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# Taking Psychological Torture Seriously: The Torturous Nature of Credible Death Threats and the Collateral Consequences for Capital Punishment

John Bessler

*University of Baltimore School of Law*, [jbessler@ubalt.edu](mailto:jbessler@ubalt.edu)

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**Taking Psychological Torture Seriously:  
The Torturous Nature of Credible Death Threats  
and the Collateral Consequences for Capital Punishment**

*By John D. Bessler\**

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\* Associate Professor, University of Baltimore School of Law; Adjunct Professor, Georgetown University Law Center; Visiting Scholar/Research Fellow, Human Rights Center, University of Minnesota Law School (Spring 2018); Of Counsel, Berens & Miller, P.A., Minneapolis, Minnesota.

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## I. Introduction

The modern definition of *torture* makes clear that torture can be either physical or psychological in nature.<sup>1</sup> The U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which entered into force in 1987<sup>2</sup> and which the U.S. ratified in 1994, defines torture in just those terms.<sup>3</sup> In particular, that convention defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for a prohibited purpose, such as to obtain a confession or to punish.<sup>4</sup> The Inter-American Convention to Prevent and Punish Torture likewise defines torture “to be any act intentionally

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1 The OXFORD ENGLISH DICTIONARY (1971) defines torture as “severe or excruciating pain or suffering (of body or mind).” Accord DAVID LUBAN, TORTURE, POWER, AND LAW 116 (2014); WMA Declaration of Tokyo, WORLD MED. ASS’N (Mar. 22, 2017), <https://www.wma.net/policies-post/wma-declaration-of-tokyo-guidelines-for-physicians-concerning-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment-in-relation-to-detention-and-imprisonment/> (“For the purpose of this Declaration, torture is defined as the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authority, to force another person to yield information, to make a confession, or for any other reason.”). The World Medical Association’s Declaration of Tokyo was originally adopted by the 29th World Medical Assembly in Tokyo, Japan, in October 1975. *Id.*; see also BONITA MEYERSFELD, DOMESTIC VIOLENCE AND INTERNATIONAL LAW 78 (2010) (“The traditional definition of torture contains four elements: severe pain and suffering, whether mental or physical; intent; purpose; and state involvement.”).

2 A total of 163 countries are parties to the convention. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, 1465 U.N.T.S. 85, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en) (listing parties).

3 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, 1465 U.N.T.S. 113 [hereinafter “Convention Against Torture” or “CAT”]; JENNIFER K. ELSEA ET AL., THE TREATMENT OF PRISONERS: LEGAL, MORAL OR CRIMINAL? 211 (Ralph D. McPhee ed., 2006) (noting that the U.S. “signed CAT on April 18, 1988, and ratified the Convention on October 21, 1994, subject to certain declarations, reservations, and understandings”).

4 CAT, *supra* note 3, at art. 1. Cf. Rome Statute of the International Criminal Court art. 7(2)(e), July 17, 1998 (“‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”); David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 L. & INEQ. 343 (2011) (discussing the definition of torture).

performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose.”<sup>5</sup>

Death threats, because of their unlawful and invidious nature<sup>6</sup> and their potentially coercive effects, normally have significant, adverse legal consequences.<sup>7</sup> They may result in the evidentiary exclusion of confessions obtained through such means,<sup>8</sup> amount to persecution,<sup>9</sup> or lead to civil liability, whether for intentional

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- 5 Organization of American States, Inter-American Convention to Prevent and Punish Torture art. 2, Dec. 9, 1985, O.A.S.T.S. No. 67. “Torture,” that convention continues, “shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.” *Id.* As that convention further provides: “The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.” *Id.*
- 6 See *Lacey v. Allstate Indemnity Co.*, No. 2:12-cv-02051-SGC, 2015 WL 875379, at \*7 n.7 (N.D. Ala. Mar. 2, 2015) (“‘barbaric means’ included death threats toward the plaintiff and his children”).
- 7 1 ENCYCLOPEDIA OF DEATH AND THE HUMAN EXPERIENCE 553 (Clifton D. Bryant & Dennis L. Peck eds., 2009) (“In general, a death threat is not protected speech if there is intent to follow through with the threat. Other factors are considered in determining an unlawful death threat, such as the context in which the threat occurred and whether the target is fearful of serious harm. The means by which an illegal death threat can be communicated include speech, telecommunications, mail, e-mail, and the Internet.”).
- 8 See *United States v. Jenkins*, 938 F.2d 934, 937 (9th Cir. 1991) (“the beatings and death threats alone were sufficient to make the initial confession coerced”); *id.* at 940 (“the implicit threat of a repetition of the beatings and the fear that the police might make good on their twice-promised death threat were sufficient to render Jenkins’s 2:00 a.m. confession coerced”); *Browner v. State*, 765 S.E.2d 348, 352 (Ga. 2014) (“Physical or mental torture is the type of fear of injury that prevents a confession from being admissible . . . .”); DAVID H. KAYE ET AL., *THE NEW WIGMORE: A TREATISE ON EVIDENCE, Expert Evidence* § 8.8.3(5)(ii) (2d ed. 2018) (“A credible death threat is an enormous risk factor for confessions in general—when this factor is present, a confession is much more likely to occur . . . .”).
- 9 *Loptyeva v. Sessions*, 704 F. App’x 677, 678 (9th Cir. 2017) (citation omitted) (finding that “a ‘specific and menacing death threat’ from a police official” is “‘strong evidence of persecution’”); *Marcos v. Gonzales*, 410 F.3d 1112, 1119 (9th Cir. 2005) (“Credible death threats . . . can support a finding of past persecution.”); *Corado v. Ashcroft*, 384 F.3d 945, 947–48 (8th Cir. 2004) (a “specific, credible, and immediate” death threat can

infliction of emotional distress (“IIED”),<sup>10</sup> by creating a hostile work environment,<sup>11</sup> or otherwise.<sup>12</sup> For example, threats of murder<sup>13</sup>

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constitute persecution); *Cordon-Garcia v. INS*, 204 F.3d 985, 991 (9th Cir. 2000) (“threats of violence and death are enough” to establish persecution); *see also Singh v. Lynch*, 637 F. App’x 320 (9th Cir. 2016) (“Credible death threats, combined with an actual assassination attempt shortly thereafter, substantially supports a finding of past persecution. Therefore, Singh has unquestionably demonstrated that he suffered past persecution . . . .”); *Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732 (8th Cir. 2013) (“Persecution ‘includes the credible threat of death, torture, or injury to one’s person or liberty on account of a protected ground,’ but does not include ‘low-level intimidation and harassment.’” (citing *Matul-Hernandez v. Holder*, 685 F.3d 707, 711 (8th Cir. 2012))); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004) (“Persecution may be emotional or psychological, as well as physical.”); *id.* at 1121 (“Viewed cumulatively, Zakia’s evidence of a death threat, violent physical attacks against her husband and sons, a near-confrontation with a violent mob, vandalism, economic harm and emotional trauma compels a finding of past persecution.”); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1243 (9th Cir. 1999) (death threats against prosecutor were on account of his political opinion, supporting claim of a well-founded fear of persecution).

- 10 *Bobola v. F/V Expectation*, 204 F. Supp. 3d 382 (D. Mass. 2016) (“[A]llegations involving extreme or outrageous threats, such as death threats, can be sufficient to state a claim for IIED.”); *Denton v. Silver Stream Nursing & Rehab. Ctr.*, 739 A.2d 571, 577 (Pa. Super. Ct. 1999) (holding that death threats by a coworker, who was found to be in possession of a firearm at work, stated an IIED claim).
- 11 *Pryor v. United Air Lines, Inc.*, 791 F.3d 488, 496–97 (4th Cir. 2015) (a death threat left for an airline employee in a secure, restricted space, along with the “ample evidence” that the employee was “subjectively terrified after receiving the threats,” were sufficient to find a hostile work environment); *Allen v. Mich. Dep’t of Corr.*, 165 F.3d 405, 411 (6th Cir. 1999) (holding that a hostile work environment existed where the individual received a threatening letter that contained a death threat; the note was signed by the “KKK” and contained a reference to lynching, a drawing of a stick figure with a noose around its neck). Those making death threats to coworkers are subject to termination of employment. *Stephenson v. Amsted Industries Inc.*, No. 09-CV-12267, 2010 WL 5894939, at \*7 (E.D. Mich. Oct. 13, 2010) (“[S]everal courts have held that death threats against coworkers constitute a legitimate nondiscriminatory reason for termination . . . .” (citing *Smith v. Leggett Wire Co.*, 220 F.3d 752, 759 (6th Cir. 2000))).
- 12 Death threats—it has been written—“are not ‘acts which merely constitute harassment, disrespectful or disparate treatment, a hostile work environment, humiliating criticism, intimidation, insults or other indignities.’” *Turley v. ISG Lackawanna, Inc.*, 803 F. Supp. 2d 217, 255 (W.D.N.Y. 2011) (quoting *Lydeatte v. Bronx Overall Econ. Dev. Corp.*, No. 00 Civ. 5433, 2001 WL 180055, at \*2 (S.D.N.Y. Feb. 22, 2001)).
- 13 *Amouri v. Holder*, 572 F.3d 29, 33 (1st Cir. 2009) (citation omitted) (“To establish persecution, an alien must demonstrate that the harm (whether



or putting a gun to one's head as part of a threat to kill can be compelling evidence of past persecution.<sup>14</sup> Death threats can also lead to the dismissal of a civil case,<sup>15</sup> result in criminal prosecutions and convictions,<sup>16</sup> show consciousness of guilt for an underlying

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actual or feared) is more than the sum total of ordinary harassment or mistreatment. We need not probe that point too deeply; this case involves claimed threats of murder—and threats of murder easily qualify as sufficiently severe harm.”); *Lin Un v. Gonzales*, 415 F.3d 205, 210 (1st Cir. 2005) (citing *Aguilar-Solis v. INS*, 168 F.3d 565, 570 (1st Cir. 1999)) (“It seems to us that credible verbal death threats may fall within the meaning of ‘persecution.’ We have indicated that a threat to life could amount to persecution.”).

- 14 *Singh v. Holder*, 585 F. App'x 530, 531 (9th Cir. 2014) (“Singh’s statement that the KLF members held a gun to his head when they threatened him was a particularly important aspect of his claim to consider in assessing whether he had experienced past persecution.”).
- 15 *Kalwasinski v. Ryan*, No. 96-cv-6475, 2007 WL 2743434, at \*2 (W.D.N.Y. Sept. 17, 2007) (“Death threats directed at an opposing party and a witness are sufficiently serious to warrant the sanction of dismissal.”); *see also* *Michael v. Boutwell*, 138 F. Supp. 3d 761, 785 (N.D. Miss. 2015) (“When considering whether dispositive relief is an appropriate sanction for witness intimidation, other courts have considered: (1) the nature of the threat; (2) whether the threat is likely to have a chilling effect on testimony; (3) whether the threats ‘are the result not of malice but of mental illness;’ and (4) whether the threats are the only instance of improper litigation conduct.”).
- 16 *United States v. Mann*, No. 99-4115, 2000 WL 372243 (8th Cir. Apr. 12, 2000) (affirming conviction for mailing threatening letter to the President of the United States); *Li v. Shelhamer*, No. 5:12-CV-1435 (LEK/DEP), 2013 WL 4483081, at \*1 (N.D.N.Y. Aug. 20, 2013) (following a jury trial, a person was convicted of eleven counts of transmitting death threats in violation of 8 U.S.C. § 875 and sentenced to 114 months in prison); *Baldwin v. Commonwealth*, No. 0740-17-4, 2018 WL 3430995, at \*1 (Va. Ct. App. July 17, 2018) (affirming conviction following man’s guilty plea for sending written threat to kill or do bodily harm to woman and her daughter); *State v. Cameron*, No. 48619-9-II, 2017 WL 2365118, at \*1 (Wash. Ct. App. May 31, 2017) (affirming conviction for “felony harassment-death threats”); *see also* *Radford v. State*, 538 S.W.3d 894, 895 (Ark. Ct. App. 2018) (citation omitted) (“A person commits the offense of first-degree terroristic threatening if, with the purpose of terrorizing another person, he or she threatens to cause death or serious physical injury to another person.”); *State v. Robb*, 723 N.E.2d 1019, 1034–35 (Ohio 2000) (“Defendant’s threats to kill a guard or cut off a guard’s hand helped prove his intent to kill . . .”).

offense,<sup>17</sup> create a conflict of interest,<sup>18</sup> and lead to aggravated sentences.<sup>19</sup>

Because of their severity, credible death threats have been found to be torturous in nature,<sup>20</sup> with the Convention Against

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- 17 *United States v. Castleman*, 795 F.3d 904, 915 (8th Cir. 2015) (citations omitted) (“[E]vidence of death threats against witnesses . . . is generally admissible against a criminal defendant to show consciousness of guilt of the crime charged.”); *State v. Diggins*, 836 N.W.2d 349, 357 (Minn. 2013) (citations omitted) (“Evidence of a threat made by the defendant against a witness is relevant to show the defendant’s ‘consciousness of guilt.’”).
- 18 *Locascio v. United States*, 395 F.3d 51, 57 (2d Cir. 2005) (“[N]o one would question that a credible death threat from a co-defendant ordering a lawyer to sacrifice a client’s interests constitutes an actual conflict of interest.”); *People v. Avila*, 119 Cal. Rptr. 3d 657, 663 (Cal. Ct. App. 2011) (“Here, there was a credible death threat resulting in the filing of new criminal charges against appellant. The public defender is both the named victim and a necessary witness at any trial on those charges. The trial court properly concluded that the removal of the public defender and the appointment of conflict counsel was an appropriate way to proceed.”); *State v. Barrett*, No. M2009-02636-CCA-R3-CD, 2012 WL 2870571, at \*34 (Tenn. Crim. App., July 13, 2012) (“[E]vidence of the Defendant’s statements about having killed before and his threats to kill other inmates was admissible.”).
- 19 *United States v. Dougherty*, 632 F. App’x 993, 995 (11th Cir. 2015) (“In explaining why an upward variance was warranted in this case, the district court also noted that it had considered the death threats made to bank customers and employees . . . .”); *United States v. Sogan*, 388 F. App’x 521, 523 (6th Cir. 2010) (“This court has repeatedly held that notes containing the statement, ‘I have a gun,’ qualify for the enhancement for threats.”); *United States v. Hunn*, 24 F.3d 994, 999 (7th Cir. 1994) (“[T]he district court properly enhanced Hunn’s sentence under U.S.S.G. § 2B3.1(b)(2)(F) for his death-threats made during the bank robbery.”); *Perkins v. State*, 559 N.W.2d 678, 692 (Minn. 1997) (“The sentencing judge found ‘particular cruelty’ in Perkins’ death threats to A.L. and her children . . . .”); *State v. Brown*, No. A15-0108, 2016 WL 281072, at \*1–2 (Minn. Ct. App. Jan. 25, 2016) (“The PSI identified aggravating factors, including . . . appellant’s threats against her family . . . .”); *State v. Jackson*, 596 N.W.2d 262, 267 (Minn. Ct. App. 1999) (finding “multiple aggravating factors,” including holding gun to victim’s head and threatening to kill her, made defendant’s crimes “severe”; “death threats and use of handcuffs, and the psychological impact of his crimes” justified “a double-duration departure from the sentencing guidelines”).
- 20 CONGRESSIONAL RESEARCH SERVICE, 7-5700, R40139, CLOSING THE GUANTANAMO DETENTION CENTER: LEGAL ISSUES 25 (2009) (“In November 2008, a military commission judge ruled that statements made by a detainee to U.S. authorities were tainted by his earlier confession to Afghan police hours before, which had purportedly been made under threat of death. The judge concluded that the coercive effects of the death threats producing the detainee’s first confession had not dissipated by the time of



Torture itself barring the use of any statement made as a result of torture.<sup>21</sup> The right to be free from torture is a universal, non-derogable right,<sup>22</sup> and not even prisoners or heinous offenders can be subjected to torturous treatment or punishment.<sup>23</sup> As both

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the second. Subsequently, a federal *habeas* court ruled that ‘every statement made by the detainee since his arrest [was] a product of torture. . . .’ (citing *United States v. Jawad*, D-021 (Nov. 19, 2008)).

- 21 CAT, *supra* note 3, at art. 15 (“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”).
- 22 G.A. Res. 2200 (XXI), International Covenant on Civil and Political Rights, art. 7 (Dec. 16, 1966) [hereinafter “ICCPR”] (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 5 (Dec. 10, 1948) [hereinafter “Universal Declaration of Human Rights”] (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”). *See also* G.A. Res. 3452 (XXX), annex, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at art. 3 (Dec. 9, 1975) [hereinafter “Declaration on the Protection of All Persons”] (“No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.”); ICCPR, *supra*, at art. 4(2) (“No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”); Daniel O’Donnell, *The Obligation to Establish Sentences for Torture that Are Commensurate with the Gravity of the Offense*, 22 BUFF. HUM. RTS. L. REV. 95, 96 (2015) (citation omitted) (“The prohibition of torture is *ius cogens*—a peremptory norm that applies to all members of the international community, independently of their treaty obligations. One of the many obligations concerning torture recognized by international law is that of criminalizing torture and making it ‘punishable by appropriate penalties which take into account [the] grave nature’ of this crime.”).
- 23 HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 204 (2003) (“The ICCPR is the most comprehensive international human rights treaty the United States has ratified and it includes provisions explicitly intended to protect prisoners from abuse or mistreatment. Under ICCPR article 7, no one ‘shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ The prohibition against such abusive treatment applies to prison authorities, governing both actions against individual prisoners as well as the overall conditions of confinement in which prisoners live.”). *Cf. Roper v. Simmons*, 543 U.S. 551, 560 (2005) (“By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.”). The Grand Chamber of the European Court of Human Rights has held on multiple occasions

the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (“ICCPR”) make clear: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>24</sup> While courts have not always found death threats to be credible or to amount to torturous conduct,<sup>25</sup> threats that place individuals in great fear can (and often have been found to) constitute acts of mental or psychological torture.<sup>26</sup>

With credible death threats producing psychological terror already treated as torturous in nature, this article explores what the collateral consequences are for capital prosecutions and death sentences.<sup>27</sup> After all, death threats are ordinarily unlawful<sup>28</sup> and

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that the prohibition against torture makes for no exceptions. *E.g.*, *El-Masri v. Former Yugoslav Republic of Maced.*, App. No. 39630/09, Eur. Ct. H.R. ¶ 195 (2012).

- 24 Universal Declaration of Human Rights, *supra* note 22, at art. 5; ICCPR, *supra* note 22, at art. 7.
- 25 *See Velasco v. Holder*, 436 F. App’x 379, 379 (5th Cir. 2011); *Salan-Espinoza v. Holder*, 446 F. App’x 833, 834 (9th Cir. 2011). A finding of torture requires a case-by-case examination, and factfinders must sort through whether acts, including particular threats, rise to the level of torture or not. Seth Lowry, *Truth Be Told: Truth Serum and Its Role in the War on Terror*, 20 REGENT U. L. REV. 337, 348–50 (2008) (“[C]ourts have opted to analyze torture claims on a case-by-case basis and usually base their decision on the gruesomeness, intensity, or shock value of the treatment alleged . . .”).
- 26 JOHN D. BESSLER, *THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION* 218 (2017) (“[T]he Tennessee Supreme Court noted of ‘threats to kill’ that ‘the anticipation of physical harm to one’s self or a loved one constitutes mental torture.’”); *id.* (discussing the interrogation of criminal suspects who were suffocated with plastic bags and had loaded guns pointed at their heads during rounds of Russian roulette).
- 27 *Collateral consequences*—in ordinary parlance—“are the legal disabilities that attach as an operation of law when an individual is convicted of a crime but are not part of the sentence for the crime.” CLAIR A. CRIPE ET AL., *LEGAL ASPECTS OF CORRECTIONS MANAGEMENT* 505 (3d ed. 2013). “Examples of collateral consequences include the denial of government issued licenses or permits, ineligibility for public services and public programs, and the elimination or impairment of civil rights.” *Id.* In this article, the *collateral consequences* terminology is employed in a slightly different manner. It refers here to the consequences flowing from the fact that death threats are already treated by the law as illegal, cruel, and torturous acts.
- 28 Death threats are serious offenses. *E.g.*, 18 U.S.C. § 871 (1994) (“Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect,

capital charges and death sentences are, at bottom, nothing more than state-sponsored threats of death.<sup>29</sup> While the Convention Against Torture has a “lawful sanctions” exception to torture,<sup>30</sup> and while the death penalty remains on the books in certain nations and locales at this point in time,<sup>31</sup> if death threats, because of their immutable characteristics, qualify as acts of torture, then that fact should logically have serious implications for death penalty jurisdictions. The world’s nations, by signing and ratifying the Convention Against Torture, have collectively agreed to prevent and criminalize torture in all forms.<sup>32</sup> Indeed, torture has, for decades,

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or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined under this title or imprisoned not more than five years, or both.”).

- 29 Proponents of capital punishment frequently ground their defense of it on the idea that the threat of death may deter crime. Glenn M. Bieler, *Death Be Not Proud: A Note on Juvenile Capital Punishment*, 7 N.Y.L. SCH. J. HUM. RTS. 179, 179 (1990) (“Proponents claim the threat of death deters severe criminal behavior.”). In fact, the death penalty has *not* been shown to be a greater deterrent to violent crime than life-without-parole sentences. See NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, *DETERRENCE AND THE DEATH PENALTY* (2012) (reviewing three decades of research and concluding that the research on the effect of capital punishment on homicide is not informative about whether capital punishments decreases, increases or has no effect on homicide rates).
- 30 The definition of *torture* in the Convention Against Torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” CAT, *supra* note 3, at art. 1(1).
- 31 *Facts About the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated Sept. 17, 2018) (listing death penalty and non-death penalty states); *The Death Penalty in 2016: Facts and Figures*, AMNESTY INTERNATIONAL (Apr. 11, 2017), <https://www.amnesty.org/en/latest/news/2017/04/death-penalty-2016-facts-and-figures/> (giving statistics on the death penalty’s use worldwide).
- 32 The Convention Against Torture provides: “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” CAT, *supra* note 3, at art. 2(1). “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” CAT, *supra* note 3, at art. 2(2). “An order from a superior officer or a public authority may not be invoked as a justification of torture.” CAT, *supra* note 3, at art. 2(3). The Convention Against Torture also provides: “Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.” CAT, *supra* note 3, at art. 4(1); *see also*

been universally prohibited by international law and been seen by U.S. courts as a clear violation of the “law of nations.”<sup>33</sup>

Although judges seem to have no difficulty identifying and condemning physical torture,<sup>34</sup> they have been more reticent to recognize psychological forms of torture, at least in certain contexts.<sup>35</sup> This article argues that twenty-first century jurists need, at long last, to take psychological torture seriously. And in the death penalty

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CAT *supra* note 3, at art. 4(2) (“Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”). “CAT claims require the adjudicator to consider the possibility of future torture.” *Saleh v. Sessions*, No. 18-3212, 2018 WL 5304812, at \*3 (6th Cir. Oct. 25, 2018) (citation omitted); *accord* *Gomez-Domingo v. Sessions*, No. 16-2669, 2018 WL 4492433, at \*2 (2d Cir. Sept. 19, 2018) (“The agency must consider ‘all evidence relevant to the possibility of future torture’ . . . .”) (quoting 8 C.F.R. § 1208.16(c)(3) (2018)); *Bartolome v. Sessions*, 904 F.3d 803, 808 (9th Cir. 2018) (“During the reasonable fear determination, the asylum officer elicits ‘all information relating both to fear of persecution and fear of torture.’”) (quoting *Reasonable Fear of Persecution & Torture Determinations*, INS AOBT 8/6/2008, at \*21, 2008 WL 7226112 (Aug. 6, 2008)).

33 *E.g.*, *Filártiga v. Peña-Irala*, 630 F.2d 876, 884–85 (2d Cir. 1980) (“[O]fficial torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens . . . . [I]nternational law confers fundamental rights upon all people vis-a-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them.”).

34 “One of the reasons physical torture is constitutionally out of the question,” one legal commentator has noted, “is that the constitution protects bodily integrity against invasion and physical torture always involves such an invasion.” JEREMY WALDRON, *TORTURE, TERROR AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE* 240 (2010) (citing the work of Seth Kreimer). In 2008, the Nebraska Supreme Court forthrightly declared the electric chair to be unconstitutional and torturous in nature. “[S]ome prisoners will be tortured during electrocutions,” the court ruled, noting that “unconsciousness and death are not instantaneous for many condemned prisoners” and that “[t]hese prisoners will, when electrocuted, consciously suffer the torture that high voltage electric current inflicts on the human body.” *State v. Mata*, 745 N.W.2d 229, 270, 279 (Neb. 2008).

35 Sean Kevin Thompson, *The Legality of the Use of Psychiatric Neuroimaging in Intelligence Interrogation*, 90 CORNELL L. REV. 1601, 1625 (2005) (“Thus far, cases of mental torture tend to be limited to severe forms of mental suffering occasioned by actions such as mock execution or threatened dismemberment or castration.”) (citing War Crimes Documentation Cent., U.S. Dep’t of the Army, Report on Iraqi War Crimes (Desert Shield/Desert Storm) 8 (1992) (unclassified version), reprinted in U.N. SCOR, 48th Sess., at 16–18, U.N. Doc. S/25441 (1993)).



context, that means recognizing capital prosecutions and death sentences for what they are: torturous threats of death.<sup>36</sup> Death threats and mock executions, both of which inflict trauma and severe pain and suffering, are already classified as psychological torture,<sup>37</sup> and many sources,<sup>38</sup> including a U.N. guide to investigating torture,

36 Death threats are made in many contexts for a wide variety of reasons. *E.g.*, U.S. DEP'T OF STATE, 110TH CONGRESS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2007, 568, 2402, 2590, 2593, 2615, 2664, 2666 (Joint Comm. Print 2008) (describing anonymous death threats against journalists, human rights activists and a political cartoonist); SARA SCHATZ, IMPACT OF ORGANIZED CRIME ON MURDER OF LAW ENFORCEMENT PERSONNEL AT THE U.S.-MEXICAN BORDER 83 (2014) (describing death threats by organized crime elements); THE SAGE ENCYCLOPEDIA OF TERRORISM 200 (Gus Martin ed., 2d ed. 2011) (“One of the most famous ‘death’ fatwas in modern times was the 1989 decree issued by the Ayatollah Ruhollah Khomeini, the then leader of the Islamic Republic of Iran, calling for the death of the British writer Salman Rushdie. The fatwa declared that Rushdie should be executed for having insulted Islam in his novel *The Satanic Verses*, published in late 1988.”).

37 *See generally* THE TRAUMA OF PSYCHOLOGICAL TORTURE (Almerindo E. Ojeda ed., 2008). *Accord* 1 TRAUMA PSYCHOLOGY: ISSUES IN VIOLENCE, DISASTER, HEALTH, AND ILLNESS 37 (Elizabeth K. Carll ed., 2007) (“Psychological torture occurs in many forms, some of which are highly subtle, yet quite devastating.”); *id.* (citations omitted) (“*Threats of death and mock executions* convince the victim that he or she could certainly die at the hands of the torturer. Often torturers threaten to arrest, torture, or kill a victim’s family members, including children. Another devastating form of torture is to be *forced to listen to others being tortured* without being able to intervene, or to *witness the torture of others*, including family members and friends.”); Donna E. Arzt, *The Lockerbie “Extradition by Analogy” Agreement: “Exceptional Measure” or Template for Transnational Criminal Justice?*, 18 AM. U. INT’L L. REV. 163, 206 n.143 (2002) (“Forms of psychological torture and ill-treatment include death threats and threats of abuse against the prisoner’s family . . .”).

38 *E.g.*, HANDBOOK OF MULTICULTURAL ASSESSMENT: CLINICAL, PSYCHOLOGICAL, AND EDUCATIONAL APPLICATIONS 168 (Lisa A. Suzuki & Joseph G. Ponterotto eds., 3d ed. 2008) (“Psychological torture may include, among other techniques, humiliation, degradation, death threats, mock executions, being forced to violate taboos, forced confessions, being forced to reveal intimate personal information, and being forced to witness the torture of others, including family members.”). Some of the “more commonly used psychological torture methods” have been listed as follows: “Threats,” “Mock executions,” “Isolation,” “Witnessing torture sessions,” “Sleep deprivation,” “Loud noise,” “Constant exposure to bright light,” “Total sensory deprivation,” “Sexual humiliation,” “Not allowed to wear clothes,” “Constant interrogation,” “Not allowed to wash or to go to toilet,” “Not allowed to be alone in the toilet,” “Excrement abuse.” FORENSIC MEDICINE: CLINICAL AND PATHOLOGICAL ASPECTS 62 (Jason Payne-

list varieties of mental torture (e.g., “Threats of death, harm to family, further torture, imprisonment, mock executions”; “Threats of attack by animals, such as dogs, cats, rats or scorpions”; and “Forcing the victim to witness torture or atrocities being inflicted on others.”).<sup>39</sup>

Part II of this article describes the illegality of death threats, highlighting how credible death threats are ordinarily treated as criminal, tortious, or torturous acts.<sup>40</sup> The article then describes the process by which the death penalty is administered, laying out the collateral consequences for capital punishment of credible death threats already being classified as illegal and as unlawful acts of torture. Part III thus details the process by which capital charges are leveled and death sentences are sought, obtained, and carried out. That section reveals that threats to execute offenders are, in effect, nothing more than torturous threats of death, albeit ones made by state actors in a particular context. Finally, Part IV argues that, given the absolute and existing legal prohibition against psychological torture, lawyers and judges should no longer tolerate, or be complicit with, criminal justice systems that make use of death threats of whatever kind or nature. Because death threats are already properly classified as torturous acts in multiple contexts, including

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James et al. eds., 2003); *see also id.* (“Sham executions are an ultimate form of psychological torture and they are carried out with the utmost care to make them realistic. The victim is not always relieved when the soldiers fire blanks, but may end up wanting them to end his life.”).

39 Office of the United Nations High Commission for Human Rights (Geneva), Professional Training Series No. 8/Rev. 1, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* p. 29, ¶ 145 (2004).

40 *See, e.g.,* Al Shimari v. CACI Premier Tech., Inc., 300 F. Supp. 3d 758, 781 (E.D. Va. 2018) (citing a 1997 report of the Committee Against Torture concluding that “threats, including death threats,” constitute torture); JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 712, 866 (4th ed. 2013) (discussing the Committee Against Torture’s condemnation of “threats, including death threats,” as “either torture or cruel, inhuman or degrading treatment”). *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75(2)(e), June 8, 1977, 1125 U.N.T.S. 3 (proscribing “[t]hreats to commit” “[m]urder”, “[v]iolence to the life, health, or physical or mental well-being of persons”, “[t]orture”, “[m]utilation”, “humiliating and degrading treatment...and any form of indecent assault”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 4(2)(h), June 8, 1977, 1125 U.N.T.S. 609 (proscribing threats to commit the same and additional conduct).



in the context of torture-murder prosecutions, the use of death threats as part of any crime and punishment regime is inconsistent with human rights principles.<sup>41</sup> The article concludes that the death penalty should be classified under the rubric of torture.

## II. The Illegality and Torturous Nature of Threats of Death

### A. Existing Legal Protections Against Death Threats Against Individuals

Death threats may be either express or implied.<sup>42</sup> Public officials sometimes receive illicit death threats,<sup>43</sup> but state actors—as history shows—also sometimes make death threats or fail to protect prisoners or others following the making of death threats.<sup>44</sup> In the latter circumstances, death threats can result in liability for government officials for which there is no qualified immunity.<sup>45</sup>

41 This article provides an in-depth examination of an argument I have explored elsewhere. See generally BESSLER, *THE DEATH PENALTY AS TORTURE*, *supra* note 26.

42 *United States v. Sogan*, 388 F. App'x 521, 523 (6th Cir. 2010).

43 E.g., *Texas Dep't of Criminal Justice v. Levin*, No. 03-15-00044-CV, 2007 WL 2302603, at \*5 (Tex. Crim. App. May 25, 2017).

