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# Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement

John D. Bessler\*

I am certainly not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.

—Thomas Jefferson\*\*

Perhaps the whole business of the retention of the death penalty will seem to the next generation, as it seems to many even now, an anachronism too discordant to be suffered, mocking with grim reproach all our clamorous professions of the sanctity of life.

—Benjamin N. Cardozo\*\*\*

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\*\* Letter from Thomas Jefferson to Samuel Kercheval, July 12, 1816. This excerpt from Jefferson's letter is one of four inscriptions chiseled in stone at the Jefferson Memorial in Washington, D.C.

\*\*\* BENJAMIN N. CARDOZO, LAW AND LITERATURE 93–94 (1931). Cardozo made this prediction in 1931, a year before his appointment to the Supreme Court. Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 97 (2002).

## I. INTRODUCTION

In 1764, Cesare Beccaria, the 26-year-old eldest son of an Italian nobleman, published a short treatise, *Dei delitti e delle pene*, that was translated into English three years later as *On Crimes and Punishments*.<sup>1</sup> In it, Beccaria argued that “there must be proportion between crimes and punishments.”<sup>2</sup> Beccaria—the father of the abolitionist movement<sup>3</sup>—pointedly asked: “Is death really a *useful* or *necessary* punishment for the security or good order of society?”<sup>4</sup> “By what right,” he pondered, “can men presume to

<sup>1</sup> CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS xxxi (Richard Bellamy ed., Richard Davies trans., 1995) [hereinafter BECCARIA (Bellamy ed.)]; see also MARCELLO MAESTRO, CESARE BECCARIA AND THE ORIGINS OF PENAL REFORM 5 (1973) (“Born in Milan on March 15, 1738, he was the first son of aristocratic though not very wealthy parents, Giovanni Saverio and Maria Beccaria. His full name and title were Marchese Cesare Beccaria Bonesana.”). The first Italian edition of Beccaria’s book—a slender volume coming in at slightly more than 100 pages—was published by Aubert of Leghorn and was received in Milan on July 16, 1764. *Id.* at 20. The first English translation of the book became available in the United States in the 1770s. See *id.* at 43 n.10; CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY 4 (Bryan Vila & Cynthia Morris, eds., 1997); LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865, at 52 (1989). By the end of the eighteenth century approximately sixty editions of *On Crimes and Punishments* had been published. MAESTRO, *supra*, at 43. A more complete history of Beccaria’s book—and additional information about the editions and translations of it—can be found elsewhere. See, e.g., BECCARIA (Bellamy ed.) *supra*, at xli–xliv, xlv–xlvii; STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 91 (2002).

There are multiple English translations of Beccaria’s *On Crimes and Punishments*. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS xxx (Aaron Thomas, ed., Aaron Thomas & Jeremy Parzen, trans., 2008) [hereinafter BECCARIA (Thomas ed.)]. I have chosen to utilize the most recent one, a translation published in 2008 by the University of Toronto Press as part of the Lorenzo Da Ponte Italian library series. André Morellet completed a French translation of the book in 1765, and German, Swedish, Russian, Spanish and early English translations were often based on that French translation, which radically reorganized Beccaria’s book and transposed whole paragraphs and sentences. *Id.* at xxvii–xxx; MAESTRO, *supra*, at 40–43. The French translation of Beccaria’s book, prepared by Morellet, was not even sent to Beccaria until after its publication in France. BECCARIA (Bellamy ed.), *supra*, at 119–20 n.4; MAESTRO, *supra*, at 40. What has been described as the “authoritative Italian edition” of *Dei delitti e delle pene*—one that Beccaria himself had a hand in revising—came out in 1766 as Beccaria’s fame was growing around the globe. Aside from the translation utilized here, only two other English translations of that authoritative Italian text exist. BECCARIA, (Thomas ed.), *supra*, at xxx & n.48 (citing BECCARIA (Bellamy ed.), *supra* & CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (David Young trans., 1986) [hereinafter BECCARIA (Young trans.)]).

<sup>2</sup> BECCARIA (Thomas ed.), *supra* note 1, at 17. Beccaria believed that crimes are “distributed across a scale that moves imperceptibly by diminishing degrees from the highest to the lowest” and that “[i]f geometry were applicable to the infinite and obscure combinations of human actions, there would be a corresponding scale of punishments, descending from the most severe to the mildest.” *Id.* at 18.

<sup>3</sup> See WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 5 (3d ed. 2002); Hugo Adam Bedau, *Interpreting the Eighth Amendment: Principled vs. Populist Strategies*, 13 T.M. COOLEY L. REV. 789, 805 (1996) (“The original impetus to abolish the death penalty two hundred years ago in Europe was fueled by Cesare Beccaria’s little book, *On Crimes and Punishments*, and by Jeremy Bentham in England.”).

The term “abolitionist” is commonly used to refer to opponents of slavery or to opponents of capital punishment. See Krista L. Patterson, *Acculturation and the Development of Death Penalty Doctrine in the United States*, 55 DUKE L.J. 1217, 1226 (2006). It is used here to refer to anti-death penalty advocates.

The connection between opponents of slavery and the death penalty is a long-standing one. Anti-slavery activists, such as Frederick Douglass, often also opposed capital punishment. See WILLIAM S. McFEELY, FREDERICK DOUGLASS 189 (1991); FREDERICK DOUGLASS, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 418 (Phillip S. Foner, ed., 1950); Dr. James J. Megivern, *Our National Shame: The Death Penalty and the Disuse of Clemency*, 28 CAP. U. L. REV. 595, 595–96 (2000) (citing 3 THE FREDERICK DOUGLASS PAPERS 242–48 (John W. Blassingame ed., 1979)).

<sup>4</sup> BECCARIA (Thomas ed.), *supra* note 1, at 26 (italics in original).

slaughter their fellows?”<sup>5</sup> “It seems absurd to me,” Beccaria continued, “that the laws, which are the expression of the public will, and which execrate and punish homicide, should themselves commit one, and that to deter citizens from murder they should order a public murder.”<sup>6</sup>

¶2 Beccaria railed against the barbarity of state-sanctioned executions, viewing them as violative of natural law. “[S]overeignty and the laws,” he wrote, “are nothing but the sum of the smallest portions of the personal liberty of each individual; they represent the general will, which is the aggregate of particular wills.”<sup>7</sup> “Who has ever willingly given other men the authority to kill him?” he asked rhetorically,<sup>8</sup> adding that “the death penalty is not a *right*, but the war of a nation against a citizen.”<sup>9</sup> Viewing life itself as “a natural right,”<sup>10</sup> Beccaria vehemently called for the death penalty’s abolition. “[I]f I can demonstrate that the death penalty is neither useful nor necessary,” the idealistic Beccaria proclaimed, “I will have won the cause of humanity.”<sup>11</sup>

¶3 For Beccaria, executions brutalized societies. “If the passions or the necessities of war have taught us how to shed human blood,” he believed, “the laws, which moderate the conduct of men, should not augment that cruel example, which is all the more baleful when a legal killing is applied with deliberation and formality.”<sup>12</sup> To persuade skeptical readers, Beccaria posed a series of questions: “Can the cries of an unfortunate wretch rescue from time, which never reverses its course, deeds already perpetrated?”<sup>13</sup> “When reading history, who does not shudder with horror at the barbaric and useless tortures that have been cold-bloodedly invented and practiced by men who considered themselves wise?”<sup>14</sup> “What must men think when they see wise magistrates and solemn ministers of justice, who with tranquil indifference have a criminal dragged with slow precision to his death, and as a poor wretch writhes in his last agonies while awaiting the fatal blow, the judge goes on with cold insensitivity—and perhaps even with secret satisfaction at his own authority—to savour the comforts and pleasures of life?”<sup>15</sup>

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<sup>5</sup> *Id.* at 51.

<sup>6</sup> *Id.* at 55.

<sup>7</sup> *Id.* at 51.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 52. Similar views were also expressed by Dr. Benjamin Rush, an early American physician who believed that “[t]he punishment of death has been proved to be contrary to the order and happiness of society.” Steven H. Jupiter, *Constitution Notwithstanding: The Political Illegitimacy of the Death Penalty in American Democracy*, 23 *FORDHAM URB. L.J.* 437, 478 n.198 (1996). Dr. Rush wrote: “Every man possesses an absolute power over his own liberty and property, but not over his own life. When he becomes a member of political society, he commits the disposal of his liberty and property to his fellow citizens; but as he has no right to dispose of his life, he cannot commit the power over it to any body of men. To take away life, therefore, for any crime, is a violation of the first political compact.” *Id.*

<sup>10</sup> BECCARIA (Thomas ed.), *supra* note 1, at 61. The concept of “natural rights” was, of course, well-known to the Framers of the U.S. Constitution. See Terry Brennan, *Natural Rights and the Constitution: The Original “Original Intent”*, 15 *HARV. J.L. & PUB. POL’Y* 965, 971–74 (1992).

<sup>11</sup> BECCARIA (Thomas ed.), *supra* note 1, at 61.

<sup>12</sup> *Id.* at 55. Dr. Benjamin Rush—Thomas Jefferson’s friend and correspondent—felt much the same way, saying capital punishment “lessens the horror of taking away human life” and thus “tends to multiply murders.” BANNER, *supra* note 1, at 104.

<sup>13</sup> BECCARIA (Thomas ed.), *supra* note 1, at 26.

<sup>14</sup> *Id.* at 51.

<sup>15</sup> *Id.* at 56.

¶4 *On Crimes and Punishments* also spoke out against torture—a concept associated with the intentional infliction of pain.<sup>16</sup> Beccaria contended that the use of torture is unlikely to produce truthful testimony and runs contrary to the principle that innocent people not be punished.<sup>17</sup> “No man,” Beccaria wrote, “can be considered *guilty* before the judge has reached a verdict, nor can society deprive him of public protection until it has been established that he has violated the pacts that granted him such protection.”<sup>18</sup> Beccaria especially decried the use of torture to punish infamy, writing that “a man judged infamous by the law” should not suffer “the dislocation of his bones.”<sup>19</sup> “Torture itself,” Beccaria emphasized, “causes real infamy to its victims.”<sup>20</sup>

¶5 Nevertheless, executions and torture devices like the rack and the thumbscrew were commonplace throughout Europe in the 1700s,<sup>21</sup> and the novelty of Beccaria’s views were not lost on him. Indeed, Beccaria began his treatise with a quote from Renaissance philosopher and English statesman Francis Bacon: “In all negociations of difficulty, a man may not look to sow and reap at once, but must prepare business, and so ripen it by degrees.”<sup>22</sup> Beccaria thus knew that change would not come easily.

¶6 Although Beccaria and one of his early supporters, Pietro Verri, argued for the abolition of torture, a practice now prohibited by international law,<sup>23</sup> only limited reform on that front had taken place before Beccaria’s rise to prominence. Sweden had outlawed torture for ordinary crimes in 1734, but would not do so for all purposes until 1772.<sup>24</sup> Likewise, in 1740, Frederick II, King of Prussia,<sup>25</sup> abolished torture for all but “especially serious cases,” and, in 1754 completely banned judicial torture, calling it “gruesome” and

<sup>16</sup> Christoph Burchard, *Torture in the Jurisprudence of the Ad Hoc Tribunals*, 6 J. INT’L CRIM. JUST. 159, 160 (2008); see also Paola Gaeta, *When Is the Involvement of State Officials a Requirement for the Crime of Torture?*, 6 J. INT’L CRIM. JUST. 183 (2008) (discussing the definition of torture).

<sup>17</sup> See Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT’L & COMP. L. REV. 275, 281–82 (1994).

<sup>18</sup> BECCARIA (Thomas ed.), *supra* note 1, at 32 (italics in original).

<sup>19</sup> *Id.* at 33–34.

<sup>20</sup> *Id.*

<sup>21</sup> See Günter Frankenberg, *Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty*, 56 AM. J. COMP. L. 403, 413 (2008); Parker B. Potter, Jr., *Antipodal Invective: A Field Guide to Kangaroos in American Courtrooms*, 39 AKRON L. REV. 73, 83 (2006); Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 128 U. PA. L. REV. 989, 1031 (1978). For graphic descriptions of torture and executions in Europe in the 1700s, see MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* 3–6, 12–13 (Alan Sheridan trans., 1995); MAESTRO, *supra* note 1, at 14–15.

<sup>22</sup> BECCARIA (Thomas ed.), *supra* note 1, at xxi, 3; BECCARIA (Bellamy ed.), *supra* note 1, at xxxiii, 1. The frontispiece to the third edition of *Dei delitti e delle pene*, published in 1765, was a copperplate engraving based on a sketch Beccaria provided. It depicts a figure, Justice, shunning an executioner who is carrying a sword and axe in his right hand and who is trying to hand Justice a cluster of severed heads with his outstretched left hand. Justice’s gaze is instead transfixed on a pile of prisoner’s shackles and worker’s tools—the instruments symbolizing imprisonment and hard labor. BECCARIA (Thomas ed.), *supra* note 1, at 2.

<sup>23</sup> Isaac A. Linnartz, *The Siren Song of Interrogational Torture: Evaluating the U.S. Implementation of the U.N. Convention Against Torture*, 57 DUKE L.J. 1485, 1491–93 (2008).

<sup>24</sup> See BECCARIA (Thomas ed.), *supra* note 1, at 173 n.10; Heikki Pihlajamäki, *The Painful Question: The Fate of Judicial Torture in Early Modern Sweden*, 25 LAW & HIST. REV. 557, 574 (2007).

<sup>25</sup> Frederick II became an admirer of Beccaria. In a September 5, 1777 letter to Voltaire, Frederick II lauded Beccaria, writing: “Beccaria has left nothing to glean after him; we need only to follow what he has so wisely indicated.” MAESTRO, *supra* note 1, at 134.

“an uncertain means to discover the truth.”<sup>26</sup> Holy Roman Empress Maria Theresa of Austria (1717-1780) was particularly slow to act, abolishing torture only in 1776, mainly at the urging of Austrian law professor Joseph von Sonnenfels.<sup>27</sup>

It is clear that when Beccaria wrote *On Crimes and Punishments*, he recognized that torture and executions—then well-entrenched worldwide—would not disappear overnight. “Human sacrifices,” Beccaria conceded, “were common among almost all nations,” and he acknowledged that “only a few societies have refrained from use of the death penalty—and for only a brief period of time.”<sup>28</sup> In fact, the list was extremely short. In the first century A.D., the Buddhist King of Lanka, Amandagamani, abolished the death penalty during his reign, with successive kings following suit.<sup>29</sup> In 724 A.D., Japan’s Emperor Shomu, a devout Buddhist, also forbade executions—as did some early Buddhist rulers in India.<sup>30</sup> In 818 A.D., Japanese Emperor Saga also outlawed the death penalty, effectively abolishing it for the next 300 years,<sup>31</sup> while Emperor Taizong of Tang barred executions in China, leading to an execution-free period there between 747 and 759 A.D.<sup>32</sup> Empress Elizabeth Petrovna (1709-1761) also decreed the suspension of executions in Russia for a short period of time in the 1750s, though the death penalty itself was not formally repealed.<sup>33</sup> In Western Europe, William the Conqueror abolished the death penalty in 1066, though he did so only because he preferred mutilations of the body, such as castration, to executions.<sup>34</sup>

Though Beccaria knew what he was up against, he remained optimistic, appealing to monarchs everywhere to rid society of capital punishment, promising the sweet vindication of history. “The voice of one philosopher,” he admitted, “is too weak against

<sup>26</sup> MAESTRO, *supra* note 1, at 18–19, 126–27, 136; BECCARIA (Thomas ed.), *supra* note 1, at 173 n.11; Frankenberg, *supra* note 21, at 408.

<sup>27</sup> Beccaria’s book greatly influenced the debate over the use of torture—what Beccaria called “a cruelty condoned by custom in most nations.” BECCARIA (Thomas ed.), *supra* note 1, at 32. Most significantly, his book influenced Sonnenfels to fight for the abolition of torture and the death penalty—and inspired him to write a book of his own, *On the Abolition of Torture*, that was published in 1775.

<sup>28</sup> BECCARIA (Thomas ed.), *supra* note 1, at 57.

<sup>29</sup> C.H.S. Jayawardene, *The Death Penalty in Ceylon*, 3 CEYLON J. HIST. SOC. STUD. 166, 185 (1960).

<sup>30</sup> David T. Johnson, *Japan’s Secretive Death Penalty Policy: Contours, Origins, Justifications, and Meanings*, 7 ASIAN-PAC. L. & POL’Y J. 62 n.27 (2006) (citing Damien P. Horigan, *Of Compassion and Capital Punishment: A Buddhist Perspective on the Death Penalty*, 41 AM. J. OF JURIS. 271, 283–85 (1996)).

