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# Foreword: The Death Penalty in Decline: From Colonial America to the Present

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# CRIMINAL LAW BULLETIN

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FOREWORD

THE DEATH PENALTY IN DECLINE: FROM  
COLONIAL AMERICA TO THE PRESENT

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## Foreword

# The Death Penalty in Decline: From Colonial America to the Present

John D. Bessler\*

In colonial America, corporal punishments—both lethal and non-lethal—were a gritty reality of life. The Massachusetts “Body of Liberties,” adopted in 1641, contained twelve capital offenses and authorized the imposition of up to forty lashes. Everything from murder and rebellion, to adultery and bestiality, to blasphemy and witchcraft were punishable by death, with eleven of the twelve offenses—as in Connecticut’s 1642 colonial code—citing Bible passages as authority.<sup>1</sup> The English “Bloody Code” made far more acts, over 150, punishable by death,<sup>2</sup> but English and colonial officials used identical public spectacles—hangings, stocks, ear cropping and the pillory—to impress the populace with the sovereign’s absolute power.<sup>3</sup> In 1733, Benjamin Franklin—writing in *The Pennsylvania Gazette*—took note of one such event, penning these words: “Yesterday, being Market Day, Watt who was concern’d in the Counterfeit Money, as mentioned in one of our late Papers, received part of his Punishment, being whipt, pilloried and cropt. He behaved so as to touch the Compassion of the Mob, and they did not fling at him (as was expected) neither Snow-balls nor any Thing else.”<sup>4</sup>

In the late seventeenth century, the Quakers curtailed the death penalty’s use in the colony of Pennsylvania. The “Great Law” of 1682, promulgated under William Penn, restricted executions to cases of treason and murder, though that law, ultimately disapproved by English

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<sup>1</sup>Massachusetts Body of Liberties (1641); Henry W. Farnam, Chapters in the History of Social Legislation in the United States to 1860, at 15 (Union, NJ: The Lawbook Exchange, 2000) (1902).

<sup>2</sup>Frank McLynn, *Crime and Punishment in Eighteenth-century England* xi (New York: Routledge, 1989).

<sup>3</sup>Bradley Chapin, *Criminal Justice in Colonial America, 1606-1660*, at 55 (Athens, GA: University of Georgia Press, 2010).

<sup>4</sup>Joseph A. Leo Lemay, ed., *Benjamin Franklin, Writings* 205 (New York: Literary Classics of the United States, 1987).

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authorities, lacked staying power.<sup>5</sup> “On William Penn’s death in 1718,” explains one source, “the ‘Great Law’ was rescinded in favor of a harsher criminal code, similar to those of the other colonies.”<sup>6</sup> Seventeenth- and eighteenth-century colonial penal codes often led to the execution of murderers and rapists, but also to those convicted of lesser offenses, some of which are no longer even considered criminal acts.<sup>7</sup> From the first recorded execution of an Englishman in colonial America, that of George Kendall in Virginia in 1608, until 1791, the year Americans ratified the U.S. Bill of Rights, all thirteen original colonies witnessed multiple executions. Among the executed: those found guilty of aiding runaway slaves, arson, attempted murder and rape, bestiality, burglary, horse stealing, kidnapping, piracy, sodomy and witchcraft.<sup>8</sup>

The use of severe, even deadly, bodily punishments—whether by military commanders, slaveholders, or civilian authorities—was not uncommon in the American colonies.<sup>9</sup> For example, in 1751, a court in Spotsylvania County, Virginia ordered that the sheriff take Mary McDaniel “to the Whipping post & inflict fifteen lashes on her bare back.” Her offense: petty larceny for stealing “the Cloaths of Mr George Washington when he was washing in the River some time last Summer.”<sup>10</sup> In the 1750s, George Washington—then a British military officer—himself personally ordered executions and other corporal punishments. For instance, in 1756, Washington—responding to an inquiry about whether deserters should be whipped—instructed Lieutenant Colonel Adam Stephen of the Virginia Regiment: “Things not yet being rightly settled for punishing Deserters according to their crimes; you must go on in the old way of whipping stoutly.”<sup>11</sup> Often, soldiers were whipped with thirty-nine lashes, the number laid out in a

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<sup>5</sup>Isaac Sharpless, *A Quaker Experiment in Government: History of Quaker Government in Pennsylvania, 1682-1783*, at 148 (Philadelphia: Ferris & Leach, 1902).

<sup>6</sup>Larry K. Gaines & Roger LeRoy Miller, *Criminal Justice In Action: The Core 311* (Independence, KY: Cengage Learning, 7th ed. 2012).

<sup>7</sup>Robert M. Bohm, *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States 3-4* (Waltham, MA: Anderson Publishing, 4th ed. 2012).

<sup>8</sup>John D. Bessler, *Cruel and Unusual: The American Death Penalty and the Founders’ Eighth Amendment 270* (Boston: Northeastern University Press, 2012).

<sup>9</sup>Alan Taylor, *American Colonies: The Settling of North America 387* (New York: Penguin Books, 2002).

<sup>10</sup>Washington Papers, Court Case, 3 December 1751, available at [www.founders.archives.gov](http://www.founders.archives.gov).