44 Prison officials are legally obligated to protect prisoners from harm. *HANDBOOK ON PRISONS* 575 (Yvonne Jewkes ed., 2013) (“[I]t has long been accepted that the authorities have a duty to protect prisoners against third parties, such as fellow prisoners who might harm them.”).

45 *Santiago v. Blair*, 707 F.3d 984, 993 (8th Cir. 2013) (“[A] reasonable jury could conclude that Clubbs issued the death threats because Santiago had filed and pursued his excessive force grievance. Thus, Clubbs is not entitled to qualified immunity regarding the retaliatory death threats.”); *Irving v. Dormire*, 519 F.3d 441, 449 (8th Cir. 2008) (“We conclude that, when viewed in the light of their retaliatory nature, their objectively credible basis, and their fear-inducing result, the death threats allegedly made by Brigance form the basis of an injury sufficiently serious to implicate the Eighth Amendment.”); *Rodriguez v. Secretary for Dep't of Corr.*, 508 F.3d 611, 617 n.12 (11th Cir. 2007) (“[W]e conclude that the gang-related threats made on Rodriguez’s life, which were explicitly reported to prison officials, present a substantial enough risk of harm to trigger a prison official’s Eighth Amendment duty to act; that is, to take some steps to investigate the likelihood that the reported threat will materialize and to take some steps aimed at reducing the likelihood of the risk.”); *Odom v. S. Carolina Dep't of Corr.*, 349 F.3d 765, 770 (4th Cir. 2003) (inmate-on-inmate assault, preceded by death threats, was sufficiently substantial for Eighth Amendment purposes to survive summary judgment); see also *Wright v. Fry*, No. 1:18-cv-00016-KGB/JTK, 2018 WL 5266845 \*1 (E.D. Ark. Oct. 22, 2018) (citations omitted) (“While allegations of verbal threats, taunts, name calling, or the use of offensive language alone do not support claims for use of excessive

For example, in *Jones v. Carroll*,<sup>46</sup> a former inmate, Charles Jones, brought a section 1983<sup>47</sup> claim for violation of his civil rights against prison employees, alleging that they failed to protect him from an attack by another inmate, Anibal Melendez. The federal district court determined that a genuine issue of material fact existed as to whether Jones told prison officials about violent threats he received from Melendez, whom had threatened to kill Jones.<sup>48</sup> In that case, the federal district court ruled that “a reasonable factfinder could conclude, based on plaintiff’s evidence,” that the “State defendants . . . subjectively knew of the substantial risk of harm that Melendez posed to plaintiff based on Melendez’s death threats.”<sup>49</sup>

Death threats are illegal and extremely shocking and outrageous acts,<sup>50</sup> and they are frequently used by criminals or

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force, an exception is recognized “when the state official engaged in a brutal and wanton act of cruelty even though no physical harm was suffered.”); *Irving v. Wells*, No. 1:18-CV-47 JMB, 2018 WL 2868927, at \*2 (E.D. Mo. June 11, 2018) (“Although verbal threats are normally insufficient to violate the Constitution, the Eighth Circuit has concluded that death threats . . . may form the basis of an injury sufficiently serious to implicate the Eighth Amendment.”) (citing *Irving*, 519 F.3d at 448–49); *Titus v. Does #10-20*, No. 17-cv-1315-MJR, 2018 WL 558532, at \*3 (S.D. Ill. Jan. 25, 2018) (citations omitted) (“Courts must apply an objective standard to determine whether a particular threat, given all the circumstances, may amount to a constitutional violation. The pertinent inquiry is whether a ‘reasonable’ victim would fear for his or her life or safety as a result of the threat; not whether this plaintiff experienced actual fear.”).

46 *Jones v. Carroll*, 628 F. Supp. 2d 551 (D. Del. 2009).

47 Title 42 U.S.C. § 1983 (2017) allows prisoners to seek redress for the deprivation, under color of state law, of rights guaranteed by the U.S. Constitution or federal laws. *Perry v. Garcia*, No. 09cv622 LAB (RBB), 2010 WL 3633042, at \*12 (S.D. Cal. July 16, 2010); *Norton v. Garro*, 957 F. Supp. 1067, 1070 (E.D. Wis. 1997); *Webb v. Hopkins*, No. 88 CV 2501, 1989 WL 15814, at \*1 (E.D.N.Y. Feb. 9, 1989).

48 *Jones*, 628 F. Supp. 2d at 553–55.

49 *Id.* at 560. As that court further ruled: “The court finds that the failure to protect an inmate from another inmate who had issued continuing death threats poses an objective risk of excessive harm to the threatened inmate.” *Id.* at 560 n.9.

50 *E.g.*, *Neumeyer v. Wawanesa General Ins. Co.*, No. 14cv181-MMA (RBB), 2015 WL 1924981, at \*24 (S.D. Cal. Apr. 24, 2015) (“death threats constitute criminal behavior”); *Baird v. Gotbaum*, 662 F.3d 1246, 1249 (D.C. Cir. 2011) (“Of course death threats are extreme . . . .”); *see also* CAL. PENAL CODE § 422 (2011) (making death threats a crime); U.S.S.G. § 2B3.1(b) (2)(F) (2016) (providing for the upward adjustment of a defendant’s base offense level for robbery by two levels “if a threat of death was made”); *United States v. Fontanez*, No. 17-13944, 2018 WL 3239249, at \*2 n.3

totalitarian or repressive regimes for illicit purposes.<sup>51</sup> Death threats, it has been held, are completely unjustified and unjustifiable,<sup>52</sup> and because of their nature, they can themselves be evidence of aggressive or murderous intent.<sup>53</sup> The seriousness of death threats is even reflected in the application of evidentiary rules. As the U.S. Court of Appeals for the Second Circuit emphasized in a recent case:

It is long settled that the admissibility of death threats made by a defendant is evaluated in accordance with the ordinary principles of Federal Rule of Evidence 403. At the same time, the potential for unfair prejudice is so great that Rule 403's balancing test permits admission of death threat evidence only if there is clear need for the evidence and it serves an important purpose.<sup>54</sup>

As the Second Circuit ruled in that case: “It is hard to deem harmless the erroneous admission of death threat evidence. In this instance, the evidence was toxic.”<sup>55</sup>

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(11th Cir. June 3, 2018) (noting that the defendant “received a two-level enhancement for making a threat of death” pursuant to U.S.S.G. § 2B3.1(b)(2)(F) (2016)).

51 STEPHEN J. MOREWITZ, *DEATH THREATS AND VIOLENCE: NEW RESEARCH AND CLINICAL PERSPECTIVES* 101 (2008) (citation omitted).

52 *See Schanze v. Schanze*, No. A15-0231, 2015 WL 8548626, at \*3 n.2 (Minn. Ct. App. Dec. 14, 2015) (“We categorically reject Daniel’s argument that the harm threatened was not imminent because it was contingent on Danielle having an extramarital affair. To adopt this argument could be read to suggest that an extramarital affair somehow justifies death threats. The unfortunate occurrence of an extramarital affair does not ever justify death threats.”).

53 *Hernandez v. Stainer*, No. 1:11-cv-00489-AWI-JLT, 2013 WL 5773041, at \*16 (E.D. Cal. Oct. 24, 2013) (“[W]here both perpetrators made death threats against the victims, each assisting the other in what appears to be a highly coordinated assault, and where the shooting does not appear to have been either an accident or impulse by Ramirez, but rather part of a jointly understood and planned strategy of attack, the evidence is certainly sufficient to support a finding by reasonable jurors that Petitioner shared the same homicidal mind state as Ramirez.”); *People v. Gamble*, 899 N.Y.S.2d 207, 209 (N.Y. App. Div. 2010) (“Defendant’s pattern of aggressive conduct toward the victims, including specific death threats and menacing with a handgun, was highly probative of motive and intent . . .”).

54 *United States v. Morgan*, 786 F.3d 227, 229 (2d Cir. 2015) (citation omitted).

55 *Id.* at 234. *See also* *United States v. Tarantino*, No. 08-CR-0655 (JS), 2012

Death threats are not constitutionally protected speech.<sup>56</sup> “[T]he First Amendment,” the U.S. Supreme Court has ruled, “permits a State to ban a ‘true threat.’”<sup>57</sup> As the Supreme Court has explained: “[T]rue threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>58</sup> “Intimidation in the constitutionally proscribable sense of the word,” the Court emphasized, “is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”<sup>59</sup> Thus, the constitutional rights of someone making a true threat are not violated if an adverse action (e.g., a criminal prosecution or the termination of employment) follows the making of that threat.<sup>60</sup>

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WL 1458197, at \*4 (E.D.N.Y. Apr. 27, 2012) (citations omitted) (“Death threats, like other evidence, are subject to the usual Rule 403 balancing test. Nevertheless, courts are mindful that ‘the potential prejudice from death threats may be great’ and may tend to ‘exclude death threats more frequently than other evidence.’”).

56 United States v. Walker, 665 F.3d 212, 227 (1st Cir. 2011) (“The law is crystal clear that threats are not constitutionally protected speech.”). See Santiago v. Blair, 707 F.3d 984, 992 (8th Cir. 2013) (“[A] reasonable jury could find that threats of death, issued by a correctional officer tasked with guarding a prisoner’s segregated cell, would chill a prisoner of ordinary firmness from engaging in the prison grievance process . . . .”); Van Deelen v. Johnson, 497 F.3d 1151, 1157 (10th Cir. 2007) (“[A]llegations of physical and verbal intimidation, including a threat by a deputy sheriff to shoot him if he brought any more tax appeals, would surely suffice under our precedents to chill a person of ordinary firmness from continuing to seek redress for (allegedly) unfair property tax assessments.”).

57 Virginia v. Black, 538 U.S. 343, 359 (2003) (quoting Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam)).

58 *Id.*

59 *Id.* at 360; see also Baumgartner v. Eppinger, No. 1:10CV2810, 2013 WL 5563913, at \*17 (N.D. Ohio, Sept. 27, 2013) (citations omitted) (“The Seventh Circuit, in a case involving 18 U.S.C. § 876, stated that, in order for the government to establish a ‘true threat,’ it must demonstrate that a reasonable person would foresee that the statement at issue would be interpreted by the recipient as ‘a serious expression of an intention to inflict bodily harm upon,’ or to kill, that person. The court emphasized the importance of the context of the statement in determining whether it was a true threat or merely political hyperbole.”).

60 See, e.g., Smith v. N.Y.C. Dep’t of Educ., 109 A.D.3d 701, 702–03 (N.Y. App. Div. 2013) (holding that disciplinary proceeding and ultimate discipline imposed against tenured teacher, that is, termination of employment, did not violate teacher’s right to free speech under the First Amendment, where teacher’s death threats against initial arbitrator in a prior disciplinary



That is because it is improper to threaten someone with death. The Supreme Court, in fact, has made clear that a victim's fear, if reasonable or grounded in reality, mandates that threatening speech lose its First Amendment protection.<sup>61</sup>

### ***B. Death Threats, Persecution, and the U.S. Constitution's Eighth Amendment***

The U.S. Constitution's Eighth Amendment imposes a duty on prison officials "to protect prisoners from violence at the hands of

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proceeding were true threats not entitled to First Amendment protection, and they did not implicate matters of public concern); *Misiak v. Boeing*, No. C09-0716-JCC, 2010 WL 55857, at \*4–5 (W.D. Wash. Jan. 5, 2010) ("The state courts neither misinterpreted nor misapplied Supreme Court authority in determining that prohibiting inmates from making death threats is related to the legitimate penological interest of protecting correctional officers."). A person subjected to a plausible and imminent threat of serious injury or death is entitled to the law's protection—a principle that, as a general matter, applies equally to inmates. *Valdez v. City of New York*, No. 11 Civ. 05194(PAC)(DF), 2013 WL 8642169, at \*11 (S.D.N.Y. Sept. 3, 2013) ("[C]ourts have consistently required plaintiffs in inmate-safety cases to allege that they either suffered a physical injury or were subject to an imminent threat of serious physical injury in circumstances making the threat plausible."). Of course, an inmate is legally protected from harm only if the threat is real. *See Chalif v. Spitzer*, No. 9:05-CV-1355 (LEK/DEP), 2008 WL 1848650, at \*9 (N.D.N.Y. Apr. 23, 2008) (finding no substantial risk of serious harm where plaintiff alleged that he was "subjected to psychological torture by imminent threat of death" but complaint did not include "any incident[] whereby he was assaulted by any fellow inmates, or that such an assault was threatened and imminent"). *See also Richardson v. Castro*, No. 97-CV-3772 (SJ), 1998 WL 205414, at \*5 (E.D.N.Y. Apr. 24, 1998) (citation omitted) ("[V]erbal threats do not violate the constitution 'unless accompanied by physical force or the present ability to effectuate the threat.'").

61 Joshua Azriel, *First Amendment Implications for E-Mail Threats: Are There Any Free Speech Protections?*, 23 J. MARSHALL J. COMPUTER & INFO. L. 845, 846 (2005) (citation omitted) ("The U.S. Supreme Court recently decided a case where the victim's fear mandates that threatening speech lose its First Amendment protection. The Court, in a 6-3 decision, ruled that cross burning is not protected speech when it is used to intimidate an individual or a group of people. The salient part of the Court's ruling is that intimidation is a true threat, and a prohibition on intimidating threats protects people from a fear of violence. The Court stated that the speaker does not actually have to carry out the threat for it to be illegal. This follows the reasoning of several lower court decisions that use a reasonable person standard to determine the efficacy of a threat.").

other prisoners”<sup>62</sup> and prison guards.<sup>63</sup> The Eighth Amendment, in fact, has already been found to protect inmates from death threats.<sup>64</sup> One federal district court articulated the applicable standard: “Courts must apply an objective standard to determine whether a particular threat of death or harm, given all the circumstances, may amount to a constitutional violation.”<sup>65</sup> “The pertinent inquiry,” that court stressed, “is whether a ‘reasonable’ victim would fear for his or her life as a result of the threat; not whether this plaintiff experienced actual fear.”<sup>66</sup> In that case, the court observed that “repeated threats to beat and kill Plaintiff and to have officers at his next prison ‘get’ him” may have “violated Plaintiff’s constitutional rights.”<sup>67</sup> “These actions,” the court concluded, taking note of how the inmate was forced to strip and spread his buttocks for an inordinate length of time, were calculated “to strike fear into Plaintiff, to humiliate him, and to emphasize that the Defendants had the power to harm and

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62 Farmer v. Brennan, 511 U.S. 825, 833 (1994) (citation omitted).

63 See Hudson v. McMillian, 503 U.S. 1 (1992) (a correctional officer’s use of excessive physical force against a prisoner may, in appropriate circumstances, constitute a cruel and unusual punishment even though the prison does not suffer either “significant injury” or “serious injury”); McClanahan v. Butler, No. 16-cv-340-SMY, 2016 WL 4154910, at \*2 (S.D. Ill. Aug. 5, 2016) (“The intentional use of excessive force by prison guards against an inmate without penological justification constitutes cruel and unusual punishment in violation of the Eighth Amendment and is actionable under § 1983.”); see also 42 U.S.C. § 1997e(e) (2012) (“No Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility for mental or emotional injury suffered while in custody without a prior showing of physical injury. . . .”); Johnson v. Bradford, 72 F. App’x 98, 99 (5th Cir. 2003) (“Johnson’s challenge to the defendants’ alleged death threats does not present a claim of physical injury and therefore fails to state an excessive force claim.”).

64 Dobbey v. Ill. Dep’t of Corr., 574 F.3d 443, 445 (7th Cir. 2009) (citations omitted) (“[A] threat, which is how the plaintiff interpreted the incident, can rise to the level of cruel and unusual punishment.”); *id.* (“‘Mental torture is not an oxymoron, and has been held or assumed in a number of prisoner cases to be actionable as cruel and unusual punishment,’ . . . — imagine falsely informing a prisoner that he has been sentenced to death.”); Lamon v. Brown, No. 12-cv-1176-JPG-DGW, 2013 WL 6508490, at \*2 (S.D. Ill. Dec. 12, 2013) (citation omitted) (“[T]hreats or mental torture can rise to the level of cruel and unusual punishment.”).

65 Bardo v. Stolworthy, No. 15-cv-1193-JPG, 2015 WL 7713710, at \*8 (S.D. Ill. Nov. 30, 2015) (citing Dobbey v. Ill. Dep’t of Corr., 574 F.3d 443, 445 (7th Cir. 2009)).

66 *Id.*

67 *Id.*



kill him.”<sup>68</sup>

American jurists have long classified verbal threats as potentially violative of the Eighth Amendment if accompanied by extreme psychological torment or harm.<sup>69</sup> For instance, in *Babcock v. White*,<sup>70</sup> the Seventh Circuit held that “the Constitution does not countenance psychological torture merely because it fails to inflict physical injury.”<sup>71</sup> Likewise, in *Northington v. Jackson*,<sup>72</sup> an inmate, Craig Northington, filed a civil rights action against sheriff’s deputies, corrections officers, and a county sheriff’s department alleging that law enforcement officers stopped him on his way from the Denver County Jail to his community placement worksite.<sup>73</sup> In that case, Northington alleged that a captain put a revolver to his head and threatened to kill him.<sup>74</sup> In its analysis, the Tenth Circuit, noting that Northington “alleged psychological injury as a result of the alleged death threat,”<sup>75</sup> explicitly ruled: “Under these circumstances, if true, it could be ‘malicious and sadistic’ for a corrections officer to place a revolver to a prisoner’s head and threaten to pull the trigger.”<sup>76</sup> “Mr. Northington’s allegations, accepted as true, may state a violation of

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68 *Id.*

69 *Cummings v. Harrison*, 695 F. Supp. 2d 1263, 1272 (N.D. Fla. 2010); *see also id.* at 1273 (“[D]espite the general principle that verbal threats are insufficient to state a claim, some cases have recognized that verbal threats to kill an inmate do present an Eighth Amendment claim.”). In *Cummings*, the court ruled: “The threats as presented in Plaintiff’s affidavit reveal sufficient psychological harm to survive. This is especially true as the verbal threats are alleged to have been continuing and combined with physical assaults.” *Id.*; *see also Gomez v. Bironde*, No. 91-15731, 1992 WL 153007, at \*2 (9th Cir. July 6, 1992) (“Gomez’s allegations of excessive force combined with death threats arguably state a[n] [E]ighth [A]mendment claim.”); *Johnson v. Glick*, 481 F.2d 1028, 1029–30, 1033 (2d Cir. 1973) (finding that a prisoner stated an Eighth Amendment claim by alleging that an officer struck him and threatened to kill him), *cert. denied*, 414 U.S. 1033 (1973); *cf. United States v. Gore*, 592 F.3d 489, 491–92 (4th Cir. 2010) (the government “concedes that some minimal right of self-defense must be available to inmates charged under 18 U.S.C. § 111 because disabling an inmate entirely from protecting himself from wanton, unlawful aggression threatening death or serious bodily injury would violate the Eighth Amendment’s prohibition of cruel and unusual punishments”).

70 *Babcock v. White*, 102 F.3d 267 (7th Cir. 1996).

71 *Id.* at 273.

72 *Northington v. Jackson*, 973 F.2d 1518 (10th Cir. 1992).

73 *Id.* at 1520, 1522.

74 *Id.* at 1522.

75 *Id.* at 1524.

76 *Id.*

the Eighth Amendment,” the Tenth Circuit determined.<sup>77</sup>

In immigration and asylum cases, prior death threats are used to establish past persecution or a well-founded fear of future persecution.<sup>78</sup> For instance, in *Hernandez-Avalos v. Lynch*,<sup>79</sup> the Fourth Circuit held that a native and citizen of El Salvador, Maydai

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77 *Id.* at 1525. In its ruling, the Tenth Circuit distinguished *Collins v. Cundy*, 603 F.2d 825 (10th Cir. 1979), in which the Tenth Circuit had previously ruled that a sheriff’s “idle threat to hang a prisoner” did not give rise to a section 1983 claim. *Northington*, 973 F.2d at 1524 (citing *Collins*, 603 F.2d at 827); *see also* *Clark v. Ellis*, No. 4-11-cv-00135-KGB-JTK, 2012 WL 3595973, at \*4 (E.D. Ark. May 24, 2012) (citations omitted) (“[M]ere verbal threats made by a state-actor do not constitute a § 1983 claim . . . . [T]he constitution does not protect against all intrusions on one’s peace of mind. Fear of emotional injury which results solely from verbal harassment or idle threats is generally not sufficient to constitute an invasion of an identified liberty interest.”).

78 Death threats are a frequent staple of persecution claims. *E.g.*, *Tairou v. Whitaker*, No. 17-1404, 2018 WL 6252780, at \*4 (4th Cir. Nov. 30, 2018) (“Because Tairou received multiple, explicit threats of death both during and after the village gathering, the BIA’s conclusion as to past harm contravenes our express and repeated holding that the ‘threat of death’ qualifies as persecution.”); *Loptyeva v. Sessions*, 704 F. App’x 677, 681 (9th Cir. 2017) (citation omitted) (“[W]hile ‘death threats alone can constitute persecution,’ the context in which the threat is made ultimately determines its persecutory impact[.]”); *Godoy v. Holder*, 434 F. App’x 634, 635 (9th Cir. 2011) (citations omitted) (“[D]eath threats, when combined with other factors present here (including the murders of family members and physical confrontations with persecutors), may constitute persecution.”); *Ramirez-Recinos v. U.S. Att’y Gen.*, 406 F. App’x 457, 459 (11th Cir. 2010) (“[W]e upheld a persecution claim where an alien received numerous death threats, was dragged by her hair out of her car and beaten, had her groundskeeper tortured and killed by attackers looking for her, and was further kidnapped and beaten.”); *Kumar v. Gonzales*, 444 F.3d 1043, 1055 (9th Cir. 2006) (holding that threats to kill individual if he returned to India “require a finding that he has met his burden of showing a well-founded fear of future persecution”); *Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000) (“[M]enacing death threats can constitute a primary part of a past persecution claim, particularly where those threats are combined with confrontation or other mistreatment.”); *Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 602 (E.D. Pa. 2003) (“Given Mr. Sackie’s undisputed and uncontroverted testimony that he was threatened with imminent death on numerous occasions, frequently given mind altering substances and suffered cuts to his back and arms, we must find that he has met his burden of proving that he was tortured in his native country.”). *Cf.* *Pabon v. U.S. Att’y Gen.*, 704 F. App’x 903, 907 (11th Cir. 2017) (“Being intentionally shot at is sufficiently extreme to establish persecution, even if the attack is unsuccessful, and there is no strict physical harm requirement to establish persecution.”).

79 *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015).

Hernandez-Avalos (“Hernandez”), had sufficiently proven past persecution and a well-founded fear of future persecution based on a gang’s death threats.<sup>80</sup> In 2007, members of the Mara 18 gang had killed the cousin of Hernandez’s husband for refusing to join the gang.<sup>81</sup> Hernandez had not witnessed the murder, but she later identified the body and took it home for burial.<sup>82</sup> After that burial, gang members had come to her home and threatened to kill her if she fingered the gang members responsible for the murder.<sup>83</sup> Within a few months, Hernandez was threatened with death again when Mara 18 gang members returned to her home and put a gun to her head after she told them her 12-year-old son would not join the gang.<sup>84</sup> After Hernandez was similarly threatened with death yet a third time by gang members, she fled to the United States with the help of a smuggler.<sup>85</sup>

In *Hernandez-Avalos*, the Fourth Circuit took note of the death threats, emphasizing that its jurisprudence made clear that “the threat of death qualifies as persecution.”<sup>86</sup> “Because Hernandez credibly testified that she received death threats from Mara 18,” the Fourth Circuit determined, “she has proven that she has a well-founded fear of future persecution were she to return to El Salvador.”<sup>87</sup> “[I]n this case,” the Fourth Circuit stressed, “Mara 18 threatened Hernandez in order to recruit her son into their ranks, but they also threatened Hernandez, rather than another person, because of her family connection to her son.”<sup>88</sup> Acknowledging the corruption and the power of gangs within Salvadoran prisons and El Salvador’s judicial system,<sup>89</sup> and finding that Hernandez had established her eligibility for asylum, the Fourth Circuit concluded that Hernandez’s credible testimony “is legally sufficient under the circumstances present here to establish that the Salvadoran authorities are unable or unwilling to protect her from the gang members who threatened her.”<sup>90</sup> In

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80 *Id.* at 946–53.

81 *Id.* at 947.

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.* at 949.

87 *Id.*

88 *Id.* at 950.

89 *Id.* at 952–53.

90 *Id.* at 953.

reality, death threats have long been a problem in El Salvador,<sup>91</sup> as they have been in many other countries.<sup>92</sup>

American courts have wrestled on more than one occasion with cases involving death threats made against inmates. For example, in *Chandler v. D.C. Department of Corrections*,<sup>93</sup> a threat was made against an inmate's life and the inmate alleged it had caused him "psychological damage" and that his fear that the threat would be carried out caused him to suffer "[n]ightmares and [to] wak[e] up in a frantic sweat."<sup>94</sup> In that case, the U.S. Court of Appeals for the District of Columbia began its analysis by stating: "We note at the outset that verbal threats, without more, may be sufficient to state a cause of action under the Eighth Amendment."<sup>95</sup> The Court of Appeals then concluded that, "[d]epending on the gravity of the fear," "the credibility of the threat," and the targeted person's "psychological condition," a death threat "could have caused more than de minimis harm and therefore could have been sufficient to state a claim of excessive use of force."<sup>96</sup> "These issues," the Court of Appeals ruled, reversing the district court's dismissal of

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91 See, e.g., LAWRENCE MICHAEL LADUTKE, FREEDOM IN EXPRESSION IN EL SALVADOR: THE STRUGGLE FOR HUMAN RIGHTS AND DEMOCRACY 58 (2004); THOMAS L. PEARCY, THE HISTORY OF CENTRAL AMERICA 110 (2006).

92 HUMAN RIGHTS IN DEVELOPING COUNTRIES: YEARBOOK 1997 196–97 (Hugo Stokke et al. eds.) (discussing death threats in Guatemala); SILVIO WAISBORD, WATCHDOG JOURNALISM IN SOUTH AMERICA: NEWS, ACCOUNTABILITY, AND DEMOCRACY 60 (2000) (discussing death threats in South America against journalists).

93 *Chandler v. D.C. Dep't of Corr.*, 145 F.3d 1355 (D.C. Cir. 1998).

94 *Id.* at 1359.

95 *Id.* at 1360. In support of that proposition, the U.S. Court of Appeals for the District of Columbia cited Justice Harry Blackmun's concurrence in *Hudson v. McMillian*, 503 U.S. 1 (1992). In that concurrence, Justice Blackmun observed: "It is not hard to imagine inflictions of psychological harm—without corresponding physical harm—that might prove to be cruel and unusual punishment. . . . [T]he Eighth Amendment prohibits the unnecessary and wanton infliction of 'pain,' rather than 'injury.' 'Pain' in its ordinary meaning surely includes a notion of psychological harm." *Id.* at 16 (Blackmun, J., concurring); see also *id.* at 17 (Blackmun, J., concurring) ("Psychological pain often may be clinically diagnosed and quantified through well-established methods, as in the ordinary tort context where damages for pain and suffering are regularly awarded."). The U.S. Supreme Court, in a recent Eighth Amendment case, has itself found that "it is proper to consider . . . psychiatric and professional studies." *Hall v. Florida*, 134 S. Ct. 1986, 1993 (2014).

96 *Chandler*, 145 F.3d at 1361.

the inmate's Eighth Amendment claim, "cannot be resolved without more factual development."<sup>97</sup>

Similarly, in *Burton v. Livingston*,<sup>98</sup> an inmate alleged that an officer pointed a gun at him and threatened to shoot him. The officer allegedly asked the inmate to "run" so he could "blow" the inmate's "Goddamn brains out."<sup>99</sup> In that case, the officer reportedly used racial epithets and, through his words, tried "to scare" the inmate into running, potentially allowing the officer to shoot the inmate in the back and then later falsely claim that the inmate was trying to escape.<sup>100</sup> As the Eighth Circuit described the lawsuit's allegations: "The complaint states that Sgt. Livingston pointed a lethal weapon at the prisoner, cocked it, and threatened him with instant death. This incident occurred immediately after the prisoner had given testimony against another guard in a § 1983 action."<sup>101</sup> Faced with those allegations, the Eighth Circuit ruled: "The complaint describes in plain words a wanton act of cruelty which, if it occurred, was brutal despite the fact that it resulted in no measurable physical injury to the prisoner."<sup>102</sup> "The day has passed," the Eighth Circuit held, "when an inmate must show a court the scars of torture in order to make out a complaint under § 1983."<sup>103</sup> As the Eighth Circuit emphasized: "We hold that a prisoner retains at least the right to be free from the terror of instant and unexpected death at the whim of his allegedly bigoted custodians."<sup>104</sup>

97 *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 843 (1994)). As the Court of Appeals stressed: "[T]he risk that Corporal Brooks's threat might be carried out, if left unaddressed (a matter upon which the district court made no findings), could amount to 'a sufficiently substantial "risk of serious damage to [Chandler's] future health"' to be actionable as an unconstitutional condition of confinement." *Id.* (quoting *Farmer*, 511 U.S. at 843).

98 *Burton v. Livingston*, 791 F.2d 97, 99–100 (8th Cir. 1986).

99 *Id.* at 99.

100 *Id.*

101 *Id.* at 100. "Apparently," the Eighth Circuit reported, "another guard who was present took the threat seriously enough to step between the prisoner and Sgt. Livingston." *Id.*

102 *Id.*

103 *Id.*

104 *Id.* The Eighth Circuit further ruled: "So far as we can tell at this early stage of the case, the guard's conduct was not motivated by the necessity of correcting a rebellious inmate or by legitimate concerns for institutional security. Neither is it an instance of rough language which resulted only in bruised feelings." *Id.* "This is rather," the Eighth Circuit emphasized, "a complaint that a prison guard, without provocation, and for the apparent purpose of retaliating against the prisoner's exercise of his rights in



The case of *Hudspeth v. Figgins*<sup>105</sup> is also illustrative. In that case, a prisoner, James Hudspeth, sued two prison guards who had allegedly impaired his right of access to the courts, with one correctional officer reportedly threatening to transfer Hudspeth to a work detail where the inmate, per the threat, would be shot by “accident.”<sup>106</sup> In that case, the Fourth Circuit ruled: “A threat of physical harm to a prisoner if he persists in his pursuit of judicial relief is as impermissible as a more direct means of restricting the right of access to the courts.”<sup>107</sup> “It is enough,” the Fourth Circuit explained, pointing out that the inmate need not have actually succumbed to the threat, “that the threat was intended to impose a limitation upon the prisoner’s right of access to the court and was reasonably calculated to have that effect.”<sup>108</sup> If Hudspeth was intentionally placed “in fear for his life if he pressed his court actions,” the Fourth Circuit added, “that would inflict such suffering as to amount to unconstitutional punishment.”<sup>109</sup> “The life of a prisoner is a dreary one of suffering,” it concluded, “but the Constitution prohibits the infliction upon a prisoner of unnecessary suffering which is inconsistent with contemporary standards of decency.”<sup>110</sup>

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petitioning a federal court for redress, terrorized him with threats of death.” *Id.* at 100–01. “Under the circumstances of this incident,” the Eighth Circuit concluded, “the guard’s actions, if proved, were a violation of Mr. Burton’s rights under the First Amendment and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.” *Id.* at 101; *see also* *Shamsud’Diyn v. Moyer*, No. ELH-17-3271, 2018 WL 3022660, at \*9 (D. Md. June 18, 2018) (“[A] ‘complaint that a prison guard, without provocation, and for the apparent purpose of retaliating against the prisoner’s exercise of his rights in petitioning a federal court for redress, terrorizing him with threats of death,’ would be sufficient to state a claim.”) (quoting *Burton*, 791 F.2d at 100–01)); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1346 (N.D. Ga. 2002) (“Mental torture consists of ‘prolonged mental harm caused by or resulting from: the intentional infliction or threatened infliction of severe physical pain or suffering; . . . the threat of imminent death; or the threat that another person will imminently be subjected to death, [or] severe physical pain or suffering.’ As set out above, plaintiffs noted in their testimony that they feared that they would be killed by Vuckovic during the beatings he inflicted or during games of ‘Russian roulette.’ Each plaintiff continues to suffer long-term psychological harm as a result of the ordeals they suffered at the hands of defendant and others.”).

