1961.¹⁹¹ But fundamental human rights, like the right to be free from torture, are not truly universal unless they apply to all people, regardless of the past behavior of such persons.¹⁹² What separates civilized societies from terrorists and torture-murderers is that civilized societies should not, themselves, resort to terror tactics and torture in an effort to accomplish some intended objective.

291, 332 (1997); see also *District Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1287 (Mass. 1980) (Braucher, J., concurring) (finding the death penalty to be unconstitutional under state law where “[i]t will be carried out only after agonizing months and years of uncertainty”). American death row inmates, for example, often receive multiple death warrants as their cases get appealed and go through the legal system. MICHAEL MELLO, *A TRUE STORY OF INNOCENCE ON DEATH ROW* 283 (2001). A recent Tweet of Sister Helen Prejean is telling: “Tonight is Tommy Arthur’s 8th execution date. That means he has prepared to die 8 times over his 33 years on death row.” Sister Helen Prejean, TWITTER (May 25, 2017), <https://perma.cc/PH58-TCQP>.

189. William W. Berry III, *Right About Wrongs? A Review of Fried & Fried’s Because It Is Wrong and the Implications of Their Arguments on the Use of Capital Punishment*, 44 CONN. L. REV. 1677, 1689–90 (2012) (“[T]he modern use of lethal injection possesses eerie similarities to the use of torture in that it depends on a helpless prisoner. It is the process—as much as the killing itself—that gives rise to the problematic moral nature of capital punishment.”); see also MATTHEW H. KRAMER, *TORTURE AND MORAL INTEGRITY: A PHILOSOPHICAL ENQUIRY* 38 (2014) (discussing helplessness as a component of torture).

190. Universal Declaration of Human Rights, art. 5, Dec. 10, 1948, <https://perma.cc/F3ZB-SX92> (emphasis added); International Covenant on Civil and Political Rights, *supra* note 158, at art. 7 (emphasis added).

191. ROD MORGAN & MALCOLM D. EVANS, *PROTECTING PRISONERS: THE STANDARDS OF THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE IN CONTEXT* 168 (1999).

192. SUSAN EASTON, *PRISONERS’ RIGHTS: PRINCIPLES AND PRACTICE* 7 (2011) (“The essential feature of rights is precisely that they are available to all, even those who appear to be less ‘deserving’ than others and therefore rights should not be linked to virtue. Because of their universal nature, rights protect those accused of the most heinous crimes . . .”). The use of torture actually says more about *the torturer* than it does about the past behavior of *the prisoner* because it is the torturer, not the prisoner, who engages in the torture in that moment. And whereas the prisoner’s behavior has *already occurred* and cannot be undone, one who tortures makes a conscious and deliberate choice to engage in torturous conduct *in the present*.

There is an existing *jus cogens* norm barring torture,¹⁹³ something jurists should clearly take into account as they adjudicate legal challenges to the death penalty. That peremptory, international law norm puts the absolute prohibition against torture on the same level as the international law prohibitions against genocide, slavery, and maritime piracy.¹⁹⁴ International norms, to be sure, only emerge over time, but the death penalty's days—if the abolitionist trend in the international community continues—appear to be numbered. The United States is the last highly industrialized Western representative democracy to make use of capital punishment, and the countries that still make frequent use of executions—places like China, North Korea, Saudi Arabia, and Iran—are authoritarian, non-democratic countries with extremely poor human rights records. “Not until World War II did the death penalty become a major issue on the human rights agenda,” writes Sangmin Bae in *When the State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment*.¹⁹⁵ Since that time, of course, much has happened in the realm of human rights discourse and activism. As Sangmin Bae explains: “With the increasing interest in human rights safeguards during the postwar period, the recognition of the ‘right to life’ as a normative objective gained momentum. The focus shifted from the state’s right to kill to a citizen’s right not to be executed by the state.”¹⁹⁶ “Over the years,” Bae observes, “international bodies have increasingly made statements and adopted policies favoring the abolition of capital punishment on human rights grounds.”¹⁹⁷