<sup>11</sup>Adam Stephen to George Washington, Jan. 18, 1756 & George Washington to Adam Stephen, Feb. 1, 1756, available at [www.founders.archives.gov](http://www.founders.archives.gov).

biblical verse from Corinthians.<sup>12</sup> In 1757, Washington also wrote another British soldier, John Stanwix, about his use of hangings, reporting: “I have a Gallows near 40 feet high erected (which has terrified the rest exceedingly).” “I am determined, if I can be justified in the proceeding,” Washington wrote two weeks before actually carrying out two executions, “to hang two or three on it, as an example to others.”<sup>13</sup>

Though William Penn, inspired by his Quaker beliefs, had experimented with milder punishments, the American public’s views on capital punishment and other bodily punishments did not change substantially until the publication of Cesare Beccaria’s treatise, *Dei delitti e delle pene*. Originally published in Italian in 1764 and translated into English three years later as *On Crimes and Punishments*, Beccaria’s book quickly drew the attention of intellectuals in Europe and the British colonies.<sup>14</sup> Translated into 22 languages, the slender treatise—written by a 26-year-old, Roman Catholic noble from Milan—sought proportionality between crimes and punishments, an idea Montesquieu, a French baron, had also articulated in his popular *De l’esprit des loix* (1748), later translated into English in the 1750s as *The Spirit of the Laws*.<sup>15</sup> Beccaria’s book, cited in 1769 in Sir William Blackstone’s *Commentaries on the Laws of England*, opposed torture, but drew special attention for the then-novel idea that executions were not an efficacious way to fight crime.<sup>16</sup> *On Crimes and Punishments* is frequently credited as the first Enlightenment text to make a comprehensive case for the death penalty’s abolition.<sup>17</sup>

<sup>12</sup>General Orders, Washington Papers, available at [wwwFOUNDERS.archives.gov](http://wwwFOUNDERS.archives.gov); Caroline Cox, *A Proper Sense of Honor: Service and Sacrifice in George Washington’s Army* 134 (Chapel Hill: University of North Carolina Press, 2004).

<sup>13</sup>Bessler, *Cruel and Unusual*, supra note 8, at 126–27.

<sup>14</sup>Bessler, *Cruel and Unusual*, supra note 8, at 31–57.

<sup>15</sup>Bessler, *Cruel and Unusual*, supra note 8, at 31; John Hostettler, *Cesare Beccaria: The Genius of ‘On Crimes and Punishments’* 22, 29, 119 (Hampshire, UK: Waterside Press, 2011); Frank W. Thackeray & John E. Findling, eds., *Events that Formed the Modern World: From the European Renaissance to the War on Terror* 126–28 (Santa Barbara, CA: ABC-CLIO, 2012).

<sup>16</sup>Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776–1865*, at 52–54 (Oxford: Oxford University Press, 1989); Bessler, *Cruel and Unusual*, supra note 8, at 48–49.

<sup>17</sup>William A. Schabas, *The Abolition of the Death Penalty in International Law* 5 (Cambridge: Cambridge University Press, 3d ed. 2002).

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Beccaria is now largely a forgotten figure, except among criminologists and legal historians.<sup>18</sup> But a who's who of America's founders read, and were greatly influenced by, Beccaria's book.<sup>19</sup> Before the Revolutionary War (1775-1783), the Continental Congress—the body that declared America's independence—even quoted Beccaria's treatise in an open letter to the inhabitants of Quebec. “‘In every human society,’ says the celebrated Marquis Beccaria,” Congress wrote in that letter, “‘there is an effort, continually tending to confer on one part of the heighth of power and happiness, and to reduce the other to the extreme of weakness and misery. The intent of good laws is to oppose this effort, and to diffuse their influence universally and equally.’”<sup>20</sup> George Washington, later the first President of the United States, ordered a copy of Beccaria's book for his step-son in 1769, and told the Continental Congress in the midst of the Revolutionary War that capital crimes in the army were “frequent” but “actually to inflict capital punishments upon every deserter or other heinous offender, would incur the imputation of cruelty.”<sup>21</sup> In a 1778 letter to Congress, Washington—identifying “the want of a proper gradation of punishments” between death and 100 lashes—specifically called for intermediate punishments “short of the destruction of life.”<sup>22</sup>

Early U.S. Presidents were enthralled by Beccaria's book, even if they did not embrace every single idea in it. In 1770, John Adams—representing British soldiers accused of murder following the Boston Massacre—passionately quoted Beccaria's words in a Massachusetts courtroom. “I am for the prisoners at the bar,” Adams said, “and shall apologize for it only in the words of the Marquis Beccaria: ‘if I can but be the instrument of preserving one life, his blessings and tears of transport, shall be sufficient consolation to me, for the contempt of all mankind.’”<sup>23</sup> Adams' son—John Quincy Adams, who came to oppose executions—later recalled the “electrical effect” his father's words

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<sup>18</sup>Aaron Thomas, ed., Cesare Beccaria, *On Crimes and Punishments and Other Writings* xvi (Toronto: University of Toronto Press, Aaron Thomas & Jeremy Parzen, trans. 2008).

<sup>19</sup>Bessler, *Cruel and Unusual*, supra note 8, at 47-58.

<sup>20</sup>Bessler, *Cruel and Unusual*, supra note 8, at 47; John P. Kaminski & Richard Lefler, eds., *Federalists and Antifederalists: The Debate over the Ratification of the Constitution 195* (Lanham, MD: Madison House, 2d ed. 1998).

<sup>21</sup>Bessler, *Cruel and Unusual*, supra note 8, at 130.

<sup>22</sup>Bessler, *Cruel and Unusual*, supra note 8, at 130-31.

<sup>23</sup>Bessler, *Cruel and Unusual*, supra note 8, at 50.

had on the jurors.<sup>24</sup> John Adams invoked Beccaria's name in his own book, *A Defence of the Constitutions of Government of the United States of America*,<sup>25</sup> and in 1786, he also copied this excerpt from Beccaria's treatise into his diary: "Every act of authority of one man over another, for which there is not an absolute necessity, is tyrannical."<sup>26</sup>

Thomas Jefferson and James Madison, of Virginia, were also very familiar with Beccaria's ideas. Jefferson read Beccaria's treatise in the original Italian, and he copied 26 different passages from it into his commonplace book.<sup>27</sup> In the 1770s, Jefferson—right around the time he penned the Declaration of Independence—prepared a draft constitution for his home state that would have outlawed torture and restricted the death penalty to cases of murder and treason.<sup>28</sup> Jefferson's "Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital," which also sought to restrict the death penalty's use to murder and treason, cited Beccaria's treatise four times in Jefferson's annotations to it.<sup>29</sup> That bill, which Madison urged the Virginia legislature to adopt, failed by just a single vote, with Madison attributing its defeat to "[t]he rage against Horse-stealers." As Madison lamented to Jefferson in a February 1787 letter: "Our old bloody code is by this event fully restored."<sup>30</sup> Although Virginia's Declaration of Rights, drafted by George Mason in 1776, prohibited "cruel and unusual punishments," Virginia's death penalty would not be curtailed until the mid-1790s at the behest of Virginia lawmaker George Keith Taylor, the brother-in-law of American jurist John Marshall.<sup>31</sup>

Early American constitutions—as well as writings by prominent American revolutionaries—reflect Beccaria's lasting impact and guid-

<sup>24</sup>Stephen P. Halbrook, *A Right to Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees* 132 n.179 (Westport, CT: Greenwood Press, 1989).