105 *Hudspeth v. Figgins*, 584 F.2d 1345 (4th Cir. 1978).

106 *Id.* at 1347.

107 *Id.* at 1348.

108 *Id.*

109 *Id.*

110 *Id.* The U.S. Supreme Court has been using the “evolving standards of



A provision of federal law put in place as part of the Prison Litigation Reform Act<sup>111</sup> regulates the ability of inmates to bring claims for compensatory damages for prison conditions that relate to an inmate’s mental health. According to the provision of that law now codified at 42 U.S.C. § 1997e(e):

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).<sup>112</sup>

But that law plainly does not allow government actors to psychologically torture prisoners with impunity.<sup>113</sup> As the Seventh Circuit wrote in rejecting the Attorney General’s contention that 42 U.S.C. § 1997e(e) makes a showing of *physical injury* a filing prerequisite for every civil rights lawsuit involving mental or emotional injury: “This contention if taken to its logical extreme would give prison officials free reign to maliciously and sadistically inflict psychological torture on prisoners, so long as they take care not to inflict any physical injury in the process.”<sup>114</sup>

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decency” test since 1958 to gauge what violates the Eighth Amendment’s Cruel and Unusual Punishments Clause. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (determining that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”).

111 42 U.S.C. § 1997e (2013).

112 *Id.* § 1997e(e).

113 *Scarver v. Litscher*, 371 F. Supp. 2d 986, 997–98 (W.D. Wis. 2005) (citation omitted) (“A plaintiff who has suffered psychological torture but not physical injury may still obtain nominal or punitive damages.”).

114 *Calhoun v. DeTella*, 319 F.3d 936, 940 (7th Cir. 2003). As the Seventh Circuit determined in that case: “As we have observed before and reemphasize here, ‘[i]t would be a serious mistake to interpret section 1997e(e) to require a showing of physical injury in all prisoner civil rights suits.’ On several occasions we have explained that § 1997e(e) may limit the relief available to prisoners who cannot allege a physical injury, but it does not bar their lawsuits altogether. As its title suggests, § 1997e(e) is a ‘limitation on recovery.’ Accordingly, physical injury is merely a predicate for an award of damages for mental or emotional injury, not a filing prerequisite for the federal civil action itself.” *Id.*; see also *id.* at 941 (“Although § 1997e(e) would bar recovery of compensatory damages ‘for’ mental and emotional injuries suffered, the statute is inapplicable to awards of nominal or punitive

As a general matter, the Eighth Amendment thus ordinarily protects inmates from harm, further requiring that they be clothed, fed, sheltered, and provided with adequate health care.<sup>115</sup> “The Eighth Amendment,” as one federal district court put it, “requires the government ‘to provide medical care for those whom it is punishing by incarceration.’”<sup>116</sup> And the Eighth Amendment has long been read to require the provision of mental health services for inmates<sup>117</sup> and to bar torture.<sup>118</sup> For example, in *Estelle v. Gamble*,<sup>119</sup> the U.S. Supreme Court determined that “the primary concern of the drafters” of the Eighth Amendment was “to proscribe ‘torture[s]’ and other ‘barbar[ous]’ methods of punishment.”<sup>120</sup> In that 1976 decision, the Supreme Court went on to declare: “Our more recent cases, however, have held that Amendment proscribes more than

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damages for the Eighth Amendment violation itself.”).

- 115 *Brown v. Plata*, 563 U.S. 493, 510 (2011) (“Prisoners are dependent on the State for food, clothing, and necessary medical care.”); *id.* at 511 (“If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation.”); *id.* at 538 (“Establishing the population at which the State could begin to provide constitutionally adequate medical and mental health care, and the appropriate time frame within which to achieve the necessary reduction, requires a degree a judgment.”); *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citations omitted) (“[P]rison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates’ . . .”).
- 116 *Scarver*, 371 F. Supp. 2d at 998 (quoting *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996)).
- 117 *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) (citations omitted) (“Courts have repeatedly held that treatment of a psychiatric or psychological condition may present a ‘serious medical need’ under the *Estelle* formulation.”); *King v. Litscher*, No. 17-CV-201-JPS, 2017 WL 4334133, at \*3 (E.D. Wis. Sept. 28, 2017) (“It is well settled that the Eighth Amendment protects the mental health of prisoners no less than their physical health.”); *Green v. Grams*, No. 10-cv-745-slc, 2011 WL 5151520, at \*3 (W.D. Wis. Oct. 28, 2011) (same).
- 118 *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (noting that “the primary concern of the drafters” of the Eighth Amendment “was to proscribe ‘torture[s]’ and other ‘barbar[ous]’ methods of punishment”); *see also* *Taylor v. Crawford*, 487 F.3d 1072, 1082 (8th Cir. 2007) (“The Eighth Amendment prohibits the unnecessary and wanton infliction of pain through torture, barbarous methods, or methods resulting in a lingering death.”); *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996) (“[R]ecent Supreme Court decisions have held that the Eighth Amendment proscribes more than just ‘physically barbarous punishments.’”).
- 119 *Estelle v. Gamble*, 429 U.S. 97 (1976).
- 120 *Id.* at 102.

physically barbarous punishments.”<sup>121</sup> “We therefore conclude,” the Court held, “that deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment.”<sup>122</sup>

A failure to provide adequate psychiatric and mental health care services to inmates is deliberately indifferent to their serious medical needs and thus constitutes an Eighth Amendment

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121 *Id.* As the Court in *Estelle v. Gamble* put it: “The Amendment embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .,’ *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968), against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with ‘the evolving standards of decency that mark the progress of a maturing society.’” *Id.* In *Jackson v. Bishop*, the Eighth Circuit—in an opinion authored by then - Judge Harry Blackmun—concluded in 1968: “[W]e have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment; that the strap’s use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess; and that it also violates those standards of good conscience and fundamental fairness enunciated by this court . . . .” *Jackson*, 404 F.2d at 579.

122 *Estelle*, 429 U.S. at 104–05 (citation omitted); *see also id.* (“This is true whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner’s serious illness or injury states a cause of action under § 1983.”).

violation.<sup>123</sup> As the Second Circuit put it in *Langley v. Coughlin*,<sup>124</sup> “the basic legal principle is clear and well established . . . that when incarceration deprives a person of reasonably necessary medical care (including psychiatric or mental health care) which would be available to him or her if not incarcerated, the prison authorities must provide such surrogate care.”<sup>125</sup> In 2011, the U.S. Supreme Court itself considered an Eighth Amendment case involving prison overcrowding and inadequate provision of services. In that case, the Supreme Court emphasized: “For years the medical and mental health care provided by California’s prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners’ basic health needs. Needless suffering and death have been the well-documented result.”<sup>126</sup> The Court stressed that California prisoners “with serious mental illness do not receive minimal, adequate care,” with suicidal inmates held “for prolonged periods in telephone-booth-sized cages without toilets.”<sup>127</sup>

123 *Rogers v. Evans*, 792 F.2d 1052, 1058 (11th Cir. 1986) (citing *Hoptowitz v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982)); *see also* *Kothmann v. Rosario*, 558 F. App’x 907, 910 (11th Cir. 2014) (citation omitted) (“A correctional system’s deliberate indifference to a prisoner’s serious medical needs, including ‘psychiatric or mental health needs,’ violates the Eighth Amendment.”); *Thomas v. Farley*, 31 F.3d 557, 559 (7th Cir. 1994) (“Mental torture is not an oxymoron, and has been held or assumed in a number of prisoner cases, such as *Joseph v. Brierton*, 739 F.2d 1244 (7th Cir. 1984); *Jordan v. Gardner*, 986 F.2d 1521, 1525–26 (9th Cir. 1993), and *Northington v. Jackson*, 973 F.2d 1518, 1524 (10th Cir. 1992), to be actionable as cruel and unusual punishment.”); *Green v. Wilson*, No. PWG-15-3866, 2018 WL 3629970, at \*5 (D. Md. July 31, 2018) (holding that the Eighth Amendment does not recognize “any distinction between the right to medical care for physical ills and its psychological and psychiatric counterparts”); *Bentz v. Mulholland*, No. 18-cv-1064-DRH, 2018 WL 2735483, at \*9 (S.D. Ill. June 7, 2018) (holding that when harassment by prison officials is “accompanied by actions which suggest that the harassment is persistent or results in pain (either physical or psychological),” such “verbal harassment may support an Eighth Amendment claim”); *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1256 n.81 (M.D. Ala. 2017) (“ADOC’s failure to provide mental-health and correctional staffing sufficient to operate a minimally adequate mental-health system is in itself an unreasonable response under the deliberate-indifference standard.”); *Henderson v. S. Carolina Dep’t of Corr.*, C/A No.: 4:17-287-BHH-TER, 2017 WL 2199020, at \*5 (D. S.C. Apr. 25, 2017) (citation omitted) (“Claims regarding mental health treatment fall under a claim for deliberate indifference to medical care.”).

124 *Langley v. Coughlin*, 888 F.2d 252 (2d Cir. 1989).

125 *Id.* at 254.

126 *Brown v. Plata*, 563 U.S. 493, 501 (2011).

127 *Id.* at 503.

Prisoners, like non-incarcerated human beings, have both physical and psychological needs. “Serious medical needs” in the prison context encompasses “conditions that are life-threatening or that carry risks of permanent serious impairment if left untreated, those that result in needless pain and suffering when treatment is withheld and those that have been diagnosed by a physician as mandating treatment.”<sup>128</sup> Suicide is but one objectively serious harm that prison officials must guard against,<sup>129</sup> and it has been specifically held that, in the prison context, “[t]he Eighth Amendment protects inmates’ mental health as well as their physical health.”<sup>130</sup> An inmate can therefore state a claim for deliberate indifference by alleging that “his ‘pleas’ for psychological treatment were ‘ignored,’”<sup>131</sup> with one U.S. magistrate judge allowing an inmate’s complaint to proceed past a motion to dismiss where the inmate alleged a deliberate indifference to his serious medical needs that resulted “in increased pain, potentially life threatening spikes in blood pressure, dizzy spells, anxiety, and other psychological trauma.”<sup>132</sup>

In the immigration context, case law makes clear that “credible, specific threats can amount to persecution if they are severe enough.”<sup>133</sup> “[T]hreats of murder,” the First Circuit has explained, “fit squarely within this rubric.”<sup>134</sup> Although the Immigration

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128 *Scarver v. Litscher*, 371 F. Supp. 2d 986, 999 (W.D. Wis. 2005).

129 *Id.*; *see also* *Whitney v. City of St. Louis*, 887 F.3d 857, 860 (8th Cir. 2018) (“The Eighth Amendment prohibits jail officials from acting with deliberate indifference towards risks of suicide.”); *Mullin v. Balicki*, 875 F.3d 140, 158 (3d Cir. 2017) (noting that a “vulnerability-to-suicide claim . . . is simply a more specific articulation of the Eighth Amendment rule that prison officials must not be deliberately indifferent to a prisoner’s serious medical needs”).

130 *Scarver*, 371 F. Supp. 2d at 1000 (citing *Calhoun v. DeTella*, 319 F.3d 936, 940 (7th Cir. 2003); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987)).

131 *Antonelli v. Sheahan*, 81 F.3d 1422, 1432 (7th Cir. 1996); *see also* *Harris v. Billington*, No. 12-cv-437-wmc, 2015 WL 1893240, at \*14 (W.D. Wis. Apr. 24, 2015) (holding that a delay in treatment “can, under certain circumstances, constitute deliberate indifference”).

132 *Davis v. Hyden*, No. A02-214 CV (JKS), 2005 WL 3116641, at \*1, 5 (D. Alaska Nov. 21, 2005).

133 *Javed v. Holder*, 715 F.3d 391, 395–96 (1st Cir. 2013); *see also* *Barreto v. U.S. Att’y Gen.*, 392 F. App’x 689, 691 (11th Cir. 2010) (“[W]e have held that a minor beating, a detention of 11 hours, and a credible death threat by a person who had the immediate ability to act on it constituted persecution.”).

134 *Javed*, 715 F.3d at 396 (quoting *López de Hincapié v. Gonzales*, 494 F.3d 213, 217 (1st Cir. 2007)); *see also* *Sumschi v. U.S. Att’y Gen.*, 677 F. App’x 579, 581 (11th Cir. 2017) (quoting *De Santamaria v. U.S. Att’y Gen.*,



and Nationality Act (“INA”)<sup>135</sup> contains no statutory definition of “persecution,”<sup>136</sup> that term has been interpreted to cover a “threat of death, torture, or injury to one’s person”<sup>137</sup> or—as another court put it—“severe humanitarian mistreatment, such as ‘death threats, involuntary confinement, torture, and other severe affronts to the life or freedom of the applicant.’”<sup>138</sup> As the Ninth Circuit ruled in 1996: “There is no question that persistent death threats and assaults on one’s life, family, and business rise to the level of persecution.”<sup>139</sup> More recently, the Ninth Circuit summarized its prior case law as follows: “In several cases, we have found that where the applicant was the target of repeated beatings, death threats, and expressions of hatred, a finding of persecution is compelled.”<sup>140</sup>

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525 F.3d 999, 1009–10 (11th Cir. 2008)) (“[W]e previously concluded that the record compelled a finding that an alien was persecuted when she received repeated death threats over the course of two years and was dragged from her vehicle by her hair, was traumatized by the torture and murder of a family groundskeeper who refused to reveal her whereabouts, and was kidnapped and beaten.”); *Sanchez Jimenez v. Att’y Gen.*, 492 F.3d 1223, 1233 (11th Cir. 2007) (finding that past persecution included death threats, attempted kidnapping, and armed men shooting at the petitioner in a moving car); *Lobo v. Holder*, 684 F.3d 11, 18 (1st Cir. 2012) (citations omitted) (“[C]redible verbal death threats may fall within the meaning of ‘persecution[.]’ . . . only when the threats are so ‘menacing as to cause significant actual suffering or harm.’”); *Andriasian v. INS*, 180 F.3d 1033, 1042 (9th Cir. 1999) (“[T]he warning that the Andriasians would be killed if they did not leave Azerbaijan immediately—which was made all the more credible by the fact that the Azeri thugs who issued the threat had just murdered Mr. Andriasian’s neighbor in cold blood—would by itself be sufficient to establish past persecution.”).

135 Under the INA, “the Attorney General has discretion to grant asylum to a noncitizen who is unable or unwilling to return to his home country ‘because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.’” *née Joseph v. Sessions*, No. 17-1403, 2018 WL 3549714, at \*2 (4th Cir. Mar. 20, 2018) (citations omitted).

136 *Id.* at \*3.

137 *Id.*; *Yan Zhang v. Sessions*, 681 F. App’x 554, 559 (8th Cir. 2017) (citations omitted); *but see Jimenez v. Att’y Gen.*, 737 Fed. Appx. 117, 118 (3d Cir. 2018) (“To meet the legal definition of torture, the threat of harm must be ‘by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’”) (quoting 8 C.F.R. § 1208.18(a)(1) (2018)).

138 *Huang v. Att’y Gen. of U.S.*, 620 F.3d 372, 380 (3d Cir. 2010) (quoting *Gomez-Zuluaga v. Att’y Gen.*, 527 F.3d 330, 341 (3d Cir. 2008)).

139 *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996).

140 *Marzbanian v. Holder*, 597 F. App’x 947, 949 (9th Cir. 2015). The U.N.



While menacing threats can constitute persecution, empty or unsubstantiated threats unsupported by evidence of danger do not meet the standard for a persecution claim.<sup>141</sup> For example, it has been held that “mere threats, such as anonymous death threats through the telephone, without more, do not rise to the level of persecution.”<sup>142</sup> But it is clear, as the Eleventh Circuit has stated, that “[a] credible death threat by a person who has the immediate ability to act on it constitutes persecution regardless of whether the threat is successfully carried out.”<sup>143</sup> “We are more likely to conclude,” the Eleventh Circuit has observed, “that the record compels a finding of past persecution when an applicant faced imminent and credible death threats.”<sup>144</sup> “We are also more likely to conclude,” the Eleventh Circuit has stressed, “that the record compels a finding

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Human Rights Committee has itself determined, in a different context, that States cannot ignore “known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained.” *INTERNATIONAL HUMAN RIGHTS LAW* 270 (Daniel Moeckli et al. eds., 2d ed. 2014) (citing *Delgado Páez v. Columbia*, CCPR/C/39/D/195/1985 (12 July 1990), para. 5.5). The Human Rights Committee has thus “found violations of the right to security where there was a failure to investigate credible death threats.” *Id.*

- 141 *Lemus-Arita v. Sessions*, 854 F.3d 476, 481 (8th Cir. 2017) (citations omitted) (“a threat that is ‘exaggerated, nonspecific, or lacking in immediacy may be insufficient’”; “[t]hreats alone constitute persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual suffering or harm”); *Hernandez-Lima v. Lynch*, 836 F.3d 109, 114 (1st Cir. 2016) (citations omitted) (“Death threats rise to the level of persecution only when ‘so menacing as to cause significant actual suffering or harm.’ Evidence that such threats were entirely empty ‘plainly supports [a] determination’ that they did not meet that standard.”); *Vera v. Holder*, 425 F. App’x 604, 605 (9th Cir. 2011) (citations omitted) (“Only in ‘extreme cases’ involving ‘repeated and especially menacing death threats’ have we held such threats establish past persecution.”).
- 142 *Cordero v. U.S. Att’y Gen.*, 374 F. App’x 882, 887 n.1 (11th Cir. 2010).
- 143 *Diallo v. U.S. Att’y Gen.*, 596 F.3d 1329, 1333–34 (11th Cir. 2010). Credible death threats can and do result in criminal prosecutions. *E.g.*, *United States v. Stewart*, 420 F.3d 1007 (9th Cir. 2005); *United States v. Polson*, 154 F. Supp. 2d 1230, 1231, 1234 (S.D. Ohio 2001). “In general, whether a communication constitutes a ‘threat’ within the purview of 18 U.S.C. § 876 is a question of fact for the jury so long as a reasonable recipient, familiar with the context of the communication, could interpret it as a threat.” *Id.* at 1235; *see also* *State v. January*, No. 75170-1-I, 2017 WL 5127889, at \*3 (Wash. Ct. App. Nov. 6, 2017) (“The nature of a threat depends on all the facts and circumstances and is not limited to a literal translation of the words spoken.”).
- 144 *Gutierrez-Granda v. U.S. Att’y Gen.*, 386 F. App’x 848, 851 (11th Cir. 2010).

of past persecution when the applicant has suffered physical injury along with death threats.”<sup>145</sup> “A specific threat of harm to an asylum applicant,” a guide produced by the American Immigration Lawyers Association observes, “is usually sufficient to demonstrate a well-founded fear of persecution.”<sup>146</sup>

### C. *The Torturous and Coercive Nature of Threats of Death*

Death threats and threats of physical harm not only induce fear<sup>147</sup> and suffice for purposes of inmates setting forth legitimate section 1983 claims,<sup>148</sup> but they can also, in particular circumstances, terrorize<sup>149</sup> and constitute acts of torture, that is, the extreme or aggravated form of cruelty.<sup>150</sup> In *Death Threats and Violence: New*

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145 *Id.*

146 REGINA GERMAIN, AILA’S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 68 (2005). That standard for making out a claim of a well-founded fear of persecution has been laid out in a number of cases. *E.g.*, *Dong Ming Wu v. U.S. Att’y Gen.*, 270 F. App’x 211, 214 (3d Cir. 2008) (citations omitted) (noting that a well-founded fear of persecution “encompasses ‘threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom,’ including forced sterilization”); *accord Yu v. U.S. Att’y Gen.*, 513 F.3d 346, 348 (3d Cir. 2008).

147 *Fortson v. Eppinger*, No.: 1:15 CV 2078, 2017 WL 603086, at \*6 (N.D. Ohio Feb. 15, 2017) (“[T]he jury was well aware that both women were extremely reluctant to testify. The record reveals that Andee Caver was afraid to testify because she had received death threats . . . .”); *see also* Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337, 1341–44 (2006) (“Death threats are particularly harmful, for they trigger short-term fear and long-term anxiety.”).

148 *McKenney v. Farrinton*, 2:16-cv-00630-JAW, 2017 WL 825280, at \*5 (D. Me., Mar. 2, 2017) (citations omitted) (“Several circuit courts of appeals have held that . . . threats can constitute the necessary adverse action. . . . [A] verbal insult alone does not constitute adverse action. Death threats and threats of serious physical harm, however, generally suffice.”); *see also* *Dixon v. Groeger*, 2:16-cv-00178 NT, 2016 WL 4532066, at \*2, \*4 (D. Me., Aug. 29, 2016) (“[D]eath threats and threats of serious physical harm generally suffice.”).

149 *In re Chiquita Brands Int’l, Inc.*, 190 F. Supp. 3d 1100, 1104 (S.D. Fla. 2016) (“AUC was a violent terrorist organization which had unleashed a systematic campaign of terror—death threats, extrajudicial killings, torture, rape, kidnappings, forced disappearances and looting—against vast swathes of the Colombian civilian population”).

150 *Azadeh v. Government of Islamic Republic of Iran*, No. 1:16-cv-1467 (KBJ), 2018 WL 4232913, at \*11 (D. D.C. Sept. 5, 2018) (noting that “torture” is a label “usually reserved for extreme, deliberate and unusually cruel practices”). *See also* MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32438, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW

*Research and Clinical Perspectives*, Stephen Morewitz, citing a 2006 study and noting the prevalence of death threats varies by context and the underlying motivations for them, emphasizes: “Death threats are a prevalent form of psychological torture. Based on a study of 69 refugees who were torture survivors, Olsen et al. (2006) discovered that death threats were the most prevalent method of torture.”<sup>151</sup> As Morewitz notes: “They are prevalent in domestic violence episodes, in time of war, and especially during periods of racial and ethnic conflicts and political instability.”<sup>152</sup> Though death threats are often coupled with physical abuse and beatings,<sup>153</sup> threats of death—all by themselves—can thus be torturous, as the legal classification of mock executions as acts of psychological torture makes crystal clear.<sup>154</sup>

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AND APPLICATION TO INTERROGATION TECHNIQUES 18 (2009) (“U.S. courts and administrative bodies have found that severe beatings, maiming, sexual assault, rape, and (in certain circumstances) death threats may constitute ‘torture’ for purposes of either CAT or TVPA”); Declaration on the Protection of All Persons, *supra* note 22, at art. 1(2) (“Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”). Threats made in interrogation settings have sometimes been described as constituting “psychological torture.” *Crowe v. County of San Diego*, 608 F.3d 406, 432 (9th Cir. 2010).

- 151 STEPHEN J. MOREWITZ, *DEATH THREATS AND VIOLENCE: NEW RESEARCH AND CLINICAL PERSPECTIVES* 5 (2008); *see also id.* at 99 (“Death threat victims can suffer severe impairment in their occupational functioning. They are at increased risk of suffering severe anxiety, depression, and other stress-related health problems and may be at risk for engaging in suicidal behaviors.”).
- 152 MOREWITZ, *supra* note 151, at 6. Threats to kill or threats of harm are prohibited by international human rights law and international humanitarian law. *See, e.g.*, Jordan J. Paust, *Human Rights on the Battlefield*, 47 *GEO. WASH. INT’L L. REV.* 509, 540–41 (2015) (“[T]he following unlawful interrogation tactics are absolutely prohibited under both human rights law and the laws of war: (1) torture that occurs from the use of waterboarding or related forms of inducement of suffocation, (2) the cold cell and related forms of inducement of hypothermia, (3) rape and other forms of sexual violence as an interrogation tactic or other form of conduct during war, (4) threats to kill the detainee and/or others, and (5) use of snarling dogs against naked persons in order to induce intense fear or terror.”).
- 153 *E.g.*, *Abebe-Jiri v. Negewo*, No. 1:90-CV-2010-GET, 1993 WL 814304, at \*1 (N.D. Ga., Aug. 20, 1993) (describing the “interrogation and torture” of a woman in the presence of several men, where she was “told to take off her clothes,” where her “arms and legs were then bound and she was whipped with a wire on her legs and her back,” and where she was “repeatedly threatened with death if she did not reveal the location of a gun”).
- 154 GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL*

### III. The Nature of Capital Prosecutions

#### A. Threats of Death in Penal Systems

Threats have long been used in penal systems and by judges, as the history of capital and corporal punishments demonstrates.<sup>155</sup> In colonial times, a common punishment was to make an offender sit on the gallows with a noose around the neck.<sup>156</sup> For example, in colonial Massachusetts, in an effort to curtail stealing, a 1736

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HUMANITARIAN LAW IN WAR 668 (2d ed. 2016) (“The U.N. Human Rights Committee and the Inter-American Commission on Human Rights consider mock executions torture.”); *see also* TORTURE AND ITS CONSEQUENCES: CURRENT TREATMENT APPROACHES 204 (Metin Başoğlu ed. 1992) (“Sham executions are a well-known and frequently reported form of torture (e.g., Allodi & Cowgill, 1982; Benfeldt-Zachrisson, 1985; Goldfeld *et al.*, 1988).”). Sometimes the detainee is subject to a prolonged threat of execution.”); *id.* at 475 (“Commonly used psychological methods of torture include . . . threats of torture to self or relatives and sham executions.”).

155 *E.g.*, John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 BRIT. J. AM. LEG. STUDIES 297 (2013) (describing the history of capital punishment and corporal punishments in the United States). Of course, making threats *against* judges is a criminal offense. *E.g.*, 18 U.S.C. § 115 (2012) (making it a crime to threaten “to assault, kidnap, or murder . . . a United States judge”); JUDICIAL INDEPENDENCE IN TRANSITION 1248 (Anja Seibert-Fohr ed., 2012) (“Violence or threats made to judges or those close to them is a criminal offence.”); *Life Under Death Threats: Dangers Faced by Judges, Prosecutors*, NPR, (Apr. 1, 2013), <http://www.npr.org/2013/04/01/175938445/the-dangers-facing-judges-and-prosecutors> (“In 2012, 1,370 threats were made against federal judges.”).

156 JEANNINE MARIE DELOMBARD, *IN THE SHADOW OF THE GALLOWES: RACE, CRIME, AND AMERICAN CIVIL IDENTITY* 341 n.31 (2012) (noting that a man was found guilty of attempted rape and sentenced “to sit on gallows”); DANIEL ALLEN HEARN, *LEGAL EXECUTIONS IN NEW ENGLAND: A COMPREHENSIVE REFERENCE, 1623–1960*, at 117 (1999). As one source notes, citing a newspaper story from 1752: “At the Court of Assize, at Springfield, the 2d Tuesday of September last, Daniel Bailey and Mary Rainer, of a Place adjoining to Sheffield in that county, were convicted of Adultery, and were sentenced to suffer the Penalty of the Law therefor, viz. to sit on the Gallows with a Rope about their Necks, for the Space of an Hour; to be whipt forty Stripes each, and to wear for ever after a Capital A, two Inches long, and proportionable in bigness, cut out in Cloth of a contrary Colour to their Cloaths, and sewed upon their upper Garments, either upon the outside of the arm, or on the back.” GEORGE FRANCIS DOW, *EVERY DAY LIFE IN THE MASSACHUSETTS BAY COLONY* 214 n.\* (1988) (citing *Boston Evening-Post*, Oct. 9, 1752).



law subjected thieves to increasing penalties—and escalating threats of death—for each offense.<sup>157</sup> A first-time offender was to be fined or whipped; a second offense required the thief to pay tremble damages, sit upon the gallows platform for an hour with a rope around his neck, and then to receive up to thirty stripes at the whipping post; and, finally, to be hanged for a third offense.<sup>158</sup> “The colonists’ rationale,” one historian notes, “was clear: anyone impervious to the fine and the whip, who did not mend his ways after an hour with a noose about him, was uncontrollable and therefore had to be executed.”<sup>159</sup> The punishment of sitting on the gallows continued to exist in Massachusetts after the Revolutionary War,<sup>160</sup> though it eventually passed from the scene along with the corporal punishments of branding, whipping, ear cropping, and standing in the pillory.<sup>161</sup>

Living under a threat of death, the evidence shows, is a deeply depressing experience, especially when one is confined in prison—and particularly when one is confined in isolation on death row with all that entails.<sup>162</sup> “Most significantly for the offender,”

157 THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 509 (1814).

158 *Id.* at 509–10.

159 DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 52 (rev. ed. 2017).

160 1 THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, FROM THE ESTABLISHMENT OF ITS CONSTITUTION, IN THE YEAR 1780, TO THE END OF THE YEAR 1800, at 351 (Boston, I. Thomas & E.T. Andrews 1801) (reprinting a 1786 law that provided for the following punishment: “to sit on the gallows with a rope round his neck for the space of one hour”); 1 THE GENERAL LAWS OF MASSACHUSETTS, FROM THE ADOPTION OF THE CONSTITUTION, TO FEBRUARY, 1822, at 65, 183, 185 (Boston, Wells & Lily and Cummings & Hillard 1823) (referencing 1782 and 1785 Massachusetts laws providing for the punishment of “sitting on the gallows, with a rope about the neck,” “sitting on the gallows with a rope about his neck,” and “sitting on the gallows the space of one hour, with a rope about his neck”); ANDREW DUNLAP, *A SPEECH DELIVERED BEFORE THE MUNICIPAL COURT OF THE CITY OF BOSTON, IN DEFENCE OF ABNER KNEELAND, ON AN INDICTMENT FOR BLASPHEMY* 2, 44 (Boston, 1834) (referencing the punishment of “sitting on the gallows, with a rope about the neck”).

161 PROCEEDINGS OF THE AMERICAN ANTIQUARIAN SOCIETY, AT THE SEMI-ANNUAL MEETING, HELD IN BOSTON, APRIL 28, 1875, at 69–70 (Worcester, Charles Hamilton, Paladium Office 1875).

162 HANDBOOK OF CORRECTIONAL MENTAL HEALTH 467 (Charles L. Scott 2d ed., 2010) (“Treating psychiatrists may encounter death row inmates experiencing overwhelming fear, helplessness, recurrent depression, and



Carol and Jordan Steiker write in *Courting Death: The Supreme Court and Capital Punishment*, “extended death row incarceration presents special problems of cruelty, especially given the prevailing harsh conditions of death row confinement.” “Condemned inmates,” they explain, “now face multiple punishments: lengthy incarceration in solitary-style conditions; the anguish of perpetually living under a sentence of death; and actual execution.”<sup>163</sup> It is a dreary existence, with death row inmates using the phrase “Dead Man Walking”—the expression popularized by Sister Helen Prejean’s book of the same name<sup>164</sup>—to refer to the condemned before execution.<sup>165</sup> In the late-nineteenth-century case of *In re Medley*,<sup>166</sup> the U.S. Supreme Court itself emphasized 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.”<sup>167</sup>

The process of state-sanctioned killing begins with a prosecutor’s notice of intent to seek the death penalty. Under federal law, the prosecutor advises the defendant and the court “a reasonable time before trial,” or before the acceptance of a plea, of the government’s intention to seek the death penalty.<sup>168</sup> The

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self-mutilation.”); *id.* (“Another phenomenon not uncommonly seen on death row is an inmate who voluntarily waives appeals in an effort to hasten the execution. The motivations of these so-called volunteers may be rooted in depression, resentment, or simple demoralization.”); *see also* Smith v. Mahoney, 611 F.3d 978, 999 (9th Cir. 2010) (Fletcher, J., dissenting) (“At the time of the arraignment, he was deeply depressed because he had been in solitary confinement for some time and subjected to harsh living conditions. He had received death threats from Native American inmates and believed that he would be killed in prison.”). The issue of “volunteers” has been discussed at length elsewhere. *E.g.*, John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939 (2005); C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849 (2000).

163 CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 207 (2016).

164 HELEN PREJEAN, *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* (1993).

165 DAVID W. NEUBAUER & HENRY F. FRADELLA, *AMERICA’S COURTS AND THE CRIMINAL JUSTICE SYSTEM* 386 (10th ed. 2011).

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

167 *Id.* at 172.