Through the years, a number of religious leaders, politicians, writers, and artists—people from all walks of life—have opposed the death penalty’s use. As Henry Schwarzschild writes of the history of efforts to abolish the death penalty in the foreword to Michael Radelet’s *Facing the Death Penalty: Essays on a Cruel and Unusual Punishment*: “The effort to abolish the death penalty is not new. It was begun in modern times in the Enlightenment (Cesare Beccaria, Benjamin Rush), but its antecedents go back at least to Talmudic times.”¹⁹⁸ “In the 1840s, it came close to succeeding in this country,” Schwarzschild explains of American anti-gallows activity, further emphasizing that major religious denominations, various human and civil

193. THOMAS WEATHERALL, *JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT* 233 (2015); see also Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15 EUR. J. INT’L L. 97 (2004).

194. BASSIOUNI, *supra* note 66, at 169.

195. SANGMIN BAE, *WHEN THE STATE NO LONGER KILLS: INTERNATIONAL HUMAN RIGHTS NORMS AND ABOLITION OF CAPITAL PUNISHMENT* 2 (2007).

196. *Id.*

197. *Id.*

198. Henry Schwarzschild, *Foreword*, in *FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT* at x (Michael L. Radelet ed., 1989).

rights organizations, as well as “thoughtful lawyers, physicians, writers, academics, artists, and community activists all over the country” have opposed executions.¹⁹⁹ As death penalty expert Michael Radelet, a sociologist at the University of Colorado Boulder, himself stresses: “Few people close to the condemned count themselves as death penalty retentionists: even prison wardens have been known to call for universal abolition.”²⁰⁰ “The survival of such a primitive rite has been made possible only by the thoughtlessness or ignorance of the public” writer Albert Camus once offered on the subject of the penalty of death.²⁰¹ Although anti-death penalty campaigns used to be focused on particular localities or countries, with individual citizens speaking out against the gallows,²⁰² the anti-death penalty movement is now decidedly *global* in nature, as it should be.²⁰³

V. CONCLUSION

It is hard to know what the tipping point (to use the title of Malcolm Gladwell’s book)²⁰⁴ will be. But the law of torture, which already prohibits acts of psychological torture along with acts of physical torture, seems poised to evolve to prohibit the death penalty’s use in all circumstances. Just as the U.S. Constitution’s Eighth Amendment has been read since *Trop v. Dulles* to “draw its meaning from the evolving standards of decency that

199. *Id.* at x–xi.

200. FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT 4 (Michael L. Radelet ed., 1989) (internal citations omitted).

201. MARK COSTANZO, JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY 15 (1997).

202. In the United States, anti-gallows societies were first formed in individual states before the first national anti-death penalty organization, the American Society for the Abolition of Capital Punishment, was founded in 1845. In the 1830s, state legislatures frequently received petitions from ordinary citizens seeking the death penalty’s abolition. CAPITAL PUNISHMENT 14 (James A. McCafferty ed., 1972). In the U.S., anti-gallows poetry was popular in the 1840s, though the Civil War put a damper on the anti-gallows campaign. JONES, *supra* note 16, at 57; Bessler, *The Italian Enlightenment and the American Revolution*, *supra* note 67, at 182; cf. H. Bruce Franklin, *Billy Budd and Capital Punishment: A Tale of Four Centuries*, in DEMANDS OF THE DEAD: EXECUTIONS, STORYTELLING, AND ACTIVISM IN THE UNITED STATES 117 (Katy Ryan ed., 2012) (“From the mid-1850s through the Civil War, the movement to abolish the death penalty was overwhelmed by the movement against slavery. When revived in the late 1860s, the anti-capital-punishment movement often seemed to its adherents to be part of inexorable global progress.”). The Washington, D.C.-based National Coalition to Abolish the Death Penalty was founded much more recently, in 1976, and has 140 national, state, and local affiliates. LOUIS J. PALMER, JR., ENCYCLOPEDIA OF CAPITAL PUNISHMENT IN THE UNITED STATES 380 (2d ed. 2008).