<sup>25</sup>1 John Adams, *A Defence of the Constitutions of Government of the United States of America, Against the Attack of M. Turgot in His Letter to Dr. Price*, dated the Twenty-Second Day of March, 1778, at 132, 182 (Philadelphia: Budd and Bartram, 3d ed. 1797).

<sup>26</sup>3 Charles Francis Adams, *The Works of John Adams, Second President of the United States: with a Life of the Author* 400 (Boston: Little, Brown, and Co., 1865).

<sup>27</sup>Bessler, *Cruel and Unusual*, supra note 8, at 54.

<sup>28</sup>Bessler, *Cruel and Unusual*, supra note 8, at 140–41.

<sup>29</sup>Bessler, *Cruel and Unusual*, supra note 8, at 141–45.

<sup>30</sup>James Madison to Thomas Jefferson, Feb. 15, 1787, reprinted in *1 Letters and Other Writings of James Madison, Fourth President of the United States* 272 (Philadelphia: J. B. Lippincott & Co., 1865).

<sup>31</sup>Bessler, *Cruel and Unusual*, supra note 8, at 150, 177; Douglas Bradburn, *The Citizenship Revolution: Politics and the Creation of the American Union, 1774–1804*, at 196 (Charlottesville: University of Virginia Press, 2009).

ing hand. After the Continental Congress issued the Declaration of Independence (1776), putting each of its signers at risk for execution for treason, American states serially adopted new constitutions that sought to curtail severe punishments. In August 1776, Maryland delegates approved a declaration of rights providing in part: "That sanguinary laws ought to be avoided, as far as is consistent with the safety of the State; and no law, to inflict cruel and unusual pains and penalties, ought to be made in any case, or at any time hereafter."<sup>32</sup> Likewise, in September 1776, Pennsylvanians adopted a new constitution, one provision of which read: "The penal laws as heretofore used shall be reformed by the legislature of this state, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to the crimes." "To deter more effectually from the commission of crimes, by continued visible punishments of long duration, and to make sanguinary punishments less necessary," the very next section read, "houses ought to be provided for punishing by hard labour, those who shall be convicted of crimes not capital; wherein the criminals shall be employed for the benefit of the public, or for reparation of injuries done to private persons."<sup>33</sup>

A number of American states—borrowing or adapting the prohibition against "cruel and unusual punishments" from the English Bill of Rights of 1689—adopted constitutions barring "cruel and unusual punishments," "cruel or unusual punishments" or simply "cruel punishments."<sup>34</sup> Others showed more unique Enlightenment fingerprints, making specific reference to the concept of proportionality. New Hampshire's 1784 constitution—following the lead of writers such as Montesquieu, Beccaria and Blackstone, expressly provided: "All penalties ought to be proportioned to the nature of the offence." "No wise legislature," clause 18 of New Hampshire's constitution read, "will affix the same punishments to the crimes of theft, forgery and the like, which they do to those of murder and treason." "[W]here the same undistinguished severity is exerted against all offences," that provision read, the people "are led to forget the real distinction in the crimes themselves." Clause 18 continued: "For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind."<sup>35</sup>

The U.S. Constitution's Eighth Amendment—part of the U.S. Bill of Rights, ratified in 1791—also expressly prohibited "cruel and unusual

<sup>32</sup>Bessler, *Cruel and Unusual*, supra note 8, at 178.

<sup>33</sup>Bessler, *Cruel and Unusual*, supra note 8, at 179.

<sup>34</sup>Bessler, *Cruel and Unusual*, supra note 8, at 178–181.

<sup>35</sup>Bessler, *Cruel and Unusual*, supra note 8, at 180.

punishments," though the Bill of Rights itself contemplated the death penalty's use. Adopted when capital and non-lethal corporal punishments were, by custom and statute, still *mandatory* punishments for certain crimes, the Fifth Amendment contained this guarantee: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The Fifth Amendment further guaranteed that no person shall "be deprived of life, liberty, or property, without due process of law" and that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."<sup>36</sup> It was not until the 1868 ratification of the Fourteenth Amendment, guaranteeing "equal protection of the laws," that Americans, in the post-Civil War era, gave legal effect to the equality principle articulated in the Declaration of Independence as "all men are created equal."<sup>37</sup>

The tremendous influence of Beccaria's treatise on American law can be gleaned from the diaries and commonplace books of American lawmakers, but it is most apparent from a 1786 letter that William Bradford, Jr., then Pennsylvania's attorney general, sent to Luigi Castiglioni, an Italian botanist.<sup>38</sup> Castiglioni—the nephew of Pietro and Alessandro Verri, brothers from Milan who had inspired Beccaria to write *On Crimes and Punishments*—had come to America in the mid-1780s to study trees and plants and to get a glimpse of American life.<sup>39</sup> In his letter, Bradford—James Madison's close friend from their days together at the College of New Jersey, now Princeton—heaped praise upon *On Crimes and Punishments*, with Bradford giving Castiglioni a newly printed American edition of Beccaria's book.<sup>40</sup> President George Washington later appointed Bradford as the second Attorney General of the United States, so Bradford—a confidant of the commander-in-chief—was extremely well connected, with Bradford's own father serving as the official printer for the Continental Congress.<sup>41</sup>

In presenting the newly printed edition of Beccaria's treatise to the Italian count, William Bradford—who believed Castiglioni to be Bec-

<sup>36</sup>U.S. Const., amends. V & VIII.