168 Charles Doyle Sr., *The Death Penalty: Capital Punishment Legislation in the 110th Congress*, in *CAPITAL PUNISHMENT UPDATE* 8 (Lorraine V. Coyne ed.,

U.S. Department of Justice has a death penalty protocol whereby a local U.S. attorney cannot seek the death penalty without prior authorization from the Attorney General of the United States. Per that protocol, U.S. attorneys are required to submit to the Department of Justice's Capital Case Unit of the Criminal Division all cases involving a charge for which the death penalty is a legally authorized sanction, regardless of whether the U.S. attorney recommends seeking the death penalty. After the Capital Case Unit reviews the case and prepares an initial analysis and recommendation, the Attorney General's Capital Case Review Committee, composed of senior Justice Department lawyers, meets with the U.S. attorney and defense counsel, reviews all documents submitted by the parties, and makes its recommendation to the Attorney General. The Attorney General then makes the final decision regarding whether to seek the death penalty.<sup>169</sup>

Part and parcel of torture is instilling the fear of death or bodily harm,<sup>170</sup> and capital charges backed by the resources of federal, state, or local prosecutors—ones designed to take a person's life—certainly cannot be taken lightly by those facing such charges.<sup>171</sup> In fact, threats of bodily harm or death, the U.N. Human

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2007).

169 SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA* 388 (6th ed. 2016).

170 On the practice of torture in prior centuries, one commentator writes: "Often, the intent was to instill the fear of death, as in the use of water torture." *THE TORTURE DEBATE IN AMERICA* 4 (Karen J. Greenberg ed., 2006). Instilling intense fear remains the goal of modern torture techniques. KERIM YILDIZ & JULIET McDERMOTT, *TORTURE IN TURKEY: THE ONGOING PRACTICE OF TORTURE AND ILL-TREATMENT* 105 (2004); *see also id.* at 39 ("[T]orture terrorizes. The body in pain winces; it trembles. The muscles themselves register fear. This, too, is rooted in pain's biological function of impelling us in the most urgent way possible to escape from the source of pain—for that impulse is indistinguishable from panic. U.S. interrogators have used the technique of "waterboarding" to break the will of detainees. They are strapped to a board and immersed repeatedly in water, just short of drowning. As anyone knows who has ever come close to drowning or suffocating, the oxygen-starved brain sends panic-signals that overwhelm everything else.").

171 Neuroscientists have noted that psychological torture—sometimes called "no-touch" torture—releases stress hormones by creating intense fear. ARMIN KRISHNAN, *MILITARY NEUROSCIENCE AND THE COMING AGE OF NEUROWARFARE* 200 (2017); *see also* Diarmuid Cunniffe, *The Worst Scars Are in the Mind: Deconstructing Psychological Torture*, 7 *ICL J.* 1, 14–16 (2013) (discussing how threats induce fear, can weaken resistance and "break the will of detainees," "are a particularly cruel form of psychological suffering,"

Rights Committee has determined, can constitute psychological torture. For instance, in *Estrella v. Uruguay*, a concert pianist—an Argentine national, Miguel Angel Estrella, then living in France—filed a communication with the Human Rights Committee about his detention in a Uruguayan prison. Estrella’s communication asserted that, in December 1977, he was subjected to torture after armed individuals in civilian clothes broke into his house, threatened him with death, and he was punched and kicked, had his feet and hands bound, and was blindfolded and hooded.<sup>172</sup> The alleged psychological torture he was subjected to was said to consist “chiefly in threats of torture or violence to relatives or friends, or of dispatch to Argentina to be executed,” and “in threats of making us witness the torture of friends.” “For hours upon end,” Estrella asserted of his tormentors, “they put me through a mock amputation with an electric saw, telling me: ‘we are going to do the same to you as Victor Jara’”—a reference to a well-known Chilean singer and guitarist who was found dead, with his hands completely smashed, at the end of September 1973 in a stadium in Santiago, Chile. On March 25, 1982, the Human Rights Committee decided that Estrella “was subjected to severe physical and psychological torture, including the threat that the author’s hands would be cut off by an electric saw, in an effort to force him to admit subversive activity.”<sup>173</sup>

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and how “[t]he sensation of fear or exposure to life-threatening situations and fear of death is, in psychological and psychiatric terms, described as a major ‘stressor’”).

172 *Estrella v. Uruguay*, Communication No. 74/1980, U.N. Doc. CCPR/C/OP/2 at 93 (1990), <http://hrlibrary.umn.edu/undocs/newscans/74-1980.html>. “The alleged physical torture consisted of electric shocks, beatings with rubber truncheons, kicks and punches, hanging him up with his hands tied behind his back, pushing him into water until he nearly drowned, and making him stand with his legs apart and arms raised for up to 20 hours.” *Id.*

173 *Id.*; see also Nigel Rodley (Special Rapporteur for the Commission on Human Rights), *Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, at 3, para. 3, U.N. Doc. A/56/156 (July 3, 2001) (“As stated by the Human Rights Committee in its General Comment No. 20 (10 April 1992), on article 7 of the International Covenant on Civil and Political Rights, the Special Rapporteur would like to remind Governments that the prohibition of torture relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim, such as intimidation and other forms of threats.”); *id.*, at 3, para. 4 (“A number of decisions by human rights monitoring mechanisms have accordingly referred to the notion of mental pain or suffering, including suffering through intimidation and threats, as a violation of the prohibition of torture and other forms

The Inter-American Court of Human Rights has itself repeatedly concluded that fear and terror are sufficient to establish mental torture. If a person is *threatened with bodily harm*, it is characterized as psychological torture. Thus, in *Maritza Urrutia v. Guatemala*, the Inter-American Court concluded in 2003: “An international juridical regime of absolute prohibition of all forms of torture, both physical and psychological, has been developed and, with regard to the latter, it has been recognized that the threat or real danger of subjecting a person to physical harm produces, under determined circumstances, such a degree of moral anguish that it may be considered ‘psychological torture.’”<sup>174</sup> Likewise, in *Baldeón García v. Peru*, the Inter-American Court found in 2006 that “threats and real danger of physical harm causes, in certain circumstances, such a degree of moral anguish that it may be considered psychological torture.”<sup>175</sup> And in *Tibi v. Ecuador*,<sup>176</sup> the Inter-American Court found that the victim “was threatened” during his detention in violation of Article 5 of the American Convention<sup>177</sup> and that such conduct, which “made him feel panic and fear for his life, . . . is a form of torture.”<sup>178</sup> That decision made clear that the American Convention’s prohibition of torture and cruel, inhuman, or degrading punishment or treatment extends to not only physical

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of ill-treatment. In particular, the Special Rapporteur would like to draw Governments’ attention to the views expressed by the Human Rights Committee in the case of *Estrella v. Uruguay*.”); *id.*, at 4, para. 8 (“It is the Special Rapporteur’s opinion that serious and credible threats, including death threats, to the physical integrity of the victim or a third person can amount to cruel, inhuman or degrading treatment or even to torture, especially when the victim remains in the hands of law enforcement officials.”).

174 *Maritza Urrutia v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 147, para. 92 (Nov. 27, 2003), [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_103\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_103_ing.pdf).

175 *Baldeón García v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 147, para. 119 (Apr. 6, 2006), [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_147\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_147_ing.pdf).

176 Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 147, para. 147 (Sept. 7, 2004).

177 Article 5 of the American Convention on Human Rights provides in part: “Every person has the right to have his physical, mental, and moral integrity respected.” Organization of American States, American Convention on Human Rights art. 5(1), Nov. 22, 1969, O.A.S.T. No. 36, 1144 U.N.T.S. 123. “No one,” that article further provides, “shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.” *Id.* at art. 5(2).

178 *Tibi v. Ecuador*, Inter-Am. Ct. H.R., (ser. C) No. 114, para. 149.



suffering but also psychic and moral anguish.<sup>179</sup> “[T]hreats and the real danger of subjecting a person to physical injury,” that court emphasized, “may be considered psychological torture.”<sup>180</sup>

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 the torture and inhumanity associated with life on death row.<sup>181</sup> In that report, its authors note that every individual on Texas’ death row “spends approximately 23 hours a day in complete isolation for the entire duration of their sentence, which, on average, lasts more than a decade.”<sup>182</sup> As the report then emphasizes: “This prolonged solitary confinement has overwhelmingly negative effects on inmates’ mental health, exacerbating existing mental health conditions and causing many prisoners to develop mental illness for the first time.”<sup>183</sup> “In addition to the detrimental effects of isolation,” the report notes, “the practice of setting multiple execution dates means that many prisoners are subjected to the psychological stress of preparing to die several times during their sentence.”<sup>184</sup> “The right to be free

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179 *Id.* at para. 147 (“The Court has also recognized that threats and the real danger of subjecting a person to physical injury, under certain circumstances, cause such a moral anguish that they may be considered psychological torture.”).

180 *Id.*

181 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 (2017)); *see also* *A Death Before Dying: Solitary Confinement on Death Row*, AM. CIV. LIBERTIES UNION (July 2013), [www.aclu.org/sites/default/files/field\\_document/deathbefore-dying-report.pdf](http://www.aclu.org/sites/default/files/field_document/deathbefore-dying-report.pdf); 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 30, 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.”).

182 HUMAN RIGHTS CLINIC, THE UNIV. OF TEX. SCH. OF LAW, *supra* note 181, at 5; *see also* Lain, *supra* note 181, at 40.

183 HUMAN RIGHTS CLINIC, THE UNIV. OF TEX. SCH. OF LAW, *supra* note 181, at 5.

184 *Id.*; *see also* ROBERT M. BOHM, DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES 225 (5th ed. 2017) (“In all death penalty jurisdictions, a death or



from torture is an absolute human right, and it is submitted that the current conditions of confinement on Texas' death row, including mandatory indefinite isolation, amount to a severe and relentless act of torture," the report concludes.<sup>185</sup> "Inmates held in solitary confinement," the report assesses, "are effectively subject to a severe form of psychological torture every day of their lives."<sup>186</sup>

The uncertainty and unknowns associated with capital cases only serve to amplify the torturous nature of death penalty regimes. "Another particularly stressful experience is the anticipation of torture," Metin Başoğlu and Susan Mineka emphasize in *Torture and Its Consequences*. As they write in that book: "This vulnerability is often exploited by the torturers who make verbal threats of torture. Many survivors report that having to wait to be taken from their cell to the torture chamber can be even more distressing than torture itself."<sup>187</sup> "The anticipatory distress," they explain, "seems to be greater if the intervals between sessions are variable and/or if there is an uncertainty about the nature of the next torture session; both of these factors obviously maximize unpredictability."<sup>188</sup> "Such observations," they point out, "are corroborated by research in animals showing that shocks delivered at variable intervals (as opposed to fixed intervals) produce greater heart rate elevations and more ulceration."<sup>189</sup> Death row inmates clearly endure enormous

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execution warrant instigates the execution process. A death warrant, which typically sets the date and place for a prisoner's execution, usually is issued by a state's governor, or the president of the United States in federal death penalty cases, and authorizes a warden or other prison officials to carry out a death sentence. In Texas, a district court judge sets the execution date. . . . The length of time before a death warrant expires and has to be reissued varies from a few days to several months.").

185 HUMAN RIGHTS CLINIC, THE UNIV. TEX. SCH. LAW, *supra* note 181, at 7.

186 *Id.* at 21. One former death row inmate described life on death row as a "slow mental, physical and spiritual torture." *Id.* at 22.

187 Metin Başoğlu & Susan Mineka, *The Role of Uncontrollable and Unpredictable Stress in Post-Traumatic Stress Responses in Torture Survivors*, in TORTURE AND ITS CONSEQUENCES: CURRENT TREATMENT APPROACHES 182, 206 (Metin Başoğlu ed., 1992).

188 *Id.*

189 *Id.* In that source, Metin Başoğlu and Susan Mineka further emphasize: "Certain forms of torture seem to have a much greater impact than others in inducing loss of control and feelings of helplessness in the detainee. Those that involve a perceived risk of death during the process appear to be more traumatic than the ones that merely involve physical pain but no real threat to life. Submersion of the head under water until near-asphyxiation or sham executions are examples of such methods." *Id.*

uncertainty and mental anguish, vacillating between hope and intense fear and despair while coping with severe depression and psychological trauma and, often, suicidal thoughts or ideation.<sup>190</sup>

### ***B. Capital Charges, Death Sentences, and Execution Protocols***

Capital charges—or threats of death by police or prosecutors—are themselves extremely problematic when analyzed through the lens of the legal prohibition against torture. It is well known that confessions can be obtained through coercion or torture,<sup>191</sup> and those facing death threats can be compelled to make choices—often as a result of duress—they might not have made had the prospect of death been removed from the equation.<sup>192</sup> False or coerced

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190 JOHN D. BESSLER, *CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT* 225 (2012) (“Condemned inmates, suffering from bouts of depression, often take their own lives . . . . One Florida study showed that 35 percent of death row inmates in that state attempted suicide and that 42 percent considered suicide.”).

191 GEORGE RYLEY SCOTT, *THE HISTORY OF TORTURE THROUGHOUT THE AGES* 276 (2009) (“Terror induced by threats is frequently tried to induce admission of guilt. A police officer may threaten to shoot the accused, and has been known to go so far as to press a revolver, loaded with blank cartridges, against the head or stomach and pull the trigger.”); *see also* *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944) (“The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.”); *Chambers v. State of Florida*, 309 U.S. 227, 237–38 (1940) (referring to “physical and mental torture and coercion” in the context of “secret inquisitorial processes”).

192 BESSLER, *THE DEATH PENALTY AS TORTURE*, *supra* note 26, at 83 (“[I]n 1994, an Illinois federal district court emphasized that duress is a valid defense where there is ‘(1) an immediate threat of death or serious bodily harm; (2) a well-grounded fear that the threat will be carried out; and (3) no reasonable opportunity to escape the threatened harm.’ And in the early twentieth century, American marriages were invalidated where the consent of grooms was not freely given, but were obtained through threats of death by the fathers of the brides. . . . In a New Jersey case from the 1950s, ‘threats of gangster violence’ and ‘arsenic poisoning’ against a husband were themselves found to raise important questions of fact as to whether

confessions occur with some frequency,<sup>193</sup> and the risk of miscarriages of justice is heightened significantly in situations involving threats of death.<sup>194</sup> As one law review article reports: “The threat of a death

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conveyances to the wife of property were procured by means of duress. In that case, *Rubenstein v. Rubenstein*, the husband’s allegations of threats of arsenic poisoning were given weight because the wife’s father was then serving a life sentence in a Pennsylvania prison for murder committed when he was associated with an ‘arsenic ring’ engaged in killings to defraud life insurers. Because the threat of arsenic poisoning was credible, the court gave significance to it.”).

- 193 *E.g.*, DANIEL REISBERG, *THE SCIENCE OF PERCEPTION AND MEMORY: A PRAGMATIC GUIDE FOR THE JUSTICE SYSTEM* 193 (2014) (providing estimates on the number of false confessions); WRIGHTSMAN’S *PSYCHOLOGY AND THE LEGAL SYSTEM* 158 (Edie Greene & Kirk Heilbrun eds., 7th ed. 2011) (“It is undisputed that false confessions led to the wrongful conviction and imprisonment of five people in Beatrice, Nebraska in a case known as the Beatrice Six . . . .”); *id.* at 159 (“The Beatrice Six—five people who falsely confessed and one who was wrongfully convicted of the 1985 rape and murder of 68-year-old Helen Wilson in Beatrice, Nebraska—set the record for the most people exonerated by DNA evidence in one case. Their exonerations and pardons in 2008 shed light on the way that interrogators were able to get detailed statements from the suspects about a crime they did not commit.”); *id.* (“Suspect Joann Taylor confessed after interrogators told her they wanted her to be the first female on Nebraska’s death row. In fact, five of the six suspects, easily influenced and probably confused, falsely confessed to escape the threat of a death penalty.”); Mordecai Specktor, *Minneapolis Attorney Steve Kaplan Helps to Free Death Row Inmate Damon Thibodeaux, Who Had Been Wrongly Convicted of Rape and Murder*, *AMERICAN JEWISH WORLD* (Feb. 1, 2013), <https://www.tcdailyplanet.net/minneapolis-attorney-steve-kaplan-helps-free-death-row-inmate-damon-thibodeaux-who-h/> (“After nine hours of police grilling, and going without sleep for more than 30 hours, Thibodeaux cracked and falsely confessed to committing rape and murder.”).
- 194 *E.g.*, *McHenry v. United States*, 308 F.2d 700, 703 (10th Cir. 1962) (citations omitted) (“An involuntary confession or one obtained by means of threats and promises which subject the mind of the accused to the torture or fear of flattery of hope is inadmissible in a criminal trial.”). As one court put it, in a situation where a man in police custody was threatened with the electric chair should he remain silent, thereby causing him to lose his capacity for rational calculation: “When a confession is forced from the mind by the flattery of hope or by the torture of fear, it is unreliable and no credit ought to be given to it. Promises or suggestions of leniency in exchange for waiving the Fifth Amendment privilege create a *flattery of hope*, which is made even more powerful by the *torture of fear* that accompanying threats of punishment induce in the mind of the accused.” *State v. Petitjean*, 748 N.E.2d 133, 141, 145 (Ohio Ct. App. 2000) (italics in original); accord DAVID V. BAKER, *WOMEN AND CAPITAL PUNISHMENT IN THE UNITED STATES: AN ANALYTICAL HISTORY* 183 (2016) (“Police

sentence causes many defendants to plead guilty in exchange for a life sentence, rather than risk the outcome of a trial.”<sup>195</sup> Just as death threats by prison guards can chill inmates’ exercise of their First Amendment rights,<sup>196</sup> the prospect of being sentenced to death in a court of law is also likely to influence the decision-making of

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investigators and state prosecutors used the threat of the death penalty to coerce false confessions from Ada JoAnn Taylor, Debra Shelden, and Kathy Gonzales.”); Joe Duggan, *Beatrice 6 Member Says Threat of Death Penalty Persuaded Her to Confess to a Slaying She Didn’t Commit*, WORLD-HERALD BUREAU (Oct. 25, 2016), [https://www.omaha.com/news/crime/beatrice-member-says-threat-of-death-penalty-persuaded-her-to/article\\_51ebcf4f-7299-5d08-8dfa-ebae55f0f5c2.html](https://www.omaha.com/news/crime/beatrice-member-says-threat-of-death-penalty-persuaded-her-to/article_51ebcf4f-7299-5d08-8dfa-ebae55f0f5c2.html) (“[W]hen the prosecutor agreed to take the death penalty off the table in exchange for a guilty plea and her cooperation, Taylor and her court-appointed attorney decided it was the best option. . . . Taylor said the decision to give a false confession may have saved her life, but it cost her more than 19½ years of freedom.”); see also Statement of Robert Dunham, Executive Director of the Death Penalty Information Center, on the release of the National Registry of Exonerations’ reports *Exonerations in 2016* and *Race and Wrongful Convictions in the United States* (Mar. 7, 2017), <https://deathpenaltyinfo.org/documents/DPICStatementOnNationalRegistryReports.pdf> (last visited Oct. 25, 2018) (“Our review of the 2016 data [from the National Registry of Exonerations] reveals that the death penalty played a role in nearly a quarter of the 54 homicide exonerations last year. In at least six of the wrongful homicide convictions, prosecutors had sought the death penalty at trial; in another, an innocent defendant had pled guilty to avoid the death penalty; and at least six additional exonerations were the product of witnesses having falsely implicated innocent defendants after police had threatened the witness or a loved one with the death penalty unless the witness cooperated with the investigation . . .”).

- 195 Rachel King, *No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Prisoners*, 16 PUB. INT. L.J. 195, 214 (2007).
- 196 *Schleig v. Borough of Nazareth*, No. 16-3499, 2017 WL 2591408, at \*4 (3d Cir. June 15, 2017) (“In the few cases in which government officials have made death threats in response to constitutionally protected activity, no one has tried to claim that the offending official’s behavior is something other than unlawful retaliation.”); *Knecht v. Collins*, Nos. 96-3682, 96-3735, 96-4114, 1999 WL 427173, at \*3 (6th Cir. June 15, 1999) (per curiam) (a reasonable jury could conclude that prison guards’ acts of filing false disciplinary charges and issuing death threats were sufficient to deter a prisoner of ordinary firmness from exercising First Amendment rights); *Walker v. Firman*, No. 16-cv-02221-RBJ-MEH, 2017 WL 4652015, at \*10 (D. Colo. Oct. 17, 2017) (“It is also clearly established that making death threats in retaliation for protected conduct violates the First Amendment.”); *Silverburg v. Seeley*, No. 3:09CV-P493-R, 2009 WL 5197870, at \*3 (W.D. Ky. Dec. 23, 2009) (“[T]he Court will allow the individual-capacity claims for damages for retaliation based on alleged threats of death . . .”).



those facing capital prosecution or capital charges.<sup>197</sup> In the lead up to actual executions, the mental torment death row inmates face is, no doubt, off the charts.

In states that still put people to death, due process and fairness considerations inevitably yield to finality. “Today’s executions,” Robert Johnson writes in *Death Work: A Study of the Modern Execution Process*, “are highly bureaucratic jobs with clearly delineated roles, responsibilities, and procedures articulated in execution protocols.”<sup>198</sup> These protocols are often laden with minutia about how the executions will be carried out, yet the protocols put condemned inmates on notice, in no uncertain terms, that the

197 *E.g.*, *Bussey v. State*, 184 So. 3d 1138, 1141 (Fla. Dist. Ct. App. 2015) (detectives’ repeated threats of the death penalty amounted to coercion that rendered a murder defendant’s confession involuntary); *id.* at 1145–46 (“The purpose of the detectives’ comments regarding the death penalty . . . was not to inform [Bussey] of the penalties he faced. Rather, the purpose of the comments was to instill fear in Bussey that he would face the death penalty with the hope that his fear would cause him to confess to the robbery and murder.”); *cf.* *Galenski v. Commonwealth*, No. 2012-SC-000407-MR, 2013 WL 6730018, at \*2 n.9 (Ky. Dec. 19, 2013) (citation omitted) (“The Beatrice Six is the colloquial name given to a group of six youths that were wrongfully convicted of murder in Beatrice, Nebraska, as a result of confessions induced by the threat of the death penalty.”); *People v. Sanders*, 976 N.Y.S.2d 205, 213 (N.Y. App. Div. 2013) (Hall, J., dissenting) (citations omitted) (“The defendant was threatened, by the FBI agent, with the possibility of death. This threat was used to overcome the defendant’s will, which is so ‘fundamentally unfair as to deny due process.’”); *State v. Knight*, No. 04-CA-35, 2008 WL 4369764, at \*8–13 (Ohio Ct. App. Sept. 26, 2008) (Donovan, J., dissenting) (asserting that a murder confession was involuntary and “improperly induced” because “threats of the electric chair” introduced a “torture of fear” in order to “overbear” the suspect’s will). It has long been understood that torturous practices, which can include the use of death threats, can lead to false confessions. As one judge on the Supreme Court of Washington stressed in 2009: “We have reason to believe that, even in our own country and even in our own time, men have gone to prison and even death row on the strength of confessions wrought by torture.” *State v. Riofta*, 209 P.3d 467, 477 (Wash. 2009) (en banc) (Chambers, J., concurring in dissent). The threat of death may also influence the decision-making of lawyers representing those facing the prospect of capital charges or death sentences. *E.g.*, Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475, 482–84 (2013) (finding that the threat of the death penalty increases the probability of a plea agreement by approximately 20 percent, and noting that capital charges enable prosecutors to empanel “death-qualified” juries and that “the use of the death penalty as leverage in plea negotiations raises important legal and ethical issues”).

198 ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* 42 (1998).



government aims to kill them. In a 2001 news story, *The New York Times* reported about the 56-page “Execution Protocol” to be used by the staff of the federal penitentiary in Terre Haute, Indiana.<sup>199</sup> While professing to allow executions to be carried out “in an efficient and humane manner,” it provided a “systemic countdown to execution” that includes several pre-execution checklists.<sup>200</sup> “As soon as practical after establishment of the execution date,” one section of the protocol read, “the warden at U.S.P. Terre Haute or designee, will personally brief the condemned individual regarding relevant aspects of the execution process.”<sup>201</sup> “A briefing sheet outlining these aspects of the execution will be given to the individual,” the protocol continued.<sup>202</sup> In other words, not only is a death row inmate already fully aware that a death sentence has been imposed, but a prison official describes to the inmate the process by which that inmate’s life will be extinguished by the state.

Under that Execution Protocol, the warden’s briefing with the condemned inmate was to take place “By 30 Days Before the Execution,” as was a conference with the condemned inmate pertaining to the selection of execution witnesses, to include “one spiritual adviser, two defense attorneys and three adult friends or relatives (at least 18 years old).”<sup>203</sup> In addition, the condemned inmate was to be asked about “Disposition of Body” and “Disposition of Personal Property and Accounts,” with the inmate “to provide instructions concerning the disposition of his/her body no later than 14 days prior to the execution.”<sup>204</sup> Throughout the process, the condemned inmate would be continually reminded, in ways big and small, that the execution was approaching. “At least seven days prior to the execution, the warden or designee will contact the condemned individual to arrange for his/her last meal,” the protocol read.<sup>205</sup> “Between 24 and 12 Hours Prior,” it continued, “[t]he warden will contact the condemned individual to finalize arrangements for his/her final meal and ensure that it is properly prepared and served by

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199 See Jane Fritsch, *Word for Word/Execution Protocol; Please Order Your Last Meal Seven Days in Advance*, N.Y. TIMES, Apr. 22, 2001, <http://www.nytimes.com/2001/04/22/weekinreview/word-for-word-execution-protocol-please-order-your-last-meal-seven-days-advance.html>.

200 *Id.*

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id.*

staff.”<sup>206</sup> After the termination of the condemned inmate’s telephone privileges “24 hours prior to the execution,” the condemned inmate’s final meal was to be served “Between 12 and 3 Hours Prior” to the execution.<sup>207</sup> The death row inmate would, of course, also be aware of an attorney’s final efforts to save the inmate’s life as well as the submission of any clemency petition, all of which the inmate would be helpless to predetermine the outcome.<sup>208</sup>

According to the Execution Protocol,<sup>209</sup> the warden, during the period “Between 3 Hours and 30 Minutes Prior” to the execution, was to “designate a recorder who will begin logging execution activities in the official execution log book.”<sup>210</sup> And in “The Final 30 Minutes,” several items were listed to be accomplished by prison authorities.<sup>211</sup> In particular, the Execution Protocol’s section for “Bringing the Condemned Individual to the Execution Room” required the condemned individual to be removed from an inmate holding cell, strip-searched, and then “dressed in khaki pants, shirt and slip-on shoes,” “secured with restraints, if deemed appropriate by

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206 *Id.*

207 *Id.*

208 The chances of a clemency petition being granted are quite small. DAVID R. DOW, *EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA’S DEATH ROW* 86 (2005) (“Death penalty lawyers file clemency petitions on behalf of their clients because when someone’s life is at stake, lawyers tend to leave nothing on the cutting room floor, but when they are writing the petitions, they know it is a mere formality.”); *see also id.* (italics in original) (noting that “*hope* is too strong a word to describe the clemency process in Texas”; “[d]eath row inmates do not receive clemency in Texas”).

209 This execution protocol is one of many throughout the United States that methodically detail how executions are to be carried out. The texts of various execution protocols can be found on the Death Penalty Information Center’s website. *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-lethal-injection> (last visited Sept. 28, 2018) (containing links to available protocols). *But see* EVAN J. MANDERY, *CAPITAL PUNISHMENT IN AMERICA: A BALANCED EXAMINATION* 492 (2d ed. 2012) (“[M]any states do not make their procedures known. Professor Deborah Denno of Fordham Law School has tirelessly detailed the failings of states in this regard, offering many examples of states that have vague and even secret execution protocols.”); *see also* DANIEL LACHANCE, *EXECUTING FREEDOM: THE CULTURAL LIFE OF CAPITAL PUNISHMENT IN THE UNITED STATES* 91 (2016) (“[A]nthropological studies of executions in the modern era have drawn a connection between execution protocols and a loss of agency of both the condemned and the state actors engaged in ‘death work.’”).

210 Fritsch, *supra* note 199.

211 *Id.*

the warden,” and “escorted to the Execution Room by the Restraint Team.”<sup>212</sup> “In the Execution Room,” the protocol continued, “the ambulatory restraints, if any, will be removed, and the condemned individual will be restrained to the Execution Table.”<sup>213</sup> “Once the condemned individual has been secured to the table,” the protocol read for the execution’s final stage, “at the direction of the warden, staff inside the Execution Room will open the drapes covering the windows of the witness rooms.”<sup>214</sup> “The warden,” the protocol then read, “will ask the condemned individual if he/she has any last words or wishes to make a statement.”<sup>215</sup> Because executions extinguish life and many executions are botched, a fact that death row inmates are no doubt well aware of, the psychological torment as an execution approaches is especially heightened.<sup>216</sup>

#### IV. The Torturous Nature of State-Sanctioned Killing

##### A. *Mental vs. Physical Pain or Suffering*

Cruelty and torture—the aggravated form of cruelty—are prohibited by law.<sup>217</sup> The U.N. Human Rights Committee, back in 1993, held that “the death penalty must be carried out in such a

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212 *Id.*

213 *Id.*

214 *Id.*

215 *Id.* ROBERT M. BOHM, *DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES* 202 (5th ed. 2017) (“When the first jolt of 2,000-volt electricity hit Tafero, the sponge in the headpiece gave off a combustible gas, which shot smoke and flames from the top of the leather hood hiding Tafero’s face. The flames—described as 3 inches to a foot long—horrified witnesses. Tafero’s attorney described the flawed execution as torture.”).

216 AUSTIN SARAT, *GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY* 5 (2014). In some cases, death row inmates have been forced to spend an extended amount of time on the lethal injection gurney or to endure excruciating pain during the execution itself. REV. CARROLL PICKETT & CARLTON STOWERS, *WITHIN THESE WALLS: MEMOIRS OF A DEATH HOUSE CHAPLAIN* 79–98 (2017); Ziva Branstetter & Cary Aspinwall, *Inmate Clayton Lockett Dies of Heart Attack After Botched Execution; Second Execution Postponed*, *TULSA WORLD* (Apr. 30, 2014), [http://www.tulsaworld.com/news/state/inmate-clayton-lockett-dies-of-heart-attack-after-botched-execution/article\\_80cc060a-cff2-11e3-967c-0017a43b2370.html](http://www.tulsaworld.com/news/state/inmate-clayton-lockett-dies-of-heart-attack-after-botched-execution/article_80cc060a-cff2-11e3-967c-0017a43b2370.html).