<sup>31</sup> Taylor Young Hong, *Televised Executions and Restoring Accountability to the Death Penalty Debate*, 29 COLUM. HUM. RTS. L. REV. 787, 794 n.38 (1998) (reviewing JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* (1997) [hereinafter BESSLER, *DEATH IN THE DARK*] (citation omitted)).

<sup>32</sup> CHARLES BENN, *CHINA’S GOLDEN AGE: EVERYDAY LIFE IN THE TANG DYNASTY* 8 (2002).

<sup>33</sup> See BECCARIA (Thomas ed.), *supra* note 1, at 174 n.15; ANDREW A. GENTES, *EXILE TO SIBERIA, 1590-1822: CORPoreal Commodification and Administrative Systematization in Russia* 51, 78 (2008); Maria Kiriakova, *The Death Penalty in Russia 1917-2000: A Bibliographic Survey of English Language Writings*, 30 INT’L J. LEGAL INFO. 482, 486–87 (2002). Though Beccaria praised the Russian empress as providing “the leaders of all peoples an illustrious example worth at least as much as many conquests bought with the blood of her country’s sons,” see BECCARIA (Thomas ed.), *supra* note 1, at 52, the “reality”—as one commentator wrote—was that Russia’s death penalty “was replaced by terribly cruel punishments which often resulted in the convict’s death.” *Id.* at 174 n.15. As that author writes: “In fact, convicts were beaten with the *knut*, their nostrils were torn, and then their forehead and cheeks were branded with an iron. Many died and those who survived were usually deported to do forced labour in Siberia.” *Id.*

<sup>34</sup> Frederick C. Millett, *Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment?*, 6 PIERCE L. REV. 547, 551 (2008). Henry I ultimately reinstated the death penalty in 1108 and the death penalty was not abolished again in England until 1965. *Id.*

the clamour and the cries of so many people who are guided by blind habit.”<sup>35</sup> But calling upon “the few sages scattered across the face of the earth” to “echo” back to him, he countered:

[I]f the truth should reach the throne of the monarch—despite the many obstacles that keep it at bay against his wishes—let him know that it arrives with the secret support of all mankind; and let him know that the bloody notoriety of conquerors will fall silent before him and that a just posterity will bestow him a pre-eminent place among the peaceful monuments of the Tituses, the Antonines, and the Trajans.<sup>36</sup>

That few nations had barred executions, Beccaria lamented, “is consistent with the fate of great truths, which last no longer than a flash of lightning in comparison with the long and dark night that envelopes mankind.”<sup>37</sup> “The happy epoch,” the young Beccaria wrote, “has not yet arrived in which truth shall be—as error has heretofore been—in the hands of the greatest number.”<sup>38</sup>

In his own lifetime, Beccaria witnessed only modest success—dying alone in his house in 1794 in the midst of the bloody French Revolution and just two years after the notorious French physician, Dr. Guillotin, invented his beheading machine.<sup>39</sup> In 1786, persuaded by Beccaria’s ideas, Grand Duke Leopold of Tuscany did adopt a Tuscan penal code that totally eliminated the death penalty,<sup>40</sup> and in 1787, Holy Roman Emperor

<sup>35</sup> BECCARIA (Thomas ed.), *supra* note 1, at 57.

<sup>36</sup> *Id.* The Coliseum in Rome, which gets its name from its colossal size, was originally known as the “Amphitheatre of Titus.” It was the emperor’s property—a place where slaves were taken to die, where criminals were executed, and where gladiators fought to the death and for their own lives, often against wild beasts. *Livaudais v. Municipality No. 2*, 16 La. 509, 1840 WL 1413 (1840); Rachel Stevens, *The Trafficking of Children: A Modern Form of Slavery, Using the Alien Tort Statute to Provide Legal Recourse*, 5 WHITTIER J. CHILD & FAM. ADVOC. 645, 652 (2006); accord FIK MEIJER, *THE GLADIATORS: HISTORY’S MOST DEADLY SPORT* (2007).

<sup>37</sup> BECCARIA (Thomas ed.), *supra* note 1, at 57.

<sup>38</sup> *Id.*

<sup>39</sup> MAESTRO, *supra* note 1, at 153–55. In the early 1790s, during the French Revolution’s infamous Reign of Terror led by Robespierre, approximately 17,000 executions of presumed enemies of the state took place. William E. Nelson, *Marbury v. Madison, Democracy, and the Rule of Law*, 71 TENN. L. REV. 217, 227 (2004); see also Scott M. Malzahn, *State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility*, 26 HAST. INT’L & COMP. L. REV. 83, 86 (2002).

<sup>40</sup> BECCARIA (Thomas ed.), *supra* note 1, at xxix; MAESTRO, *supra* note 1, at 124, 135; Laurence A. Grayer, *A Paradox: Death Penalty Flourishes in U.S. While Declining Worldwide*, 23 DENV. J. INT’L L. & POL’Y 555, 557 (1995). The Grand Duke of Tuscany, Pietro Leopold (or Leopold II as he became known in 1790 after succeeding his brother, Joseph II), also ordered the burning of instruments of torture, and was apparently pleased with the results, reporting in 1789 that “mild laws together with a careful vigilance” had reduced common crimes and almost eliminated “the most atrocious” ones. MAESTRO, *supra* note 1, at 122, 135; Helen Borowitz & Albert Borowitz, Book Review, 45 MD. L. REV. 1066, 1070 n.8 (1986) (reviewing SAMUEL Y. EDGERTON, JR., *PICTURES AND PUNISHMENT: ART AND CRIMINAL PROSECUTION DURING THE FLORENTINE RENAISSANCE* (1985)).

Other European and American intellectuals, including Jeremy Bentham and Dr. Benjamin Rush, would later cite the Tuscan example in their anti-death penalty advocacy. Joan Fitzpatrick & Alice Miller, *International Standards on the Death Penalty: Shifting Discourse*, 19 BROOK. J. INT’L L. 273, 336 n.289 (1993) (citing HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* 85–86 (1987)); MAESTRO, *supra* note 1, at 140–41; see also Hugo Adam Bedau, *Bentham’s Utilitarian Critique of the Death Penalty*, 74 J. CRIM. L. & CRIMINOLOGY 1033, 1033–36 (1983) (describing Bentham’s writings against capital punishment, including in his 1775 book, *Rationale of Punishment*).

Joseph II, Leopold's brother, followed suit, abolishing Austria's death penalty save for crimes of revolt against the state.<sup>41</sup> It was the translation of Beccaria's ideas, however, that enabled them to breathe life over time. Those writings, once translated, became influential not just with a few monarchs but with scores of European and American intellectuals.<sup>42</sup>

¶10 To date, Beccaria's vision—of a world without torture and the death penalty, and in which life imprisonment would be the ultimate sanction—has not yet been realized, not by a long shot. Acts of torture still occur<sup>43</sup> and 60 countries, including the United States of America, still authorize capital punishment for ordinary crimes,<sup>44</sup> though a growing number of nations—137 at last count—have outlawed executions either by law or in practice.<sup>45</sup> Of the countries that retain capital punishment for ordinary crimes—among them Afghanistan, China, Cuba, the Democratic Republic of Congo, Iran, Iraq, Libya, Malaysia, North Korea, Pakistan, Saudi Arabia, Somalia, Uganda and Yemen—many are autocratic or totalitarian regimes with abysmal human rights records; in that list, only Japan and the United States stand out as highly industrialized countries.<sup>46</sup>

<sup>41</sup> MAESTRO, *supra* note 1, at 122, 136; *see also* Patterson, *supra* note 3, at 1219 n.11 (citing M. MARC ANCEL, EUROPEAN COMM'N ON CRIME PROBLEMS, THE DEATH PENALTY IN EUROPEAN COUNTRIES 9 (1962)). Joseph II's mother was Empress Maria Theresa, who died in 1780 after a long reign. MAESTRO, *supra* note 1, at 112. Joseph II (1741-1790)—whose sister, Marie Antoinette, was guillotined in France in 1793—ruled for a decade following his mother's death. *Id.* at 122.

<sup>42</sup> *On Crimes and Punishments* went through six editions in just eighteen months and was translated into several languages—a kind of eighteenth-century bestseller. BECCARIA (Thomas ed.), *supra* note 1, at xxix; CESARE BECCARIA, ON CRIMES AND PUNISHMENTS, at x (Henry Paolucci, trans., 1963) [hereinafter BECCARIA (Paolucci, trans.)]; *see also* Daye v. State, 769 A.2d 630, 637 (Vt. 2000) (noting “the influence of Cesare Beccaria” on the Pennsylvania Constitution of 1776); George Fisher, *The Birth of the Prison Retold*, 104 YALE L.J. 1235, 1278 (1995) (“Beccaria was enormously influential in Britain.”); Matthew A. Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 AM. J. JURIS. 97, 131 (1994) (discussing Beccaria's influence on monarchs); *id.* (“Two years after the original anonymous publication, in Tuscany, of Beccaria's *On Crimes and Punishments*, a French translation was completed by Abbé Morellet. With amazing rapidity, the book became the toast of salons and courts from Paris to Vienna. As Henry Paolucci puts it in the introduction to his contemporary edition of Beccaria's work, ‘as if an exposed nerve had been touched, all Europe was stirred to excitement.’ Beccaria became a world celebrity. Voltaire praised his book as ‘le code de l'humanité,’ translating it himself and writing a long commentary on it. Diderot did the same thing.”).

*On Crimes and Punishments* is still considered one of the most influential books of the past three centuries on those subjects. *See* BECCARIA (Thomas ed.), *supra* note 1, at x.

<sup>43</sup> *See, e.g.*, Sarah Joseph, *Committee Against Torture: Recent Jurisprudence*, 6 HUM. RTS. L. REV. 571 (2006).

<sup>44</sup> *See* Abolish the Death Penalty, Amnesty International, <http://www.amnesty.org/en/death-penalty> (last visited Aug. 31, 2009). Nations that are abolitionist for “ordinary crimes” retain the death penalty for crimes such as those committed in wartime or under military law. *See* Ursula Bentele, *Race and Capital Punishment in the United States and Africa*, 19 BROOK. J. INT'L L. 235, 240 n.15 (1993).

<sup>45</sup> *See* Abolish the Death Penalty, *supra* note 44. Amnesty International lists all “Abolitionist” and “Retentionist” countries, breaking down the abolitionist countries into three categories: “Abolitionist for all Crimes,” “Abolitionist for Ordinary Crimes only,” and “Abolitionist in Practice.” *Id.*

<sup>46</sup> *See* Abolitionist and Retentionist Countries, Amnesty International, [www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries#retentionist](http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries#retentionist) (last visited Aug. 31, 2009). Japan's death penalty—not exactly a model of transparency and accountability—is carried out with utmost secrecy. Until a short time ago, the Japanese government actually did not even publicly disclose when executions would take place, and executed inmates' family members only learned of executions when told to come and pick up the bodies. BESSLER, DEATH IN THE DARK, *supra* note 31, at 192. In December 2007, under mounting pressure from critics, Japanese officials finally modified that practice. They now publicly release the names and crimes of those hanged, but only on the day of the execution. Japan, which has 102 people on death row, recently hanged three murderers on the same day—an event reminiscent of a triple execution that took place in Arkansas in 1994. *Id.* at 77; Blaine Harden, *Japan Hangs Three Killers as Pace of*



¶11 The progress made by the abolitionist movement—especially when one looks back at the sheer number of executions that were carried out in medieval times and the Enlightenment era—is striking. Europe is now a death-penalty-free zone;<sup>47</sup> America’s closest neighbors, Canada and Mexico, are abolitionist;<sup>48</sup> and a growing number of poor and developing countries, such as Albania and Angola, Cambodia and Colombia, Haiti and Nicaragua, and Rwanda and Azerbaijan, have totally barred executions.<sup>49</sup> Even South Africa—once the home of a brutal apartheid regime that made frequent use of executions—no longer authorizes death sentences after the country’s Constitutional Court declared them unconstitutional over a decade ago.<sup>50</sup>

¶12 As we approach the 250th anniversary of the publication of *On Crimes and Punishments*, it seems fitting to look back at where the abolition movement has traveled so far, to gauge where we stand now, and to assess what may lie ahead. Beccaria’s book shaped influential Enlightenment thinkers such as Bentham and Voltaire as well as countless early American abolitionists,<sup>51</sup> including Dr. Benjamin Rush, an American founding father and one of Pennsylvania’s leading lights.<sup>52</sup> But Beccaria’s views—spread haphazardly in the eighteenth century, sometimes through unauthorized editions and translations<sup>53</sup>—undeniably still have currency today, even if Beccaria could never

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*Executions Rises*, WASH. POST, June 18, 2008, at A10.

<sup>47</sup> SANGMIN BAE, WHEN THE STATE NO LONGER KILLS: INTERNATIONAL HUMAN RIGHTS NORMS AND ABOLITION OF CAPITAL PUNISHMENT 24–27 (2007). Abolition of the death penalty is now a condition of entry into the European Union. SCHABAS, *supra* note 3, at 302–03.

<sup>48</sup> Canada abolished the death penalty for ordinary crimes in 1976 and for all crimes in 1998. Mexico abolished the death penalty for all crimes in 2005. See Abolitionist and Retentionist Countries, *supra* note 46.

<sup>49</sup> *Id.*

<sup>50</sup> *S v Makwanyane and Another*, 1995 (6) BCLR 665 (CC). Interpreting a constitutional bar on “cruel, inhuman or degrading treatment or punishment,” South Africa’s Constitutional Court declared the death penalty unconstitutional, and in doing so invoked the African concept of “ubuntu”—a concept closely associated with the Western concept of human dignity. John D. Bessler, *In the Spirit of Ubuntu: Enforcing the Rights of Orphans and Vulnerable Children Affected by HIV/AIDS in South Africa*, 31 HAST. INT’L & COMP. L. REV. 33, 89 n.274 (2008); accord Ursula Bentele, *Back to an International Perspective on the Death Penalty as a Cruel Punishment: The Example of South Africa*, 73 TUL. L. REV. 251 (1998); Peter Norbert Bouchkaert, *Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa*, 32 STAN. J. INT’L L. 287 (1996). In American courts, of course, the concept of human dignity has also become a touchstone of Eighth Amendment jurisprudence. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); see also *Glass v. Louisiana*, 471 U.S. 1080, 1085 (1985) (Brennan, J., dissenting from denial of certiorari) (“[B]asic notions of human dignity command that the State minimize ‘mutilation’ and ‘distortion’ of the condemned prisoner’s body.”).

<sup>51</sup> Beccaria had a special influence on Enlightenment figure Francois-Marie Arouet, better known by his pseudonym, Voltaire. See Joshua E. Kastenberg, *An Enlightened Addition to the Original Meaning: Voltaire and the Eighth Amendment’s Prohibition Against Cruel and Unusual Punishment*, 5 TEMP. POL. & CIV. RTS. L. REV. 49, 50, 55–56 (1995).

<sup>52</sup> MAESTRO, *supra* note 1, at 140 (“The influence of Beccaria’s ideas in Pennsylvania was so great that several prominent men went so far as to follow him in his stand for the complete abolition of the death penalty. In 1792 Dr. Benjamin Rush, a distinguished citizen and professor of clinical medicine at the University of Pennsylvania, published an essay entitled *Considerations of the Injustice and Impolicy of Punishing Murder by Death* in which he proclaimed that ‘the marquis of Beccaria has established a connexion between the abolition of capital punishment, and the order and happiness of society.’”).

<sup>53</sup> See, e.g., BECCARIA (Thomas ed.), *supra* note 1, at xxvii–xxviii (noting the editorial liberties that a French translator took in translating Beccaria’s book); MAESTRO, *supra* note 1, at 40 (reprinting a letter that a French translator sent to Beccaria informing him of the completed translation, with the translator writing: “Men of letters belong to all nations and to the whole world; they are united by links stronger than those 5 which exist among the citizens of one country, the inhabitants of one city, the members of one family.”). *On Crimes and Punishments* would be widely distributed and read in the United States for many decades.

have imagined all the twenty-first century technologies now capable of transmitting his ideas.<sup>54</sup>

¶13 America's Founding Fathers read Beccaria's text by candlelight, sometimes in Italian,<sup>55</sup> but in the Information Age, television, radio, blogs, and e-mails now spread facts and ideas at supersonic speed, revolutionizing—as never before—the anti-death penalty movement's capabilities. After recalling that movement's long history, from its humble beginnings with one Italian criminologist, to anti-death penalty efforts in the Progressive Era, to litigation in the 1970s before the Supreme Court, this Article explores the more recent grassroots moratoria and abolition initiatives powered by the Internet. In recounting how the abolition of the death penalty is rapidly becoming a norm of international law, this Article further examines how America—with its retentionist position—is becoming increasingly isolated from the world community.