<sup>37</sup>Declaration of Independence (1776); U.S. Const., amend. XIV.

<sup>38</sup>Antonio Pace, ed., Luigi Castiglioni's *Viaggio: Travels in the United States of North America 1785-1787*, at 313-14 (Syracuse, NY: Syracuse University Press, 1983).

<sup>39</sup>Pace, Luigi Castiglioni's *Viaggio*, *supra* note 38, at xii, xxix-xxxiv.

<sup>40</sup>Pace, Luigi Castiglioni's *Viaggio*, *supra* note 38, at 313-14.

<sup>41</sup>Bessler, *Cruel and Unusual*, *supra* note 8, at 79; Robert A. Nowlan, *The American Presidents, Washington to Tyler: What They Did, What They Said, What Was Said About Them, with Full Source Notes* 165 (Jefferson, NC: McFarland & Co., 2012).

caria's nephew—wrote: "It is a new proof of the veneration my countrymen harbor for the opinions of your famous relative. I should like it to be known by the author of this book, so well received in the Old World, that his efforts to extend the domain of humanity have been crowned in the New World with the happiest success." "Long before the recent Revolution," Bradford explained in his letter, "this book was common among lettered persons of Pennsylvania, who admired its principles without daring to hope that they could be adopted in legislation, since we copied the laws of England, to whose laws we were subject." "However," Bradford continued, "as soon as we were free of political bonds, this humanitarian system, long admired in secret, was publicly adopted and incorporated by the Constitution of the State, which, spurred by the influence of this benign spirit, ordered the legislative bodies to render penalties less bloody and, in general, more proportionate to the crimes."<sup>42</sup>

The impact of *On Crimes and Punishments*, which Bradford used in drafting his widely read 1793 legislative report, *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania*, is thus undisputed.<sup>43</sup> In fact, in his 1786 letter to Luigi Castiglioni, William Bradford specifically emphasized: "The name of Beccaria has become familiar in Pennsylvania, his authority has become great, and his principles have spread among all classes of persons and impressed themselves deeply in the hearts of our citizens." "You yourself must have noticed the influence of these precepts in other American states," Bradford noted, aware that Castiglioni had been traveling throughout America on his overseas trip.<sup>44</sup> Touring all thirteen American states, Castiglioni spent more than two years in North America, including stops at Monticello and Mount Vernon.<sup>45</sup> Writing of Beccaria's influence in America, Bradford explained in his 1786 letter: "The tyranny of prejudice and injustice has fallen, the voice of a philosopher has stilled the outcries of the masses, and although a bloody system may still survive in the laws of many of our states, nevertheless the beneficent spirit sown by Beccaria works secretly in behalf of the accused, moderating the rigor of the laws and tempering justice with compassion."<sup>46</sup> That "bloody system," inherited from England, was peppered with capital crimes, often based upon Old Testament pas-

<sup>42</sup>Pace, Luigi Castiglioni's *Viaggio*, supra note 38, at 313-14.

<sup>43</sup>Bessler, *Cruel and Unusual*, supra note 8, at 85-91.

<sup>44</sup>Pace, Luigi Castiglioni's *Viaggio*, supra note 38, at 314.

<sup>45</sup>Pace, Luigi Castiglioni's *Viaggio*, supra note 38, at 1-269; A. J. Morrison, ed., *Travels in Virginia in Revolutionary Times* 61-63 (Lynchburg, VA: J. P. Bell Co., 1922).

<sup>46</sup>Pace, Luigi Castiglioni's *Viaggio*, supra note 38, at 314.

sages, with executioners—frequently reprieved felons—used to carry out its deadly dictates.<sup>47</sup>

American laws as regards capital and corporal punishments, however, began to change from the 1780s to 1790s. With the end of the Revolutionary War, Americans turned their attention back to penal reform—a subject put on hold during fighting with the British. In 1786, Pennsylvania—with its Quaker traditions—once again led the way, eliminating the death penalty for burglary, robbery and sodomy. In 1794, Pennsylvanians went even further, dividing murder into degrees and restricting the death penalty's use to acts of first-degree murder. New York, New Jersey and Virginia legislators also voted in 1796 to reduce the number of capital crimes, a trend emulated in other states in the early nineteenth century.<sup>48</sup> Non-lethal corporal punishments, such as flogging, also came under scrutiny, including in the military. For instance, in 1793, Massachusetts governor John Hancock—now most remembered for his flamboyant signature—called for a halt to the punishments of “cropping and branding, as well as that of the Public Whipping Post,” which he labeled “an indignity to human nature.” In their place, Hancock suggested that “a sentence to hard labor will perhaps have a more salutary effect than mutilating or lacerating the human body.”<sup>49</sup>

The law's shift away from bloody, or sanguinary, punishments coincided with the rise of America's penitentiary system.<sup>50</sup> Inspired by Quakers and other reform-minded civic leaders, Philadelphia's Walnut Street Prison—considered to be America's first modern penal institution—opened its doors in 1790. The penitentiary system emphasized solitary confinement and self-examination, or penitence, as a means of salvation and reformation, with prisoners receiving more humane treatment than previously afforded to them.<sup>51</sup> Prior to that time, U.S. jails and prisons were often decrepit, dungeon-like facilities, full of vice and disease, as was the case of a notorious Connecticut prison that used a former copper mine to house offenders in the 1770s. In the caverns of Connecticut's Simsbury prison, inmates labored underground and

<sup>47</sup>1 David Levinson, ed., *Encyclopedia of Crime and Punishment* 153 (Thousand Oaks, CA: SAGE Publications, 2002); Christine Quigley, *The Corpse: A History* 309 (Jefferson, NC: McFarland & Co., 1996).

<sup>48</sup>David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* 115 (Cambridge: Harvard University Press, 2010).

<sup>49</sup>Bessler, *Cruel and Unusual*, supra note 8, at 54.

<sup>50</sup>O. F. Lewis, *The Development of American Prisons and Prison Customs 1776-1845*, at 8-9, 11, 13-14, 46, 151, 257, 325, 342 (Albany, NY: Prison Association of New York, 1922).