217 GREENBERG, *supra* note 170, at 366 (noting that the Convention Against Torture treats torture as an extreme form of cruel, inhuman or degrading treatment).

way as to cause the least possible physical and mental suffering.”<sup>218</sup> Similarly, the U.S. Supreme Court, while upholding the death penalty’s constitutionality in cases like *Wilkerson v. Utah*,<sup>219</sup> *In re Kemmler*,<sup>220</sup> *Gregg v. Georgia*,<sup>221</sup> *Baze v. Rees*<sup>222</sup> and *Glossip v. Gross*,<sup>223</sup> has held that torture—as well as any barbaric method of execution<sup>224</sup> (or one causing a “lingering death”)—is prohibited by the U.S. Constitution’s Eighth Amendment.<sup>225</sup> For instance, the Supreme

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- 218 Committee on Civil and Political Rights, *NG v. Canada*, ¶ 1, U.N. Doc. CCPR/C/49/D/469/1991 (Nov. 5, 1993). The Human Rights Committee expressed the view that there would be a real risk of cruel and inhumane treatment were gas asphyxiation to be used to carry out an execution. *Id.*; see also Committee on Civil and Political Rights, *Kindler v. Canada*, U.N. Doc. CCPR/C/48/D/470/1991 (July 30, 1993).
- 219 *Wilkerson v. Utah*, 99 U.S. 130 (1879) (upholding the constitutionality of the public firing squad).
- 220 *In re Kemmler*, 136 U.S. 436 (1890) (upholding the constitutionality of New York’s electric chair).
- 221 *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding the constitutionality of Georgia’s death penalty). At the same time as the *Gregg* ruling, the U.S. Supreme Court also upheld the constitutionality of the death penalty in Florida and Texas. *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).
- 222 *Baze v. Rees*, 553 U.S. 35 (2008) (upholding the constitutionality of Kentucky’s three-drug lethal injection protocol).
- 223 *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (upholding the constitutionality of Oklahoma’s three-drug lethal injection protocol). Although the Supreme Court struck down the death penalty as unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972), it reversed course four years later and upheld the death penalty’s constitutionality in *Gregg v. Georgia*, 428 U.S. 153 (1976).
- 224 *Wilkerson*, 99 U.S. at 135–36 (noting in dicta that “burning alive” and other “punishments of torture . . . in the same line of unnecessary cruelty, are forbidden” by the U.S. Constitution’s Eighth Amendment).
- 225 *In re Kemmler*, 136 U.S. at 447. Dissents have asserted that particular methods of executions are unconstitutional. *E.g.*, *Gomez v. U.S. Dist. Ct. for Northern Dist. of Cal.*, 503 U.S. 653, 658 (1992) (Stevens, J., dissenting) (citations omitted) (“More than a century ago, we declared that ‘[p]unishments are cruel when they involve torture or a lingering death.’ In light of our contemporary understanding of the methods of execution and in light of less cruel alternatives presently available, I believe that execution by cyanide gas is ‘incompatible with ‘the evolving standards of decency that mark the progress of a maturing society.’”); *Glass v. Louisiana*, 471 U.S. 1080, 1086 (1985) (Brennan, J. dissenting) (“[T]he Eighth Amendment requires that, as much as humanly possible, a chosen method of execution minimize the risk of unnecessary pain, violence, and mutilation. If a method of execution does not satisfy these criteria—if it causes ‘torture or a lingering death’ in a significant number of cases—then unnecessary cruelty inheres in that method of execution and the method violates the Cruel and Unusual Punishments Clause.”).



Court—staking out its position—held more than a century ago, in its 1890 decision *In re Kemmler*: “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 [C]onstitution.”<sup>226</sup> The American founders’ use of *cruel* in the Eighth Amendment, the Court ruled, “implies . . . something inhuman and barbarous,—something more than the mere extinguishment of life.”<sup>227</sup> But the *In re Kemmler* pronouncement about the death penalty’s constitutionality came decades before the U.S. ratification of the Convention Against Torture and its clear prohibition of “mental torture.”<sup>228</sup>

Although the U.S. Supreme Court has, over the years, upheld the constitutionality of the electric chair, the firing squad, and lethal injection,<sup>229</sup> the Court has yet to take up—has yet to even consider on the merits—the death penalty’s adverse psychological impact. For example, while a few Justices have urged the full Court to take up the issue of the “death row phenomenon,” the Court has yet to accept for review a case dealing with prolonged stays on death row.<sup>230</sup>

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226 *In re Kemmler*, 136 U.S. at 447.

227 *Id.*

228 AMERICA NEEDS HUMAN RIGHTS 207 (Anuradha Mittal & Peter Rosset eds., 1999) (noting that the United States signed the Convention Against Torture on April 18, 1988, ratified it on October 21, 1994, and that the convention entered into force in the United States on November 20, 1994).

229 In such cases, the U.S. Supreme Court has focused on whether the particular method of execution would produce a lingering death and whether there would be excruciating, *physical* pain at the time of the inmate’s death. Although the Supreme Court has upheld the constitutionality of lethal injection, the most common method of execution today, Supreme Court Justices have sometimes dissented from the Court’s decisions. *E.g.*, *Arthur v. Dunn*, 137 U.S. 725, 725 (2017) (Sotomayor, J., dissenting) (arguing that petitioner Thomas Arthur had “amassed significant evidence that Alabama’s current lethal-injection protocol will result in intolerable and needless agony”); JOHN D. BESSLER, *Introduction to STEPHEN BREYER, AGAINST THE DEATH PENALTY* 1–70 (John D. Bessler ed., 2016) (discussing the dissents in *Glossip v. Gross*, 135 S. Ct. 2726 (2015)).

230 *See* WILLIAM A. SCHABAS, *THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD’S COURTS* 124–25 (1996) (discussing the death row phenomenon); Patrick Hudson, *Does the Death Row Phenomenon Violate a Prisoner’s Human Rights under International Law?* 11 EUR. J. INT’L L. 833 (2000) (same); Kara Sharkey, *Delay in Considering the Constitutionality of Inordinate Delay: The Death Row Phenomenon and the Eighth Amendment*, 161 U. PA. L. REV. 861, 863 (2013) (“The Supreme Court has repeatedly declined to address the validity of the unconstitutional delay claim raised by Valle and other death row inmates before him. The



Meanwhile, the Court has struck down multiple non-lethal corporal punishments that operate on the body<sup>231</sup> as well as death sentences for assorted categories of offenders seen to have diminished capacity or responsibility.<sup>232</sup>

Since the prohibition against torture is absolute and non-derogable,<sup>233</sup> and because credible death threats and threats of serious bodily harm are, even now, properly considered to be acts of torture,<sup>234</sup> the death penalty must be outlawed post-haste. Already, a

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issue first came to the Court's attention over fifteen years ago, in *Lackey v. Texas*." (citing *Valle v. Florida*, 132 S. Ct. 1, 1 (2011); *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (memorandum of Stevens, J., respecting the denial of certiorari)).

- 231 *E.g.*, *Hope v. Pelzer*, 536 U.S. 730, 733–35 & n.2, 738, 745 (2002) (alleging that prison officials handcuffed a shirtless inmate to a hitching post for seven hours, leading to "a substantial risk of physical harm" and unnecessary exposure to heat and sun, the Supreme Court held that such conduct constituted an "obvious" Eighth Amendment violation); *Weems v. United States*, 217 U.S. 349, 373 (1910) (striking down as unconstitutional a sentence of *cadena temporal* that entailed a minimum twelve-year sentence of imprisonment, chained day and night at the wrists and ankles, while performing hard and painful labor while so chained).
- 232 *E.g.*, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (finding that the Eighth Amendment's Cruel and Unusual Punishments Clause prohibits the death penalty for the non-homicidal rape of a child); *Roper v. Simmons*, 543 U.S. 551 (2005) (declaring the unconstitutionality of the death penalty for juvenile offenders); *Atkins v. Virginia*, 536 U.S. 304 (2002) (declaring the unconstitutionality of the death penalty for the intellectually disabled); *Ford v. Wainwright*, 477 U.S. 399 (1986) (barring the execution of the insane); *Enmund v. Florida*, 458 U.S. 782 (1982) (setting aside the death penalty for the driver of a getaway car in a robbery-murder); *Coker v. Georgia*, 433 U.S. 584 (1977) (finding the death penalty to be disproportionate punishment for the non-homicidal rape of an adult woman).
- 233 Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1535 (2009) ("Torture is a form of treatment of human beings that is absolutely prohibited under various forms of customary and treaty-based international law in all social contexts.").
- 234 John Alan Cohan, *Torture and the Necessity Doctrine*, VAL. U. L. REV. 1587, 1596 (2007) ("[I]n addition to physical torture there can be psychological torture, such as threatening to execute the suspect, putting a gun to his head and saying you will shoot, threatening to castrate him, telling him that you are going to kill his family members if he does not tell you the information you are seeking, and similar tactics that, while not physically painful, inflict mental pain or suffering, even when there is no intent to carry out such threats."); *see also* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 179 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (citations omitted) ("In criminal law, courts generally determine whether an individual's words or actions constitute a threat by examining whether a reasonable person in the

number of American judges—many of whom have publicly expressed aversion for death sentences and executions<sup>235</sup>—have concluded that capital punishment should be declared unconstitutional.<sup>236</sup> “I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds,” Justice Harry Blackmun wrote in 1972 while dissenting from the Supreme Court’s landmark, 5–4 decision in *Furman v. Georgia*, which found then-existing death penalty laws to be unconstitutional.<sup>237</sup> Although he originally thought legislators, not judges, should decide the matter, Blackmun later changed his mind. “From this day forward, I no longer shall tinker with the machinery of death,” he concluded in 1994, this time taking the view that capital punishment should be declared unconstitutional after seeing the reality of death penalty cases.<sup>238</sup> “I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed,” he emphasized.<sup>239</sup>

It is, in fact, simply impossible for the death penalty to be used or administered without resorting to credible threats of death, the very kind of threats that, when made by prison guards or non-state

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same circumstances would conclude that a threat had been made.”).

- 235 Many U.S. Supreme Court Justices, while on the Court or after retiring from it, have expressed moral or legal objections to capital punishment. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 113, 176–79 (2005); MICHAEL MELLO, *AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL* (1996); JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY* 451–52 (2001). Through the years, trial court and appellate judges have expressed regret about imposing death sentences or described them as cruel and unusual punishments. *E.g.*, 80 *THE FRIEND: A RELIGIOUS AND LITERARY JOURNAL* 99–100 (1907) (noting that Bird Wilson, the son of American Founding Father James Wilson and a judge on Pennsylvania’s Court of Common Pleas, expressed regret for the rest of his life after imposing a death sentence as part of his judicial duties; he was once heard to exclaim of the condemned man: “He was launched into eternity unprepared; but, O God! Impute it not to me!”); Kevin M. Barry, *The Law of Abolition*, 107 *J. CRIM. L. & CRIMINOLOGY* 521 (2017) (discussing American judges who have expressed their objections to capital punishment).
- 236 Barry, *supra* note 235, at 535 (“In all, at least thirty-five federal and state judges have concluded that the death penalty is unconstitutional per se.”).
- 237 *Furman v. Georgia*, 408 U.S. 238, 405–06 (1972) (Blackmun, J., dissenting).
- 238 *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of cert.).
- 239 *Id.*

actors, are already properly classified as acts of torture.<sup>240</sup> Capital charges and death sentences are plainly credible threats of death because they are enforced by tremendous state power. Not only do threats of death inflict severe mental anguish and psychological torture on their targets,<sup>241</sup> but they inflict severe mental trauma on capital jurors,<sup>242</sup> lawyers,<sup>243</sup> and members of execution teams.<sup>244</sup>

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- 240 Threats against prison guards by *an inmate* have themselves been found to be highly credible where the guards “were placed in fear” because of the inmate’s “ability to obtain weapons” and his gang connections within the prison. *People v. Mosley*, 65 Cal. Rptr. 3d 856, 864 (Cal. Ct. App. 2007).
- 241 11 HANDBOOK OF PSYCHOLOGY: FORENSIC PSYCHOLOGY 431 (Alan M. Goldstein & Irving B. Weiner eds., 2003) (“Some [death row] inmates may find the sustained isolation and chronic deprivation of years of solitary confinement to be so psychologically painful that the escape of death appears preferable.”); MICHAEL L. PERLIN ET AL., COMPETENCE IN THE LAW: FROM LEGAL THEORY TO CLINICAL APPLICATION 94 n.536 (2008) (“It has been estimated that ‘as many as fifty percent of Florida’s death row inmates become intermittently insane.’”); *see also* LYNDA G. ADAMSON, THEMATIC GUIDE TO POPULAR NONFICTION 206 (2006) (noting that San Quentin, California, guards yelled “dead man walking” when death row inmates were out of their cells).
- 242 Michael E. Antonio, “*I didn’t know it’d Be so Hard*”: Jurors’ Emotional Reactions to Serving on a Capital Trial, 89 JUDICATURE 282, 283–84 (2006) (“[R]esearchers studying criminal cases have identified ‘one or more physical and/or psychological symptoms that could be related to jury duty.’ These included reoccurring thoughts about the trial that would keep the jurors awake at night or nightmares about the crime and the defendant, stomach pains, nervousness, tension, shaking, headaches, heart palpitations, sexual inhibitions, depression, anorexia, faintness, numbness, chest pain, and hives. . . . Findings showed ‘jurors whose jury panel rendered a death penalty did sustain greater PTSD [Post-Traumatic Stress Disorder] symptoms than did jurors whose jury panel rendered a life sentence.’”).
- 243 *See generally* SUSANNAH SHEFFER, FIGHTING FOR THEIR LIVES: INSIDE THE EXPERIENCE OF CAPITAL DEFENSE ATTORNEYS (2013); *see also* 1 APPEALS AND WRITS IN CRIMINAL CASES §6.2 (3d ed. 2017) (“The job of appellate counsel in a capital case is complicated by the wide-ranging scope and fast-changing nature of capital jurisprudence, as well as the length of the time over which the litigation will continue. In addition, the magnitude of the undertaking, including the severity of the consequences of losing the case, create a unique set of pressures.”); Sara Mayeux, *Review of Fighting for Their Lives: Inside the Experience of Capital Defense Attorneys by Susannah Sheffer*, H-NET (Nov. 2013), <http://www.h-net.org/reviews/showrev.php?id=40132> (noting that capital defenders “cycle through rage, fear, anxiety, guilt, helplessness, and numbness; they fall into ruts of depression; they work all night, drink too much, and flail through nightmares”).
- 244 JOHN D. BESSLER, DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA 147 (1997) (noting that Utah and other states have stress inoculation programs to try to prevent prison staff members from suffering

In addition, executions inflict extreme mental pain or suffering on the condemned's family and friends,<sup>245</sup> and emotional trauma on execution eyewitnesses.<sup>246</sup> Family members have experienced serious adverse health consequences in close proximity to the imposition or carrying out of death sentences,<sup>247</sup> with one death row

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from post-traumatic stress disorder after executions); Annmarie Timmins, *Former Warden 'Haunted' by Executions*, CONCORD MONITOR (Aug. 13, 2010), <https://www.concordmonitor.com/Archive/2010/08/999787691-999787691-1008-CM> (quoting former warden Ron McAndrew, who oversaw Florida executions, as saying, "Many colleagues turned to drugs and alcohol from the pain of knowing a man had died at their hands. And I've been haunted by the men I was asked to execute in the name of the state of Florida.").

- 245 SANDRA JOY, GRIEF, LOSS, AND TREATMENT FOR DEATH ROW FAMILIES: FORGOTTEN NO MORE 212 (2014) ("There are some surviving execution witnesses who strongly regret their decision to witness, thus feel led to advise other families against witnessing subsequent executions."); Rachel King, *No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Inmates*, 16 B.U. PUB. INT. L.J. 195, 197–99, 209, 211–17 (2007) (describing the emotional and physical impacts of the death penalty on death row inmates' family members, and listing migraine headaches, skyrocketing blood pressure, nightmares and sleeplessness, grief and uncontrollable crying, drug and alcohol abuse, recurring health problems, severe depression, heart attacks, and attempted suicide).
- 246 ROBERT L. BALDWIN, LIFE AND DEATH MATTERS: SEEKING THE TRUTH ABOUT CAPITAL PUNISHMENT 205 (2009) ("Those whose jobs are part of the process of execution also suffer from long-term effects similar to post-traumatic stress disorder. Because executions are so grim, most states that allow capital punishment offer counseling to all execution witnesses (except those related to the condemned)."); BROKEN IMAGES, BROKEN SELVES: DISSOCIATIVE NARRATIVES IN CLINICAL PRACTICE 68, 84 (Stanley Krippner & Susan Marie Powers eds., 1997) (citing Freinkel, A. et al., *Dissociative Symptoms in Media Execution Witnesses*, 151 AM. J. OF PSYCHIATRY 1335, 1335–39 (1994)) ("Freinkel et al. (1994) described that the witnessing of the execution of a convicted killer produced significant depersonalization among journalists observing the event."); see also SCOTT CHRISTIANSON, THE LAST GASP: THE RISE AND FALL OF THE AMERICAN GAS CHAMBER 182 (2010) ("San Quentin's prison personnel became accustomed to two or three witnesses fainting during each execution, and others vomiting or otherwise breaking down under the stress.").
- 247 Helen Kearney, *Children of Parents Sentenced to Death*, in CAPITAL PUNISHMENT: NEW PERSPECTIVES 162 (Peter Hodgkinson ed., 2016) (citations omitted) (describing examples that "illustrate the extraordinary levels of stress and trauma that the children and family" of death row inmates undergo, including a father in Belarus who suffered a heart attack shortly after learning of his son's execution and the mother of an Indiana death row inmate who overdosed after joining her son for his last meal); *id.*



inmate's mother suffering a heart attack and a stroke after a state governor signed a death warrant.<sup>248</sup>

### **B. The Torturous Effects of Death Sentences and Executions**

Just as it is considered an act of torture to force someone to watch the rape, sexual assault, or torture of a loved one,<sup>249</sup> it should be considered an act of torture to permit the imposition of a death sentence or the use of an execution. Capital sentences and executions inflict severe psychological harm on those closest to the condemned as well as those associated with the process of state-sanctioned killing, from inmates and their family members to prison chaplains, lawyers, and executioners.<sup>250</sup> The powerlessness of a loved one to

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at 145 (“Recent studies document the serious emotional and psychological distress experienced by the children and families of death row inmates, characterized by symptoms corresponding with post-traumatic stress disorder, ambiguous loss, and complicated and disenfranchised grief.”).

248 Shirley Dicks, *Six Accounts of Wrongly Convicted Prisoners on Death Row*, in CONGREGATION OF THE CONDEMNED: VOICES AGAINST THE DEATH PENALTY 146, 153–54 (Shirley Dicks ed., 1995).

249 *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgement, ¶ 149 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001) (“[T]he *Furund’ija* Trial Chamber found that being forced to watch serious sexual attacks inflicted on a female acquaintance was torture for the forced observer. The presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped.”) (citing *Furund’ija* judgment); see also *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Judgment, ¶ 153 (Special Court for Sierra Leone Aug. 2, 2007) (“[A] third party could suffer serious mental harm by witnessing acts committed against others, particularly against family or friends.”).

250 *E.g.*, Walter C. Long, *The Constitutionality and Ethics of Execution-Day Prison Chaplaincy*, 21 TEX. J. C.L. & C.R. 1, 3 (2015) (“Execution-day chaplains work for the State, but there should be no question that they also form quick and strong emotional bonds with the men and women they are assigned to counsel and accompany to their deaths.”); Seema Kandelina & Peter Hodgkinson, *The Greater Stigma? Family Visits to the Condemned*, in CAPITAL PUNISHMENT: NEW PERSPECTIVES 127 (Peter Hodgkinson ed., 2013) (“In Texas, at the instance of being sentenced to death, the condemned’s family become the untouchables—literally—and by implication, the entire constituency of the families of the condemned are marginalized and stigmatized. In a world where there are so many examples of cruel, inhuman and degrading treatment and punishment, Texas’s treatment of the mothers, fathers, husbands, wives, children and grandchildren of its condemned must rank high.”); LOUIS J. PALMER, JR., THE DEATH PENALTY IN THE UNITED STATES: A COMPLETE GUIDE TO FEDERAL AND STATE LAWS 240 (2d ed. 2014) (noting that John Hurlbert, the executioner at New York’s Sing Sing Prison during the 1920s, executed over 120 prisoners in Sing Sing’s electric chair, but resigned in 1926 and, deeply depressed, committed suicide



prevent harm to a close relative is—and long has been—an aspect of torturous conduct,<sup>251</sup> and the only way to eliminate such torture is to eliminate executions altogether. Just as it is an act of torture to kill a helpless or defenseless victim in the non-state actor context,<sup>252</sup> it should be considered an act of torture to deliberately kill an inmate who is tied down on a gurney at the moment of his or her death.<sup>253</sup>

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in the basement of his home three years later). American laws typically allow condemned inmates' family members, along with a small number of "reputable" or "respectable citizens," to attend executions. BESSLER, *DEATH IN THE DARK*, *supra* note 244, at 44, 46, 72–73. And death row inmates' family members—who, themselves, are not responsible for the particular crimes committed by the condemned inmates—suffer severe pain and suffering as a result of executions. Even if they do not actually attend an execution in person, they know when it will occur and yet will be utterly helpless to stop it. This means that death row inmates' family members experience "anticipatory grief"—a particularly bizarre form of loss. *E.g.*, ROBERT M. BOHM, *DEATHQUEST III: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES* 351 (3d ed. 2007).

- 251 *E.g.*, *United States v. Juvenile (I.H., Jr.)*, 1 F. Supp. 2d 509, 520 (D.V.I. 1998) (noting that the defendant participated "in the brutal violation" of a man's wife "while the husband was only some few feet away, powerless to spare her from such torture").
- 252 *E.g.*, *Van Tran v. Colson*, 764 F.3d 594, 622–23 (6th Cir. 2014) (emphasizing that a victim's helplessness or defenselessness, including in an "execution-style murder," "evinces torture or depravity of mind"); *Lawlor v. Commonwealth*, 738 S.E.2d 847, 887 (Va. 2013) ("The psychological aspect of torture may be established, for example, 'where the victim is in intense fear and is aware of, but helpless to prevent, impending death . . . for an appreciable lapse of time.'" (quoting *Ex parte Key*, 891 So. 2d 384, 390 (Ala. 2004))); *State v. Davis*, 318 S.W.3d 618, 643 (Mo. 2010) (en banc) (finding evidence to support jury determination "that the murder was committed with depravity of mind because the crime involved binding Ms. Spicer, subjecting her to repeated acts of gruesome physical and sexual torture with the purpose of promoting her death, and that Mr. Davis killed or aided in killing Ms. Spicer while she was bound helplessly, thereby exhibiting a callous disregard for human life"); *State v. Frye*, 461 S.E.2d 664, 680 (N.C. 1995) (finding the defendant's crime involved "psychological torture").
- 253 CLIVE STAFFORD SMITH, *INJUSTICE: LIFE AND DEATH IN THE COURTROOMS OF AMERICA* 29–40 (2012) ("Over the years I have watched six of my clients die: two in the electric chair, two in the gas chamber and two on the lethal injection gurney."); *id.* ("It always happens at night, in darkness. I have never been able to decide whether it matters how they do it, since the prisoner ends up dead anyway. In one sense the gurney is most surreal, since the scene is meant to emulate a clinical setting, yet the prisoner is strapped down in the shape of a cross, his arms wide to give room for the needle. Sometimes the prison staff take ten minutes, twenty minutes, three-quarters of an hour probing the prisoner's arm, trying to find

The Convention Against Torture specifically prohibits both physical and psychological torture, so the U.S. Supreme Court should no longer focus only on the risk of maladministration of lethal-injection drugs and the potential for excruciating physical pain at the very moment of an inmate's execution, as it did in *Baze v. Rees*<sup>254</sup> and *Glossip v. Gross*.<sup>255</sup> Instead, the Supreme Court should use the modern definition of torture and broaden its focus to examine the psychological terror and self-evident mental torture associated with death sentences and executions.<sup>256</sup> Mental torture is just as bad as physical torture, and both mental and physical torture are prohibited in the Convention Against Torture and similar human rights instruments.<sup>257</sup> There is simply no legitimate justification to condemn one form of torture (i.e. the physical) while tolerating another (i.e. the psychological).

A person experiences severe psychological suffering when that person is incapacitated and helpless to prevent his or her death,<sup>258</sup> and that is true for any person, regardless of what that person may have done—or not done—in the past. Already, threats of violence and death threats can form the basis of an intentional infliction of emotional distress (“IIED”) claim<sup>259</sup> because they inflict

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a vein.”).

254 *Baze v. Rees*, 553 U.S. 35 (2008).

255 *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

256 *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1251 (11th Cir. 2005) (“When courts seek to define torture in international law, they often look to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment . . . . Accordingly, we, for ATA [Alien Tort Act] purposes, too look to the Convention when deciding what constitutes torture according to the law of nations.”).

257 *See supra* text accompanying notes 4–5; *see also* ELIZABETH A. SHEEHY, *DEFENDING BATTERED WOMEN ON TRIAL: LESSONS FROM THE TRANSCRIPTS* 259 (2014) (“Psychological torture causes as much mental and traumatic stress as physical torture, and it amplifies brain injuries, making it more difficult to treat for depression and anxiety those who have experienced both.”).

258 *Smith v. State*, 122 So. 3d 224, 242 (Ala. 2011) (“After the initial gunshots rendered Smith helpless to prevent her death she suffered great psychological torture as she listened to her abductors discuss how they were going to kill her and dispose of her body while she begged for medical attention.”).

259 *Harris v. Cellco Partnership*, No. 5:15-cv-529-Oc-30PRL, 2016 WL 232235, at \*3 (M.D. Fla. Jan. 15, 2016) (“In cases where Florida courts have permitted a plaintiff to move forward with an IIED claim, they often involve threats of death, rape, or severe bodily harm to the plaintiff or family members of the plaintiff.”); *Allam v. Meyers*, No. 09-cv-10580 (KMW), 2011

severe emotional distress and are considered to be “outside the bounds of decency.”<sup>260</sup> And such threats can also be torturous when those threats are credible ones—as death threats made in the death penalty context naturally and inevitably are when one considers their immutable characteristics. In American jurisprudence, “forms of torture” already include “mock executions by placing a gun” in someone’s mouth “and pulling the trigger.”<sup>261</sup> Likewise, the use of Russian roulette during interrogation has been found to be a

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WL 721648, at \*10–11 (S.D.N.Y. Feb. 24, 2011) (allowing IIED claim based on a “five month-long, deliberate and malicious campaign of harassment and intimidation” that included “threats of violence” and death threats, as well as “relentless humiliation and emotional abuse”); *Eves v. Ray*, 840 N.Y.S.2d 105, 106 (App. Div. 2007) (sustaining verdict for defendant on IIED counterclaim where, “on several occasions,” plaintiff “threatened the defendant both physically and financially, and stalked him”); *Nims v. Harrison*, 768 So. 2d 1198, 1201 (Fla. Dist. Ct. App. 2000) (finding “as a matter of law” that “Nims’ complaints state a cause of action for intentional infliction of mental distress”; high school teacher stated cause of action against students for IIED where students participated in production and distribution of newsletter that threatened to kill teacher and to rape her and all of her children); *Household Credit Servs., Inc. v. Driscoll*, 989 S.W.2d 72, 81–82 (Tex. App. 1998) (general pattern of harassing behavior, including bomb and death threats, constituted extreme and outrageous behavior that could give rise to IIED claim); *Behringer v. Behringer*, 884 S.W.2d 839, 842, 844–45 (Tex. App. 1994) (allowing IIED claim where evidence of death threats included talk of hiring a hit man, and where there were threats that a husband would be beaten up and, as a result of the death threats and the wife’s actions, the husband “was in fear of his life every day, all the time”).

260 *E.g.*, *Barrios v. Elmore*, No. 3:18-cv-132-DJH-RSE, 2018 WL 3636576, at \*4 (W.D. Ky. Ct. App. July 31, 2018) (denying motion to dismiss IIED claim, with the court finding threats to someone’s life “to be sufficiently outside the bounds of decency to be considered outrageous”); *see also* Tania Tetlow, *Criminalizing “Private” Torture*, 58 WM. & MARY L. REV. 183, 233–34 (2016) (“‘Psychological torture’ should be defined, with reference to the tort of intentional infliction of emotional distress, as ‘the use of extreme and outrageous conduct to intentionally cause severe emotional distress.’”); *id.* at 238 (“IIED allows civil damages for ‘outrageous’ behavior resulting in ‘extreme emotional distress.’”).

261 *Cannon v. Burge*, No. 05 C 2192, 2006 WL 273544, at \*3 (N.D. Ill. Feb. 2, 2006); *see also* *Massie v. Gov’t of North Kor.*, 592 F. Supp. 2d 57, 64, 66 (D. D.C. 2008) (describing a mock execution and men held in captivity who “endured individual threats of death, threats to kill others, severe beatings, torture, both physical and mental, and other means of coercion”). *Compare* *Zalewski v. City of New York*, No. 1:13-CV-7015 (ARR) (PK), 2018 WL 5113137, at \*7 (E.D.N.Y. Oct. 19, 2018) (“Courts in this circuit have found that ‘verbal threats, combined with the brandishing of [a] weapon, could be unreasonable and therefore constitute excessive force.’”) (citations omitted).

form of torture,<sup>262</sup> as have “threats to kill” and “the anticipation of physical harm to one’s self or a loved one.”<sup>263</sup> If a threat to kill an inmate in one context (i.e. where a prison guard makes the threat) is torturous, then a threat to kill an inmate in another context (i.e. where the judicial system makes the threat) should also be classified as torturous. In the twenty-first century, the universal rights to human dignity and life and to be free from cruelty and torture should take center stage in the modern death penalty debate.

### C. *The Importance of Human Dignity*

Not only are death threats torturous in nature, but they are unnecessary<sup>264</sup> and utterly inconsistent with the right to life<sup>265</sup> and

262 *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1463 (D. Haw. 1995). This case also found “[s]olitary confinement while handcuffed or tied to a bed” to be a form of torture. *Id.*

263 *State v. Hall*, 8 S.W.3d 593, 601 (Tenn. 1999) (“This Court has repeatedly held that the anticipation of physical harm to one’s self or a loved one constitutes mental torture. The evidence here clearly supports a finding of mental torture.”) (citations omitted).

264 A core principle of the Enlightenment—one articulated by Cesare Beccaria, Montesquieu and others centuries ago—was that any punishment that goes beyond “absolute necessity” is “tyrannical.” BESSLER, *THE DEATH PENALTY AS TORTURE*, *supra* note 26, at 37, 255; *see also* JOHN D. BESSLER, *THE CELEBRATED MARQUIS: AN ITALIAN NOBLE AND THE MAKING OF THE MODERN WORLD* 7, 217–18 (2018) (discussing Montesquieu’s and Beccaria’s views of necessity as the justification for punishment); JOHN D. BESSLER, *THE BARON AND THE MARQUIS: LIBERTY, TYRANNY, AND THE ENLIGHTENMENT MAXIM THAT CAN REMAKE AMERICAN CRIMINAL JUSTICE* (2019) (discussing the history and modern-day implications of the maxim penned by Montesquieu—and then publicized by Beccaria—that any punishment not grounded in necessity is “tyrannical”). In a world of maximum-security prisons, and in which life-without-possibility-of-parole sentences are authorized by law, it cannot be said that death sentences or executions are necessary, let alone absolutely necessary. JOHN D. BESSLER, *THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION* 439 (2014).

265 *CAPITAL PUNISHMENT: GLOBAL ISSUES AND PROSPECTS* 18–19 (Peter Hodgkinson & Andrew Rutherford eds., 1996) (“The original draft of the *Universal Declaration*, prepared by John P. Humphrey in early 1947, recognized a right to life that ‘can be denied only to persons who have been convicted under general law of some crime to which the death penalty is attached’. But Eleanor Roosevelt, who chaired the Drafting Committee, cited movement underway in some states to abolish the death penalty, and suggested that it might be better not to make any explicit mention of the matter. René Cassin reworked Humphrey’s draft and removed any reference to the death penalty. Cassin’s proposal found its way, virtually unchanged,



the notion of human dignity.<sup>266</sup> Human dignity has long been called the “touchstone” of the U.S. Constitution’s Eighth Amendment,<sup>267</sup> and dignity is also a central value of international law. As the U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment puts it:

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into the final version of the *Declaration*, despite some subsequent attempts to return to the original proposal. It is clear from the *travaux préparatoires* that the death penalty was considered to be incompatible with the right to life, and that its abolition, although not immediately realizable, should be the goal of Member states. Subsequent interpretations, by General Assembly and Economic and Social Council resolutions, support this conclusion.”) (*italics in original*).