¶14 In that milieu, this Article also analyzes existing Eighth Amendment jurisprudence, evolving public attitudes, and the ongoing legal and political struggles in the United States over capital punishment. In particular, this Article seeks to answer some difficult and thorny questions in the wake of recent Supreme Court cases dealing with everything from death sentences for child rape<sup>56</sup> to the constitutionality of lethal injection<sup>57</sup> to the habeas corpus rights of Guantánamo detainees.<sup>58</sup> What role will legislatures, U.S. courts and the American public play in future battles over America's death penalty? After the Supreme Court's 7-2 ruling in *Baze v. Rees*,<sup>59</sup> which upheld Kentucky's lethal injection protocol, is the Constitution's ban on "cruel and unusual punishments" a dead letter? Or are Eighth Amendment claims still as viable as ever in the death penalty context? And more than two centuries after Beccaria's death, just what lies ahead for the abolition movement and constitutional litigation in capital cases? Is the death penalty here to stay? Or will America soon see its last state-sanctioned execution?

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See MASUR, *supra* note 1, at 52 ("In the 1780s most catalogues of books for sale in America included an edition of Beccaria's essay, and newspapers such as the *New Haven Gazette and Connecticut Magazine* serialized Beccaria for their readers."); M.H. Hoeflich, *Translation & the Reception of Foreign Law in the Antebellum United States*, 50 AM. J. COMP. L. 753, 768–71 (2002) (noting that Joseph Story owned a copy of Beccaria's book).

<sup>54</sup> Two commentators, Samuel Gross and Phoebe Ellsworth, once quipped—albeit only half-jokingly—that "the last new argument against the death penalty" may have been made by Cesare Beccaria in 1764. See Timothy V. Kaufman-Osborn, *Regulating Death: Capital Punishment and the Late Liberal State*, 111 YALE L.J. 681, 685 (2001) (reviewing AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* (2001)).

<sup>55</sup> Jefferson is reported to have read Beccaria in Italian. MERRILL PETERSON, *THOMAS JEFFERSON AND THE NEW NATION* 124 (1970); see also MAESTRO, *supra* note 1, at 141 ("We find another proof of Beccaria's early popularity on the American continent in Thomas Jefferson's *Commonplace Book* which contains several extracts from Montesquieu in French, followed by no less than twenty-six extracts from Beccaria in Italian, all long passages cited in Jefferson's own handwriting. These extracts were written, according to Gilbert Chinard who edited the *Commonplace Book*, between 1774 and 1776, when Jefferson became a member of the Virginia Committee of Revisors for the reform of the legal system.").

<sup>56</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

<sup>57</sup> *Baze v. Rees*, 128 S. Ct. 1520 (2008).

<sup>58</sup> *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

<sup>59</sup> *Baze*, 128 S. Ct. at 1520.

## II. THE BREADTH OF BECCARIA'S INFLUENCE

A. *European Penal Reform*

¶15 *On Crimes and Punishments*, though not translated and distributed everywhere all at once, shaped countless Enlightenment thinkers, including many advocates of prison reform. In Europe, for example, Beccaria's disciples included William Eden, who authored *Principles of Penal Law* in 1771; Voltaire, who wrote a famous commentary on Beccaria's book that was then frequently reprinted with it; and Maximilien Robespierre, who advocated for the death penalty's abolition in France in 1791.<sup>60</sup> Beccaria's writings also greatly influenced John Howard, who vocally opposed capital and corporal punishment,<sup>61</sup> as well as his fellow Englishman Jeremy Bentham.<sup>62</sup>

¶16 Voltaire, especially, brought attention to *On Crimes and Punishments*. After reading Beccaria's book, Voltaire—a popular writer—called Beccaria “a brother” and “a beneficent genius whose excellent book has educated Europe.”<sup>63</sup> Voltaire successfully campaigned to exonerate a wrongfully condemned man in 1763, wrote on the subject of

<sup>60</sup> SCHABAS, *supra* note 3, at 5; Simon Devereaux, *Imposing the Royal Pardon: Execution, Transportation, and Convict Resistance in London, 1789*, 25 LAW. & HIST. REV. 101, 123 & n.63 (2007) (citing Hugh Dunthorne, “Beccaria and Britain,” in CRIME, PROTEST AND POLICE IN MODERN BRITISH SOCIETY: ESSAYS IN MEMORY OF DAVID J. V. JONES (David W. Howell & Kenneth O. Morgan, eds. 1999) & Anthony J. Draper, *Cesare Beccaria's Influence on English Discussions of Punishment, 1764-1789*, 26 HIST. OF EUROPEAN IDEAS 177-99 (2000)).

<sup>61</sup> *United States v. Blake*, 89 F. Supp. 2d 328, 343 (E.D.N.Y. 2000). In 1777, John Howard—a prison reformer—published a detailed account of the terrible conditions of British prisons and called for changes in the treatment of prisoners. JOHN HOWARD, *THE STATE OF THE PRISONS IN ENGLAND AND WALES* (1777); Randall McGowen, “The Well-Ordered Prison,” in *THE OXFORD HISTORY OF THE PRISON* 87 (1995); *see also* Fisher, *supra* note 42, at 1236 (“Howard decried the filth of the prisons, the avarice of their keepers, and the neglect of the magistrates who were charged with overseeing both. He made detailed recommendations for the proper running of prisons.”). Howard, for example, thought day-and-night solitary confinement too harsh. JOHN HOWARD, *AN ACCOUNT OF THE PRINCIPAL LAZARETTOS IN EUROPE* 169 n.\* (1789).

Early English prisons, which often kept prisoners in irons, were dirty, disease-infested and served mainly to confine debtors and those awaiting trial or execution or, as was commonly the case, transportation to American or Australian penal colonies. Devereaux, *supra* note 60, at 127-28; Fisher, *supra* note 42, at 1239, 1267-68. And the situation was much the same in the United States, where the first prisons were not built until the late eighteenth century. *Compare* LAWRENCE FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 78 (1994) (“In Connecticut, a prison was improvised in 1773 out of certain copper mines at Simsbury. Called ‘Newgate’ after the English prison, it became the state prison of Connecticut in 1790. This was, by all accounts, a horrendous dungeon, a dark cave of ‘horrid gloom.’”) *with* Sara A. Rodriguez, *The Impotence of Being Earnest: Status of the United Nations Standard Minimum Rules for the Treatment of Prisoners in Europe and the United States*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 61, 68 (2007) (“The first prison in the United States, the Walnut Street Jail in Philadelphia, was built in 1787 and converted in 1790 to include a ‘penitentiary house.’ It featured a program advocated by Quakers, who wanted to reform offenders ‘while also providing humane treatment.’”).

<sup>62</sup> Bentham wrote that punishment is intended “to induce a man to choose always the least mischievous of two offences.” JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 168 (J.H. Burns & H.L.A. Hart eds., 1970) (1789); *see also* JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 201 (N. M. Tripathi Private Ltd. 1975) (1802) (“Where two offences are in conjunction, the greater offence ought to be subjected to severer punishment, in order that the delinquent may have a motive to stop at the lesser.”); JAMES E. CRIMMINS, *ON BENTHAM* 51-57 (2004) (discussing Beccaria's influence on Bentham); H.L.A. Hart, *Bentham and Beccaria*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 40 (1982) (discussing the relationship between Beccaria and Bentham).

<sup>63</sup> MAESTRO, *supra* note 1, at 44-45.

the death penalty and the need for criminal law reform, and had direct contact with American Founding Fathers, including Benjamin Franklin and Dr. Benjamin Rush.<sup>64</sup>

¶17 Across the English Channel, legal scholars were also intrigued by Beccaria's writings. Jeremy Bentham, the noted English philosopher and social reformer, began reading *On Crimes and Punishments* around the time that he was admitted to the bar in 1769, and was so taken with the book that he wrote of Beccaria: "Oh, my master, first evangelist of Reason . . . you who have made so many useful excursions into the path of utility, what is there left for us to do?"<sup>65</sup> Bentham—who freely acknowledged Beccaria's influence—was a vocal critic of capital punishment, objecting to its "irremissibility."<sup>66</sup>

¶18 William Blackstone's much-revered *Commentaries on the Laws of England*<sup>67</sup> also explicitly referred to Beccaria.<sup>68</sup> Blackstone—the famed Oxford scholar whose writings were frequently consulted by colonial lawyers—called the Italian thinker "an ingenious writer, who seems to have well studied the springs of human action, that crimes are more effectually prevented by the certainty, than by the severity, of punishment."<sup>69</sup> Blackstone himself criticized the infliction of harsh punishments,<sup>70</sup> saying that it is "absurd and impolitic to apply the same punishment to crimes of different magnitude."<sup>71</sup> Although he

<sup>64</sup> Kastenbergh, *supra* note 51, at 50–51, 58, 61–62; MAESTRO, *supra* note 1, at 18–19.

<sup>65</sup> BECCARIA (Paolucci, trans.), *supra* note 42, at x–xi; Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 272 n.27 (2005).

<sup>66</sup> JEREMY BENTHAM, THEORY OF LEGISLATION 353–54 (2d ed. 1874); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 22 (1987).

<sup>67</sup> Blackstone became the Vinerian Chair at Oxford in 1758, and the first volume of his *Commentaries on the Laws of England*—a huge success in the American colonies—was published in 1765. See Daniel R. Coquillette, *The Legal Education of a Patriot: Josiah Quincy Jr.'s Law Commonplace* (1763), 39 ARIZ. ST. L.J. 317, 327–28 (2007).

<sup>68</sup> *State v. Wheeler*, 175 P.3d 438, 443 (Or. 2007) ("Although Blackstone suggested that fine distinctions in ranges of punishments may be difficult to make and are best left to legislative judgment, he set out a number of principles, at least some of them inspired by his reading of Cesare Beccaria's contemporary treatise on criminal law and punishment, *On Crimes and Punishments* (1764; first English trans 1767). Blackstone, following Beccaria, emphasized rationality in the imposition of punishments, rather than the indiscriminate application of harsh punishments such as the death penalty. Punishment, in Blackstone's view (as influenced by Beccaria), should take into account the manifold complexities of aggravating and extenuating circumstances, including a weighing of the effectiveness of a particular penalty in preventing future crimes.") (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 15–16 (1769)).

<sup>69</sup> 4 BLACKSTONE, *supra* note 68, at 17; see also Markus Dirk Dubber, "The Power to Govern Men and Things"; *Patriarchal Origins of the Police Power in American Law*, 52 BUFF. L. REV. 1277, 1310 (2004) ("The Americans of the time clearly paid much attention to Cesare Beccaria's *Crimes and Punishments* (1764), as did everyone else interested in matters of criminal law, including Blackstone.").

<sup>70</sup> William Blackstone believed that a punishment "ought always to be proportioned to the particular purpose it is meant to serve, and by no means exceed it." 4 BLACKSTONE, *supra* note 68, at 12.

<sup>71</sup> 4 BLACKSTONE, *supra* note 68, at 17–18. As Blackstone wrote: "A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect either in the wisdom of the legislature, or the strength of executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is, it must be owned, much *easier* to extirpate than to amend mankind: yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure." *Id.* Blackstone also wrote that executions should be avoided where "the evil to be prevented is not adequate to the violence of the preventative." *Id.* at 10. According to Sir William Holdsworth, "it was Beccaria's book which helped Blackstone to crystallize his ideas, and it was Beccaria's influence which helped to give a more critical tone to his treatment of the English criminal law than to his treatment of any other part of English law." MAESTRO, *supra* note 1, at 130.

The word "sanguinary"—a term commonly used during the founding era—has long been defined as

remained supportive of executions and corporal punishments (e.g., the cutting off of the nose and ears),<sup>72</sup> Blackstone favored the death penalty in only limited circumstances.<sup>73</sup> Indeed, he recounted the “melancholy truth” that English law made approximately 160 different crimes punishable by death.<sup>74</sup>

### B. America’s Founding Period

¶19 Americans carefully read Beccaria’s writings, which profoundly shaped the country’s founding era and the Bill of Rights—a fact not lost on scholars<sup>75</sup> and judges.<sup>76</sup> One commentator has called *On Crimes and Punishments* “more influential than any other single book” in America’s revolutionary period,<sup>77</sup> and history shows that early American jurists, as well as the Founders themselves, often turned to Beccaria for guidance.<sup>78</sup> One study reveals that America’s Founders, in their writings and speeches,

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“bloody,” “cruel,” or “murderous.” A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (1792); see also *State v. Newman*, 140 N.W.2d 406, 412 (Neb. 1966) (defining “bloodthirstiness” as “[e]ager to shed blood, cruel, sanguinary, murderous”). The New Hampshire, Pennsylvania and South Carolina constitutions all called for less “sanguinary” punishments. See N.H. CONST. of 1784, art. XVIII; S.C. CONST. of 1778, art. I, § 40 (1790); PA. CONST. of 1776, § 38 (1790); accord *Sterling v. Cupp*, 625 P.2d 123, 128 (Or. 1981) (“The Pennsylvania Constitution . . . provided that the penal laws were to be reformed and punishments made less ‘sanguinary’ (i.e., bloody) by substituting imprisonment at hard labor.”).

<sup>72</sup> See MAESTRO, *supra* note 1, at 130; Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 712 (2003).

<sup>73</sup> As Blackstone wrote: “[T]he pains of death, and perpetual disability by exile, slavery, or imprisonment, ought never to be inflicted, but when the offender appears *incorrigible*: which may be collected either from a repetition of minuter offenses; or from the perpetration of some one crime of deep malignity, which of itself demonstrates a disposition without hope or probability of amendment and in such cases it would be cruelty to the public, to defer the punishment of such a criminal, till he had an opportunity of repeating perhaps the worst of villanies.” 4 BLACKSTONE, *supra* note 68, at 12.

<sup>74</sup> *Id.* at 18–19.

<sup>75</sup> See IRVING BRANT, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING* 464 (1915) (“*On Crimes and Punishments* helped shape our Fifth and Eighth Amendments.”); Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 813 (1975) (“There were three American translations of Beccaria, each coupled with Voltaire’s Commentary, which were published in America before the formulation of the Bill of Rights. They became immediately popular at both bookstores and lending libraries.”) (citing MARY-MARGARET H. BARR, *VOLTAIRE IN AMERICA 1774-1880*, at 121 (1941)); *id.* at 829–30 (“Madison himself had been a member of the committee which drew up the Virginia Declaration of Rights, so it is not surprising that he turned to the state provisions and particularly relied on the amendments of Virginia and Massachusetts for content.”); *id.* at 830 (pointing out that Madison himself noted “the impact of the Enlightenment and specifically Beccaria on the Virginia Revisal of the Laws, and, in fact, had included the treatise of Beccaria in the list of recommended books which he had reported as proper for the use of the Continental Congress”) (quoting 8 *THE PAPERS OF JAMES MADISON* 393 (W. Hutchinson & W. Rachal eds., 1962) and BRANT, *supra*, at 38–39).

<sup>76</sup> See, e.g., *Carmona v. Ward*, 576 F.2d 405, 427 (2d Cir. 1978) (Oakes, J., dissenting) (noting that the Framers were familiar with the writings of Beccaria and that James Madison was “a student of Beccaria and had included Beccaria’s treatise in the list of recommended books for use by the Continental Congress”).

<sup>77</sup> ADOLPH CASO, *WE THE PEOPLE: FORMATIVE DOCUMENTS OF AMERICA’S DEMOCRACY* 239 (2001).