<sup>51</sup>Lewis, *The Development of American Prisons*, supra note 50, at 25, 271, 293.

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were chained in overcrowded cages.<sup>52</sup> Virginia governor James Monroe—later the fifth U.S. President—would describe Virginia's state penitentiary, on which construction began in 1797, as a "benevolent system." The penitentiary system, Monroe observed, was based on the idea that "in punishing crime, the society or rather the government ought not to indulge in the passion of revenge."<sup>53</sup>

After Pennsylvania's Walnut Street Prison opened shortly before the Eighth Amendment's ratification in 1791, other states soon followed suit, employing prominent architects such as Benjamin Latrobe—who helped Thomas Jefferson construct the U.S. Capitol—to design more modern prison facilities.<sup>54</sup> New York passed legislation in 1796 providing for the construction of the Newgate state prison in Greenwich Village; New Jersey completed its state penitentiary in 1797; and penitentiaries in Virginia and Kentucky opened in 1800, the same year Massachusetts appropriated money for one.<sup>55</sup> In Maryland, a new penitentiary opened in 1811.<sup>56</sup> Likewise, the year 1816 saw the opening of New York's Auburn Prison, and New York's Sing Sing Prison began operating in 1825.<sup>57</sup> These penitentiaries could house offenders for long periods of time, thus curtailing the need for severe corporal punishments and executions.

The U.S. penitentiary system was not completed in the lifetimes of America's founders. Still, those political leaders saw great potential—and expressed much hope—for the new system. In the 1820s, James Madison wrote one Quaker reformer, Roberts Vaux of Pennsylvania, that "the Penitentiary System" was "an experiment so deeply interesting to the cause of Humanity."<sup>58</sup> In 1823, James Madison even wrote to a veteran from Kentucky, a physician, who had written to ask the former President about his views on capital punishment. That veteran and honorary member of the Lexington Medical Society, G. F. H. Crockett, had sent Madison a copy of Crockett's extended essay, *An Address to the Legislature of Kentucky on the Abolition of Capital*

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<sup>52</sup>Mitchell P. Roth, *Prisons and Prison Systems: A Global Encyclopedia* 341 (Westport, CT: Greenwood Press, 2006).

<sup>53</sup>Harry Ammon, *James Monroe: The Quest for National Identity* 180 (Charlottesville: University of Virginia Press, 1990).

<sup>54</sup>Roth, *Prisons and Prison Systems*, supra note 52, at 157.

<sup>55</sup>Shahid M. Shahidullah, *Crime Policy in America: Laws, Institutions, and Programs* 61 (Lanham, MD: University Press of America, 2008).

<sup>56</sup>Wilbur R. Miller, ed., *The Social History of Crime and Punishment in America: An Encyclopedia* 1074 (Thunder Oaks, CA: SAGE Publications, 2012).

<sup>57</sup>John T. Whitehead, Mark Jones & Michael C. Braswell, *Exploring Corrections in America* 46–47 (Newark, NJ: Matthew Bender & Co., 2008).

<sup>58</sup>Bessler, *Cruel and Unusual*, supra note 8, at 159.

*Punishments, in the United States, and the Substitution of Exile for Life*, an essay that specifically invoked Beccaria's name.<sup>59</sup> Madison's response: "I should not regret a fair and full trial of the entire abolition of capital punishments by any State willing to make it: tho' I do not see the injustice of such punishments in one case at least."<sup>60</sup> In 1827, Madison also wrote a letter to another correspondent who had sent the ex-President a report on Pennsylvania's penal system. In that letter, Madison said he was "attracted to what related to the penitentiary discipline as a substitute for the cruel inflictions so disgraceful to penal codes."<sup>61</sup>

By the 1830s, America's penitentiary system—though it faced financial challenges and administrative difficulties on a state-by-state basis—was starting to come of age. Thomas Paine—the American revolutionary whose ideas in his runaway bestseller, *Common Sense*, inspired the Revolutionary War—had himself argued in his own writings that it is "sanguinary punishments which corrupt mankind." "Lay then the axe to the root, and teach governments humanity," Paine emphasized. In *Rights of Man*, published in 1791, Paine—often considered the Father of the American Revolution—had forthrightly editorialized: "When, in countries that are called civilized, we see age going to the workhouse and youth to the gallows, something must be wrong in the system of government." "Civil government does not exist in executions," he wrote, "but in making such provision for the instruction of youth and the support of age, as to exclude, as much as possible, profligacy from the one and despair from the other."<sup>62</sup> By the time Alexis de Tocqueville came to America to study its penal system in the 1830s, the author of *Democracy in America* felt comfortable penning these words: "In no other country is criminal justice administered with more mildness than in the United States. Whilst the English seem disposed carefully to retain the bloody traces of the Middle Ages in their penal legislation, the Americans have almost expunged capital punishment from their codes."<sup>63</sup>

The year 2014 marks the 250th anniversary of the publication of the original Italian version of *On Crimes and Punishments*, Beccaria's classic treatise. Over that last two and half centuries, American law—

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<sup>59</sup>G. F. H. Crockett, *An Address to the Legislature of Kentucky, on the Abolition of Capital Punishments, in the United States, and the Substitution of Exile for Life* (Georgetown, KY: N. L. Finnell, 1823).

<sup>60</sup>Bessler, *Cruel and Unusual*, *supra* note 8, at 158.

<sup>61</sup>Bessler, *Cruel and Unusual*, *supra* note 8, at 159.

<sup>62</sup>Bessler, *Cruel and Unusual*, *supra* note 8, at 108.