- 266 Juan E. Méndez, *The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment*, 20 HUM. RTS. BRIEF 2, 5 (2012) (“I believe it is necessary for the international community to discuss this issue further and for states to reconsider whether the death penalty *per se* fails to respect the inherent dignity of the human person and violates the prohibition of torture or CIDT.”); *see also* *Identoba v. Georgia*, App. No. 73235/12, Eur. Ct. H.R. ¶¶ 69–71 (2015) (citations omitted) (where, during a march conducted to mark the International Day Against Homophobia, LGBT people in Georgia were subjected to death threats, the European Court of Human Rights wrote of the target of those threats: “Given that they were surrounded by an angry mob that outnumbered them and was uttering death threats and randomly resorting to physical assaults, demonstrating the reality of the threats, . . . the situation was already one of intense fear and anxiety. . . . [T]he Court concludes that the treatment of the applicants must necessarily have aroused in them feelings of fear, anguish and insecurity, which were not compatible with respect for their human dignity and reached the threshold of severity within the meaning of Article 3 taken in conjunction with Article 14 of the Convention.”).
- 267 *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.”); *see also* *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017) (quoting *Hall*, 134 S. Ct. at 1992) (“The Eighth Amendment prohibits ‘cruel and unusual punishments,’ and ‘reaffirms the duty of the government to respect the dignity of all persons.’”); *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910) & *Trop*, 356 U.S. at 101) (“The Eighth Amendment ‘is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.’ To enforce the Constitution’s protection of human dignity, this Court looks to the ‘evolving standards of decency that mark the progress of a maturing society.’”); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (referring to “the fundamental respect for humanity underlying the Eighth Amendment”).



Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.<sup>268</sup>

In *Brown v. Plata*,<sup>269</sup> the U.S. Supreme Court itself made clear that offenders do not lose their right to human dignity by virtue of their incarceration. As Justice Anthony Kennedy wrote for the Supreme Court in that case: “To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison’s failure to provide sustenance for inmates ‘may actually produce physical ‘torture or a lingering death.’”<sup>270</sup> “A prison that deprives prisoners of basic sustenance, including adequate medical care,” Justice Kennedy emphasized, “is incompatible with the concept of human dignity and has no place in civilized society.”<sup>271</sup> In a world of universal human rights, inmates and even heinous offenders, just like everyone else, have a right to be free from torture and from cruel, inhuman, or degrading treatment.<sup>272</sup>

268 Declaration on the Protection of All Persons, *supra* note 22, at 91. The preamble to the U.N. Charter, signed in 1945, the year World War II came to a close, explicitly recites that one of its purposes is “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.” U.N. Charter pmbl.

269 *Brown v. Plata*, 563 U.S. 493 (2011).

270 *Id.* at 510 (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (quoting *In re Kemmler*, 136 U.S. at 447)); *see also Estelle*, 429 U.S. at 103 (citation omitted) (“An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical ‘torture or a lingering death,’ the evils of most immediate concern to the drafters of the [Eighth] Amendment.”).

271 *Brown*, 563 U.S. at 511.

272 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, 555 (2017); Liesel J. Danjczek, *The Mentally Ill Offender Treatment and Crime Reduction Act and Its Inappropriate Non-Violent Offer Limitation*, 24 J. CONTEMP. HEALTH L. POL’Y 69, 97 (2007); *see also* UNITED NATIONS OFFICE ON DRUGS AND CRIME, HANDBOOK FOR PRISON LEADERS: A BASIC TRAINING TOOL AND CURRICULUM

Death sentences and execution protocols, like other acts of torture, dehumanize individuals and strip offenders of their humanity, however tarnished by whatever crimes they have committed in the past.<sup>273</sup> The Convention Against Torture plainly requires that nations prevent and criminalize torture,<sup>274</sup> envisioning the elimination of torturous punishments in accordance with the dictates of that convention and the humanitarian impulses

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FOR PRISON MANAGERS BASED ON INTERNATIONAL STANDARDS AND NORMS 27 (2010) (noting that certain rights “are non-derogable, meaning that they must be fully respected at all times and in all circumstances” and listing “the right to life, the right to be free from torture and other cruel, inhuman or degrading treatment” as among those rights; “[p]rison officials are responsible for ensuring that they do not violate any of these rights”).

273 David Rose, *Executions Dehumanize Everyone*, PITT. POST-GAZETTE (Sept. 27, 2015), <http://www.post-gazette.com/opinion/Op-Ed/2015/09/27/Having-worked-in-corrections-for-decades-I-hope-Pennsylvania-abolishes-the-death-penalty/stories/201509270109>.

274 Nigel Rodley & Matt Pollard, *Criminalisation of Torture: State Obligations Under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, EUR. HUM. RTS. L. REV. 115 (2006). Various provisions of law around the world punish torturous acts, though laws proscribing torture vary widely in the actual punishments they impose. See generally Daniel O’Donnell, *The Obligation to Establish Sentences for Torture that Are Commensurate with the Gravity of the Offense*, 22 BUFF. HUM. RTS. L. REV. 95 (2016) (describing legal provisions in various countries that criminalize and punish torture); see also 18 U.S.C. § 114 (1996) (“Whoever, within the special maritime and territorial jurisdiction of the United States, and with intent to torture (as defined in section 2340), maim, or disfigure, cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person; or[,] Whoever, within the special maritime and territorial jurisdiction of the United States, and with like intent, throws or pours upon another person, any scalding water, corrosive acid, or caustic substance— Shall be fined under this title or imprisoned not more than twenty years, or both.”).

behind it.<sup>275</sup> In *Kennedy v. Louisiana*,<sup>276</sup> the U.S. Supreme Court, in considering an Eighth Amendment case, forthrightly proclaimed: “Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule.”<sup>277</sup> “When the law punishes by death,” Justice Anthony Kennedy wrote for the Court, “it risks its own sudden descent into brutality.”<sup>278</sup> In declaring the use of the electric chair to be unconstitutional, the Nebraska Supreme Court said something quite similar, with that court writing in 2008: “We recognize the temptation to make the prisoner suffer, just as the prisoner made an innocent victim suffer. But it is the hallmark of a civilized society that we punish cruelty without practicing it. Condemned prisoners must not be tortured to death, regardless of their crimes.”<sup>279</sup>

#### ***D. The Coercive Nature (and Distorting Effects) of Death Threats***

The use of any death threat, whether by a state actor or a non-state actor, should raise an immediate red flag because credible death threats, as shown, are already classified as torturous acts.<sup>280</sup> In fact, threats of death are serious enough that, in civil cases and the application of the criminal law, they can be the basis of a duress defense.<sup>281</sup> For example, where threats of death were made in the

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275 Not surprisingly, American law already expressly states that the purpose of the Convention Against Torture is to prohibit torture. 8 C.F.R. § 208.18(a) (3) (2018) (noting that the “object and purpose” of the Convention Against Torture is “to prohibit torture”); *see also* Ashika Singh, *The United States, the Torture Convention, and Lex Specialis: The Quest for a Coherent Approach to the CAT in Armed Conflict*, 47 COLUM. HUM. RTS. L. REV. 134, 151 (2016) (noting a Swiss cable emphasizing that “the Convention Against Torture . . . has as its sole purpose the protection against torture”). As criminologist Robert Johnson, of American University, writes of the importance of human dignity in punishment practices: “Punishment that dehumanizes is itself a crime; punishment that respects the human dignity of the criminal is justice. In the matter of crime and just punishment, criminals dehumanize their victims but, ideally, the punishments meted out in society’s name do not dehumanize the criminals.” Robert Johnson, *Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House*, 13 SEATTLE J. FOR SOC. JUST. 583, 587 (2014).

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

277 *Id.* at 420.

278 *Id.*

279 *State v. Mata*, 745 N.W.2d 229, 279 (Neb. 2008).

280 *See* PAUST ET AL., *supra* note 40.

281 *See* *Bacigalupo v. Santoro*, No. 94-cv-02761-BLF, 2018 WL 6272238, at \*12

context of a divorce decree, the defense of duress was found to be “an issue of fact to be disposed of at the trial.”<sup>282</sup> Death threats

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(N.D. Cal. Nov. 30, 2018) (“Central to a defense of duress is the immediacy of the threat or menace on which the defense is premised.”); *In re Chiquita Brands Int’l, Inc.*, 284 F. Supp. 3d 1284, 1324 (S.D. Fla. 2018) (holding that the duress defense “is narrowly construed, and viable only if defendant can show that he or she acted under an immediate threat of death or serious bodily injury at the time the conduct occurred; that he or she had a well-grounded fear that the threat would be carried out, and that he or she had no reasonable opportunity to escape or inform the police”); *Cormier v. State*, 540 S.W.3d 185, 190 (Tex. Ct. App. 2017) (quoting TEX. PENAL CODE § 8.05(a) (1994)) (“Duress is an affirmative defense that applies if the defendant ‘engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another.’”); *Oliver v. Ameriquest Mortg.*, No. 301444, 2012 WL 284618, at \*3 (Mich. Ct. App. Jan. 31, 2012) (“[D]eath threats could potentially support a finding of duress . . . .”); Kristen Cherry, Comment, *Marriage and Divorce Law in Pakistan and Iran: The Problem of Recognition*, 9 TULSA J. COMP. & INT’L L. 319, 330 (2001) (“If consent needed for the *khul* is obtained by duress, the divorce is void. Such duress must be of a serious nature such as threats of death, bodily harm, or captivity.”); *see also* *People v. Speer*, 255 P.3d 1115, 1119 (Colo. 2011) (en banc) (discussing statutory defense of duress based on conduct resulting from “the use or threatened use of unlawful force” and applying “an objective standard of reasonableness,” said to exculpate “only for threats that a reasonable person would not have been able to resist”); *People ex rel. Rusch v. Rivlin*, 277 Ill. App. 183, 186 (1934) (citation omitted) (“The compulsion which will excuse a criminal act . . . must be present, imminent, and impending, and of such a nature as to induce a well grounded apprehension of death or serious bodily harm if the act is not done. A threat of future injury is not enough.”). *Compare* *People v. Anderson*, 50 P.3d 368, 376 (Cal. 2002) (“The reasons a person acted in a certain way, including threats of death, are highly relevant to whether the person acted with a conscious or wanton disregard for human life.”), *with* *State v. Davis*, No. A07-0331, 2008 WL 2020402, at \*5 n.1 (Minn. Ct. App. May 13, 2008) (noting that, in Minnesota, duress is a statutory defense that applies when a person “commits a crime because his will has been overborne by threats of death from another participant in the crime”), and GEERT-JAN ALEXANDER KNOOPS, *DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW* 98 (2d ed. 2008) (“Psychological threats, which amount to imminent death or serious bodily harm, may trigger the defense of necessity.”).

282 *In re Kittinger’s Estate*, 101 N.Y.S.2d 844, 847 (Sur. Ct., N.Y. County, N.Y. 1950). *Accord* *McIntosh v. McIntosh*, 26 Cal. Rptr. 26, 27–28 (Cal. App. 1962) (“[W]e are satisfied that the trial court was justified in finding that plaintiff was coerced into writing the waiver by fear of personal injury or death at the hands of defendant; that said fear was induced by the beating of November 13, 1959, coupled with the subsequent threats of defendant; that the waiver was not the voluntary act of plaintiff and was invalid.”).

have been used to set aside a state court judgment,<sup>283</sup> and threats of death—in both the civil and the criminal contexts—can be highly pertinent to a duress defense’s viability and legitimacy.<sup>284</sup>

Death threats are inherently coercive. They have been recognized as such since time immemorial, and that is so because death threats remove a person’s ability to make voluntary decisions based on free will. Thus, in *Avco Financial Services, Inc. v. Johnson*,<sup>285</sup> the Supreme Court of Utah, citing an earlier precedent, put it this way: “In *Fox v. Piercey*,<sup>286</sup> this Court reviewed the development of the law of duress since the time of Lord Coke, when only threats of death, dismemberment, mayhem or imprisonment were recognized as coercive actions constituting duress.”<sup>287</sup> “In that case,” Utah’s highest court observed, “we followed the modern trend, and adopted the ‘subjective’ test, holding that ‘any wrongful act or threat which actually puts the victim in such fear as to compel him to act against his will constitutes duress.’”<sup>288</sup> Death threats made to someone in police custody, it is important to remember, can easily produce false confessions, with such threats—whether made by police officers or prosecutors—leading individuals to make incriminating statements or plead guilty to crimes they have not committed.<sup>289</sup>

283 *In re Slater*, 200 B.R. 491, 496 (Bankr. E.D.N.Y. 1996) (“[T]he Debtor’s allegations that her brother physically assaulted her and threatened her life before and during the trial . . . does constitute extrinsic fraud sufficient to attack the state court judgment.”).

284 *Rowley v. Rowley*, 290 P. 181, 184 (Okla. 1930) (“Certainly, a threat to the effect that her husband would kill her and her baby would be sufficient to justify execution of an instrument, if she honestly believed the threat would be carried into execution did she not sign it. The fact that she soon thereafter secured a divorce from her husband, on grounds of extreme cruelty and threats to kill, corroborates her statements and justifies her belief that in all probability his threats would be executed.”); *cf.* *Hoffman v. Hoffman*, 30 Pa. 417, 420 (Pa. 1858) (“There were no threats of death or bodily harm, which constitutes duress *per minas* in the case.”).

285 *Avco Fin. Servs., Inc. v. Johnson*, 596 P.2d 658 (Utah 1979).

286 *Fox v. Piercey*, 227 P.2d 763 (Utah 1951).

287 *Avco Fin. Servs., Inc.*, 596 P.2d at 660 (citing *Fox*, 227 P.2d at 766).

288 *Id.* (quoting *Fox*, 227 P.2d at 766).

289 Examples of false confessions in the death penalty context are not hard to find. *THE WITNESS STAND AND LAWRENCE S. WRIGHTSMAN, JR.* 60 (Cynthia Willis-Esqueda & Brian H. Bornstein eds., 2016) (citation omitted) (“[M]ore than 300 people in the United States have been exonerated by DNA, including several who served time on death row. To everyone’s astonishment, false confessions have been a contributing factor in over 25% of these wrongful convictions.”); Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY



### ***E. Death Row, “Mock” Executions, and Threats to Life or Bodily Integrity***

Death row inmates endure prolonged periods of confinement in harsh conditions. They confront the prospect of death on a daily basis, inevitably experiencing extreme uncertainty and anxiety as the days and months and years go by and as all the capital litigation and pleas for mercy occur. They are confined in small, spartan cells, and they often wait for death for years, even multiple decades, as their attorneys press their legal claims. The waiting and anxiety can be torturous, especially as it is so prolonged,<sup>290</sup> though threats of death—all by themselves—meet the torture threshold because of their inherent features. As one recent study put it: “Common methods of psychological torture involve threats to the victim or the victim’s loved ones, isolation or solitary confinement, sleep and sensory deprivation, exposure to loud noise, or forcing a victim to watch or participate in the torture of others.”<sup>291</sup> “A typical example,”

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381, 382–83 (2005) (noting that false confessions and snitch testimony were the two most common causes of error in Illinois exoneration cases); *see also* TRUE STORIES OF FALSE CONFESSIONS vii, 147 (Rob Warden & Steven A. Drizin eds., 2009) (“false confessions are amazingly common”; “the death penalty can be misused to intimidate an innocent person into making a false confession”); DALE S. RECINELLA, THE BIBLICAL TRUTH ABOUT AMERICA’S DEATH PENALTY 133 (2004) (“False confessions can also be easily obtained from the mentally ill.”); DAVID V. BAKER, WOMEN AND CAPITAL PUNISHMENT IN THE UNITED STATES: AN ANALYTICAL HISTORY 181 (2016) (“False confessions are a significant factor in female wrongful convictions; slightly more than one-fifth of female wrongful convictions involve false confessions.”).

290 ROBERT JOHNSON, DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS 196 (1998) (“It is his confinement, culminating in the deathwatch and ending with his execution, that epitomizes death row confinement. This confinement-unto-death, I will argue, is a clear and complete case of torture.”); *cf.* *Habtemicael v. Ashcroft*, 370 F.3d 774, 782 (8th Cir. 2004) (citations omitted) (“An unlawful or extrajudicial threat of imminent death comes within the definition of torture if it is specifically intended to bring about prolonged mental pain or suffering. This intent requirement is satisfied if prolonged mental pain or suffering either is purposefully inflicted or is the foreseeable consequence of a deliberate act.”).

291 ASHLEY McCULLEY, THE PHYSICAL AND PSYCHOLOGICAL SEQUELAE IN ADULT REFUGEES OR ASYLUM SEEKERS WHO HAVE SURVIVED TORTURE 8 (2013), [https://ethnomed.org/clinical/torture/torture-literature-review/AshleyMcCulley\\_Dec2013\\_final.pdf](https://ethnomed.org/clinical/torture/torture-literature-review/AshleyMcCulley_Dec2013_final.pdf) (“The most common types of psychological torture . . . were threats, witnessing torture, mock execution, humiliation, and sensory, hygiene, or sleep deprivation.”); *id.* (“Psychological sequelae are also a result of physical torture methods. For example, waterboarding is a physical torture method that simulates

Dr. Hernán Reyes, of the International Committee of the Red Cross, writes of psychological torture, “is the ‘sham execution,’ a method known to be extremely traumatic in which prisoners are led out to what they believe is their summary execution.”<sup>292</sup> “Verbal threats of death or mutilation” and “[t]hreats involving others (family etc.)” have elsewhere been labeled as forms of psychological torture,<sup>293</sup> along with “[t]hreats of being killed or infliction of serious injury” and “[t]hreats of separation from, torture of or killing of family members.”<sup>294</sup>

Mock executions, as a matter of fact, have been shown by researchers to be as severe as various physically torturous acts.<sup>295</sup> In a study of torture conducted by Metin Başoğlu of King’s College London, Başoğlu and his colleagues surveyed 279 torture survivors—both soldiers and civilians—from the once war-torn former Yugoslavia.<sup>296</sup> Between 2000 and 2002, those survivors answered questions about the types of torture that they endured.<sup>297</sup>

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drowning, but the sheer terror of feeling like you are going to die produces psychological sequelae. Merging both physical and psychological torture methods leaves survivors with relentless long-term psychological sequelae.”).

292 Hernán Reyes, *The Worst Scars Are in the Mind: Psychological Torture*, 89 INT’L REV. OF THE RED CROSS 591, 600, 611–12 (2007).

293 Caroline Gorst-Unsworth & Eva Goldenberg, *Psychological Sequelae of Torture and Organised Violence Suffered by Refugees from Iraq*, 172 BRITISH J. PSYCHIATRY 90, 92 (1998), [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/8772F08B130FC04BC6A2E29D407DA3C2/S0007125000149244a.pdf/psychological\\_sequelae\\_of\\_torture\\_and\\_organised\\_violence\\_suffered\\_by\\_refugees\\_from\\_iraq.pdf](https://www.cambridge.org/core/services/aop-cambridge-core/content/view/8772F08B130FC04BC6A2E29D407DA3C2/S0007125000149244a.pdf/psychological_sequelae_of_torture_and_organised_violence_suffered_by_refugees_from_iraq.pdf).

294 Engelke Randers, *Torture; Mental Sequelae and Treatment Approaches—Are These Applicable in Low-Income Countries?*, UNIVERSITETET I OSLO 8, <https://www.duo.uio.no/bitstream/handle/10852/29693/ProsjektXRanders.pdf?sequence=2> (last visited Oct. 25, 2018).

295 E.g., Linda Piwowarczyk, *Seeking Asylum: A Mental Health Perspective*, 16 GEO. IMMIGR. L.J. 155, 162 (2001) (footnote omitted) (“Partly in response to more aggressive human rights monitoring, methods of torture have evolved to become more psychological in nature, thereby leaving fewer physical signs. This shift is alarming in view of the experience from the Center for Victims of Torture in Minneapolis that indicated that greater psychological damage is inflicted by methods such as sham executions, sexual torture, prolonged arbitrary detention, especially with sensory deprivation, disappearance of a loved one, threats against family members, and witnessing the torture of others.”).

296 Roxanne Khamsi, *Psychological Torture ‘as Bad as Physical Torture’*, NEW SCIENTIST (Mar. 5, 2007), <https://www.newscientist.com/article/dn11313-psychological-torture-as-bad-as-physical-torture/>.

297 *Id.*

In particular, they were asked to rate the distress they felt on a scale of zero (no distress) to four (maximum distress). About 20 of the survivors experienced purely *psychological* torture, including sham executions, the torture of family members, or threats of rape, and the researchers collected medical data on whether the survivors showed signs of Post-Traumatic Stress Disorder (“PTSD”).<sup>298</sup> The study found that psychological manipulations—threats and witnessing the torture of others—were ranked very high on the scale.<sup>299</sup> Sham executions (3.7), witnessing torture of close ones (3.6), threats of rape (3.6), threats against family (3.4), witnessing torture of others (3.4), threats of death (3.3), and threats of further torture (3.2) were rated in an essentially equivalent manner on the distress scale to these forms of physical torture: hanging by the wrists tied at the back (3.8),<sup>300</sup> suffocation/asphyxiation (3.8), electric torture (3.7), *falaga* (3.6),<sup>301</sup> burning parts of the body (3.6), forced extraction of teeth (3.6), stretching of the body (3.5), beating (3.5), hanging by hands or feet (3.5), needles under toenails or fingernails (3.4), beating over the ears with cupped hands (3.4), and pulling/dragging/lifting by hair (3.2).<sup>302</sup> It is now clear that those who endure physical threats

298 *Id.* In 2013, the American Psychiatric Association revised the diagnostic criteria for PTSD in the fifth edition of its *Diagnostic and Statistical Manual of Mental Disorders* (“DSM-5”), a professional manual cited by the U.S. Supreme Court in a recent case dealing with the issue of intellectual disability. *Moore v. Texas*, 137 S. Ct. 1039, 1045 (2017). In the DSM-5, PTSD is included in a new category titled “Trauma- and Stressor-Related Disorders.” One of the criteria for a PTSD classification includes exposure to death, threatened death, actual or threatened serious injury, or actual or threatened sexual violence in any of the following ways: direct exposure, witnessing the trauma, learning that a relative or close friend was exposed to a trauma, or indirect exposure to aversive details of the trauma in the course of professional duties (e.g., first responders, medics). *PTSD: National Center for PTSD*, U.S. DEP’T OF VETERANS AFFAIRS, [https://www.ptsd.va.gov/professional/PTSD-overview/dsm5\\_criteria\\_ptsd.asp](https://www.ptsd.va.gov/professional/PTSD-overview/dsm5_criteria_ptsd.asp) (last updated Feb. 22, 2018).

299 Khamsi, *supra* note 296.

300 CULLEN MURPHY, *GOD’S JURY: THE INQUISITION AND THE MAKING OF THE MODERN WORLD* 91 (2012) (hanging by the wrists tied at the back is also known, among other things, as “reverse hanging”).

301 *Falaga* involves beating the soles of the feet. DARIUS REJALI, *TORTURE AND DEMOCRACY* 274 (2007).

302 Khamsi, *supra* note 296. In speaking about the results of the study’s findings, Dr. Basoglu—a psychiatrist and specialist in trauma studies—made clear that the distinction between physical and psychological torture was artificial. “Until now, both sides of the debate have expressed opinions based on personal impressions,” Basoglu emphasized. “But these data,” he added,

and psychological torture experience severe pain and suffering, commonly developing major depressive disorder and PTSD.<sup>303</sup>

## V. Taking Psychological Torture Seriously

### A. *Death Threats as a Form of Psychological Torture*

Psychological torture is just as abhorrent as physical torture.<sup>304</sup> It is, however, sometimes more difficult to identify because the signs of it may not be discernible with the human

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“clearly suggest that you cannot make a distinction between physical forms of torture and something else called ‘cruel and degrading treatment.’”

Nicholas Bakalar, *The Line Between Torture and Cruelty*, N.Y. TIMES (Mar. 6, 2007), <http://www.nytimes.com/2007/03/06/health/psychology/06tort.html>.

303 *Kabba v. Mukasey*, 530 F.3d 1239, 1242 (10th Cir. 2008). Psychological torture is itself a common feature of domestic violence and rape, which may or may not involve the loss of life. *E.g.*, *Sneed v. Johnson*, No. 1:04CV588, 2007 WL 709778, at \*59 (N.D. Ohio Mar. 2, 2007) (quoting report of Dr. Smalldon) (“Psychological torture often accompanied the rapes. For example, David recalls the man threatening that his dog ‘would eat [David] up’ if he refused to do what he was told.”); *People v. Coffman*, 96 P.3d 30, 54 (Cal. 2004) (“Certain features of defendants’ relationship fit the profile of a battering relationship: a pattern of escalating violence, sexual abuse within the relationship, jealousy, psychological torture, threats to kill . . . .”); *State v. Anthony*, 555 S.E.2d 557, 597 (N.C. 2001) (“[T]he evidence showed that Samantha had an *ex parte* domestic violence order served on defendant shortly before her murder and made statements to several witnesses that defendant had threatened and followed her and that she feared him. Samantha even saw defendant slowly driving past the hair salon she was patronizing just hours before her murder. This evidence supports the inference that Samantha experienced psychological unease and fear before her murder.”).

304 In the U.S., emotional and psychological harms are not currently treated as seriously as physical harms within prisons. *E.g.*, *Perkins v. Kan. Dep’t of Corr.*, 165 F.3d 803, 807 (10th Cir. 1999); *Brooks v. Humphrey*, No. 5:12-CV-281 (CAR), 2012 WL 5866293, at \*3 n.11 (M.D. Ga. Nov. 19, 2012) (citing 42 U.S.C. § 1997e(e) (1996)) (“Plaintiff could not recover compensatory or punitive damages for the ‘mental, emotional, and psychological’ harm caused by his placement within range of Watson’s ‘daily and constant barrage of death threats.’ An inmate in prison who files a federal civil action cannot recover damages on the basis of mental or emotional injury suffered while in custody without demonstrating a related physical injury.”). The Prison Litigation Reform Act, enacted in 1996, has made it more difficult for prisoners to recover compensatory damages for psychological suffering. JOHN BOSTON & DANIEL E. MANVILLE, *PRISONERS’ SELF-HELP LITIGATION MANUAL* 528 (4th ed. 2010). That federal law, however, does not change the well-settled definition of torture.



eye. In *Psychological Torture: Definition, Evaluation and Measurement*, one expert, Pau Pérez-Sales, begins that scholarly monograph by labeling “the concept of torture (especially psychological torture)” as “elusive and blurred.”<sup>305</sup> “There is not an official definition of or consensus on the meaning of psychological torture,” Pérez-Sales emphasizes.<sup>306</sup> But that source nonetheless relays how various types of threats—from threats of death to threats against family members, and from threats of inflicting pain to threats to rape loved ones—have previously been classified as methods of torture.<sup>307</sup> The New York-based Center for Constitutional Rights, in a report on Guantánamo, has itself classified the following techniques as psychological torture: “Solitary confinement, light and sound manipulation, exposure to the elements and to extreme temperature, . . . sleep deprivation, and threats of transfer for torture in another country.”<sup>308</sup>

Courts have not always found death threats sufficient to constitute torture, with not every threat of death found to be credible or specific enough to qualify as such.<sup>309</sup> One of the horrifying features of death threats, though, is the sheer uncertainty of knowing if, or when, they will be carried out.<sup>310</sup> For example, as one California

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305 PAU PÉREZ-SALES, *PSYCHOLOGICAL TORTURE: DEFINITION, EVALUATION AND MEASUREMENT* 2 (2017).

306 *Id.* at 7.

307 *Id.* at 120.

308 *Id.* at 7. Pérez-Sales considers “psychological torture to be *the use of techniques of cognitive, emotional or sensory attacks that target the conscious mind and cause psychological suffering, damage and/or identity breakdown in most subjects subjected to them; such techniques may be used alone or together with other techniques to produce a cumulative effect.*” *Id.* at 8; see also Edward Domovitch et al., *Human Torture: Description and Sequelae of 104 Cases*, 30 CAN. FAM. PHYSICIAN 827 (1984) (conducting a study of 104 torture victims and noting that common methods of torture included threats of death and sham executions); Katherine J. Eder, *The Importance of Medical Testimony in Removal Hearings for Torture Victims*, 7 DEPAUL J. HEALTH CARE L. 281, 283 (2004) (footnote omitted) (“Common threats of psychological torture include isolation, threats, humiliation, sham executions, and witnessing the torture of others. Rape and sexual assault are also forms of torture commonly practiced during arrest or imprisonment or during conflicts.”).

309 *United States v. Rodriguez-Vasquez*, 4 F. Supp. 3d 1146, 1154 (N.D. Cal. 2013) (“The Court is aware of no case—and the defendant cites none—holding that death threats alone constitute torture under the CAT standard. The receipt of these threats after he returned to Honduras, while undoubtedly disturbing, does not support the defendant’s claim that he could have established a plausible claim of torture prior to removal.”).

310 *People v. Holt*, 937 P.2d 213, 263 (Cal. 1997) (“The crime undoubtedly inflicted mental torture as well as physical violence on the victim who



appellate court has written: “While a victim of domestic violence and continuing death threats might well suspect she will be attacked sometime in the future, she has no way of knowing exactly when or where that attack will occur.”<sup>311</sup> Threats of death are thus often closely associated with—indeed, equivalent to and part and parcel of—torturous conduct.<sup>312</sup> “Death threats are patently material to the grave risk analysis,” another California appellate decision determined in another case involving allegations of domestic violence.<sup>313</sup> As that court wrote: “Due process required the trial court to decide the material issue of father’s alleged death threats and to afford mother the opportunity to offer relevant and competent evidence on that issue.”<sup>314</sup> As another court, in Michigan, put it in the context of yet another domestic violence case: “The prior acts presented by the prosecution at trial also qualify as acts of domestic violence, since defendant ‘caus[ed] physical harm’ to the victim and made death threats toward her ‘that would make a reasonable person feel terrorized, frightened, intimidated, threatened, harassed, or molested.’”<sup>315</sup>

### ***B. The Definition of Psychological Torture***

Of critical importance, psychological torture has been defined in criminal cases as an awareness of, but a helplessness

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was forced to accompany defendant to the bedroom, submit to his sexual assault, and lie apprehensively on the floor awaiting her uncertain fate as he ransacked her belongings while she suffered oxygen deprivation.”); *Neill v. State*, 896 P.2d 537, 556–57 (Okla. Crim. App. 1994) (citations omitted) (“Mental anguish includes the victim’s uncertainty as to his ultimate fate. Our finding of torture is supported by the mental torment of Mr. Zeller prior to the shooting, rather than the events which took place afterwards. In the present case, the evidence clearly supports a finding of mental anguish beyond that which necessarily accompanies a killing. Accordingly, the evidence was sufficient to support the ‘especially heinous, atrocious or cruel’ aggravating circumstance.”).

311 *People v. Arellano*, 23 Cal. Rptr. 3d 172, 176 (Cal. Ct. App. 2004).

312 *Hekmati v. Islamic Republic of Iran*, 278 F. Supp. 3d 145, 160 (D. D.C. 2017) (“[I]n *Moradi*, this Court held that a detainee in Iranian prison experienced torture when his interrogators subjected him to ‘severe physical and mental pain, including threatening him with death and dismemberment . . . .’” (citing *Moradi v. Islamic Republic of Iran*, 77 F. Supp. 3d 57, 68–69 (D. D.C. 2015))).

313 *Noergaard v. Noergaard*, 197 Cal. Rptr. 3d 546, 553 (Cal. Ct. App. 2015).

314 *Id.* at 554.

315 *People v. Phillips*, No. 323333, 2016 WL 232324, at \*1 (Mich. Ct. App. Jan. 19, 2016).

to prevent, one's impending death.<sup>316</sup> "Psychological torture," the Court of Criminal Appeals of Alabama has held, "can be inflicted where the victim *is in intense fear and is aware of, but helpless to prevent, impending death.*"<sup>317</sup> "Such torture," that court has ruled, "must have been present for an appreciable lapse of time, sufficient enough to cause prolonged or appreciable suffering."<sup>318</sup> Although courts have not established a particular length of time that is necessary for a premeditated murder to be transformed into a torture-murder, and in reality there is no specific time requirement for a finding of torture to be made,<sup>319</sup> it is clear that a few hours or even a few minutes can suffice.<sup>320</sup> In fact, a murder victim's awareness of, but

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316 *Scott v. State*, 937 So. 2d 1065, 1083 (Ala. Crim. App. 2005).