<sup>78</sup> See *People ex rel. Colorado Bar Ass’n v. Irwin*, 152 P. 905, 908 (Colo. 1915) (citing a passage of Blackstone referencing Beccaria); *Eureka County Bank Habeas Corpus Cases*, 126 P. 655, 661 (Nev. 1912) (citing Beccaria); *State v. Burlington Drug Co.*, 78 A. 882, 885 (Vt. 1911) (“While the [state constitutional] provision suggests the immunities of the Great Charter, its language seems due rather to the influence of Beccaria, whose treatise on Crimes and Punishments was translated into English in 1768, and was read avidly by lawyers and jurists everywhere in the latter part of the eighteenth and the earlier part of the nineteenth centuries. This is no fanciful conjecture, for in discussing the subject of penal laws Chipman

invoked Beccaria so much that Beccaria ranks seventh overall in frequency of citation—only St. Paul, Montesquieu, Sir William Blackstone, John Locke, David Hume, and Plutarch rank higher.<sup>79</sup>

¶20

Beccaria's influence was felt particularly keenly—and quickly—in the American colonies, a landscape already bursting at the seams with revolutionary ideas and impulses. In 1770, the American patriot and lawyer John Adams famously defended the British soldiers accused of murder in the Boston Massacre, and Adams showed close familiarity with the reform-minded Italian criminologist. In taking on this unpopular cause, Adams—though a death penalty supporter<sup>80</sup>—eloquently invoked Beccaria in his opening statement on behalf of his clients:

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acknowledges the influence of the Italian writer, quotes from his work, and says in precise terms: ‘The world is more indebted to the Marquis Beccaria for this little Treatise on Crimes and Punishments than to all other writers on the subject.’”); *Ex parte* Smith, 111 P. 930, 936 (Nev. 1910) (citing Beccaria); *Ex parte* Davis, 110 P. 1131, 1134 (Nev. 1910) (same); *Ex parte* Rickey, 100 P. 134, 141 (Nev. 1909) (same); *People v. Lesser*, 27 N.Y.S. 750 (N.Y. Sup. Ct. 1894) (same); *Ex parte* Deidesheimer, 14 Nev. 311, 1879 WL 3488, at \*4 (1879) (same); *State v. Deal*, 64 N.C. 270, 1870 WL 1723, at \*3 (1870) (same); *Blair v. Ridgely*, 41 Mo. 63, 1867 WL 4732, at \*7 (1867) (same); *Gordon v. People*, 33 N.Y. 501, 514 (1865) (same); *Cook v. Board of Chosen Freeholders of Middlesex County*, 26 N.J.L. 326, 1857 WL 94, at \*4 (N.J. Sup. 1857) (same); *State v. Dunning*, 9 Ind. 20, 1857 WL 3554, at \*4 (1857) (same); *Commonwealth v. Anthes*, 71 Mass. 185, 225 (1855) (same); *Ezekiel v. Dixon*, 3 Ga. 146, 1847 WL 1321, at \*7 (1847) (same); *Commonwealth ex rel. Short v. Deacon*, 1823 WL 2218, at \*4 (Pa. 1823) (same); *New York v. Melvin*, 2 Wheeler C.C. 262, Yates Sel. Cas. 112 (1810) (referencing a “saying of the Marquis Beccaria” that “the judicial system of every country is two or three hundred years behind its progress in civilization”); *Cunningham v. Caldwell*, 3 Ky. 123, 1807 WL 528, at \*5 (1807) (citing Beccaria’s “celebrated work on Crimes and Punishments”); *State v. Hobbs & Return Strong*, 1803 WL 184 (Vt. 1803) (quoting Beccaria at length); *Brinley v. Avery*, 2 Kirby 22, 1786 WL 162, at \*1 (Conn. 1786) (citing Beccaria).

<sup>79</sup> Donald Lutz, a University of Houston political scientist, conducted the examination of the Founding Fathers’ writings and speeches. The historical record also shows more than one-third of all libraries in the period 1777–90 contained a copy of Beccaria’s now-famous essay, *On Crimes and Punishments*, and that Beccaria accounted for about one percent of citations to published writers in the 1770s and three percent in the 1780s. See Founding Father’s Library, The Forum at The Online Library of Liberty (a project of Liberty Fund, Inc.), [http://oll.libertyfund.org/index.php?Itemid=259&id=438&option=com\\_content&task=view](http://oll.libertyfund.org/index.php?Itemid=259&id=438&option=com_content&task=view); Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth Century American Political Thought*, 78 AM. POL. SCI. REV. 189 (1984); see also DONALD LUTZ, A PREFACE TO AMERICAN POLITICAL THEORY 136, 138 (1992). The Founding Fathers cited the Bible more frequently than any other source. JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION: THE FAITH OF OUR FOUNDING FATHERS 51–52 (1987).

<sup>80</sup> Adams thought the death penalty necessary in certain circumstances. See DAVID McCULLOUGH, JOHN ADAMS 540 (2001) (“Capital punishment was part of life. Nor was Adams opposed to it. As President, he had signed death warrants for military deserters.”); Letter from John Adams to Colonel Hitchcock, Oct. 1, 1776 (“It is said, there was shameful Cowardice. If any Officer was guilty of it, I sincerely hope he will be punished with death. This most infamous and detestable Crime, must never be forgiven in an Officer.”); Letter from John Adams to Henry Knox, Sept. 29, 1776 (“I despise that Panick and those who have been infected with it, and I could almost consent that the good old Roman fashion of decimation should be introduced. The Legion, which ran away, had the name of every Man in it, put into a Box, and then drawn out, and every tenth Man was put to death. The terror of this Uncertainty, whose Lot it would be to die, restrained the whole in the time of danger from indulging their fears.”); AUTOBIOGRAPHY OF JOHN ADAMS, part 1, sheet 20 of 53, Adams Family Papers: An Electronic Archive, Massachusetts Historical Society, <http://www.masshist.org/digitaladams/> (last visited Aug. 31, 2009) (discussing letters of his which were intercepted by the British and later printed) (“The Expressions were Will your judiciary Whip and hang without Scruple. This they construed to mean to excite Cruelty against the Tories, and get some of them punished with Severity. Nothing was farther from my Thoughts. I had no reference to Tories in this. . . . [M]y Question meant no more than ‘Will your judges have fortitude enough to inflict the severe punishments when necessary as Death upon Murderers and other capital Criminals, and flagellation upon such as deserve it.’ Nothing could be more false and injurious to me, than the imputation of any sanguinary Zeal against the Tories, for I can truly declare that through the whole Revolution and from that time to this I never committed one Act of Severity against the Tories. On the contrary I was a constant Advocate for all

I am for the prisoners at the bar and shall apologize for it only in the words of the Marquis Beccaria. “If by supporting the rights of mankind, and of invincible truth, I shall contribute to save from the agonies of death one unfortunate victim of tyranny, or ignorance, equally fatal, his blessings and years of transport shall be sufficient consolation to me for the contempt of all mankind.”<sup>81</sup>

Indeed, John Adams was so taken by Beccaria that he had copied Beccaria’s words into his diary.<sup>82</sup> After transcribing them, Adams put down his own thoughts, writing in his diary: “The Sovereign Power is constituted, to defend Individuals against the Tyranny of others. Crimes are acts of Tyranny of one or more on another or more. A Murderer, a Thief, a Robber, a Burglar, is a Tyrant.”<sup>83</sup> His son, John Quincy Adams, who came to oppose capital punishment,<sup>84</sup> would later remark on the “electric effect” Beccaria’s words—as spoken by his father—had on jurors.<sup>85</sup> Though John Adams expressed no moral qualms with the death penalty’s use, the writings of his wife, Abigail, reveal that the Adams family certainly considered the possibility that America’s death penalty might one day be abolished.<sup>86</sup>

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the Mercy and Indulgence consistent with our Safety.”).

<sup>81</sup> United States v. Flemmi, 195 F. Supp.2d 243, 253 (D. Mass. 2001) (citing McCULLOUGH, *supra* note 80, at 65–68 and Marvin Wolfgang, *Introduction to CESARE BECCARIA, OF CRIMES AND PUNISHMENTS* ii (Marsilo Publishers 1996)); *see also* Schwartz & Wishingrad, *supra* note 75, at 814 n.148 (“John Adams made this statement in quoting from Beccaria’s treatise which had been translated into English and published in London in 1770. On June 28, 1770, Adams copied a passage from Beccaria into his diary.”).

<sup>82</sup> *See* DIARY OF JOHN ADAMS 15 (diary entry for June 28, 1770), Adams Family Papers: An Electronic Archive, Massachusetts Historical Society, <http://www.masshist.org/digitaladams/> (last visited Aug. 31, 2009); Schwartz & Wishingrad, *supra* note 75, at 814 n.148 (citing 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 352–53 n.2 (Butterfield ed., 1961) (“This passage did in fact appear in the opening statement of his October defense of Captain Preston, who was accused and later acquitted in the Boston Massacre trial. Adams bought his own copy of Beccaria’s works in the Italian edition in Paris in 1780, and it is among his books in the Boston Public Library.”)); *see also* Pauley, *supra* note 42, at 132 (“One of the earliest translations of *On Crimes and Punishments*, a London 1775 edition, was in the library of John Adams. As Adolph Caso tells us in *America’s Italian Founding Fathers*, in that book ‘the Coat of Arms of John Adams, stamped on the first page, bears the inscription in Latin: ‘Libertatem/ Amicitiam/ Retinebis/ Et Fidem,’ which may be translated, ‘You will retain liberty, friendship, and faith.’”). Sixteen years later, Adams wrote in his diary, first in English then in the original Italian, another quotation from Beccaria: “Every Act of Authority, of one Man over another for which there is not an absolute Necessity, is tyrannical.” DIARY OF JOHN ADAMS 44, (diary entry for July 20, 1786), Adams Family Papers: An Electronic Archive, Massachusetts Historical Society, <http://www.masshist.org/digitaladams/> (last visited Aug. 31, 2009).

<sup>83</sup> DIARY OF JOHN ADAMS, *supra* note 82, at 44; *see also* Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1, 16 (2008) (quoting John Adams’ “lifelong belief that all of history had proved that the People, unrestrained, tend to be ‘unjust, tyrannical, brutal, barbarous, and cruel.’”).

<sup>84</sup> *See* 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 82, at 352, 353 n.2; 2 *id.* at 440, 442; Nicholas Levi, *Veil of Secrecy: Public Executions, Limitations on Reporting Capital Punishment, and the Content-Based Nature of Private Execution Laws*, 55 FED. COMM. L.J. 131, 137 (2002).

<sup>85</sup> DIARY OF JOHN ADAMS, *supra* note 82, at 44.

<sup>86</sup> *See* Letter from Abigail Adams to John Adams, 31 March 1797, Adams Family Papers: An Electronic Archive, Massachusetts Historical Society, <http://www.masshist.org/digitaladams/> (last visited Aug. 31, 2009) (“We are suffering under the same apprehensions which have afflicted other places. The attempts to destroy Boston by fire are daily, or rather Nightly repeated. Patrols are constantly kept. They have detected but few. The vile wretches have got into the Country. At Milton they keep a Nightly watch. It is really a distressing calamity, but we shall be infested with more vagabonds, if the states go on to abolish capital punishment.”). Her feelings on capital punishment can also be gleaned from another letter she sent her husband. *See* Letter from Abigail Adams to John Adams, 12 January 1794, Adams Family Papers: An

¶21 Another leading founder, James Wilson, also regularly referred to Beccaria's treatise in his own writings and law lectures.<sup>87</sup> Wilson—a Pennsylvania native who opposed slavery, served as the College of Philadelphia's first law professor and, in 1789, became a member of the Supreme Court—was thoroughly enamored with Beccaria's ideas.<sup>88</sup> Wilson expressed reservations about capital punishment, calling the prior English practice of not affording counsel to those accused of capital crimes “unreasonable and severe.” He also argued that false confessions were sometimes given, pointing out that one man had shown up alive after three people were hanged for his supposed murder.<sup>89</sup> In another reflection of the changing times, Wilson's son, a Pennsylvania judge, would later resign his judgeship because of his opposition to capital punishment.<sup>90</sup>

¶22 Dr. Benjamin Rush—a friend of John Adams and an ardent death penalty foe—was also an admirer of Beccaria's work.<sup>91</sup> Dr. Rush invoked Beccaria's name at a reading he gave at the house of Benjamin Franklin—another Beccaria admirer—in March 1787.<sup>92</sup> “I have said nothing upon the manner of inflicting death as a punishment for crimes, because I consider it as an improper punishment for any crime,” Rush explained, going on to cite the death penalty's abolition in Tuscany.<sup>93</sup> A devout Christian, Rush often

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Electronic Archive, Massachusetts Historical Society, <http://www.masshist.org/digitaladams/> (last visited Aug. 31, 2009) (“In France they have at length added the Murder of [the] unfortunate Queen to the measure of their Inequality, Whilst Humanity sickens at the recital of their crimes, her death is less horrible than the cruel imprisonment and indignities she has sustained.”).

<sup>87</sup> SCHABAS, *supra* note 3, at 5; *see also* Schwartz & Wishingrad, *supra* note 75, at 823 (noting that James Wilson—famous for his law lectures—spoke at the College of Philadelphia on the “Necessity and Proportion of Punishments” in which he discussed Beccaria's views and that Robert J. Turnbull, in *A Visit to the Philadelphia Prison*, published in 1796, discussed Pennsylvania's experiment with penal reform and stated that “[s]everal circumstances combined to make the proposed alteration expedient, and among others the small and valuable gift of the immortal Beccaria to the world had its due influence”); Pauley, *supra* note 42, at 131 (“It is not possible here to survey all of the ways in which Beccaria influenced continental jurisprudence in the late eighteenth century.”); *id.* at 132 (“The influence of Beccaria's book on the American founding fathers was also staggering. Within six years of the first English translation of 1767, a reprint of that edition was issued in New York. In 1776, an edition including Voltaire's commentary appeared in Philadelphia. In the next several years, other editions were published in different American cities. This publication history is significant when one considers how long it took for other important Enlightenment works of philosophy to be published in America—Rousseau's *Confessions* not until 1796 and Montesquieu's *Spirit of the Laws* not until 1802.”).

<sup>88</sup> JAMES WILSON, *Of the Nature of Crimes; and the Necessity and Proportion of Punishments*, in 2 COLLECTED WORKS OF JAMES WILSON 240 (Kermit L. Hall & Mark David Hall eds., 2007) (“The theory of criminal law has not, till lately, been a subject of much investigation. The Marquis of Beccaria led the way.”); *accord* Robert Aitken, *James Wilson: A Lost American Founder*, 29 LITIGATION 61, 64–65 (2003).

<sup>89</sup> WILSON, *supra* note 88, at 307.

<sup>90</sup> Aitken, *supra* note 88, at 73.

<sup>91</sup> For additional biographical information about this prominent Philadelphia physician, see CLAIRE G. FOX, GORDON L. MILLER & JACQUELYN C. MILLER, COMP., BENJAMIN RUSH, M.D.: A BIBLIOGRAPHIC GUIDE (1996); BENJAMIN RUSH, REVOLUTIONARY PHYSICIAN: AN INTERPRETATION OF RELIGION IN THE REPUBLIC (1984); DONALD J. D'ELIA, BENJAMIN RUSH: PHILOSOPHER OF THE AMERICAN REVOLUTION (1974); DAVID FREEMAN HAWKE, BENJAMIN RUSH: REVOLUTIONARY GADFLY (1971); CARL BINGER, REVOLUTIONARY DOCTOR: BENJAMIN RUSH, 1746–1813 (1966); SARAH R. RIEDMAN & CLARENCE C. GREEN, BENJAMIN RUSH, PHYSICIAN, PATRIOT, FOUNDING FATHER (1964).

<sup>92</sup> *See* CHRISTOPHER HITCHENS, THOMAS JEFFERSON 39 (2005) (“Benjamin Franklin admired Beccaria hugely.”); BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS, AND UPON SOCIETY 15 (Mar. 9, 1787).

<sup>93</sup> *Id.*



expressed his faith and his anti-death penalty views in his correspondence<sup>94</sup> and invoked Beccaria in his writings more than once.<sup>95</sup>

¶123

John Hancock—a signatory to the Declaration of Independence—and leaders such as William Bradford<sup>96</sup> and Thomas Paine carefully read Beccaria’s writings, too.<sup>97</sup> A former Pennsylvania Attorney General, Bradford penned *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania* in 1793 that echoed many of Beccaria’s arguments.<sup>98</sup> He questioned the necessity of capital punishment and argued for the elimination of it for all offenses except high treason and murder until more information could be obtained. Paine, like Dr. Rush, was an ardent abolitionist. He opposed Louis XVI’s execution,<sup>99</sup> regretted the French Assembly’s vote to impose a death sentence,<sup>100</sup> as Thomas Jefferson did,<sup>101</sup> and ended up risking his own life in the

<sup>94</sup> See 1, 2 BENJAMIN RUSH, LETTERS at 316, 416–17, 463, 479–82, 490–91, 496, 526–27, 570, 581, 584, 620–21, 628, 799, 874–75, 922–23, 1090–91, 1102, 1114, 1126 (L.H. Butterfield ed., 1951).

<sup>95</sup> THE SELECTED WRITINGS OF BENJAMIN RUSH 41, 46, 97 (Dagobert D. Runes ed., 2007).

<sup>96</sup> Matthew W. Meskell, *The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 844 (1999) (“Spurred by Beccaria’s essay, William Bradford wrote a widely-circulated article entitled *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania, With Notes and Illustrations* in 1793 in which he quoted with approval many of Beccaria’s arguments.”).

<sup>97</sup> Oregon v. Hirsch, 114 P.3d 1104, 1132 (Or. 2005); see also KEALLY D. MCBRIDE, PUNISHMENT AND POLITICAL ORDER 90 (2007) (noting that Thomas Paine was “well acquainted with the work *On Crimes and Punishments*” and that “Cesare Beccaria’s work was mentioned in pamphlet after pamphlet about criminal law in the new republic”). Thomas Paine’s *Common Sense* first appeared on January 9, 1776, and spread with lightning speed throughout the American colonies. THE DECLARATION OF INDEPENDENCE AND THE CONSTITUTION OF THE UNITED STATES 4 (Pauline Maier ed., 1998) [hereinafter THE DECLARATION OF INDEPENDENCE]. Paine also published *Rights of Man*, a guide to the Enlightenment, in 1791, and shortly thereafter *The Age of Reason*. See R. B. Bernstein, *Rediscovering Thomas Paine*, 39 N.Y.L. SCH. L. REV. 873, 887–89 (1994).