<sup>63</sup>2 Alexis de Tocqueville, *Democracy in America* 104 (Stillwell, KS: Digireads, 2007).

including America's death penalty—has changed a great deal, of course. A large number of U.S. states—eighteen, to be exact—now prohibit capital punishment; mandatory death sentences, the norm in the founding era, have been replaced by discretionary ones; and non-lethal corporal punishments, such as branding and whipping, have been abandoned by the American penal system.<sup>64</sup> The U.S. Supreme Court declared mandatory executions unconstitutional back in 1976, the year of America's bicentennial, though executions—heavily concentrated in the South—continue to be carried out, albeit sporadically and in a highly arbitrary and discriminatory fashion. Of the approximately 1,350 executions that have taken place in America since 1976, more than 1,100 of them were carried out in the South, with more than 600 of those executions taking place in either Texas or Virginia.<sup>65</sup> Also, executions under military law, once so prevalent, have declined dramatically.<sup>66</sup> National statistics show that only two percent of counties have been responsible for more than half of cases leading to executions since 1976,<sup>67</sup> with other studies demonstrating that the odds of receiving a death sentence rise dramatically for those who kill whites. The data pertaining to those executed for interracial homicides show most dramatically how racial bias, in the form of race-of-the-victim discrimination, continues to invidiously infect America's death penalty. Since the 1970s, 20 whites have been executed for killing blacks. By contrast, 262 blacks—an exponentially higher number—have been executed for killing whites.<sup>68</sup>

America's eighteenth-century death penalty is, in many ways, unlike twenty-first century practices, though the end result—the death of inmates—is exactly the same. For example, the way in which executions are carried out has changed dramatically since America's colonial and founding eras. The method of execution has moved from hangings, firing squads and gibbeting, to the electric chair and lethal gas, to what we largely have today: more clinical lethal injections, administered

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<sup>64</sup>Alexis M. Durham III, *Crisis and Reform: Current Issues in American Punishment* 172 (Boston: Little, Brown and Co., 1994); Linda E. Carter, Ellen S. Kreitzberg & Scott W. Howe, *Understanding Capital Punishment* §§ 5.03–5.04 (New York: Matthew Bender & Co., 3d ed. 2012).

<sup>65</sup>Facts about the Death Penalty, Death Penalty Information Center 1, 3 (updated as of Oct. 23, 2013).

<sup>66</sup>See generally Rich Federico, *The Unusual Punishment: A Call for Congress to Abolish the Death Penalty under the Uniform Code of Military Justice for Unique Military, Non-Homicide Offenses*, 18 Berkeley J. Crim. L. 1 (2013).

<sup>67</sup>The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All (Washington, DC: Death Penalty Information Center, Oct. 2013).

<sup>68</sup>Facts about the Death Penalty, *supra* note 65, at 1, 3.

with chemicals and needles.<sup>69</sup> Likewise, executions are no longer public affairs, as they were in the founding era. Starting in the 1830s, and continuing until the last public execution in 1936 in Owensboro, Kentucky, Americans gradually replaced executions in the public square with executions behind thick prison walls.<sup>70</sup> In the 1880s, lawmakers in Ohio, Minnesota and Indiana also started requiring that executions take place at night.<sup>71</sup> That trend led to more than 80% of U.S. executions from 1977 to 1995 taking place between 11:00 p.m. and 7:30 a.m., with more than 50% of the 313 executions in that time frame occurring between midnight and 1:00 a.m.<sup>72</sup> While Texas, the country's most active death penalty state, has recently gone back to using daytime executions,<sup>73</sup> the secrecy surrounding executions nationwide—first imposed by newspaper “gag” laws, and now enforced by bans on the filming of executions—largely continues.<sup>74</sup>

In early America, public executions showcased the government's authority, with the condemned criminal, in the presence of community and religious leaders, making dying declarations on the gallows. But such spectacles—often rowdy or less than solemn affairs—also generated significant anti-gallows sentiment, thus fueling the anti-death penalty movement. Eventually, both proponents and opponents of capital punishment, worried about crimes committed in the very shadow of the gallows or embarrassed by the spectacles themselves, agreed to move them out of public view. By moving executions into the confines of prisons, and by shifting executions from daylight hours into the dark of night, American legislators thus eliminated the public's participation in state-sanctioned killing, at least in terms of its most dramatic aspect: execution day. This, in turn, led to much public apathy as regards the issue of the death penalty itself. As laws were passed in New York, Virginia and elsewhere that prohibited newspapers from publishing execution details, state legislators—choosing to shroud executions with as much secrecy as possible—strongly signaled that

<sup>69</sup>Randall Coyne & Lyn Entzeroth, *Capital Punishment and the Judicial Process* 83-113 (Durham, NC: Carolina Academic Press, 2012).

<sup>70</sup>John D. Bessler, *Death in the Dark: Midnight Executions in America* 67 (Boston: Northeastern University Press, 2007).

<sup>71</sup>Bessler, *Death in the Dark*, supra note 70, at 6, 84-86.

<sup>72</sup>Bessler, *Death in the Dark*, supra note 70, at 81.

<sup>73</sup>David R. Dow, *Executed on a Technicality: Lethal Injustice on America's Death Row* 164 (Boston: Beacon Press, 2005) (noting that, until the mid-1990s, Texas executions were held “before sunrise”; in 1995, Texas officials began conducting executions after 6:00 p.m.).

<sup>74</sup>John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 *Fed. Comm. L.J.* 355, 368-372 (1993).

executions were only brutalizing society. After all, if the public never hears about executions and they are kept out of sight, how could they possibly deter criminal behavior?