317 *Shanklin v. State*, 187 So. 3d 734, 808 (Ala. Crim. App. 2014) (italics in original) (quoting *Ex parte Key*, 891 So. 2d 384, 390 (Ala. 2004)); accord *Shaw v. State*, 207 So. 3d 79, 122 (Ala. Crim. App. 2014); *Boyle v. State*, 154 So. 3d 171, 234 (Ala. Crim. App. 2013); *Albarran v. State*, 96 So. 3d 131, 208, 214 (Ala. Crim. App. 2011). The court in *Ex parte Key* found that, in that case, "the victim suffered psychological torture for an appreciable period." *Ex parte Key*, 891 So. 2d at 390.

318 *Shanklin v. State*, 187 So. 3d 734, 808 (Ala. Crim. App. 2014) (quoting *Ex parte Key*, 891 So. 2d at 390); accord *Shaw v. State*, 207 So. 3d 79, 122 (Ala. Crim. App. 2014); *Boyle v. State*, 154 So. 3d 171, 234 (Ala. Crim. App. 2013); *Baker v. State*, 87 So. 3d 587, 604 (Ala. Crim. App. 2009); *Ex parte Deardorff*, 6 So. 3d 1235, 1240 (Ala. 2008). As the Court of Criminal Appeals of Alabama, explaining the operation of the standard in that death penalty jurisdiction, has put it: "[T]he factor of psychological torture must have been present for an appreciable lapse of time, sufficient enough to have caused prolonged or appreciable suffering, i.e., the period of suffering must be prolonged enough to separate the crime from 'ordinary' murders for which the death penalty is not appropriate." *Mitchell v. State*, 84 So. 3d 968, 986 (Ala. Crim. App. 2010) (quoting *Norris v. State*, 793 So. 2d 847, 861 (Ala. Crim. App. 1999)). See *Doe v. Qi*, 349 F. Supp. 2d 1258, 1317 (N.D. Cal. 2004) ("In order to establish mental (in contrast to physical torture), the TVPA [Torture Victims Protection Act] requires a showing of 'prolonged' mental harm that is caused by the threat that either the victim or another will be imminently subjected to death or severe physical pain or suffering. The TVPA does not define the length of time required for a finding of 'prolonged' mental harm.") (citing 28 U.S.C. § 1350 note § 3(b)(2)).

319 *E.g.*, *State v. Gailey*, No. 08-0628, 2009 WL 778772, at \*3 (Iowa Ct. App. Mar. 26, 2009) ("There is no requirement that torture be inflicted for any minimum period of time. . . . We conclude there is substantial evidence to support the jury's finding that Gailey intentionally subjected his wife and daughter to mental torture to support a conviction for first-degree kidnapping.").

320 *E.g.*, *State v. Walters*, 588 S.E.2d 344, 363 (N.C. 2003) ("The victims were subjected to at least an hour and a half of psychological torture by being trapped in the trunk of a car while pleading for their lives. The victims

helplessness to prevent, impending death for an appreciable period of time, is a defining feature of “especially heinous, atrocious, or cruel” homicides.<sup>321</sup> That aggravating circumstance—and a finding of torture—has been made, for example, where a perpetrator discussed whether or not to kill a victim in the presence of that victim or where

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were also abducted at gunpoint and robbed of jewelry. Furthermore, Susan Moore was forced to witness Tracy Lambert being shot in the head. We thus conclude that the evidence more than warranted the trial court’s submission of the (e)(9) aggravating circumstance to the jury for both murders.”); *State v. Carter*, 114 S.W.3d 895, 904 (Tenn. 2003) (finding that photographs, including one of “Mrs. Jackson’s partially nude body” and one of “Mr. Jackson’s body in the closet,” aided “in establishing that the victims suffered torture in the form of severe mental anguish” because “[t]he jury could infer from these photographs that both victims anticipated physical harm,” with the court further emphasizing that “[m]ental torture” occurs “when a victim hears or anticipates the harm or killing of a spouse and is helpless to assist”); *State v. Nesbit*, 978 S.W.2d 872, 886–87 (Tenn. 1998) (“the jurors were capable of evaluating the proof and determining whether the victim suffered severe mental pain when, over the course of a six hour time period, her body was burned and beaten in her own home, with four of her young children present”; “[t]he sufficiency of the evidence to support a jury’s finding of torture does not depend upon whether an expert witness utters the magical words ‘severe physical or mental pain’” but “whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt”; “we conclude that the proof is sufficient to support a jury finding that both severe physical and mental pain was inflicted upon the victim while she remained alive and conscious”).

321 *E.g.*, *Floyd v. State*, No. CR-13-0623, 2017 WL 2889566, at \*70 (Ala. Crim. App. July 7, 2017) (containing jury instruction to that effect); *see also* *State v. McNeill*, 624 S.E.2d 329, 339 (N.C. 2006) (noting that killings that involve the infliction of psychological torture leave the victim “in her last moments aware of, but helpless to prevent, impending death”); *State v. Alston*, 461 S.E.2d 687, 718–19 (N.C. 1995) (finding a murder was “especially heinous, atrocious, or cruel” because of “evidence of psychological terror” that included defendant’s prior threats “to ‘smash in’ the victim’s face and kill the victim”; “[i]t is reasonable to infer that the victim suffered psychological torture and anxiety as her fears were realized and the defendant carried out his threats,” with the court citing prior cases where psychological terror was found before determining: “In the last minutes of the victim’s life, as her face was forced into the pillow and she struggled to breathe, she undoubtedly was left aware of, but unable to prevent, her impending death.”); *accord* *State v. Bell*, 603 S.E.2d 93, 121 (N.C. 2004); *State v. Tirado*, 599 S.E.2d 515, 544 (N.C. 2004); *State v. Barden*, 572 S.E.2d 108, 142 (N.C. 2002); *State v. Mann*, 560 S.E.2d 776, 788 (N.C. 2002); *State v. Anthony*, 555 S.E.2d 557, 596–97 (N.C. 2001); *State v. Spruill*, 360 S.E.2d 667, 670, 674 (N.C. 1987); *State v. Gladden*, 340 S.E.2d 673, 694 (N.C. 1986); *State v. Hamlet*, 321 S.E.2d 837, 846 (N.C. 1984).

the victim pleaded for his or her life.<sup>322</sup>

As the Court of Criminal Appeals of Alabama has written of that aggravating circumstance: “In determining the application of this aggravating circumstance ‘we must consider whether the violence involved in achieving the killing went beyond what was necessary to cause death, whether the victims experienced appreciable suffering after a swift assault, and whether there was psychological torture.’”<sup>323</sup> In determining if an offense is especially heinous, atrocious, or cruel, Alabama courts examine these three factors: “(1) the infliction on the victim of physical violence beyond that necessary or sufficient to cause death; (2) appreciable suffering by the victim after the assault that ultimately resulted in death; and (3) the infliction of psychological torture on the victim.”<sup>324</sup> As regards the last factor, the Alabama courts have stated: “Thus, mental suffering may be found where a victim witnesses the murder of another (particularly a family member) and then realizes that soon he or she will also be killed, as well as where the victim is expressly taunted with the prospect of his or her own death.”<sup>325</sup> The consideration of the existing definition of psychological torture in death penalty states such as Alabama has important—and unmistakable—collateral consequences for capital punishment.

The Alabama case of *Ex parte Deardorff*<sup>326</sup> is noteworthy. In that case, the Supreme Court of Alabama considered the case of Donald Deardorff, a man convicted of capital murder. In determining that the murder was especially heinous, atrocious, or

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322 *State v. Hodges*, 944 S.W.2d 346, 357–58 (Tenn. 1997).

323 *Smith v. State*, 122 So. 3d 224, 241 (Ala. Crim. App. 2011) (quoting *Brownfield v. State*, 44 So. 3d 1, 41 (Ala. Crim. App. 2007)).

324 *Saunders v. State*, 10 So. 3d 53, 108 (Ala. Crim. App. 2007) (citing *Brooks v. State*, 973 So. 2d 380, 417–18 (Ala. Crim. App. 2007)).

325 *Id.* at 108–09; accord *Brooks v. State*, 973 So. 2d 380, 418–19 (Ala. Crim. App. 2007); *Norris v. State*, 793 So. 2d 847, 859–60 (Ala. Crim. App. 1999). Psychological torture has been found in multiple Alabama cases. *E.g.*, *Brown v. State*, 982 So. 2d 565, 607 (Ala. Crim. App. 2006) (“The evidence establishes that the victim suffered for an appreciable amount of time following the assault and clearly endured extensive psychological torture.”). But it has not been found where the victims were shot in rapid succession. *Norris v. State*, 793 So. 2d 847, 862 (Ala. Crim. App. 1999) (“[B]ecause the three victims were shot in rapid, uninterrupted succession, any momentary fear or anxiety of impending death did not last sufficiently long as to constitute the unnecessary torture required to elevate the offense to an especially heinous, atrocious, or cruel offense . . .”).

326 *Ex parte Deardorff*, 6 So. 3d 1235 (Ala. 2008).



cruel when compared to other capital offenses, Alabama’s highest court set forth a detailed description of the murder—one involving binding the victim’s hands with duct tape, keeping the victim in a closet, driving him to a remote spot while his hands and mouth were taped, and then shooting him in the head four times while his head was covered with a pillowcase.<sup>327</sup> Deardorff was sentenced to death for the execution-style murder,<sup>328</sup> with the Court of Criminal Appeals finding sufficient evidence to support the determination that the murder was especially heinous, atrocious, or cruel.<sup>329</sup> As the court pointed out, the victim feared for his life, “[t]he terror he experienced must have escalated tremendously when his mouth was taped and his hands were bound,” and “he had to know that his death was imminent.”<sup>330</sup> In affirming Deardorff’s death sentence, the Supreme Court of Alabama specifically highlighted that the victim was “threatened with death” and “held in captivity and confined in a closet” while hooded and with his hands taped.<sup>331</sup> Those circumstances, the court observed, constituted “psychological torture so as to meet the standard for a murder that is ‘especially heinous, atrocious, or cruel.’”<sup>332</sup>

Other courts in American death penalty states have also found the presence of psychological torture where the victim had an awareness of impending death but an inability to prevent it. For example, in *State v. Sloan*,<sup>333</sup> the Supreme Court of Missouri ruled:

327 *Id.* at 1237–40.

328 That various “execution-style” murders have been described as torturous in nature is itself telling about the torturous nature of actual executions. *E.g.*, MICHAEL J. BOYLE, *VIOLENCE AFTER WAR: EXPLAINING INSTABILITY IN POST-CONFLICT STATES* 296 (2014) (quoting U.N. Assistance Mission for Iraq (UNAMI), Human Rights Report (2006)) (“Dozens of bodies bearing signs of torture and showing execution style killings have continued to appear daily in and around Baghdad, as well as other parts of the country.”); CLINT RICHMOND, *FETCH THE DEVIL: THE SIERRA DIABLO MURDERS AND NAZI ESPIONAGE IN AMERICA* 60 (2014) (“The mother and daughter had been methodically tortured over a period of time and then carefully and deliberately put to death—execution style. The prolonged torture of the victims and execution-style killings were the most heinous crimes either of the veteran criminologists had seen in their long careers.”). Both execution-style killings and state-sanctioned killings involve the infliction of severe pain or suffering.

329 *Ex parte Deardorff*, 6 So. 3d at 1238.

330 *Id.* (quoting *Deardorff v. State*, 6 So. 3d 1205 (Ala. Crim. App. 2004)).

331 *Id.* at 1240.

332 *Id.*

333 *State v. Sloan*, 756 S.W.2d 503 (Mo. 1988) (en banc).

Here, the evidence shows that Jason was the last member of the Sloan family to be shot. The jury could have reasonably believed that Jason had heard the previous gunshots and was therefore hiding under a blanket, his arms covering his head, in a hopeless effort to conceal himself from appellant's aim. This is sufficient evidence of psychological torture, as it indicates that Jason had the opportunity to anticipate and reflect upon his impending death while his parents and brother were shot.<sup>334</sup>

In another case, *State v. Oliver*,<sup>335</sup> the Supreme Court of North Carolina similarly found especially heinous, atrocious, or cruel murders included those “calculated to leave the victim in his last moments as a sentient being, aware but helpless to prevent impending death, focusing on the deliberate, intentional and senseless aspect of a conscienceless and pitiless murder inflicting psychological torture.”<sup>336</sup> In that case, the court found that the victim had pleaded “please don’t shoot me” before death, concluding that “the evidence was sufficient to support the submission to the jury of the factor that the murder was especially heinous, atrocious, or cruel.”<sup>337</sup> Of course, death row inmates in their final days and hours, if not so depressed that they simply abandon their appeals altogether, are also forced to beg for their lives, if only through their lawyers.

In the context of criminal responsibility, findings of psychological torture have frequently been made where a murder victim begged for his or her own life.<sup>338</sup> The fact that there is a

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334 *Id.* at 511.

335 *State v. Oliver*, 307 S.E.2d 304 (N.C. 1983).

336 *Id.* at 318.

337 *Id.* at 319.

338 *Id.* at 318–19 (defendant’s boasting to fellow inmates that he had enjoyed killing victim, who had begged for his life, was evidence of “conscienceless and pitiless murder inflicting psychological torture”); *see also* *State v. Rhines*, 548 N.W.2d 415, 452 (S.D. 1996) (“The evidence also shows that Rhines possessed the necessary intent for a finding of torture. When Schaeffer pleaded with Rhines for his life, Rhines did not tell officers of his desire to quickly end his victim’s life. Instead, Rhines described his own sarcastic and scornful attitude toward Schaeffer’s suffering. Rhines also stated that when he believed Schaeffer had survived the third stab wound, he tied his victim’s hands and left him to die. This evidence supports a finding that Rhines intended to cause unnecessary pain to his victim.”).

short time lapse between a victim's abduction or incapacitation and the victim's death—as one Tennessee court has put it—“does not alone support a finding that the victim was mentally tortured.”<sup>339</sup> As that court stressed: “[P]roof that the victim begged for his life in the last few seconds of his life is, by itself, insufficient to support a finding of mental torture that would distinguish this murder from any other murder.”<sup>340</sup> “The fact that the victim begged for his life or that there were multiple gunshots,” the Supreme Court of Florida similarly emphasized, “is an inadequate basis to find this aggravating factor absent evidence that [the perpetrator] intended to cause the victim unnecessary and prolonged suffering.”<sup>341</sup> But where the victim begged for life and was made to suffer for more than a fleeting amount of time (i.e. an appreciable amount of time), a finding of psychological torture has been made.<sup>342</sup> Defendants in capital cases and those sentenced to death plainly suffer for an appreciable amount of time, with the prospect of an untimely death via a state-sanctioned killing hanging over their heads like the Sword of Damocles.<sup>343</sup>

Extreme mental anguish, it has been held, occurs where a person realizes that he or she is about to be killed but is unable to do anything to stop it.<sup>344</sup> Indeed, torture techniques are specifically

339 State v. Beckman, No. 02C01-9406-CR-00107, 1995 WL 568471, at \*17 (Tenn. Crim. App. Sept. 27, 1995).

340 *Id.*

341 Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993); *see also id.* (“The record fails to demonstrate any intent by Bonifay to inflict a high degree of pain or to otherwise torture the victim.”).

342 *E.g.*, Fowler v. State, 779 P.2d 580, 588 (Okla. Crim. App. 1989) (“Mr. Barrier attempted to fight off the attack and begged for his life before he died. Such evidence clearly demonstrated torture and serious physical abuse, thereby supporting the jury’s finding that the death of John Barrier was heinous, atrocious or cruel.”). Whether any particular murder qualifies as a *torture-murder* can be a factual issue for a jury to determine. Talamantez v. Superior Court, 122 Cal. App. 3d 629, 638 (Cal. Ct. App. 1981).

343 VALERI R. HELTERBRAN, WHY FLAMINGOS ARE PINK: . . . AND 250 OTHER THINGS YOU SHOULD KNOW 102 (2007) (*italics in original*) (“The phrase *sword of Damocles* is defined as a threat, peril, or imminent danger.”).

344 Neill v. State, 896 P.2d 537, 556 (Okla. Crim. App. 1994) (“There is ample evidence of the extreme mental anguish suffered by these three (3) women prior to their deaths. This evidence illustrates the realization by these women that they were going to be harmed and even killed by Appellant. Two (2) of the women suffered the additional mental anguish of hearing their co-workers being savagely murdered and realizing they could be next. The cause of this extreme mental torture was Appellant’s intentional

designed to strip the object of the torture from any control or agency and to create a “state of total helplessness.”<sup>345</sup> It is for that reason that threats of various kinds, subjecting their targets to an uncertain fate, have long been considered to be torturous in nature.<sup>346</sup> In that regard, Almerindo Ojeda, the Director at University of California, Davis’s Center for the Study of Human Rights in the Americas, has specifically classified the following as acts of torture: threats “to self or to others”; “threats of death, physical torture, or rendition”; “mock executions”; and “forced witnessing of torture (visually or aurally).”<sup>347</sup> “Mock” executions, of course, are simply credible threats of death, and thus considered classic examples of psychological torture because of their inherent characteristics.<sup>348</sup> Ironically, 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.<sup>349</sup> If a mock execution or a mock amputation qualifies as an

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actions.”).

345 *Mohammed v. Obama*, 704 F. Supp. 2d 1, 27 (D.D.C. 2009) (quoting Metin Başoğlu et al., *Torture vs Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?*, 64 ARCHIVES GEN. PSYCHIATRY 277, 283 (2007)) (“Torture and ‘enhanced interrogation techniques’ employed by the Government during the War on Terror have been shown to be ‘geared toward creating anxiety or fear in the detainee while at the same time removing any form of control from the person to create a state of total helplessness.’”).

346 Andrea Montavon-McKillip, *CAT Among Pigeons: The Convention Against Torture, A Precarious Intersection Between International Human Rights Law and U.S. Immigration Law*, 44 ARIZ. L. REV. 247, 253–54 (2002) (“Mental torture can be inflicted by direct or implied threats that cause fear, including death threats or threats of serious injury against an individual or her family, or by forcing an individual to watch the abuse or murder of loved ones.”).

347 David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L.J. 823, 836–37 (2012).

348 LUBAN, *supra* note 1, at 166; see also PÉREZ-SALES, PSYCHOLOGICAL TORTURE, *supra* note 305, at 308, 333 (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).

349 The debate about how to classify executions—and whether they are legitimate or illegitimate exercises of state power—has led to heated debate over the years. Compare HANS GÖRAN FRANCK, THE BARBARIC PUNISHMENT: ABOLISHING THE DEATH PENALTY 35 (William 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.”), with Ernest van den Haag, *Introduction: Death but Not Torture*, in THE DEATH PENALTY: A DEBATE 13 (1983) (containing Ernest van den



act of torture (as it should),<sup>350</sup> then a real execution—logically and rationally—must also qualify.

### C. *The Torturous Nature of Non-Lethal Acts*

Many acts short of death can qualify as torture under existing law.<sup>351</sup> “Rape can constitute torture,” the Third Circuit explicitly ruled in *Zubeda v. Ashcroft*,<sup>352</sup> for example. As the Third Circuit stated: “Rape is a form of aggression constituting an egregious violation of humanity. The scarring effects of rape compare with ‘psychological sequelae of . . . survivors of abuse constituting torture under international law . . . .’”<sup>353</sup> Indeed, “rape” and “threats to rape” have been listed among common “torture techniques.”<sup>354</sup> If acts short of death, including threats of non-homicidal rape or bodily harm, can qualify as torture, then (once again) it is only logical that credible threats of death—threats designed to put individuals in fear for their lives—should also qualify under that legal rubric.<sup>355</sup> In short, just

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Haag’s views on the death penalty in a “Pro”/“Con” debate between Ernest van den Haag and John P. Conrad).

- 350 NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 180 (2010) (“In addition to the ‘classic’ examples of torture such as electric shocks, examples of acts which have been determined as torture or other prohibited ill-treatment, include methods such as severe beatings; mock executions and mock amputations; sensory manipulation and deprivation, and forced positions causing severe pain; rape and other sexual violence.”).
- 351 Such non-lethal acts include rape, forced impregnation, branding, beating, electric shocks administered to the genitals, pulling out fingernails, burning with hot irons, suspension from ceiling fans, and threats to inflict bodily harm. *E.g.*, *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001); *see also* *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995) (referring to allegations of “murder, rape, forced impregnation, and other forms of torture”); *In re Extradition of Suarez-Mason*, 694 F. Supp. 676, 682 (N.D. Cal. 1988) (“shock sessions were interspersed with rapes and other forms of torture”).
- 352 *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003).
- 353 *Id.* (citations omitted); *see also id.* (“courts have equated rape with conduct recognized under the law of nations as torture”).
- 354 *Al-Saher*, 268 F.3d at 1147; *see also* ANNE-MARIE L.M. DE BROUWER, *SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR* 211 (2005) (“[T]he case law of the ICTY has recognised that rape and other forms of sexual violence can rise to the level of torture . . . . [O]ther forms of sexual violence qualifying as torture are threats to sexually mutilate a person, threats to rape someone . . . .”).
- 355 Whether someone intends his words “to be taken as a threat,” and whether those words are “sufficiently unequivocal, unconditional, immediate and specific” to convey to the target of them “an immediacy of purpose and

as prison officials are not allowed to threaten inmates with death or bodily harm during their confinement in prison, state actors should not be allowed to threaten inmates with death in connection with interrogations or during plea bargaining or as part of the criminal justice system more broadly. A death threat is a death threat,<sup>356</sup> and the fact that an inmate has done something heinous in the past does not justify a government official in making a torturous threat of death that is backed by the enormous power of the state.<sup>357</sup>

That mock executions, non-judicial threats of death, and threats of severe pain or suffering are already classified as acts of torture makes clear that real executions should also be so classified. Tellingly, the U.S. Department of State has previously recognized mock executions to be a form of torture,<sup>358</sup> as have federal courts in the United States.<sup>359</sup> The United States Code itself defines “torture”

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immediate prospect of execution of the threat,” is to be based on “all the surrounding circumstances and not just on the words alone.” *People v. Mosley*, 65 Cal. Rptr. 3d 856, 864 (Cal. Ct. App. 2007); cf. *Nifadev v. Holder*, 577 F. App’x 481, 487 (6th Cir. 2014) (“Nifadev was subjected to credible threats to his life and subjected to a period of suffocation at the hands of the police when handcuffed and helpless in a police vehicle on account of a protected ground. This treatment bears a striking resemblance to torture . . .”).

356 As Shakespeare put it in a much different context: “A rose by any other name would smell as sweet.” Or, as Gertrude Stein once emphasized, playing off of Shakespeare’s line: “A rose is a rose is a rose is a rose.” SUNIL SETHI, *THE BIG BOOKSHELF: SUNIL SETHI IN CONVERSATION WITH 30 FAMOUS WRITERS* 83 (2011).

357 And this is to say nothing of the horror that must be experienced by innocent people who are mistakenly sentenced to death. Miscarriages of justice are relatively common, especially in death penalty cases. *Innocence and the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/innocence-and-death-penalty> (last visited Sept. 24, 2018); see also THE NATIONAL REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Sept. 24, 2018). The stories of just some of the exonerees are highlighted in a series of short documentary films produced in 2013 and available online. See ONE FOR TEN, <http://oneforten.com> (last visited Sept. 24, 2018).

358 U.S. DEPT’ OF STATE, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993*, S. Prt. 103-7 (Joint Comm. Print 1994) (recognizing mock executions as a form of torture in Chad, Columbia, Liberia, Moldova and Sudan).

359 *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1492 (C.D. Cal. 1988) (“The form of the persecution includes the following: arbitrary arrest, short term detention, torture including use of electric shock, *capucha*, beatings, rape, ‘disappearance’, extra-judicial executions, abductions, threats against family members, intimidation, forced ingestion of food,

to mean “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”<sup>360</sup> Not only are “mock” executions already treated as acts of torture,<sup>361</sup> they are, under existing law put in place by U.S. Congress and the executive branch, banned by the U.S. Code<sup>362</sup> and the U.S. Army

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false imprisonment, mock-executions, sleep deprivation, mass killings, and forced relocations.”); *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179, 185 (D. D.C. 2003) (“[T]he pilot POWs were tortured more severely than other POWs. The torture inflicted included severe beatings, mock executions, threatened castration, and threatened dismemberment.”), *vacated on other grounds*, *Acree v. Republic of Iraq*, 370 F.3d 41 (2004); *Acree*, 271 F. Supp. 2d at 210, 218 (describing “mock executions” and “several death threats” by the Saddam Hussein’s Iraqi Intelligence Service that caused “great distress” and “psychological torture,” and referring to Iraq’s “all-encompassing environment of physical and mental torture through extreme physical brutality and physical injury, mock executions, threats of death, intense fear”).

360 18 U.S.C. § 2340(1) (2004). The phrase “severe mental pain or suffering” in that federal statute is defined as follows: “[T]he prolonged mental harm caused by or resulting from—(A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality . . . .” *Id.* § 2340(2) (A)–(D) (*italics added*).

361 *Tshitenge Muteba v. Zaire*, Communication 124/1982, Human Rights Committee [U.N. Doc. Supp. No. 40 (A/39/40)] at 182, ¶ 10.2 (Mar. 25, 1983), <http://hrlibrary.umn.edu/undocs/session39/124-1982.htm> (“During the first nine days of detention he was interrogated and subjected to various forms of torture including beatings, electric shocks and mock executions.”). The Human Rights Committee lists “beatings, electric shocks, mock executions, deprivation of food and water and thumb presses” under the torture rubric. Sarah Joseph et al., *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* 159 (2006). In 1999, the Clinton Administration—in a report to the U.N. Committee Against Torture—itsself described “[t]he intentional infliction of ‘mental’ pain and suffering” to include “various psychological forms of torture and ill-treatment,” including “mock executions.” Bessler, *THE DEATH PENALTY AS TORTURE*, *supra* note 26, at 324 n.18.

362 18 U.S.C. § 2340(2)(C) (2004); *see also* David R. Dow et al., *The Extraordinary Execution of Billy Vickers, the Banality of Death, and the Demise of Post-Conviction Review*, 13 WM. & MARY BILL RTS. J. 521, 550 n.150 (2004) (“Mock executions and other threats of imminent death are widely recognized to be

Field Manual.<sup>363</sup> “Sham executions,” a book on trauma notes of simulated executions, are “a widely practiced form of torture.”<sup>364</sup>

If threats of death or threats to inflict severe pain or suffering

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a form of unconscionable torture. Legislation passed by the United States Congress on April 30, 1994, implementing the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, identifies ‘the threat of imminent death’ as a form of torture. This provision was designed to bring ‘mock executions’ within the ambit of the legislation.”) (citing 18 U.S.C. § 2340(2)(C) (2004); David P. Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 NOVA L. REV. 449, 455–56 (1991)).

- 363 DEPT’ OF THE ARMY, FIELD MANUAL 34–52: INTELLIGENCE INTERROGATION 1-8 (Washington, D.C., Sept. 28, 1992) (listing “Mock executions” as an example of “mental torture,” and listing the following as “[e]xamples of coercion”: “Threatening or implying physical or mental torture to the subject, his family, or others to whom he owes loyalty”); *see also* DAVID P. GUSHEE, IN THE FRAY: CONTESTING CHRISTIAN PUBLIC ETHICS, 1994–2013, 121 (2014) (noting that the U.S. Army Field Manual prohibits military personnel from beating prisoners, waterboarding them, sexually humiliating them, threatening them with dogs, depriving them of food and water, performing mock executions, shocking them with electricity, burning them, or causing other types of pain); David E. Graham, *The Treatment and Interrogation of Prisoners of War and Detainees*, 37 GEO. J. INT’L L. 61, 89–90 (2005) (noting that Army Field Manual 34-52 prohibits “[p]hysical or mental torture and coercion” and lists “Mock executions” as an example of mental torture); MATTHEW LIPPMAN, LAW AND SOCIETY 495 (2015) (“In 2005, Congress amended the Detainee Treatment Act to prohibit the use of cruel, inhuman, or degrading treatment by government personnel and to prohibit military interrogators from employing interrogation techniques not authorized under the Army Field Manual. The manual, for example, prohibits the use of dogs, hooding, forced nakedness, hypothermia, mock executions, electric shocks, and waterboarding.”).
- 364 METIN BAŞOĞLU & EBRU ŞALCIOĞLU, A MENTAL HEALTHCARE MODEL FOR MASS TRAUMA SURVIVORS: CONTROL-FOCUSED BEHAVIORAL TREATMENT OF EARTHQUAKE, WAR, AND TORTURE TRAUMA 41 (2011). As that source observes: “Sometimes the detainee is subjected to a prolonged threat of execution.” For instance, detainees are told that “they are going to be shot the next morning.” As that source continues of how such torturous acts unfold: “The next day they are taken from their cell, blindfolded and taken to another room where someone holds an unloaded gun at their head and pulls the trigger. The same procedure may be repeated for days or weeks on end.” *Id.* Studies of torture have revealed that “[p]otentially life-threatening (e.g. deprivation of basic needs), fear-inducing treatments (e.g. threats of harm to self and close ones, sham executions, asphyxiation), and humiliating treatments were the major determinants of perceived severity of the torture experience.” *Id.* at 52; *see also id.* at 61 (noting “various stressor events that are said not to involve intense physical pain” (e.g., “sham executions”) “can be as distressing as physical torture”).



already are classed as acts of torture,<sup>365</sup> then plainly such credible threats, when coupled with a clear intention that those threats be actualized, must also be classified as torture.<sup>366</sup> It has sometimes

365 *E.g.*, James P. Terry, *Torture and the Interrogation of Detainees*, 32 CAMPBELL L. REV. 595, 612–13 (2010) (“The cases brought under the TVPA [Torture Victims Protection Act] reference seven distinct forms of severe abuse that would constitute torture: (1) severe beatings using weapons such as truncheons and clubs; (2) threats of imminent death, to include mock executions; (3) threats of removing body parts and[/]or extremities; (4) burning, especially burning with cigarettes; (5) electric shocks to genital areas, or threats to do so; (6) rape or sexual assault, to include injury to sexual organs, or threats of the same; and (7) forcing the detainee to watch the extreme physical or mental torture of others. The severity of these examples of treatment found in civil proceedings suggests that similar severity would have to be found to warrant conviction under the criminal provisions in 18 U.S.C. §§ 2340-2340A.”).

366 Torture has been described as a specific intent crime. MICHAEL OTTERMAN, *AMERICAN TORTURE: FROM THE COLD WAR TO ABU GHRAIB AND BEYOND* 109 (2007); COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 2971 (2016). But in the case of capital punishment, even if a particular judge has no specific intent to inflict severe pain or suffering, the result—in every case—is that severe pain and suffering is inflicted. Moreover, capital punishment is a torturous punishment that society imposes collectively. THE DEATH PENALTY TODAY 115 (Robert M. Bohm ed., 2008) (“Vengeance is a human emotion experienced by individual people. Retribution is a collective response to wrongdoing from society rather than individual family members.”). Research shows that some like to see bad people suffer. Malcolm Ritter, *Men Enjoy Seeing Bad People Suffer*, USA TODAY (Jan. 18, 2006). To date, courts have yet to find executions, even botched executions, to be torturous acts. *E.g.*, *Estate of Lockett v. Fallin*, 841 F.3d 1098, 1113 (10th Cir. 2016) (*italics in original*) (citation omitted) (“The Supreme Court has determined that, in the execution context, ‘torture’ and ‘cruel and unusual punishment’ require that executing officials *mean* to choose an execution method that will cause extra pain beyond that necessary to carry out the death sentence.”). The legal prohibitions against torture and cruelty, however, are designed to insulate ourselves from our baser instincts. As Justice Thurgood Marshall once wrote: “The Eighth Amendment is our insulation from our baser selves.” CHARLES L. ZELDEN, *THURGOOD MARSHALL: RACE, RIGHTS, AND THE STRUGGLE FOR A MORE PERFECT UNION* 149 (2013). This helps explain why the prohibition against torture is—and should be—*absolute*. THE ROUTLEDGE HANDBOOK OF GLOBAL ETHICS 123 (Darrel Moellendorf & Heather Widdows eds., 2015) (“The function of the absolute moral prohibition against torture as an archetype of the fact that there are some activities in which civilized people do not engage is too important to allow a breach of the prohibition even if the degree of the wrongfulness of torturing

been suggested, including in the infamous Torture Memo prepared during the Bush Administration after 9/11, that a threat must be “imminent” in order for the threat to constitute torture.<sup>367</sup> But when a capital charge is brought or a death sentence is imposed, the consequences of that capital charge or death sentence are clearly known by government officials at the very moment that it is brought or imposed. An execution might not occur for years, or even decades, down the road.<sup>368</sup> But it is readily apparent to all concerned that the threat of death for the offender will be real, immediate, and dire. As the execution date approaches, the seriousness of the threat of death (already highly credible) will only be magnified.<sup>369</sup> And all of this is

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the person in question were not reason enough in itself.”); RICHARD MATTHEWS, *THE ABSOLUTE VIOLATION: WHY TORTURE MUST BE PROHIBITED* 220 (2008) (“[T]he absolute prohibition against torture, including the nonderogability clause of the United Nations Convention against Torture, is morally sound. Hence torture must be absolutely forbidden, no matter what.”).