<sup>98</sup> WILLIAM BRADFORD, AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA (1793) (referring to Beccaria in the Introduction, the chapter “On Capital Punishments,” and the “Conclusion”); see also *Furman v. Georgia*, 408 U.S. 238, 336 (1972) (Marshall, J., concurring).

<sup>99</sup> On January 15, 1793, in France’s National Assembly, Paine invoked Robespierre’s call for the death penalty’s abolition in asking that Louis XVI’s life be spared: “It has already been proposed to abolish the punishment of death, and it is with infinite satisfaction that I recollect the humane and excellent oration pronounced by Robespierre on that subject in the Constituent Assembly. This cause must find its advocates in every corner where enlightened politicians and lovers of humanity exist, and it ought above all to find them in this assembly. Monarchical governments have trained the human race, and inured it to the sanguinary arts and refinements of punishment; and it is exactly the same punishment which has so long shocked the sight and tormented the patience of the people, that now, in their turn, they practice in revenge upon their oppressors. But it becomes us to be strictly on our guard against the abomination and perversity of monarchical examples: as France has been the first of European nations to abolish royalty, let her also be the first to abolish the punishment of death, and to find out a milder and more effectual substitute.” THOMAS PAINE, *Reasons for Preserving the Life of Louis Capet*, in 3 THE WRITINGS OF THOMAS PAINE 123–24 (Moncure Daniel Conway ed., 1895).

<sup>100</sup> SCHABAS, *supra* note 3, at 5 & n.31 (citations omitted). On January 19, 1793, Paine—an honorary delegate because of his role in the American Revolution—regretted the National Assembly’s vote to sentence Louis XVI to death, saying: “I voted against it from both moral motives and motives of public policy.” PAINE, *Shall Louis XVI Have Respite?*, *supra* note 99, at 127; Geoffrey Robertson, *Ending Impunity: How International Criminal Law Can Put Tyrants on Trial*, 38 CORNELL INT’L L.J. 649, 652 (2005). In his speech that day, Paine was twice interrupted by Jean-Paul Marat, who said that Paine was “incompetent to vote on this question” because Paine was a Quaker whose “religious principles” were “opposed to capital punishment.” JOHN KEANE, *TOM PAINE: A POLITICAL LIFE* 368 (2003). Yet Paine persisted in his oration: “I know that the public mind of France, and particularly that of Paris, has been heated and irritated by the dangers to which they have been exposed; but could we carry our thoughts into the future, when the dangers are ended and the irritations forgotten, what to-day seems an act of justice may then appear an act of vengeance. [*Murmurs.*] My anxiety for the cause of France has become for the moment concern for her honor. If, on my return to America, I should employ myself on a history of the

process.<sup>102</sup> In 1793, in a speech before a joint session of the legislature, Massachusetts governor John Hancock also asked legislators to follow Beccaria's call for less discretion in sentencing.<sup>103</sup>

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Thomas Jefferson was especially fascinated by Beccaria's ideas.<sup>104</sup> Between 1774 and 1776, Thomas Jefferson—the drafter of the Declaration of Independence<sup>105</sup> and the

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French Revolution, I had rather record a thousand errors on the side of mercy, than be obliged to tell one act of severe justice. . . . France has but one ally—the United States of America. That is the only nation that can furnish France with naval provisions, for the kingdoms of northern Europe are, or soon will be, at war with her. It unfortunately happens that the person now under discussion is considered by the Americans as having been the friend of their revolution. His execution will be an affliction to them, and it is in your power not to wound the feelings of your ally. Could I speak the French language I would descend to your bar, and in their name become your petitioner to respite the execution of the sentence on Louis.” PAINE, *supra* note 99, at 125, 127 (italics in original).

<sup>101</sup> Thomas Jefferson felt conflicted and remorseful over the execution of the French king and queen, seeing death as unnecessary. In a draft autobiography written in 1821, Jefferson laid out his feelings: “The deed which closed the mortal course of these sovereigns, I shall neither approve nor condemn. I am not prepared to say that the first magistrate of a nation cannot commit treason against his country, or is unamenable to its punishment: nor yet that where there is no written law, no regulated tribunal, there is not a law in our hearts, and a power in our hands, given for righteous employment in maintaining right, and redressing wrong. Of those who judged the king, many thought him wilfully criminal, many that his existence would keep the nation in perpetual conflict with the horde of kings, who would war against a regeneration which might come home to themselves, and that it were better that one should die than all. I should not have voted with this portion of the legislature. I should have shut up the Queen in a Convent, putting harm out of her power, and placed the king in his station, investing him with limited powers, which I verily believe he would have honestly exercised, according to the measure of his understanding.” Thomas Jefferson, *Autobiography Draft Fragment*, Jan. 6–July 27, 1821, <http://memory.loc.gov/> (follow “List all Collections” hyperlink; then follow “Jefferson, Thomas ~ Papers ~ 1606-1827” hyperlink; then search “autobiography” in “Search Collection”; then follow “Thomas Jefferson, July 27, 1821, *Autobiography Draft Fragment*, January 6 through July 27”) (last visited Aug. 31, 2009).

<sup>102</sup> Thomas Paine would suffer the consequences for his idealism. See John P. Frank, Book Review, 61 *YALE L.J.* 1227, 1229 (1952) (reviewing HOWARD SWIGGETT, *THE EXTRAORDINARY MR. MORRIS* (1952)). After being arrested and imprisoned in France in 1793, Paine only narrowly avoided execution through a stroke of luck. A guard walked through the French prison where Paine was held, putting chalk marks on the cell doors of condemned prisoners, but Paine's door was open at the time and when it was closed the mark on it was hidden from view; Paine—released from prison shortly thereafter—was thus fortuitously saved from the executioner. THOMAS CLIO RICKMAN, *THE LIFE AND WRITINGS OF THOMAS PAINE* 261–62 (1908); Bernstein, *supra* note 97, at 889. Ironically, Robespierre—who failed to convince the National Assembly to do away with executions, then later changed his position, calling for the execution of Louis XVI and overseeing France's Reign of Terror—would later be guillotined. MAESTRO, *supra* note 1, at 153–54; SCHABAS, *supra* note 3, at 5; Paul Rosenzweig, *Targeting Terrorists: The Counterrevolution*, 34 *WM. MITCHELL L. REV.* 5083, 5084 (2008).

<sup>103</sup> See Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 *MICH. L. REV.* 1179, 1200–01 (1982) (“In a speech before a joint session of the legislature in 1793, Governor Hancock called on the representatives to abandon this system and impose Beccaria's method, but the House failed to comply.”); *id.* at 1201 n.106 (quoting Hancock as saying, “I recommend these ideas to your wise deliberations, that such punishments may be provided as, if administered with certainty and inflexibility, may be sufficient to check the progress of crime.”); *id.* at 1198 (“Beccaria's stand against capital punishment won many adherents in post-Revolutionary Massachusetts.”) (citations omitted).

<sup>104</sup> See Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 *EMORY L.J.* 1139, 1215 (1996) (citing *THE COMMONPLACE BOOK OF THOMAS JEFFERSON* 314 (G. Chinard ed., 1926) (quoting CESARE BECCARIA, *AN ESSAY ON CRIMES AND PUNISHMENTS* 87–88 (1764))); Pauley, *supra* note 42, at 131; Schwartz & Wishingrad, *supra* note 75, at 817.

<sup>105</sup> *THE DECLARATION OF INDEPENDENCE*, *supra* note 97, at 7–17. It was John Adams who suggested that Thomas Jefferson take the lead role in drafting the Declaration of Independence. J. Harvie Wilkinson, III, *Building a Legal Culture of Affection*, 99 *NW. U. L. REV.* 1235, 1243 (2005). Building upon George Mason's work with Virginia's constitution, Jefferson took up his pen and built into the Declaration of Independence a natural rights framework, stating that “all men are created equal” and “are endowed by

future U.S. president—actually copied twenty-six different passages from Beccaria’s text into his *Commonplace Book* by hand.<sup>106</sup> Jefferson drafted three proposals for Virginia’s constitution that would have curtailed the death penalty’s use,<sup>107</sup> and the Declaration of Independence famously recites the “inalienable” right to life.<sup>108</sup> While Jefferson was part of a committee that expanded the death penalty’s availability in wartime,<sup>109</sup> he also became a member of the Virginia Committee of Revisors for legal reform, drafting a bill for Virginia’s legislature specifically calling for proportionate punishments.<sup>110</sup>

Jefferson’s bill, plainly inspired by Beccaria’s treatise, called for “a corresponding gradation of punishments” in relation to the seriousness of the offense.<sup>111</sup> Though the

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their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness.” Bruce Kempkes, *The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight*, 42 DRAKE L. REV. 593, 604 (1993).

<sup>106</sup> Schwartz & Wishingrad, *supra* note 75, at 817; see also MAESTRO, *supra* note 1, at 141 (“Criminal law was Jefferson’s field and at the end of 1778 he had already completed his ‘Bill for Proportioning Crimes and Punishments in Cases heretofore Capital.’ This bill was copiously annotated, and Beccaria’s name appears four times in the footnotes, which refer to several passages of his famous treatise. Not until 1785 was the bill introduced in the House of the Virginia Commonwealth; it was rejected then, but it was later approved when presented again in 1796.”).

<sup>107</sup> Jefferson’s drafts proposed that the state’s General Assembly “have no power to pass any law inflicting death for any crime, excepting murder, and those offenses in the military service for which they shall think punishment by death absolutely necessary; and all capital punishments in other cases are hereby abolished.” MAESTRO, *supra* note 1, at 141 (citing Thomas Jefferson, Third Draft of the Virginia Constitution (1776), reprinted in 1 THE PAPERS OF THOMAS JEFFERSON 359 (Julian P. Boyd ed., 1950)). Jefferson also proposed language to forbid the General Assembly from prescribing “torture in any case whatever.” 2 THE WORKS OF THOMAS JEFFERSON 169 (Paul Leicester Ford ed., 1904). Jefferson’s drafts, however, failed to pass. See Alexander Tsesis, *Undermining Inalienable Rights: From Dred Scott to the Rehnquist Court*, 39 ARIZ. ST. L.J. 1179, 1188 (2007).

<sup>108</sup> Jefferson’s draft of the Declaration of Independence had originally recognized “inherent and inalienable rights.” That language morphed into “inherent & unalienable rights,” which later became “certain unalienable rights.” THE DECLARATION OF INDEPENDENCE, *supra* note 97, at 8, 11, 13. The terms “inalienable” and “unalienable” are used interchangeably in multiple state constitutions with no apparent difference in meaning between the two terms. See David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 102 n.314 & 129 n.444 (2007); Daniel Avila, *Assisted Suicide and the Inalienable Right to Life*, 16 ISSUES L. & MED. 111, 112 n.4 & 113 n.6 (2000); Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules*, 2 U. PA. J. CONST. L. 609, 630 n.104 (2000).

<sup>109</sup> Jefferson, who saw executions as warranted during war, helped to revise the Articles of War in 1776, expanding the number of death-eligible offenses in them. John F. O’Connor, *Don’t Know Much About History: The Constitution, Historical Practice, and the Death Penalty Jurisdiction of Courts-Martial*, 52 U. MIAMI L. REV. 177 (1997) (“The 1776 Code, drafted by a committee comprised of John Adams, Thomas Jefferson, John Rutledge, James Wilson, and R.R. Livingston, greatly enlarged the class of capital crimes cognizable under military law. Where the 1775 Articles had limited the death penalty to three purely military offenses, the 1776 Articles permitted capital punishment for sixteen different crimes.”). At the same time, however, many early American leaders, such as George Washington, were revolted by senseless wartime cruelty and adopted a policy to treat prisoners of war humanely. DAVID HACKETT FISCHER, *WASHINGTON’S CROSSING* 378 (2004).

<sup>110</sup> Schwartz & Wishingrad, *supra* note 75, at 817; Jupiter, *supra* note 9, at 476 n.191. Jefferson’s bill for proportionate punishments—as one scholar puts it—“called for punishment based on the theory of prevention outlined by Cesare Beccaria and developed by Jeremy Bentham.” Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 321 (2007) (citing Markus D. Dubber, *An Extraordinarily Beautiful Document: Jefferson’s Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment*, in MODERN HISTORIES OF CRIME AND PUNISHMENT (Markus D. Dubber & Lindsay Farmer eds., 2007)).

<sup>111</sup> 2 THE WORKS OF THOMAS JEFFERSON, *supra* note 107, at 394. Jefferson himself—in a letter he wrote in August 1776—called for “strict and inflexible punishments,” but ones that were “proportioned to the crime,” “proportioned to the offense.” Letter from Thomas Jefferson to Edmund Pendleton, Aug. 26, 1776, in 1 THE PAPERS OF THOMAS JEFFERSON 505 (J. Boyd ed., 1950); see also *id.* at 490 (reprinting the letter

legislation called for the death penalty for treason and murder<sup>112</sup> and contained draconian<sup>113</sup> and controversial provisions,<sup>114</sup> it was still quite progressive for the age.<sup>115</sup> The bill ultimately failed to pass by a single vote,<sup>116</sup> but it undeniably marked an attempt

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from Edmund Pendleton to Jefferson that Jefferson was responding to, with Pendleton's letter referencing Jefferson's efforts at "reformation as to our criminal system of laws," stating that the criminal law "has hitherto been too Sanguinary, punishing too many crimes with death, I confess, and could wish to see that change for some other mode of Punishment in most cases," but warning Jefferson not to go too far, saying, "if you mean to relax all punishments and rely on virtue and the public good as sufficient to prompt obedience to laws, you must find a new race of men to be the subjects of it").

<sup>112</sup> Davison M. Douglas, *God and the Executioner: The Influence of Western Religion on the Death Penalty*, 9 WM. & MARY BILL RTS. J. 137, 157 (2000) ("Thomas Jefferson . . . drawing heavily on Beccaria's penal theories, proposed the abolition of all capital crimes except murder and treason in Virginia in 1779.").

<sup>113</sup> The proposed code called for mandatory death sentences for treason and murder, death by poison for those who killed by poisoning, the hanging and gibbeting of any challenger who killed someone in a duel, castration for male rapists and men committing sodomy, and for acts of maiming similar disfigurement. If an offender lacked the body part to be maimed or disfigured, the bill provided that "some other part of at least equal value and estimation, in the opinion of a jury," was to be taken. See MAESTRO, *supra* note 1, at 142; Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 AM. J. LEGAL HIST. 35, 89–91 (2005); 2 THE WORKS OF THOMAS JEFFERSON, *supra* note 107, at 396–98, 402–04. In essence, Jefferson's proposed code followed "the Roman lex talionis, the law of the claw, and the Mosaic law, an 'eye for an eye and a tooth for a tooth,' as he put it." WILLARD STERNE RANDALL, THOMAS JEFFERSON: A LIFE 299 (Harper Perennial 1994). Indeed, Jefferson later conceded that in drafting the bill he "thought it material not to vary the diction of the antient statutes by modernizing it, nor to give rise to new questions by new expressions." See Thomas Jefferson, *Autobiography Draft Fragment*, Jan. 6–July 27, 1821, Feb. 6 Entry, <http://memory.loc.gov/> (follow "List all Collections" hyperlink; then follow "Jefferson, Thomas ~ Papers ~ 1606–1827" hyperlink; then search "autobiography" in "Search Collection"; then follow "Thomas Jefferson, July 27, 1821, *Autobiography Draft Fragment*, January 6 through July 27") (last visited Aug. 31, 2009). The speed with which executions were to be carried out under the bill certainly showed that Jefferson believed in swift punishments, another concept articulated by Beccaria in *On Crimes and Punishments*. See BECCARIA (Thomas ed.), *supra* note 1, at 39, 86. Jefferson's bill provided that executions were to be carried out almost immediately—literally within hours or days of sentencing—for those convicted of treason or murder. 2 THE WORKS OF THOMAS JEFFERSON, *supra* note 107, at 401–02.

<sup>114</sup> Not only did Jefferson's bill call for castration for males committing sodomy or rape, but under his bill, a female committing rape or a homosexual act was to be punished "by boring through the cartilage of her nose a hole of one half inch in diameter at the least." 2 THE WORKS OF THOMAS JEFFERSON, *supra* note 107, at 403; Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 14 WOMEN'S RTS. L. REP. 263, 288 n.243 (1992); see also JEFF BROADWATER, GEORGE MASON, FORGOTTEN FOUNDER 278 (2006) ("Bill No. 64 . . . set the penalties for homosexual acts: 'If a man, by castration, if a woman, by cutting thro' the cartilage of her nose a hole of one half inch diameter at the least.' Because the penalty at common law had been death, this was considered progress.").