With Beccaria's treatise laying the intellectual groundwork, the death penalty's failure to deter crime became—over time—a major focus of American legislative debate. As hard labor and life sentences came to be seen as viable substitutes for capital sentences, Michigan abolished the death penalty in 1846, with Rhode Island and Wisconsin following suit in 1852 and 1853, respectively. "Although little was made of the deterrence argument in Michigan's successful abolition," notes one source, "by 1868, arguments made before the Minnesota legislature included the statement that crime had not increased in Michigan, Rhode Island, or Wisconsin since abolition."<sup>75</sup> Sometimes, American newspapers violated then-existing gag laws by reporting the gruesome details of executions, thereby generating renewed anti-death penalty fervor. For example, in 1889, Minnesota passed what came to be known as the "midnight assassination law," a law requiring that executions take place in private and before sunrise, with newspapers prohibited from printing any execution details. After Minnesota newspapers violated that law by reporting on the 1906 botched hanging of William Williams, it became the state's last execution, with state lawmakers—in the midst of the Progressive Era—abolishing the death penalty in 1911.<sup>76</sup>

Over the past four decades, the U.S. Supreme Court—utilizing the Eighth and Fourteenth Amendments—has already restricted the death penalty's use. It is no longer constitutional to execute the insane.<sup>77</sup> It is no longer permitted to execute those with severe intellectual disabilities, previously classified as the "mentally retarded."<sup>78</sup> It is no longer permissible to kill non-homicidal rapists<sup>79</sup> or juvenile offenders who commit crimes before the age of eighteen.<sup>80</sup> It is no longer permissible to execute those who did not kill or attempt to kill or who played

<sup>75</sup> Alan W. Clarke & Laurelyn Whitt, *The Bitter Fruit of American Justice: International and Domestic Resistance to the Death Penalty* 78 (Boston: Northeastern University Press, 2007).

<sup>76</sup> John D. Bessler, *Legacy of Violence: Lynch Mobs and Executions in Minnesota 1849-1911* (Minneapolis: University of Minnesota Press, 2003); John D. Bessler, "Midnight Assassination Law" and Minnesota's Anti-Death Penalty Movement, 1849-1911, 22 *Wm. Mitchell L. Rev.* 577, 624-27 (1996).

<sup>77</sup> *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986); *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007).

<sup>78</sup> *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

<sup>79</sup> *Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977); *Kennedy v. Louisiana*, 554 U.S. 407, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008).

<sup>80</sup> *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

a less culpable role in the commission of an offense; only those found to be major participants in the crime—and whose mental state rises to the level of reckless indifference to the value of human life—are currently eligible for the death penalty under existing Eighth Amendment jurisprudence.<sup>81</sup> Ironically, while the Supreme Court routinely reads the Eighth Amendment to *protect* prisoners from harm, the Court still upholds the death penalty's constitutionality even though executions continue to be arbitrarily and discriminatorily inflicted and are—by definition—specifically designed to kill inmates.<sup>82</sup>

In America, life-without-parole (LWOP) sentences now far eclipse death sentences, a phenomenon that began after the U.S. Supreme Court, in its 1972 ruling in *Furman v. Georgia*,<sup>83</sup> declared death sentences unconstitutional.<sup>84</sup> Before *Furman*, only seven American states authorized LWOP sentences; however, three states—Alabama, Illinois and Louisiana—passed LWOP statutes following *Furman*.<sup>85</sup> After thirty-five states reenacted death penalty laws in *Furman*'s wake,<sup>86</sup> the Supreme Court reversed course and upheld death penalty laws in 1976,<sup>87</sup> with U.S. executions resuming in 1977 with Gary Gilmore's death at the hands of a Utah firing squad.<sup>88</sup> Forty-three states enacted LWOP statutes from 1971 to 2012, and now every U.S. death penalty state authorizes LWOP as a sentencing option.<sup>89</sup> And twelve-person juries, though "death-qualified," with staunch death penalty opponents regularly removed from jury panels, have found that sentencing option attractive. From 1992 to 2003, the number of prisoners serving life-without-parole sentences in the U.S. climbed

<sup>81</sup>*Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982); *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987).

<sup>82</sup>John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 *Brit. J. Am. Leg. Studies* 297, 308–309, 414–15, 424 (2013).

<sup>83</sup>*Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

<sup>84</sup>The Sentencing Project, *Life Goes On: The Historic Rise in Life Sentences in America 3* (Washington, DC: The Sentencing Project, 2013).

<sup>85</sup>The Sentencing Project, *Life Goes On*, *supra* note 84, at 3.

<sup>86</sup>John D. Bessler, *Kiss of Death: America's Love Affair with the Death Penalty 60* (Boston: Northeastern University Press, 2003).

<sup>87</sup>*Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976).

<sup>88</sup>David Shichor, *The Meaning and Nature of Punishment 150* (Long Grove, IL: Waveland Press, 2006).

<sup>89</sup>The Sentencing Project, *Life Goes On*, *supra* note 84, at 3.

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exponentially, from 12,453 to 33,633.<sup>90</sup> As of 2008, 40,081 U.S. prisoners were serving LWOP sentences,<sup>91</sup> with that number rising to 49,081 inmates in 2012.<sup>92</sup> In contrast, the total number of death row inmates now stands at 3,108, a number dwarfed by prisoners serving LWOP sentences.<sup>93</sup>

The history of the death penalty is, certainly, one of successive restrictions on its use. The English “Bloody Code,” thanks in part to the Founding Fathers’ own legislative initiatives, gave way to a less rigid and severe approach. Indeed, when the First Congress debated whether to approve the Eighth Amendment’s Cruel and Unusual Punishments Clause, Representative Samuel Livermore, of New Hampshire, foresaw that the “cruel and unusual punishments” language—a broad, non-specific prohibition—might be used one day to do away with corporal and capital punishments altogether. Representative Livermore, expressing the view that “it is sometimes necessary to hang a man” and that “villains often deserve whipping, and perhaps having their ears cut off,” raised the question of whether, in the future, legislators might be “prevented from inflicting these punishments because they are cruel?” Despite his expressed concern, the members of Congress—not fearful of what later judges might decide—approved the “cruel and unusual punishments” language by “a considerable majority.”<sup>94</sup> While the U.S. Bill of Rights—setting forth various legal protections for those accused of crimes—contains the word “capital” and the phrase “life or limb,”<sup>95</sup> the American legal system no longer allows ear cropping or hand branding even though such punishments were permissible in the founding era.<sup>96</sup> In that regard, it should not go without notice that even Justice Antonin Scalia—one of the Court’s most ardent originalists—refers to himself as a “faint-hearted originalist” because of his concession that no modern-day judge, himself included, would any longer countenance corporal punishments such as public lashing or hand branding.<sup>97</sup>

While the U.S. Supreme Court continues to allow death sentences

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<sup>90</sup>Charles J. Ogletree, Jr. & Austin Sarat, eds., *Life without Parole: America’s New Death Penalty 6* (New York: New York University Press, 2012).