- 367 Memorandum from Jay S. Bybee, Assistant Att’y Gen., to Alberto R. Gonzales, Counsel to the President 12 (Aug. 1, 2002) (on file with the U.S. Dep’t of Justice) (emphasis in original) (“The third predicate act listed in Section 2340(2) is threatening a prisoner with ‘imminent death.’ 18 U.S.C. § 2340(2)(C). The plain text makes clear that a threat of death alone is insufficient; the threat must indicate that death is ‘imminent.’ . . . Common law cases and legislation generally define imminence as requiring that the threat be almost immediately forthcoming. 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.7, at 655 (1986). By contrast, threats referring vaguely to things that might happen in the future do not satisfy this immediacy requirement. See *United States v. Fiore*, 178 F.3d 917, 923 (7th Cir. 1999). Such a threat fails to satisfy this requirement not because it is too remote in time but because there is a lack of certainty that it will occur. Indeed, timing is an indicator of certainty that the harm *will* befall the defendant. Thus, a vague threat that someday the prisoner *might* be killed would not suffice. Instead, subjecting a prisoner to mock executions or playing Russian roulette with him would have sufficient immediacy to constitute a threat of imminent death. Additionally, as discussed earlier, we believe that the existence of a threat must be assessed from the perspective of a reasonable person in the same circumstances.”).
- 368 The average time that an American death row inmate spends on death row between sentencing and execution is now more than fifteen years. Michael Johnson, *Fifteen Years and Death: Double Jeopardy, Multiple Punishments, and Extended Stays on Death Row*, 23 B.U. PUB. INT. L.J. 85, 86, 103–12 (2014). Death row inmates in other countries, including Pakistan and Japan, also spend many years on death row before execution. ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* ch. 5 (5th ed. 2015).
- 369 Cf. *Volloldo v. Ruz*, No. 1:14-MC-25 (LEK/CFH), 2017 WL 4838780 at \*6 (N.D.N.Y. Oct. 14, 2017) (“Were Plaintiffs to provide evidence that

known well in advance by every actor in the criminal justice system, from prosecutors and defense lawyers to trial and appellate judges.

It is also known by everyone involved that the inmate will suffer tremendous psychological torment while that inmate is under a constant threat of death, whether or not the threat is carried out. A mock execution may not actually inflict any observable physical harm, though someone who goes through a sham execution obviously experiences extreme psychological terror during and after the ordeal.<sup>370</sup> Just as the victim of a mock execution is tortured (and is considered a torture victim) despite the lack of any observable physical indicators that torture has occurred, a person capitally charged and sentenced to death suffers severe psychological torment<sup>371</sup> even if an execution is physically painless

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Defendants made ‘imminent death threats,’ they may be able to establish torture under the TVPA [Torture Victim Protection Act of 1991].”). In the non-state actor context, the line between a *murder* and a *torture-murder* often boils down to how long the victim was aware that his or her death would occur. *Compare Mitchell v. State*, 84 So. 3d 968, 987 (Ala. Crim. App. 2010) (“The record establishes that at least one victim suffered psychological torture. . . . ‘These murders were not accomplished in a rapid-fire manner; there was sufficient time between the . . . murders for the next victim to be placed in significant fear for his or her life . . . .’ Therefore, the circuit court did not abuse its discretion in finding that at least one of the victims suffered psychological torture.”) (quoting *Taylor v. State*, 808 So. 2d 1148, 1169 (Ala. Crim. App. 2000)), *with Norris v. State*, 793 So. 2d 847, 861 (Ala. Crim. App. 1999) (holding that the murder of three individuals was not psychologically torturous because the three victims were shot in rapid succession; the “first three shots were sudden, without any warning or precipitating event”; “[t]here was nothing preceding the first murder that would have evoked in the victims intense apprehension, fear, or anticipation of their deaths”). In the death penalty context, a death row inmate is fully aware of his or her impending death—and is helpless to prevent that death—for substantially longer than a typical victim of torture-murder. The heinous actions of torture-murderers are inexcusable, but those actions do not justify the use of torture against already-incarcerated inmates. Acts of torture should be prohibited in all circumstances.

370 JOHN CONROY, *UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE* 180 (2001) (“Dr. Rasmussen’s survey of two hundred victims (examined three days to twelve years after their torture) found that the incidence of mental symptoms at the time of examination was significantly higher among those who had been subjected to a mock execution. Rasmussen’s *Danish Medical Bulletin* article noted that 83 percent of those who experienced mock executions exhibited mental symptoms, about 20 percent more than those who had not been subjected to that particular torture.”).

371 *E.g.*, Amanda K. Eklund, *The Death Penalty in Montana: A Violation of the*

or averted altogether through an appeal or executive clemency.<sup>372</sup> Just as prison officials are not allowed to use correctional practices or techniques that exacerbate serious mental illnesses or that inflict psychological torture,<sup>373</sup> government actors should not be allowed to use punishment practices that do just that.<sup>374</sup> In allowing death

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*Constitutional Right to Individual Dignity*, 65 MONT. L. REV. 135, 142–43 (2004) (noting that “[t]here are numerous accounts of mental anguish suffered by death row inmates” and discussing the case of one inmate, Henry Arsenault, who was on death row for two years, “during which time he became obsessed with his impending death”; Arsenault’s “psychosis manifested itself in uncontrollable sweating, frequent inability to sleep or eat, unbearable nightmares, uncontrollable urination, and constant fidgeting”; when Arsenault’s execution was called off after the administration of last rites and less than half an hour before the execution was scheduled to take place, Arsenault “was so distraught that he was unable to walk, and guards had to carry him back to his cell”; a judge later described Arsenault’s condition of “raw terror and unabating stress” as “torture”).

372 During a mock execution and in lead up to an actual execution, the object of the mock execution or the actual execution also experiences *physical* symptoms such as an increased heart rate or urinating on oneself. *E.g.*, JEFFREY D. SIMON, *THE TERRORIST TRAP: AMERICA’S EXPERIENCE WITH TERRORISM* 144 (2d ed. 2001) (describing a mock execution); CONROY, *supra* note 370, at 35–36 (same). Prison officials themselves go through their own “mock” executions (of a different sort) as they test execution equipment or prepare for executions. LOUIS J. PALMER, JR., *ENCYCLOPEDIA OF CAPITAL PUNISHMENT IN THE UNITED STATES* 427 (2d ed. 2008) (“testing of the execution equipment” in Florida “is performed a minimum of eight times each year”).

373 *Walker v. State*, 68 P.3d 872, 884 (Mont. 2003) (“[I]f the particular conditions of confinement cause serious mental illness to be greatly exacerbated or if it deprives inmates of their sanity, then prison officials have deprived inmates of the basic necessity for human existence and have crossed into the realm of psychological torture.”).

374 James L. Knoll IV & Gary E. Beven, *Supermax Units and Death Row*, in *HANDBOOK OF CORRECTIONAL MENTAL HEALTH* 435, 467 (Charles L. Scott ed., 2d ed. 2010) (citations omitted) (“[E]xtended stays on death row have been associated with psychiatric decompensation. Prisoners on death row have been found to demonstrate aberrant behavior and paranoia.”); *id.* (“Treating psychiatrists should also be aware that the suicide rate of male death row inmates was found to be approximately five times higher than the rate among men in the community.”); KENNETH WILLIAMS, *MOST DESERVING OF DEATH? AN ANALYSIS OF THE SUPREME COURT’S DEATH PENALTY JURISPRUDENCE* 103 (2012) (“It is not surprising that the conditions on death row often create or exacerbate inmates’ mental problems. For example, death row inmates in Texas are housed alone in small cells measuring 6½ feet by 10 feet, containing a bed and a toilet, for 23 hours a day. They are allowed to leave their cells for one hour a day



sentences and executions, government actors are engaged in, or acquiescing to, deliberate and intentional conduct that runs afoul of the absolute prohibition against torture.<sup>375</sup>

#### D. The “Lawful Sanctions” Issue

Death penalty proponents will assert that death sentences and executions are, and traditionally have been, classified as “lawful sanctions” that constitute an exception to the definition of torture. But death sentences and executions are no longer lawful or in use in many places throughout the world,<sup>376</sup> and given the absolute, non-

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of recreation, which is also done alone.”). *See also* 1 ENCYCLOPEDIA OF GENDER AND SOCIETY 187 (Jodi O’Brien ed., 2009) (“Because 75 percent of all women who are on death row are mothers, the failure to be able to connect with their children further fosters their isolation. The isolation that women experience on death row is a risk factor for developing a mental illness or further exacerbating an existing mental condition.”).

375 *Compare* Garcia-Milian v. Holder, 755 F.3d 1026, 1034 (9th Cir. 2014) (citations omitted) (“Public officials acquiesce in torture if, ‘prior to the activity constituting torture,’ the officials: (1) have awareness of the activity (or consciously close their eyes to the fact [that] it is going on); and (2) breach their legal responsibility to intervene to prevent the activity because they are unable or unwilling to oppose it.”), *and* Sanchez-Ponce v. Whitaker, No. 17-579, 2018 WL 6266311, at \*2 (2d Cir. Nov. 30, 2018) (“A government’s inability to prevent torture—even when some state actors take ‘preventative efforts’—may be adequate to state a CAT claim.”), *with* Mouawad v. Gonzales, 485 F.3d 405, 413 (8th Cir. 2007) (citations omitted) (“A government does not acquiesce in the torture of its citizens merely because it ‘is aware of torture but powerless to stop it,’ but it does cross the line into acquiescence when it shows ‘willful blindness toward the torture of citizens by third parties.’”), *and* Ticas-Guillen v. Whitaker, No. 16-72981, 2018 WL 6266766, at \*1 (9th Cir. Nov. 30, 2018) (citations omitted) (“[T]he government ‘does not acquiesce in the torture of its citizens merely because it is aware of torture but powerless to stop it.’”). Acquiescence “requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.” 8 C.F.R. § 1208.18(a) (7) (2018). *See also* Parada v. Sessions, 902 F.3d 901, 916 (9th Cir. 2018) (“[T]he acquiescence standard is met where the record demonstrates that public officials at any level—even if not at the federal level—would acquiesce in torture the petitioner is likely to suffer.”).

376 BESSLER, CRUEL AND UNUSUAL, *supra* note 190, at 64 (noting that a growing number of countries have outlawed executions either in law or in practice); *see also* Federico Mayor Zaragoza, *The Abolition of the Death Penalty: A Question of Respect for Human Rights*, in DEATH PENALTY: A CRUEL AND INHUMAN PUNISHMENT 11, 13 (L. Arroyo Zapatero et al. eds., 2013) (discussing the work of the International Commission against the Death Penalty, which seeks the universal abolition of capital punishment).

derogable prohibition against torture,<sup>377</sup> it seems self-evident that to genuinely be a “lawful sanction” the sanction itself should not constitute an otherwise torturous act. There is already a *jus cogens* norm prohibiting torture,<sup>378</sup> and a reservation to a human rights treaty such as the Convention Against Torture cannot violate the “object and purpose” of that treaty.<sup>379</sup> The clear object and purpose of the Convention Against Torture is, manifestly, to combat, prevent, and outlaw acts of cruelty and torture.<sup>380</sup> And a nation that publicly

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377 E.g., THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 545 (Dinah Shelton ed., 2013) (noting that the prohibition of torture is non-derogable).

378 SARAH JOSEPH ET AL., SEEKING REMEDIES FOR TORTURE VICTIMS: A HANDBOOK ON THE INDIVIDUAL COMPLAINTS PROCEDURES OF THE UN TREATY BODIES 488 (Boris Wijkström ed., 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.” There is ample international authority recognising the prohibition of torture as having *jus cogens* status. The prohibition of torture also imposed obligations *erga omnes*, and every State has a legal interest in the performance of such obligations which are owed to the international community as a whole.”).

379 The Vienna Convention on the Law of Treaties provides that “[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) [T]he reservation is prohibited by the treaty; (b) [T]he treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) [I]n cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.” Vienna Convention on the Law of Treaties art. 19, May 23, 1969, 1155 U.N.T.S. 331. Although the United States has not ratified the Vienna Convention, it is considered to be the authoritative statement of the customary law of treaties. Meyer, *Customary International Law in the 21st Century*, in PROGRESS IN INTERNATIONAL LAW 197, 210 (Russell A. Miller & Rebecca M. Bratspies eds., 2008) (“[D]espite the fact that the United States has not ratified the Vienna Convention on the Law of Treaties, other states view the United States as being bound by the customary law of treaties. Insofar as the Vienna Convention is the most authoritative statement of what the customary law of treaties is, the United States is bound by the terms of the treaty.”). Moreover, U.S. law already provides that a State Party to the Convention Against Torture cannot use the “lawful sanctions” exception in Article 1 to “defeat the object and purpose of the Convention to prohibit torture.” 8 C.F.R. § 208.18(a)(3) (2018).

380 CHRIS INGELSE, THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT 391 (2001) (“In view of the object and purpose of the Convention against Torture, the objective of the Committee is to combat torture.”); United Nations Convention Against Torture art. 2(1), Feb. 4, 1985, 1465 U.N.T.S. 85 (“Each State Party shall take effective legislative,

renounces torture should not, logically, then be allowed to turn around and engage in acts that bear all the indicia of torture. As one commentator, writing about the Vienna Convention on the Law of Treaties, has aptly pointed out: “[A] reservation going against a treaty’s object and purpose would be one whereby a State ratifying the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 seeks to exclude torture from it.”<sup>381</sup>

A U.S. understanding of the Convention Against Torture—part of the U.S. reservations, understandings, and declarations (“RUDs”) to the convention—specifically reflects the U.S. Senate’s concern that the “lawful sanctions” language may be too expansive.<sup>382</sup> Indeed, case law already makes clear that even a “lawful sanction” in a country must not defeat the “object and purpose” of the Convention Against Torture.<sup>383</sup> For example, in *Nuru v. Gonzales*,

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administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”).

381 MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 272 (2009).

382 See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 341–48 (1995) (noting the U.S. ratification of the Convention Against Torture in 1994 along with a package of RUDs); *Pierre v. Gonzales*, 502 F.3d 109, 120 (2d Cir. 2007) (“[T]he United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.” (quoting 136 Cong. Rec. S17,486-01, S17,491)); *Tun v. INS*, 445 F.3d 554, 566, 571 (2d Cir. 2006) (citations omitted) (“‘lawful sanctions’ ‘do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture’”; “the Senate’s understanding that ‘a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture,’ 136 Cong. Rec. S17491, ¶ II (c), has been incorporated into this country’s refugee law.”); see also *Nuru v. Gonzales*, 404 F.3d 1207, 1221 (9th Cir. 2005) (italics in original) (“[T]he Attorney General promulgated implementing regulations defining ‘lawful sanctions’ as ‘judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty,’ *but* only so long as those sanctions do not ‘defeat the object and purpose of [CAT] to prohibit torture.’” (quoting 8 C.F.R. § 1208.18(a)(3) (2018))).

383 *Garcia-Miller v. Holder*, 755 F.3d 1026, 1033 (9th Cir. 2014) (quoting *Nuru*, 404 F.3d at 1221) (“Torture is ‘an extreme form of cruel and inhuman treatment,’ 8 C.F.R. § 208.18(a)(2), ‘that either (1) is not lawfully sanctioned by that country or (2) is lawfully sanctioned by that country, but defeats the object and purpose of CAT[.]’”); *Zhang v. Gonzales*, 214 F. App’x 3, 5 (2d Cir. 2007) (citations omitted) (“To the extent that the agency found that Zhang’s prior treatment did not qualify because the harm he identified was the result of a lawful sanction, we find that the beating and dousing

the Ninth Circuit put it this way: “[T]orture cannot be ‘inherent in or incidental to lawful sanction’ and is never a lawful means of punishment. The official sanctioning of torture necessarily defeats the object and purpose of the Convention. CAT outlaws torture absolutely . . . .”<sup>384</sup> In that same vein, it is clear that the protection provided by the Convention Against Torture extends to anyone accused of a crime<sup>385</sup> or imprisoned for one.<sup>386</sup>

There are existing U.S. regulations that purport to include

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in water were sanctions that defeated the object and purpose of CAT and therefore could qualify if that mistreatment otherwise meets the definition of torture under the regulations and BIA and court decisions.”); *see also* *Pendrak v. Holder*, 375 Fed. App’x 439, 443 (6th Cir. 2010) (emphasis added) (“[L]awful sanctions’ that *do not defeat the object and purpose of the CAT* are excluded from the definition of torture.”).

384 *Nuru*, 404 F.3d at 1222.

385 *Lian v. Gonzales*, 201 Fed. App’x 808, 810 (2d Cir. 2006) (quoting *Khouzam v. Ashcroft*, 361 F.3d 161, 169 (2d Cir. 2004)) (“[I]n *Khouzam*, we interpreted this provision to mean that CAT ‘extend[s] to situations where the victim has been accused of a crime,’”). As the Second Circuit emphasized in *Khouzam*: “When the Senate considered the CAT, its concern over the CAT’s reference to ‘lawful sanctions’ led it to qualify its ratification with the understanding that a state ‘could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.’ In directing the Attorney General to implement the CAT subject to the Senate’s understandings, it was Congress’ aim for the CAT’s protections to extend to situations where the victim has been accused of a crime.” *Khouzam*, 361 F.3d at 169.

386 *E.g.*, 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* 120–21 (1988) (“The 1975 *Declaration* was drawn up by the Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders in response to a request from the General Assembly ‘to include, in the elaboration of the Standard Minimum Rules for the Treatment of Prisoners, rules for the protection of *all persons subjected to any form of detention or imprisonment* (italics added) against torture and other cruel, inhuman or degrading treatment or punishment’. Two years after the adoption of the 1975 *Declaration*, the General Assembly requested the Commission on Human Rights to draw up a draft convention ‘in the light of the principles embodied in the Declaration’. All work undertaken in the framework of the Commission for preparing the present *Convention* was performed under an agenda item reading ‘Question of the human rights of *all persons subjected to any form of detention or imprisonment* (italics added)’. The connection between the phenomenon of torture as dealt with in the *Convention* and deprivation of liberty is also apparent from articles 10 and 11 which explicitly refer to persons ‘subjected to any form of arrest, detention or imprisonment.’”).



the death penalty as a “lawful sanction,” but those regulations also emphasize that “lawful sanctions” do not include “sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.”<sup>387</sup> In fact, when the U.S. Senate ratified the Convention Against Torture in 1994, it crafted the following understanding to make clear that the “lawful sanctions” exception was not without limits: “[T]he United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.”<sup>388</sup> In

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387 8 C.F.R. § 208.18(a)(3) (2018) (“Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.”). Those regulations also cannot somehow modify what a torturous act is; the factual nature of an act does not change with how one describes it. A pronouncement on a piece of paper or in the Code of Federal Regulations cannot transform a *torturous* act into a *non-torturous* one. The act has the characteristics inherent in it, and in the case of the death penalty those characteristics (which include the fact that capital charges and death sentences constitute death threats) are *immutable*.

388 Gail H. Miller, *Defining Torture*, in OCCASIONAL PAPER #3 (Benjamin N. Cardozo Sch. of Law/Floersheimer Ctr. for Constitutional Democracy, New York, N.Y.), Dec. 2005, at 21. In the past, it has been noted that the “lawful sanctions” provision of the Convention Against Torture has “precluded arguments that capital punishment constitutes torture.” *Id.* at 20. But capital punishment has become *unlawful* in many places, and there has been much controversy surrounding the “lawful sanctions” exception (e.g., as regards the use corporal punishments in some countries). As one commentator notes: “Many signatories agree that the lawful sanctions language creates problematic ambiguities. It diminishes the universality of the definition by infusing exceptions based on national law. As practices that may be lawful in one state may be unlawful in another, this provision undermines the effort to achieve a uniform definition of torture.” *Id.* at 21. “The U.N. Special Rapporteur on Torture, Nigel S. Rodley, recognized the potential slippery slope of the lawful sanctions exemption and has interpreted the provision so that differences in national laws would not effect the strength of the CAT. Rodley concluded that the term ‘lawful sanctions’ refers to practices that the international community widely accepts as permissible sanctions, such as imprisonment. He cited the Standard Minimum Rules for the Treatment of Prisoners as an example of international standards that may guide determinations of acceptable practices. In particular, Rodley concluded that corporal punishment may amount to torture: ‘I cannot accept the notion that the administration of such punishments as stoning to death, flogging and amputation—acts which would be unquestionably unlawful in, say, the context of custodial interrogation—can be deemed lawful simply because the punishment

other words, an act of torture is an act of torture—and a country cannot turn a torturous act into a non-torturous one simply by labeling it a “lawful sanction.”<sup>389</sup> Given that the Eighth Amendment has already been interpreted to bar torture<sup>390</sup> and that the Eighth Amendment’s meaning evolves with the times,<sup>391</sup> and given that the modern definition and understanding of torture now plainly includes both physical and mental forms of torture,<sup>392</sup> the U.S. Supreme Court should rule that death sentences and executions constitute impermissible sanctions because death threats are extremely cruel and torturous in nature.<sup>393</sup> Torture, by definition, involves the infliction of severe pain or suffering,<sup>394</sup> and that is exactly what

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has been authorized in a procedurally legitimate manner, i.e. through the sanction of legislation, administrative rules or judicial order. To accept this view would be to accept that any physical punishment, no matter how torturous and cruel, can be considered lawful, as long as the punishment has been duly promulgated under the domestic law of a State.” *Id.* at 22.

- 389 *Ghebrehiwot v. Attorney General of U.S.*, 467 F.3d 344, 359 (3d Cir. 2006) (citations omitted) (“[T]he regulation defines ‘lawful sanctions’ as ‘judicially imposed sanctions and other enforcement actions authorized by law, . . .’ but only so long as those sanctions do not ‘defeat the object and purpose of the [CAT] to prohibit torture.’ Consequently, ‘[a] government cannot exempt torturous acts from CAT’s prohibition merely by authorizing them as permissible forms of punishment in its domestic law.’”); *Khouzam v. Ashcroft*, 361 F.3d 161, 169 (2d Cir. 2004) (“It would totally eviscerate the CAT to hold that once someone is accused of a crime it is a legal impossibility for any abuse inflicted on that person to constitute torture.”).
- 390 LINDA E. CARTER ET AL., *UNDERSTANDING CAPITAL PUNISHMENT* § 4.04 (3d ed. 2012) (“the Eighth Amendment prohibits torture or barbaric punishments”).
- 391 *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017) (quoting *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014)) (“‘To enforce the Constitution’s protection of human dignity,’ we ‘loo[k] to the evolving standards of decency that mark the progress of a maturing society,’ recognizing that ‘[t]he Eighth Amendment is not fastened to the obsolete.’”).
- 392 *E.g.*, *ENCYCLOPEDIA OF INTERPERSONAL VIOLENCE* 709 (Claire M. Renzetti & Jeffrey L. Edelson eds., 2008) (discussing physical and psychological torture).
- 393 BESSLER, *THE DEATH PENALTY AS TORTURE*, *supra* note 26, at 217–19.
- 394 *State v. Piper*, 709 N.W.2d 783, 799 (S.D. 2006) (“Torture requires: ‘(1) the unnecessary and wanton infliction of severe pain, agony, or anguish; and (2) the intent to inflict such pain, agony or anguish . . . .’”); *State v. Zagorski*, 701 S.W.2d 808, 814 (Tenn. 1985) (“Although the victims died from gunshot wounds, the defendant also slit their throats, leaving them to bleed to death in the woods. This evinces depravity of mind and is a form of torture. Defendant’s actions were an infliction of gratuitous violence, and needless mutilation of victims who were already helpless from fatal wounds . . . .”); *cf. State v. Holman*, 540 S.E.2d 18, 23 (N.C. 2000) (“We have interpreted

the death penalty—an unnecessary, barbarous and dehumanizing punishment—does.<sup>395</sup> In a world of maximum-security prisons and life-without-parole sentences, death sentences and executions are also completely unnecessary.<sup>396</sup>

## VI. Conclusion

The psychological torture associated with capital punishment is self-evident and undeniable. Death threats have long been recognized as a form of torture, and there is no denying that the death penalty involves the use of death threats and worse (i.e. actual executions). Capital punishment, in truth, is a torturous practice hiding in plain sight. It has been used for centuries, with jurists in the past only occasionally, as in *People v. Anderson*,<sup>397</sup> taking note of its torturous nature. In the eighteenth century, Enlightenment thinkers thought of torture and capital punishment in separate categories. When the Italian philosopher Cesare Beccaria, the anti-death penalty pioneer, wrote in *Dei delitti e delle pene* (1764) about torture and capital punishment, he did so in separate chapters. Jeremy Bentham, the English criminal-law theorist, also conceptualized and compartmentalized torture and punishment as separate practices.<sup>398</sup> In writings not published in his lifetime, Bentham infamously justified the use of torture on the basis of utilitarianism, with pre-

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the phrase ‘unnecessarily torturous’ to encompass both physical and psychological torture, and to include a killing that leaves the victim aware of impending death but helpless to prevent it.”).

395 GABRIELE SCHWAB, HAUNTING LEGACIES: VIOLENT HISTORIES AND TRANSGENERATIONAL TRAUMA 155 (2010) (“We should no longer think of torture as a practice that happens in a torture chamber or dungeon and consists exclusively of the unnecessary and willful infliction of atrocious bodily pain, but as a much more encompassing practice of inflicting unnecessary pain and instrumentalizing pain for punitive and disciplinary measures or for purposes of control.”).

396 BESSLER, CRUEL AND UNUSUAL, *supra* note 190, at 334; *see also* E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 132 (2009) (“The means-proportionality argument is that the death penalty is unnecessary and therefore excessive relative to the next-most-severe alternative penalty (life in prison, with or without parole) whenever death adds no additional deterrent or other social benefits.”).

397 *People v. Anderson*, 493 P.2d 880, 894 (1972) (referring to the “psychological torture” associated with the death penalty).

398 BESSLER, THE DEATH PENALTY AS TORTURE, *supra* note 26, at 310–11 n.17.

trial judicial torture frequently thought of in the civil law context as necessary to procure confessions (with post-conviction torture then used to discover the names of accomplices).<sup>399</sup> But it is now crystal clear, as confirmed by the text of the Convention Against Torture, that punishments themselves can be torturous in nature. And whereas torture was largely seen in Beccaria and Bentham's time as operating on the body, it is now clear that either physical or mental torture is possible—and that both are strictly prohibited.

In reality, capital punishment has always been torturous, even if it was more torturous in Medieval times when offenders were disemboweled and drawn and quartered or burned or boiled alive<sup>400</sup> instead of being put to death through lethal injection.<sup>401</sup> Before *Furman v. Georgia*,<sup>402</sup> the California Supreme Court—in a telling admission—candidly opined in its 1972 decision in *People v. Anderson*: “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.”<sup>403</sup> “Penologists and medical experts agree,” that court determined, “that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.”<sup>404</sup> “When people on death rows are waiting to die,” the wrongfully convicted boxer Rubin “Hurricane” Carter stressed after his own exoneration, “it is easy for me to feel exactly what they are going through: the torture of waiting, the

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399 Michelle Farrell, On Torture 241–45 (Apr. 26, 2011) (unpublished Ph.D. thesis, National University of Ireland Galway), [https://aran.library.nuigalway.ie/bitstream/handle/10379/2171/FarrellM\\_OnTorture\\_PhD2011.pdf?sequence=1&isAllowed=y](https://aran.library.nuigalway.ie/bitstream/handle/10379/2171/FarrellM_OnTorture_PhD2011.pdf?sequence=1&isAllowed=y). See also LEONORE LOFT, PASSION, POLITICS, AND PHILOSOPHIE: REDISCOVERING J.-P. BRISSOT 112 (2002); THOMAS GLYN WATKIN, AN HISTORICAL INTRODUCTION TO MODERN CIVIL LAW 415 (2017).

400 BESSLER, THE DEATH PENALTY AS TORTURE, *supra* note 26, at 3–4 (describing ancient punishments).

401 Fordham law professor Deborah Denno has written at length about the progression of methods of execution in the United States. *E.g.*, Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO L.J. 1331 (2014); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49 (2007); Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319 (1997).

402 *Furman v. Georgia*, 408 U.S. 238 (1972).

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

404 *Id.*



helplessness, the pain and humiliation, and the gagging death, the obliteration.”<sup>405</sup> “It is real torture,” Oklahoma death row inmate, Richard Glossip, similarly observed from first-hand experience after his execution was delayed at the last minute after he spent 50 days in a windowless cell getting ready for his scheduled execution. “You are just in that cell and it is just like a morgue,” Glossip reported.<sup>406</sup>

It is hypocritical for governments and state officials to condemn the use of death threats, then turn around and use threats of death as part of a misguided policy that, in all candor, strays into the land of torture. It is also hypocritical for the judicial system to avoid labelling death sentences and executions as torturous when various non-lethal acts (and properly so) are already so characterized.<sup>407</sup> When a person is murdered and the victim is aware of, but helpless to prevent, death, American courts readily label the offender’s actions as involving an act of extreme cruelty (i.e. torture).<sup>408</sup> Yet, when it is the offender who is aware of, but helpless to prevent, his or her own death, the judicial system currently terms it a “lawful sanction.” Just as governments should not tolerate individuals making death threats, societies should not themselves resort to Orwellian or Kafkaesque death threats. As Albert Camus warned against state-sanctioned killing and the death penalty’s disproportionality in relation to acts of criminality in “Reflections on the Guillotine”:

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405 RUBIN “HURRICANE” CARTER & KEN KLONSKY, *EYE OF THE HURRICANE: MY PATH FROM DARKNESS TO FREEDOM* 203 (2011).

406 Leon Neyfakh, *Richard Glossip Describes Preparing to Die*, SLATE (Nov. 13, 2015), [http://www.slate.com/articles/news\\_and\\_politics/crime/2015/11/richard\\_glossip\\_the\\_condemned\\_oklahoma\\_prisoner\\_describes\\_preparing\\_to\\_die.html](http://www.slate.com/articles/news_and_politics/crime/2015/11/richard_glossip_the_condemned_oklahoma_prisoner_describes_preparing_to_die.html).

407 John D. Bessler, *What I Think About When I Think About the Death Penalty*, 62 ST. LOUIS U. L.J. 781, 790 (2018); John D. Bessler, *The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norm Barring Executions*, 79 MONT. L. REV. 7, 38–40 (2018).

408 *E.g.*, *State v. Cooper*, 718 S.W.2d 256, 259–60 (Tenn. 1986) (“It would be difficult to describe a more deliberate, brutal and horrifying infliction of death upon an innocent, unarmed person. In our opinion the circumstances of this homicide were heinous, atrocious and cruel. The deliberate taunting and threatening of a victim for hours before shooting at her once, causing her and her fellow employee to dive to the floor for safety, and then deliberately pumping the contents of four shotgun shells into her while she was helplessly trapped inside a small building could, in our opinion, convince a reasonable jury that the victim was subjected to torture and that the perpetrator of such conduct evinced depravity of mind.”).

For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.<sup>409</sup>

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409 "Reflections on the Guillotine," in *RESISTANCE, REBELLION, AND DEATH* (J. O'Brien, trans. 1960).