After his rape provision came under criticism in Europe, Jefferson recanted his support for it. See RANDALL, *supra* note 113, at 299; accord Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. LEGIS. 125, 126 n.7 (1998) (quoting 9 THOMAS JEFFERSON, PAPERS OF THOMAS JEFFERSON (Julian P. Boyd ed., 1950) (letter to James Madison)).

<sup>115</sup> Jefferson's bill proclaimed that a citizen "committing an inferior injury does not wholly forfeit the protection of his fellow citizens, but after suffering punishment in proportion to his offense, is entitled to their protection from all greater pain." RANDALL, *supra* note 113, at 298. In limiting the death penalty to treason and murder, Jefferson had thus categorically rejected the imposition of capital punishment for the more than one hundred felonies that carried the possibility of death in England's criminal code. *Id.* at 300. Jefferson, in the very first section of the bill, specifically noted that "cruel and sanguinary laws defeat their own purpose." 2 THE WORKS OF THOMAS JEFFERSON, *supra* note 107, at 395.

<sup>116</sup> See BANNER, *supra* note 1, at 96. Although the committee Jefferson chaired to revise Virginia's laws met in early 1777, it was not until late 1778 that a busy Jefferson had the bill drafted. The bill was submitted by the Committee of Revisors in 1779, but was tabled, and it was not until 1785 that the bill was actually introduced in the Virginia legislature. By then, Jefferson was serving as America's ambassador in

by Jefferson to drastically scale back the availability of death sentences. In a draft autobiography, written in the twilight of his life, Jefferson would reflect on the bill's narrow defeat even as he rejected the doctrine of *lex talionis*<sup>117</sup> and credited Beccaria's book for being the catalyst for his anti-death penalty stance.<sup>118</sup> As Jefferson wrote: "Beccaria and other writers on crimes and punishments had satisfied the reasonable world of the unrightfulness and inefficacy of the punishment of crimes by death."<sup>119</sup> Noting that "hard labor on roads, canals and other public works, had been suggested as a proper substitute," Jefferson pointed out that "[t]he Revisors had adopted these opinions; but the general idea of our country had not yet advanced to that point."<sup>120</sup>

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Only many years after it was first introduced did Jefferson's bill for proportionate punishments gain passage in Virginia. In 1821 Jefferson explained, again in his draft autobiography, that after his bill failed, "the public opinion was ripening, by time, by reflection, and by the example of Pennsylvania." Jefferson specifically noted that "[i]n 1796 our legislature resumed the subject, and passed the law for amending the penal laws of the Commonwealth."<sup>121</sup> By then, Jefferson had already shown his distaste for the

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Paris, so it fell to James Madison to present the bill in Jefferson's absence. *Id.* at 95–96; Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 937, 952 (2003). Madison—who believed Virginia's revisors "were unfortunately misled into some of the specious errors of Beccaria, then in the zenith of his fame"—wrote after the bill's defeat that the bill's fate was sealed by "[t]he rage against Horse stealers." Letter from James Madison to Thomas Jefferson, Feb. 15, 1787, in 11 THE PAPERS OF THOMAS JEFFERSON 152 (J. Boyd ed. 1950); Letter from James Madison to Thomas S. Grimke, Jan. 15, 1828, in 9 THE WRITINGS OF JAMES MADISON: 1808-1819 (Gaillard Hunt ed., 1900). For his part, Jefferson later expressed gratitude to "the unwearied exertions of Mr. Madison" in wrestling with the legislature "in opposition to the endless quibbles, chicaneries, perversions, vexations and delays of lawyers and demilawyers." Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 977 (1965).

<sup>117</sup> The ancient doctrine of "*lex talionis*"—an eye for an eye, a tooth for a tooth—demanded an equivalency between the punishment and the offense. "*Talio*" is Latin for "equivalent to" or "equal." *Carmona v. Ward*, 576 F.2d 405, 426 & n. 8 (2d Cir. 1978). In his draft autobiography, Jefferson explicitly rejected the *lex talionis* doctrine and recorded his own recollections of the lost legislative battle: "On the subject of the Criminal law, all were agreed that the punishment of death should be abolished, except for treason and murder; and that, for other felonies should be substituted hard labor in the public works, and in some cases, the *lex talionis*. How this last revolting principle came to obtain our approbation, I do not remember." See Thomas Jefferson, *Autobiography Draft Fragment*, Jan. 6–July 27, 1821, <http://memory.loc.gov/> (follow "List all Collections" hyperlink; then follow "Jefferson, Thomas ~ Papers ~ 1606-1827" hyperlink; then search "autobiography" in "Search Collection"; then follow "Thomas Jefferson, July 27, 1821, *Autobiography Draft Fragment*, January 6 through July 27") (last visited Aug. 31, 2009).

<sup>118</sup> Thomas Jefferson, *Autobiography Draft Fragment*, Jan. 6–July 27, 1821, <http://memory.loc.gov/> (follow "List all Collections" hyperlink; then follow "Jefferson, Thomas ~ Papers ~ 1606-1827" hyperlink; then search "autobiography" in "Search Collection"; then follow "Thomas Jefferson, July 27, 1821, *Autobiography Draft Fragment*, January 6 through July 27") (last visited Aug. 31, 2009).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* Apparently, Virginians found unsatisfactory the following provision in the bill targeted at horse thieves: "Whosoever shall be guilty of horse-stealing, shall be condemned to hard labour three years in the public works, and shall make reparation to the person injured." 2 THE WORKS OF THOMAS JEFFERSON, *supra* note 107, at 408.

<sup>121</sup> 1 THE WRITINGS OF THOMAS JEFFERSON 67 (1903); Thomas Jefferson, *Autobiography Draft Fragment*, Jan. 6–July 27, 1821, <http://memory.loc.gov/> (follow "List all Collections" hyperlink; then follow "Jefferson, Thomas ~ Papers ~ 1606-1827" hyperlink; then search "autobiography" in "Search Collection"; then follow "Thomas Jefferson, July 27, 1821, *Autobiography Draft Fragment*, January 6 through July 27") (last visited Aug. 31, 2009). Jefferson also emphasized that the bill passed with modifications, including eliminating "public labor" in favor of "solitary" punishments. *Id.* Thus, the bill Jefferson drafted—perhaps too progressive for the citizenry Edmund Pendleton had cautioned Jefferson about in 1776 in the midst of the American Revolution—would become law many years after its initial defeat. RANDALL, *supra* note 113, at 300.

death penalty, including in his private correspondence. In 1816, Jefferson penned a letter to William Wirt, the author of a biography of Patrick Henry. In that letter, Jefferson said, with obvious satisfaction, that Virginia “justly prides itself on having gone thro’ the revolution without a single example of capital punishment connected with that.”<sup>122</sup>

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Thomas Jefferson also revealed his genuine affection for Beccaria’s book in another piece of correspondence. As president, Jefferson, an avid book collector and one of the most well-read men of his time, would write a telling letter in 1807 recommending that its recipient, one John Norvell, read “Beccaria on crimes & punishments”—one of only a handful of books Jefferson recommended on the principles of government. Jefferson did so, he said, “because of the demonstrative manner” in which Beccaria “has treated that branch of the subject.”<sup>123</sup> By singling out *On Crimes and Punishments*, Jefferson made especially clear that he treasured Beccaria’s treatise, which had condemned the use of both torture and state-sanctioned executions.

### III. THE HISTORY OF THE ABOLITION MOVEMENT

#### A. Executions and Barbaric Punishments Through the Ages

Murders and retaliatory killings to avenge murders have taken place throughout human history.<sup>124</sup> “Its precise origins,” Justice Thurgood Marshall wrote of the death penalty, “are difficult to perceive, but there is some evidence that its roots lie in violent retaliation by members of a tribe or group, or by the tribe or group itself, against persons committing hostile acts toward group members.”<sup>125</sup> Capital punishment, another commentator posits, originated as a way to “placate the gods,” and evolved later as a way to punish individuals—with many types of offenders executed in many different ways

<sup>122</sup> 10 THE WRITINGS OF THOMAS JEFFERSON, 1816-1826, at 58–63 (Paul Leicester Ford, ed., 1899). Among Enlightenment figures, Jefferson was certainly not alone in rejecting death sentences. Jefferson’s friend and correspondent, Marquis de Lafayette—a general in the American Revolutionary War who served in the Continental Army under George Washington, and the man Jefferson assisted in drafting the French Declaration of the Rights of Man and of the Citizen—also opposed executions. See Marcello Maestro, *Lafayette as a Reformer of Penal Laws*, 39 J. OF HIST. OF IDEAS 503, 503 (1978); James Thuo Gathii, *Commerce, Conquest, and Wartime Confiscation*, 31 BROOK. J. INT’L L. 709, 718 n.46 (2006); Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 656 (2005). “I shall ask for the abolition of the punishment of death,” Lafayette famously said, “until I have the infallibility of human judgment demonstrated to me.” Michael A. Cokley, *Whatever Happened to that Old Saying “Thou Shall Not Kill?”: A Plea for the Abolition of the Death Penalty*, 2 LOY. J. PUB. INT. L. 67 (2001) (citing GARDNER C. HANKS, *AGAINST THE DEATH PENALTY: CHRISTIAN AND SECULAR ARGUMENTS AGAINST CAPITAL PUNISHMENT* 63 (1997)); accord VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT 1787-1975, 98 (Philip English Mackey ed., 1976) (indicating Lafayette uttered those words on August 17, 1830).

Lafayette’s words against the death penalty are actually sometimes mistakenly attributed to Jefferson. See *District Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1287 & n.16 (Mass. 1980) (attributing Lafayette’s quote to Thomas Jefferson; quoted by Senator Hart, A Bill to Abolish the Death Penalty Under All Laws of the United States: Hearings on S. 1760 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. 14 (1968)).

<sup>123</sup> Letter from Thomas Jefferson to John Norvell dated June 11, 1807. When Jefferson sold his prized collection of books to reconstitute the Library of Congress after British troops burned down the U.S. Capitol in 1814, Jefferson had amassed 6487 books, with titles in multiple languages. JOHN D. BESSLER, *WRITING FOR LIFE: THE CRAFT OF WRITING FOR EVERYDAY LIVING* 170 (2007).

<sup>124</sup> *Furman*, 408 U.S. at 333 (Marshall, J., concurring) (“Capital punishment has been used to penalize various forms of conduct by members of society since the beginnings of civilization.”).

<sup>125</sup> *Id.*

over the centuries.<sup>126</sup> As that commentator writes: “In the time of Moses in the Bible, the death penalty was inflicted for crimes ranging from murder to gathering sticks on the Sabbath. In ancient Greece, Socrates, convicted of corrupting the youth with his teachings, was executed by being forced to drink hemlock.”<sup>127</sup>

¶128 Every culture has seen executions in one form or another. Early Native American communities allowed families of murder victims to kill the perpetrators,<sup>128</sup> and the Babylonian Code of Hammurabi, circa 1750 B.C., punished over twenty offenses with death, including perjury, adultery, theft, harboring runaway slaves, and even faulty home construction.<sup>129</sup> Over the centuries, in fact, death sentences have been handed out for all sorts of transgressions—from serious offenses, to vices, to nearly everything else. Tobacco users and those who cursed or sold bad beer, for example, faced execution.<sup>130</sup> In India, the death penalty was inflicted for killing a cow or spreading false rumors.<sup>131</sup> Executions could be terrifically brutal as well. Asian offenders were skinned alive or tied to stakes, smeared with honey, and left for wild animals to eat, while Persian offenders were crucified, trampled by elephants, smothered with hot ashes or heavy stones, or buried alive.<sup>132</sup> The Pharaohs embalmed criminals alive for giving false testimony,<sup>133</sup> and mass drownings took place during the French Revolution.<sup>134</sup>

¶129 In England, America’s mother country, an eighteenth-century “Bloody Code” made nearly every felony a capital crime.<sup>135</sup> Death sentences could be imposed in England for everything from treason and murder to disturbing a fish-pond, killing or maiming cattle,

<sup>126</sup> Gregg Mayer, *The Poet and Death: Literary Reflections on Capital Punishment Through the Sonnets of William Wordsworth*, 21 ST. JOHN’S J. LEGAL COMMENT. 727, 728 n.8 (2007).

<sup>127</sup> *Id.*

<sup>128</sup> JOHN D. BESSLER, LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA 2 (2003) [hereinafter BESSLER, LEGACY OF VIOLENCE]. In modern times, a few American states—in what might be thought of as part of society’s long-standing and deep-seated desire for revenge—have actually allowed murder victims’ families to hire and pay private attorneys to prosecute murder defendants in capital cases. John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 513 & n.9 (1994).

<sup>129</sup> Michael P. Scharf & Ahran Kang, *Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 CORNELL INT’L L.J. 911, 915 (2005); HAMMURABI’S CODE OF LAWS (L.W. King trans.), <http://eawc.evansville.edu/anthology/hammurabi.htm> (last visited Aug. 31, 2009) (containing an English translation of the Code of Hammurabi).

<sup>130</sup> See James G. Hodge, Jr. & Gabriel B. Eber, *Tobacco Control Legislation: Tools for Public Health Improvement*, 32 J.L. MED. & ETHICS 516, 516 (2004); Rudolph J. Gerber, *Death Is Not Worth It*, 28 ARIZ. ST. L.J. 335, 336 (1996).

<sup>131</sup> Gerber, *supra* note 130, at 336.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Fisher, *supra* note 42, at 1238; Hirsch, *supra* note 103, at 1296 n.90; HARRY POTTER, HANGING IN JUDGMENT: RELIGION AND THE DEATH PENALTY IN ENGLAND FROM THE BLOODY CODE TO ABOLITION (1993). Although fifty capital crimes existed in England as of 1688, that number rose to over 200 in the next century. Millett, *supra* note 34, at 553. By 1791, the year the Eighth Amendment came into force, more than 200 crimes were punishable by death in England. See *Harmelin v. Michigan*, 501 U.S. 957, 975 (1991). Americans, by contrast, chose to inflict the death penalty for far few crimes. The relative infrequency of executions in America actually prompted the French political writer, Alexis de Tocqueville, to say this in 1840: “[I]n no other country is criminal justice administered with more mildness than in the United States. While the English seem disposed carefully to retain their bloody traces of the Middle Ages in their penal legislation, the Americans have almost expunged capital punishment from their codes.” Robert J. Cottrol, *Finality with Ambivalence: The American Death Penalty’s Uneasy History*, 56 STAN. L. REV. 1641, 1654 (2004) (reviewing BANNER, *supra* note 1) (citing ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 176 (1945)).

shooting a rabbit, setting a cornfield on fire or cutting down trees.<sup>136</sup> English subjects were hanged, burned, boiled, disemboweled, or drawn and quartered—with human bodies violently torn apart, limb-by-limb, by horses.<sup>137</sup> The dead bodies of the condemned were sometimes publicly dissected, desecrated, or gibbeted.<sup>138</sup>

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Early and medieval civilizations used torture, and acts of torture were once common in Europe.<sup>139</sup> The Greeks and the Romans, for example, systematically tortured people, with the Romans applying red hot metals and hooks to tear skin and routinely using the rack—a wooden frame mounted on rails that caused the victim’s joints and muscles to become painfully distended.<sup>140</sup> Other medieval European forms of torture included leg-screws, thumbscrews, water torture, the binding of wrists with cords, the lighting of a flammable substance on the soles of the accused’s feet, beatings with fists, hangings of individuals by their feet, and sleep deprivation for as long as forty hours.<sup>141</sup> As one commentator has written: “Until the mid-eighteenth century, torture was widely used and accepted throughout Europe, in a variety of contexts, including the procurement of testimony and confessions from criminal defendants.”<sup>142</sup>

<sup>136</sup> ARTHUR W. CAMPBELL, *LAW OF SENTENCING* § 1.2 (3d ed. 2004); E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 22* (1975). At one time in America, Asia and Europe, capital punishment was even used against animals. Pigs and dogs and a host of other animals were arrested, assigned defense counsel, put on trial and then, upon conviction, ceremoniously executed, often in public. See Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 ANIMAL L. 97, 98–115, 122–27 (2003); EDWARD P. EVANS, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS* (Faber & Faber 1987) (1906) (describing the execution of animals); Paul Schiff Berman, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288 (1994) (describing the trials of animals).