203. The French NGO, Together Against the Death Penalty (*Ensemble contre la peine de mort-ECPM*), was founded in 2000. *Ensemble contre la peine de mort (ECPM)*, WORLD COAL. AGAINST THE DEATH PENALTY <https://perma.cc/6TQ7-QJQR> (last visited Nov. 9, 2017). The World Coalition Against the Death Penalty, which brings together those committed to abolishing capital punishment, was formed in Rome in May 2002 and has become a major force in the fight against the punishment of death. PALMER, JR., *supra* note 26, at 282.

204. MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE (2000).

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mark the progress of a maturing society,”²⁰⁵ the prohibition against torture should be read in the 21st century to bar torturous practices such as capital punishment. The evolving standards approach, adopted in an opinion written by Harry Blackmun, led the U.S. Court of Appeals for the Eighth Circuit, in its 1968 decision in *Jackson v. Bishop*,²⁰⁶ to bar *the lashing* of Arkansas prisoners—a practice rooted in slavery²⁰⁷ that was once tolerated in American life.²⁰⁸ Similarly, although the use of death sentences and executions was once seen as a lawful sanction, that antiquated societal norm should be replaced by a new norm: an international law standard prohibiting the death penalty under all circumstances as part of the existing *jus cogens* norm barring torture.

The abolitionist movement continues apace, with individuals bearing the responsibility of bringing it to a successful conclusion. Although the law already recognizes universal human rights, it is up to people—and to legal systems—to safeguard and to vigilantly protect those rights. Notably, South Africa’s Christof Heyns, a Professor of Human Rights Law at the University of Pretoria and a former U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions,²⁰⁹ has devised what he calls a “struggle theory” of human rights.²¹⁰ As one commentator describes it: “In his *struggle theory of human rights* Christof Heyns develops a comprehensive account of both the historical origins and contemporary functions of human rights based on the notion of a direct symmetry between human rights and the principle of legitimate resistance to abuses of power.”²¹¹ The struggle approach, Heyns himself emphasizes, may be captured in the equation *human rights = legitimate resistance*, with struggle being the ultimate guarantor of human rights and with human rights finding their own roots in the struggles throughout history for the values that underlie those rights.²¹² If the abolition movement is to be successful, opponents of capital punishment will have to continue to struggle—in the courts and before legislative bodies—to achieve their objective: to put an end to a torturous practice that

205. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

206. 404 F.2d 571 (8th Cir. 1968).

207. KYLE HARPER, *SLAVERY IN THE LATE ROMAN WORLD, AD 275–425* at 229–30 (2011) (discussing the practice of lashing slaves); DAVID A. E. PELTERET, *SLAVERY IN EARLY MEDIAEVAL ENGLAND: FROM THE REIGN OF ALFRED UNTIL THE TWELFTH CENTURY* 92–93, 101 (1995) (same).

208. *AMERICAN SLAVERY AS IT IS: TESTIMONY OF A THOUSAND WITNESSES* 18, 20 (1839).

209. *Mr. Christof Heyns*, UNITED NATIONS: HUMAN RIGHTS: OFFICE OF THE HIGH COMM’R, <https://perma.cc/7LA6-GFJ3> (last updated 2017).

210. Christof Heyns, *The “Struggle Approach” to Human Rights*, in *HUMAN RIGHTS, PEACE AND JUSTICE IN AFRICA: A READER* 17 (C. Heyns & K. Stefinszyn eds., 2006).

211. *THE LOCAL RELEVANCE OF HUMAN RIGHTS* 355 (Koen De Feyter, Stephan Parmentier, Christiane Timmerman & George Ulrich eds., 2011) (emphasis in original).

212. Christof Heyns, *A “Struggle Approach” to Human Rights*, in *PLURALISM AND LAW*, ch. 10 (Arend Soeteman ed., 2001).

runs afoul of core human rights values such as human dignity and the rights to life and to be free of torture and inhuman and degrading treatment and punishment.