<sup>91</sup>Michael Tonry, *Punishing Race: A Continuing American Dilemma 123* (Oxford: Oxford University Press, 2011).

<sup>92</sup>The Sentencing Project, *Life Goes On*, supra note 84, at 1.

<sup>93</sup>Facts about the Death Penalty, supra note 65, at 1, 3.

<sup>94</sup>Bessler, *Cruel and Unusual*, supra note 8, at 186.

<sup>95</sup>U.S. Const., amend. V.

<sup>96</sup>Bessler, *Cruel and Unusual*, supra note 8, at 83.

<sup>97</sup>Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 861 (1989).

and executions, it is now settled law that non-lethal corporal punishments are, in the prison context, already a thing of the past. For example, in *Hope v. Pelzer*, a 2002 case, the U.S. Supreme Court held that attaching a prisoner to a hitching post in the hot sun, resulting in dehydration and a sunburn, constituted an “obvious” and “clear” Eighth Amendment violation.<sup>98</sup> Likewise, Justice Harry Blackmun—then a member of the U.S. Court of Appeals for the Eighth Circuit—authored the 1968 opinion in *Jackson v. Bishop* holding that the flogging of Arkansas prisoners was unconstitutional and ran afoul of the Eighth Amendment. “Corporal punishment,” he wrote for the Eighth Circuit, “generates hate toward the keepers who punish and toward the system which permits it.” “It is,” he added, “degrading to the punisher and to the punished alike.”<sup>99</sup> In other words, modern American jurists, recognizing human dignity as the Eighth Amendment’s touchstone, no longer allow non-lethal corporal punishments that were in regular use in the founders’ time.<sup>100</sup>

Consequently, more than a decade into the twenty-first century, Americans—including American lawmakers and judges—must squarely confront this question: should U.S. law continue to allow executions when lesser, non-lethal corporal punishments are no longer in use? It is apparent that, more than two centuries ago, some of America’s own founders—living in an era when slavery was still widespread—thought executions were *cruel*, if not altogether than at least for certain categories of offenders.<sup>101</sup> In 2010 and 2011, in fast forwarding to our own time, the number of death sentences handed out by American juries was less than 100 per year.<sup>102</sup> When one considers that LWOP sentences now far eclipse death sentences in terms of their popularity, LWOP sentences have plainly displaced executions as the *usual* sentence for convicted killers. Meanwhile, death sentences—meted out in only a small number of U.S. counties with any regularity—have become *unusual* in the extreme. Despite the U.S. Constitution’s national scope and the Fourteenth Amendment’s guarantee of “equal protection of the laws,” it is clear that—under American law, and in today’s America—like offenders are no longer being treated alike.

<sup>98</sup> *Hope v. Pelzer*, 536 U.S. 730, 734–35, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).

<sup>99</sup> *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

<sup>100</sup> Bessler, *Cruel and Unusual*, *supra* note 8, at 17; Bessler, *The Anomaly of Executions*, *supra* note 82, at 306–308, 325 n.160.

<sup>101</sup> Bessler, *Cruel and Unusual*, *supra* note 8, at 296; see also John D. Bessler, *Tinkering Around the Edges: The Supreme Court’s Death Penalty Jurisprudence*, 49 *Am. Crim. L. Rev.* 1913 (2012).

<sup>102</sup> *Facts about the Death Penalty*, *supra* note 65, at 3.

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Like the whipping post and the pillory, already relegated to the discard pile of history, the death penalty is—at bottom—a vestige of a bygone era when barbaric practices like slavery and ear cropping were still in use. With executions now barred by human rights treaties in Europe, within the borders of America's closest neighbors, Canada and Mexico, and, since 1995, by the once apartheid-dominated South Africa,<sup>103</sup> capital punishment is now viewed in much of the rest of the world as a human rights violation. While totalitarian regimes in Asia, the Middle East and North Africa continue to regularly use executions, Western democracies—the U.S. excepted—have stopped executing offenders, with European nations pledging never to execute anyone, even in wartime. Even in proceedings before the International Criminal Court—an entity tasked with prosecuting genocide, war crimes and crimes against humanity, the world's worst offenses—the death penalty is not a sentencing option.<sup>104</sup>

Recently labeled a torturous practice by Juan Méndez, the U.N. Special Rapporteur on Torture,<sup>105</sup> the use of executions is thus increasingly under siege, with the vast majority of countries no longer authorizing or using them.<sup>106</sup> As Americans continue to grapple with the centuries-old practice of putting people to death, they should consider the future of Western civilization—and the historical arc of U.S. law—and conclude that killing already incarcerated inmates is nothing more than a barbaric species of torture. After all, if lopping off offenders' ears or limbs—and rightfully so—is no longer permitted, why should the law allow the killing of killers? In the midst of the American Revolution itself, it might be recalled, Thomas Jefferson himself expressed the view that the "Lex talionis"—the notion of an eye for an eye and a tooth for a tooth—would "exhibit spectacles" whose "moral effect would be questionable" and which, ultimately, would prove "revolting to the humanized feelings of modern times."<sup>107</sup>

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<sup>103</sup>Schabas, *supra* note 17, at 356; Marie Mulvey-Roberts, ed., *Writing for Their Lives: Death Row USA 18* (Champaign, IL: University of Illinois Press, 2007).

<sup>104</sup>Bessler, *Cruel and Unusual*, *supra* note 8, at 290.

<sup>105</sup>United Nations Human Rights, Office of the High Commissioner for Human Rights, *Death Penalty Increasingly Viewed as Torture*, UN Special Rapporteur Finds, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12685&LangID=E>.

<sup>106</sup>Amnesty International, *Death Sentences and Executions 2012*, at 5 (Apr. 2013) (noting that, in 2012, "only one in 10 countries worldwide carried out death sentences").

<sup>107</sup>Bessler, *Cruel and Unusual*, *supra* note 8, at 141.