<sup>137</sup> GEORGE RYLEY SCOTT, *THE HISTORY OF CAPITAL PUNISHMENT* 155–57 (1950); Shannon D. Gilreath, *Cruel and Unusual Punishment and the Eighth Amendment as a Mandate for Human Dignity: Another Look at Original Intent*, 25 T. JEFFERSON L. REV. 559, 565–66 (2003); Jessica Powley Hayden, *The Ties that Bind: The Constitution, Structural Restraints, and Government Action Overseas*, 96 GEO. L.J. 237, 251 (2007); see also JOHN LAURENCE, *A HISTORY OF CAPITAL PUNISHMENT* 28–69, 220–30 (1950) (describing methods of execution).

<sup>138</sup> BESSLER, *DEATH IN THE DARK*, *supra* note 31, at 33 (“Not only were murderers in England publicly hanged, but they were often sentenced to be publicly dissected in Surgeons’ Hall, where spectators crowded the galleries. In other instances, the executed criminal’s body was ordered to be hung in chains near the crime scene as a warning to others.”). Gibbeting involved hanging the condemned’s body in an iron cage so that it would decompose in public view. *Baze v. Rees*, 128 S. Ct. 1520, 1557 (2008) (Thomas, J., concurring).

<sup>139</sup> For instance, the penalty for parricide—the murder of one’s parents or children—was “scourging the parricide, and then sewing him up in a leathern sack, with a live dog, a cock, a viper, and an ape, and casting him into the sea.” *State v. Bilansky*, 3 Minn. 246, 1859 WL 3085, at \*3 (1859). John Adams actually discussed a variation on this form of punishment in 1779 while in Spain: “There was lately a Sentence for Parricide. The Law required that the Criminal should be headed up in a hog’shead, with an Adder, a Toad, a Dog and a Cat and cast into the Sea. But I was much pleased to hear that Spanish humanity had suggested and Spanish Ingenuity invented a Device to avoid some part of the Cruelty and horror of this punishment. They had painted those Animals on the Cask, and the dead body was put into it, without any living Animals to attend it to its watery Grave.” JOHN ADAMS AUTOBIOGRAPHY, PART 3, “PEACE,” 1779–1780, sheet 6 of 18 [electronic edition], Adams Family Papers: An Electronic Archive, Massachusetts Historical Society, [http://www.masshist.org/digitaladams/aea/cfm/doc.cfm?id=A3\\_6/](http://www.masshist.org/digitaladams/aea/cfm/doc.cfm?id=A3_6/) (last visited Aug. 31, 2009).

<sup>140</sup> See Lippman, *supra* note 17, at 275, 277.

<sup>141</sup> *Id.* at 281, 291–92, 305–06. Other forms of torture that have been used over time include rape and other forms of sexual abuse, wall-standing, deprivation of food and water, hooding, subjection to loud noises, attacks by dogs, burning with cigarettes, gouging out of eyes, placing pins under finger- and toenails, and the infliction of electric shocks to sensitive areas of the body, including sexual organs.

<sup>142</sup> See Stephanie J. Spencer, *A and Others v. Secretary: The Use of Torture Evidence Against Criminal Defendants*, 21 TEMP. INT’L & COMP. L.J. 205, 206 (2007); see also Joachim Herrmann, *Implementing the*



¶31 This was as true for England and its colonial empire as it was in continental Europe. In England, those escaping death—either through royal pardon or “benefit of clergy”<sup>143</sup>—could have their genitals or tongues cut off or be whipped or branded on the forehead or thumb.<sup>144</sup> The American colonies, which borrowed England’s harsh criminal codes, were no exception; corporal punishments such as branding, flogging, forced labor, maiming and whipping, particularly of slaves, were inflicted frequently.<sup>145</sup> These types of punishments—in addition to gags, stocks, the scarlet letter, and the ducking stool—were designed to cause pain and to publicly humiliate offenders.<sup>146</sup> Many methods of torture, such as waterboarding or placing heavy stones on someone’s chest, would lead to death—something that can, and does, still occur when these forms of torture are employed.<sup>147</sup>

¶32 Executions in colonial days and early America were public affairs, and the occasion for sermons and considerable pomp and circumstance as the condemned prisoners were taken to the gallows.<sup>148</sup> Mandatory death sentences were meted out for violent offenses, such as murder and rape, but also for less serious crimes.<sup>149</sup> The Massachusetts Bay

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*Prohibition of Torture on Three Levels: The United Nations, the Council of Europe, and Germany*, 31 HASTINGS INT’L & COMP. L. REV. 437, 438 (2008) (“Fundamental criticism of torture came with the Enlightenment and the Natural Law philosophy, a human rights oriented philosophy, in the 17th and 18th century.”).

<sup>143</sup> The doctrine of “benefit of clergy” saved clerics from execution, but it evolved to spare condemned prisoners who could read scriptures. Eventually, “benefit of clergy” was extended to persons convicted of capital crimes for the first time, though the doctrine was eventually abolished by statute. Alex Ricciardulli, *Getting to the Roots of Judges’ Opposition to Drug Treatment Initiatives*, 25 WHITTIER L. REV. 309, 396 (2003); Fisher, *supra* note 42, at 1239 n.15. People were branded on the thumb so they could not again claim “benefit of clergy.” *Id.* at 1239. Thomas Jefferson described the doctrine in this way in commenting on a European manuscript: “This privilege originally allowed to the clergy, is now extended to every man, & even to women. It is a right of exemption from capital punishment for the first offence in most cases. It is then a pardon by the law. In other cases the Executive gives the pardon. But when laws are made as mild as they should be, both those pardons are absurd. The principle of Beccaria is sound. Let the legislators be merciful but the executors of the law inexorable.” Observations on the Article États-Unis Prepared for the Encyclopédie 1, in 5 THE WORKS OF THOMAS JEFFERSON 169 (Paul Leicester Ford ed., 1904-05).

<sup>144</sup> Hayden, *supra* note 137, at 251; Fisher, *supra* note 42, at 1238–39, 1266 n.151. In colonial New York, a “P”—for perjurer—was branded on the criminal’s forehead. Alexandra Bak-Boychuk, *Liar Laws: How MPC § 241.3 and State Unsworn Falsification Statutes Fix the Flaws in the False Statements Act (18 U.S.C. § 1001)*, 78 TEMP. L. REV. 453, 468 (2005); Alan I. Bigel, *Justices William J. Brennan, Jr. and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 11, 35 & n.130 (1994) (where under a 1786 North Carolina law, horse thieves subject to pillory, whipping, branding, and having their ears cut off, with execution available for a second offense).

<sup>145</sup> E.g., JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 175 (2003); see also Gilreath, *supra* note 137, at 565–66 (noting that Indians and slaves were sometimes burned to death). Flogging was not declared unconstitutional until the late 1960s. See *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968).

<sup>146</sup> Meskell, *supra* note 96, at 841–42.

<sup>147</sup> See Aaron R. Jackson, *The White House Counsel Torture Memo: The Final Product of a Flawed System*, 42 CAL. W. L. REV. 149, 150 (2005); Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court’s Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 71 & n.47 (1998); Dawn E. Johnson, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1571 (2007); see also Stephen C. Sieberson, *Foreword*, 41 CREIGHTON L. REV. 575, 576 (2008) (noting that in July 2006, President Bush issued an executive order authorizing “enhanced interrogation techniques,” including waterboarding). Waterboarding originated with the Spanish Inquisition and was also systematically used by the Khmer Rouge. Daniel Kanstroom, *On “Waterboarding”*: *Legal Interpretation and the Continuing Struggle for Human Rights*, 28 B.C. THIRD WORLD L.J. 269, 271 (2008).

<sup>148</sup> BANNER, *supra* note 1, at 10–15; BESSLER, *DEATH IN THE DARK*, *supra* note 31, at 25–28.

<sup>149</sup> THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 4 (Hugu Adam Bedau ed., 1997);

Colony's "Capitall Lawes of New-England," from 1636, listed these capital crimes: idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, manstealing, perjury in a capital case, and rebellion.<sup>150</sup> The codification of each crime was accompanied in the statute by an Old Testament verse as authority,<sup>151</sup> and judges used such draconian laws, most memorably in Salem, Massachusetts, in sentencing those convicted of heresy and witchcraft.<sup>152</sup>

¶33 As in Europe, offenders in the American colonies were hanged, disemboweled, or drawn and quartered,<sup>153</sup> and many offenses were punishable by death. In an era rife with superstition—American executions have frequently taken place on Fridays<sup>154</sup>—executions of many different types of offenders took place. Thomas Graunger, a teenager, was convicted in the Plymouth Colony in 1642 of committing "buggery" with "a mare, a cowe, two goates" and "a turkey." George Spencer was executed in New Haven in the seventeenth century for bestiality based on a recanted confession and because both he and a piglet were found to have a deformed eye.<sup>155</sup> And in Massachusetts, four Quakers were executed in the seventeenth century for returning to the colony after being banished, while in 1643 James Britton and Mary Latham were hanged there for adultery.<sup>156</sup>

¶34 As history shows, state-sanctioned executions have been used for centuries to punish criminals, political dissidents, and social outcasts, mostly men.<sup>157</sup> In England, public executions were carried out at Tyburn, on Tower Hill, or in front of Newgate prison. Some fifty thousand people were publicly hanged at Tyburn, though on rare occasions, royal figures were hanged privately within the Tower of London.<sup>158</sup> Offenders

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Douglas, *supra* note 112, at 156; Kastenberg, *supra* note 51, at 63.

<sup>150</sup> Millett, *supra* note 34, at 585; *Furman v. Georgia*, 408 U.S. 238, 335 (1972) (Marshall, J., concurring). A 1611 compilation of laws for the Jamestown Colony also provided: "He that upon pretended malice, shall murther or take away the life of any man, shall bee punished with death." Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 109 (2004).

<sup>151</sup> Millett, *supra* note 34, at 585; *Furman*, 408 U.S. at 335 (Marshall, J., concurring).

<sup>152</sup> See Douglas, *supra* note 112, at 155 & n.93.

<sup>153</sup> Cottrol, *supra* note 135, at 1654.

<sup>154</sup> Anthony V. Baker, *Slavery and Tushnet and Mann, Oh Why? Finding "Big Law" in Small Places*, 26 QUINNIPIAC L. REV. 691, 700 n.39 (2008).

<sup>155</sup> Kastenberg, *supra* note 51, at 63; Massachusetts Sex Ways: Puritan Ideas of Flesh and the Spirit, <http://www.austincc.edu/jdikes/1301readings/Sex%20Ways%20ALL.pdf>.

<sup>156</sup> BANNER, *supra* note 1, at 6. As Thomas Jefferson pointed out in an autobiographical sketch, prejudice against Quakers also occurred in Virginia. See Thomas Jefferson, *Autobiography Draft Fragment*, Jan. 6–July 27, 1821, available at [http://avalon.law.yale.edu/19th\\_century/jeffauto.asp](http://avalon.law.yale.edu/19th_century/jeffauto.asp) ("Towards Quakers who came here they were most cruelly intolerant, driving them from the colony by the severest penalties.")

<sup>157</sup> See, e.g., Dr. Kam C. Wong, *A Comparative Study of Laws of Assembly in China: Historical Continuity or Political Departure*, 7 ASIAN-PAC. L. & POL'Y J. 184 (2006) (noting that 90,000 political dissidents were arrested in China between 1949 and 1955 and that half of them were executed). The execution of women is rare. See Victor L. Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 609 (2006); Elizabeth Rapaport, *Equality of the Damned: The Execution of Women on the Cusp of the 21st Century*, 26 OHIO N.U. L. REV. 581 (2000); Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 L. & SOC'Y REV. 367 (1991); Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501 (1990); Victor L. Streib, *Death Penalty for Female Offenders*, 58 U. CIN. L. REV. 845 (1990). In my home state, the State of Minnesota, where many people were executed before the death penalty's abolition in 1911, only one woman, Ann Bilansky, was ever executed. BESSLER, *LEGACY OF VIOLENCE*, *supra* note 128, at 67–92 (discussing the case of Ann Bilansky).

<sup>158</sup> BESSLER, *DEATH IN THE DARK*, *supra* note 31, at 33; *accord* V.A.C. GATRELL, *THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770-1868* (1994); PETER LINEBAUGH, *THE LONDON HANGED:*

were frequently put to death—sometimes even burned at the stake<sup>159</sup>—not necessarily because of the seriousness of the offense, but because prisons were not then thought of as places to house unsavory criminals for long periods of time.<sup>160</sup>

¶35 These ritualistic killings, however, were destined to be removed from the public eye. As morals and sensibilities changed in the Victorian Era and people grew more and more uncomfortable with executions, these macabre spectacles were moved into prisons or behind walled enclosures adjoining courthouses, jails, or prisons.<sup>161</sup> Public executions in England came to an abrupt end in 1868 with the passage of national legislation, though public executions in America took much longer to disappear from the scene. Private execution laws were first enacted in the northeastern part of the United States in the 1830s, with the last American public execution—of a black man, Rainey Bethea, before a jeering crowd of 10,000 to 20,000 spectators—taking place in Kentucky in 1936.<sup>162</sup>

### B. Cesare Beccaria and the Abolition Movement

¶36 A few early Christians opposed executions,<sup>163</sup> but Cesare Beccaria is widely credited as the first Enlightenment thinker to call for the death penalty's abolition.<sup>164</sup> Born in Milan in 1738, Beccaria—a Roman Catholic and a voracious reader of philosophy<sup>165</sup>—attended a Jesuit school in Parma before attending the University of Pavia from 1754 to 1758.<sup>166</sup> After graduating with a degree in law, he first joined one

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CRIME AND CIVIL SOCIETY IN THE EIGHTEENTH CENTURY (1992); LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 (1948); see also Steven Wilf, *Imagining Justice: Aesthetics and Public Executions in Late Eighteenth-Century England*, 5 YALE J.L. & HUMAN. 51 (1993-94).

<sup>159</sup> MAESTRO, *supra* note 1, at 4; D. BRUCE HINDMARSH, THE EVANGELICAL CONVERSION NARRATIVE: SPIRITUAL AUTOBIOGRAPHY IN EARLY MODERN ENGLAND 31 (2008).

<sup>160</sup> Hirsch, *supra* note 103, at 1180.

<sup>161</sup> BESSLER, DEATH IN THE DARK, *supra* note 31, at 40–80.

<sup>162</sup> *Id.* at 31–33, 40–41.

<sup>163</sup> Douglas, *supra* note 112, at 146 (“During the first three centuries of the Christian era, the question of the death penalty was quite real for Christians as they were frequent victims of Roman executions. . . . A few early Christian writers did . . . address the issue of the death penalty. Most argued that killing was contrary to Christian ethics and that Christians must play no role in executions, although they conceded that the state did have the right to impose the death penalty.”); *id.* at 147 (“Writing in the fourth century, John Chrysostom opposed the use of the death penalty to control heresy.”); *id.* at 148 (“Pope Gregory I (590–604) commented that ‘[s]ince I fear God, I shrink from having anything whatsoever to do with the death of anyone.’ Pope Nicholas I in the ninth century recommended abolishing the death penalty: ‘You should save from death not only the innocent but also criminals, because Christ has saved you from the death of the soul.’”); *id.* at 150 (“[S]ome Christians during the Middle Ages opposed the death penalty.”).

<sup>164</sup> Beccaria is also credited with founding the modern field of criminology and as being an early opponent of torture. See BECCARIA (Thomas trans.), *supra* note 1, at xvi; Rachel A. Van Cleave, *Rape and the Querela in Italy: False Protection of Victim Agency*, 13 MICH. J. GENDER & L. 273, 280 (2007); BECCARIA (Paolucci trans.), *supra* note 42, at ix; see also LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 207 (3d ed. 2005) (“The late eighteenth century . . . was a period in which intellectuals began to rethink the premises on which criminal law rested. Great reformers—men like Cesare Beccaria, whose *Treatise on Crime and Punishment* was written in Italy in 1764—suggested that at least some of the premises were wrong and argued for a more enlightened criminal law.”).

<sup>165</sup> MAESTRO, *supra* note 1, at 5–6, 9. Beccaria read Montesquieu’s *Persian Letters*, Rousseau’s *The Social Contract*, and the books of many other writers from France, England and Scotland. BECCARIA (Thomas ed.), *supra* note 1, at xxi. For additional biographical information about Beccaria, see MARCELLO T. MAESTRO, VOLTAIRE AND BECCARIA AS REFORMERS OF CRIMINAL LAW (1972); COLEMAN PHILLIPSON, THREE CRIMINAL LAW REFORMERS: BECCARIA, BENTHAM, ROMILLY (1970).

<sup>166</sup> BECCARIA (Thomas trans.), *supra* note 1, at xvi–xvii, xl–xli.

social academy, the Accademia dei Trasformati (Academy of the Transformed), run by a wealthy count, then another, the Accademia dei Pugni (Academy of Fists), one of the many European salons and literary and reading societies of the 1700s.<sup>167</sup>

¶37 Formed by Beccaria's friend, Pietro Verri, the Academy of Fists held reformist views that did not find favor elsewhere.<sup>168</sup> The small group, which included Pietro's brother Alessandro and other men, mostly in their twenties, dedicated itself to contributing to the public good.<sup>169</sup> In particular, they sought to win over the Austrian rulers of Lombardy to a program of reform.<sup>170</sup> Though the group was short-lived, the ideas Beccaria produced as a result of his association with the Academy of Fists still endure, continuing to shape the world's death penalty debate.

¶38 The members of the Academy of Fists wrote on an array of topics, ranging from political and economic theories to literary and scientific matters.<sup>171</sup> Every ten days the group published a periodical, *Il Caffè*, the inaugural edition<sup>172</sup> of which was aimed at accomplishing “what good we can for our country” through the distribution of “useful knowledge.”<sup>173</sup> Beccaria's own writings were diverse. After falling in love with the daughter of an army colonel, Beccaria published his first pamphlet, a study of currency problems in Milan, in 1762.<sup>174</sup> In all, Beccaria wrote seven articles for *Il Caffè* on topics ranging from the trivial and whimsical—the statistical probabilities of winning a card

<sup>167</sup> *Id.* at xvii; MAESTRO, *supra* note 1, at 6, 8–9. The latter society, which operated from 1762 to 1766, is also translated as the Academy of Fisticuffs. It got its name from the pugilistic debates of its members. BECCARIA (Young trans.), *supra* note 1, at x.

<sup>168</sup> BECCARIA (Thomas trans.), *supra* note 1, at xvii–xviii. Count Pietro Verri was the man who suggested that Beccaria take up the subject of crime and punishment. *Id.* at xxii–xxiii. He was also the person Beccaria relied upon to help him edit *On Crimes and Punishments* and to work with the publisher in Livorno. *Id.* at xxii. From the start, Pietro Verri was very impressed by Beccaria, writing in a letter in April 1762: “Among the gifted young men who are forming a distinguished company at my home I will name a certain Marquis Beccaria, of good family . . . whose vivid imagination together with his careful study of the human heart make of him an exceptionally remarkable man.” MAESTRO, *supra* note 1, at 9–10.

<sup>169</sup> BECCARIA (Young trans.), *supra* note 1, at xviii; MAESTRO, *supra* note 1, at 9. Alessandro Verri worked as a prison inspector and thus was able to share valuable insights with Beccaria as Beccaria worked on his book. BECCARIA (Thomas trans.), *supra* note 1, at xxii–xxiii; *see also* MAESTRO, *supra* note 1, at 12.

<sup>170</sup> BECCARIA (Young trans.), *supra* note 1, at x; *see also id.* (“The Habsburgs had held Lombardy since 1707, but did not begin the process of reform until the end of the War of the Austrian Succession in 1748. The initial impetus in Lombardy, as elsewhere, was the need to improve the administration of finances and the economy in order to reduce the massive deficit created by the cost of war.”).

<sup>171</sup> BECCARIA (Thomas ed.), *supra* note 1, at xix, xxxvii.

<sup>172</sup> The inaugural edition—its name inspired by coffeehouse conversations—appeared in June 1764 around the same time that *On Crimes and Punishments* was published. BECCARIA (Young trans.), *supra* note 1, at xix; MAESTRO, *supra* note 1, at 46. Beccaria started working on his book in March 1763, and the first edition of *On Crimes and Punishments*, published anonymously, began circulating in July 1764, first in Tuscany and then in Lombardy. BECCARIA (Thomas trans.), *supra* note 1, at xxii–xxiii.

<sup>173</sup> BECCARIA (Thomas trans.), *supra* note 1, at xix.

<sup>174</sup> *Id.* at xviii; *see* MAESTRO, *supra* note 1, at 6. Beccaria's father did not approve of the sixteen-year-old Teresa Blasco, the object of Beccaria's affection. This prompted Beccaria—who would ultimately marry his chosen bride against his father's wishes—to take up his pen and write a letter to his father in a futile attempt to gain his father's blessing. “Please be assured that only death can destroy my resolution, and the idea of death doesn't frighten me,” the strong-willed Beccaria wrote to his father, adding: “I swear before God that I will not change my decision. I ask you in the name of Jesus Christ to stop putting obstacles to this marriage and to stop doing violence to my will and my conscience.” It took quite some time after the marriage took place—and the advice and intervention of his friend, Count Pietro Verri—before Beccaria and his father would reconcile. *Id.* at 6–8.

game and an “Essay on Odors”—to the literary—a “Fragment on Style”—to the serious—an essay on smuggling.<sup>175</sup>

¶39 One product of the Academy of Fists was the publication of Beccaria’s landmark treatise, *Dei delitti e delle pene*, at first published anonymously due to fear of persecution and ecclesiastical censorship.<sup>176</sup> “While writing my book,” Beccaria later told his French translator, “I had before my eyes the examples of Galileo, Machiavelli, and Giannone,” all of whom faced dire consequences for their views.<sup>177</sup> In his book, Beccaria dealt with his subject in a comprehensive and philosophical manner, advocating trials by jury<sup>178</sup> and condemning torture and execution as antiquated practices.<sup>179</sup>

¶40 In the section “On Torture,” Beccaria wrote about a “strange consequence” of torture: “[T]he innocent individual is placed in a worse condition than the guilty; for if both are tortured, every outcome is stacked against him, because either he confesses to a crime and is convicted or he is declared innocent and has suffered an undeserved punishment.”<sup>180</sup> Beccaria saw torture as “a cruelty,” believing only the guilty should be punished, and he worried considerably about false confessions.<sup>181</sup> Beccaria wrote: “[T]he impression of pain may increase to such a degree that, filling the entire sensory capacity, it leaves the torture victim no liberty but to choose the shortest route to relieve his pain momentarily.”<sup>182</sup> “Under these circumstances,” Beccaria concluded, “the statements made by the accused are as inevitable as the impressions made by fire and water.”<sup>183</sup>

<sup>175</sup> MAESTRO, *supra* note 1, at 47–50.

<sup>176</sup> BECCARIA (Thomas trans.), *supra* note 1, at xxii–xxiii, 166 n.36; MAESTRO, *supra* note 1, at 20; *Special Collections Focus: New Acquisitions*, LEGAL MISCELLANEA (Jacob Burns L. Libr., Washington D.C.) Autumn 2004, at 1–2, available at

[http://www.law.gwu.edu/Library/Friends/Documents/Legal\\_Miscellanea/FriendsNwsltr\\_F04.pdf](http://www.law.gwu.edu/Library/Friends/Documents/Legal_Miscellanea/FriendsNwsltr_F04.pdf);

BECCARIA (Paolucci, trans.), *supra* note 42, at xiv. The author’s anonymity was short-lived. MAESTRO, *supra* note 1, at 20. Once Milan authorities expressed no animosity toward the book’s author, and in fact welcomed the treatise, Beccaria’s identity was revealed. BECCARIA (Paolucci, trans.), *supra* note 42, at xiv. Initially, rumors circulated that the elder Pietro Verri wrote *On Crimes and Punishments*. These rumors were fueled by the fact that Verri had, in 1763, published another book, *Meditations on Happiness*, with the same publisher. But to his credit, Verri quickly denied authorship and came to Beccaria’s defense. “I suggested the topic to him,” Verri acknowledged, but admitted that the book itself “is by the Marquis Beccaria.” BECCARIA (Young trans.), *supra* note 1, at xiv; BECCARIA (Thomas trans.), *supra* note 1, at xxii–xxiii; BECCARIA (Paolucci trans.), *supra* note 42, at xiii.

<sup>177</sup> BECCARIA (Thomas trans.), *supra* note 1, at xxv–xxvi. Beccaria told his French translator that, having “heard the clanging chains of superstition and the howls of fanaticism suffocating the faint moans of truth,” he felt “compelled to be obscure and to envelop the light of truth in a pious mist” because he “wanted to be a defender of humanity without being its martyr.” *Id.* at xxvi.

<sup>178</sup> BECCARIA (Thomas trans.), *supra* note 1, at 30 (“The law whereby each man should be judged by his peers is a very useful one, for when a citizen’s liberty or wealth are at stake, those sentiments that inequality inspires should fall silent.”).

<sup>179</sup> *Id.* at 32–37.

<sup>180</sup> *Id.* at 36.

<sup>181</sup> *Id.* at 32–37.

<sup>182</sup> *Id.* at 34.

<sup>183</sup> *Id.* Many of America’s Founding Fathers shared Beccaria’s concerns. Writing in 1729, Benjamin Franklin railed against innocent men being “dragg’d into noisome Dungeons, tortured with cruel Irons, and even unmercifully starv’d to Death.” 1 J.A. LEO LEMAY, *THE LIFE OF BENJAMIN FRANKLIN: JOURNALIST, 1706-1730*, at 427–28 (2006). In *Notes on Virginia*, Thomas Jefferson also wrote: “With the Roman, the regular method of taking the evidence of their slaves was under torture. Here it has been thought better never to resort to their evidence. When a master was murdered, all his slaves, in the same house, or within hearing, were condemned to death. Here punishment falls on the guilty only, and as precise proof is required against him as against a freeman.” *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 241 (Adrienne Koch & William Peden eds., 1998).

¶41 In the section “On the Death Penalty,” Beccaria wrote, “[t]his futile excess of punishments, which have never made men better, has impelled me to consider whether the death penalty is really useful and just in a well-organized state.”<sup>184</sup> “The death penalty,” Beccaria argued, “is not useful because of the example of cruelty that it gives to men.”<sup>185</sup> “If one were to raise the objection that in almost all ages and almost all nations the death penalty has been prescribed for some crimes,” Beccaria continued, “I would reply that this objection amounts to nothing in the face of the truth—against which there is no legal remedy—and that the history of mankind gives us the impression of a vast sea of errors, in which a few confused truths float about with large and distant gaps between them.”<sup>186</sup>

¶42 Beccaria believed violent crimes should be punished severely.<sup>187</sup> But he also believed that “the purpose of punishment is neither to torment and afflict a sentient being, nor to undo a crime already committed.”<sup>188</sup> For Beccaria, “perpetual penal servitude” — or life imprisonment, in today’s parlance — was the best, and most just, way to deter others.<sup>189</sup> Echoing Montesquieu, Beccaria emphasized that “every act of authority of one man over another that does not derive from absolute necessity is tyrannical.”<sup>190</sup> “For a punishment to be just,” Beccaria wrote, “it must have only that degree of intensity that suffices to deter men from crime.”<sup>191</sup>

<sup>184</sup> BECCARIA (Thomas trans.), *supra* note 1, at 51.

<sup>185</sup> *Id.* at 55.

<sup>186</sup> *Id.* at 56–57. If monarchs left “the ancient laws in place,” Beccaria said, “it is because of the infinite difficulty in stripping the venerated rust of many centuries from so many errors.” *Id.* at 57.

<sup>187</sup> *See id.* at 21 (“[T]he violation of the right to security acquired by each citizen must be assigned some of the most severe punishments provided for by the law”); *see also id.* at 22 (“Attacks against the security and liberty of the citizens are thus among the greatest crimes.”).

<sup>188</sup> BECCARIA (Thomas trans.), *supra* note 1, at 26. “The purpose of punishment,” Beccaria added, “is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same.” *Id.* “Therefore,” Beccaria emphasized, “punishments and the method of inflicting them must be chosen such that, in keeping with proportionality, they will make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned.” *Id.*

<sup>189</sup> *Id.* at 52. Beccaria expressed his preference for life imprisonment over capital punishment stating: “To those who would say that permanent penal servitude is as painful as death, and therefore, equally cruel, I shall reply that, adding up all of the unhappy moments of slavery, it may very well be even more so, but these moments are drawn out over an entire lifetime, while death exerts the whole of its force in a single moment. And this is the advantage of penal servitude, which frightens those who witness it more than those who suffer it, for the former consider the entire sum of unhappy moments, while the latter are distracted from future unhappiness by the unhappiness of the present moment.” *Id.* at 54.

<sup>190</sup> BECCARIA (Thomas trans.), *supra* note 1, at 11. In his book, Beccaria paid considerable homage to Montesquieu, calling him a “great” and “immortal” man. *Id.* at 10–11. “As the great Montesquieu says,” Beccaria wrote, “every punishment that does not derive from absolute necessity is tyrannical.” *Id.* at 11. Beccaria parted ways with Montesquieu on the death penalty, however, as Montesquieu’s *The Spirit of the Laws* allowed executions for homicide and even theft. *Id.* at xlvi.

<sup>191</sup> *Id.* at 54. On that point, Beccaria explained: “Now, there is no one who, upon reflection, would choose the total and permanent loss of his own liberty, no matter how advantageous a crime might be: therefore, the intensity of perpetual penal servitude, substituted for the death penalty, has all that is necessary to deter even the most determined mind. Indeed, I would say that it has even more: a great many men look upon death with a calm and steady gaze, some out of fanaticism, some out of vanity (which almost always accompanies man beyond the grave), and some out of a final and desperate attempt either to live no longer or to escape from poverty. But neither fanaticism nor vanity survives in fetters or chains, under the cudgel and the yoke, or in an iron cage; and the desperate man finds that his woes are just beginning rather than ending.” *Id.* at 53–54; *see also id.* at 19 (“If the same punishment is prescribed for two crimes and injure society in different degrees, then men will face no stronger deterrent from committing the greater crime if they find it in their advantage to do so.”).

¶43 Beccaria emphasized perpetual imprisonment as a viable alternative to executions. “It is not the terrible but fleeting spectacle of a criminal’s death that is the most powerful brake on crimes,” he reasoned, “but the long and arduous example of a man deprived of his liberty, who, having become a beast of burden, repays the society he has offended through his toils.”<sup>192</sup> “It is not the intensity of the punishment that has the greatest effect on the human mind,” Beccaria wrote, “but its extension, for our sensibility is more easily and firmly affected by small but repeated impressions than by a strong but fleeting action.”<sup>193</sup> Seeing executions as both ineffective and counterproductive, Beccaria observed: “With the death penalty, every example given to the nation requires a crime; with permanent penal servitude, a single crime provides many and lasting examples.”<sup>194</sup>

¶44 Beccaria thought a criminal’s death justifiable only in times of anarchy to protect national security, or if the death penalty could be shown to deter others from committing crimes.<sup>195</sup> “The death of a citizen,” Beccaria wrote, “cannot be deemed necessary, except on two grounds.”<sup>196</sup> “The first,” he opined, “is when he retains such connections and such power that he endangers the security of the nation even when deprived of his liberty, that is, when his very existence can provoke a dangerous revolution in the established form of government.”<sup>197</sup> In that extremely limited circumstance, Beccaria felt, the citizen’s death “becomes necessary when a nation is recovering or losing its liberty, or in time of anarchy, when disorder itself takes the place of laws.”<sup>198</sup> The “second reason for believing that the death penalty could be just and necessary,” Beccaria wrote, was deterrence, though Beccaria emphasized that “centuries of experience” had taught that “the ultimate punishment has never deterred men determined to harm society.”<sup>199</sup>

¶45 Beccaria would repeat these views—and add one more, the irrevocability of capital punishment—in a government report he co-authored in 1792.<sup>200</sup> The report, written by Beccaria, Francesco Gallarati Scotti, and Paolo Risi, articulated the minority position of a committee charged with drafting a new penal code for Austrian Lombardy.<sup>201</sup> The minority report favored “perpetual enslavement” and “forced labour” for the most serious

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<sup>192</sup> *Id.* at 53.

<sup>193</sup> *Id.* at 52–53.

<sup>194</sup> *Id.* at 54.

<sup>195</sup> *Id.* at 52.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* For Beccaria, a government’s stability or instability was of great importance in considering what the punishment should be. *Id.* at 85.

<sup>198</sup> *Id.* at 52. Beccaria saw this as a very narrow exception, writing: “But when the calm rule of law prevails, under a form of government that has the support of the nation, which is well-fortified both externally and internally by both force and opinion (which is perhaps more efficacious than force itself), and in which the power to rule is vested only in the true sovereign and wealth can buy only pleasures not authority, I do not see any need to destroy a citizen, unless his death were the only real way to deter others from committing crimes.” *Id.*

<sup>199</sup> *Id.* at 52.

<sup>200</sup> See Opinion of the Undersigned Members of the Committee Charged with the Reform of the Criminal System in Austrian Lombardy for Matters Pertaining to Capital Punishment (1792), reprinted in BECCARIA (Thomas trans.), *supra* note 1, at 153–59.

<sup>201</sup> BECCARIA (Thomas trans.), *supra* note 1, at xvii, 153, 178–79 n.1. Scotti, a ministry of justice official, was one of Beccaria’s pupils when Beccaria taught economics at the Scuole Palatine in Milan, and Risi was associated with the Accademia dei Trasformati, the first academy Beccaria had joined prior to joining the Academy of Fists.

crimes, finding that “the death penalty should not be prescribed except in the case of absolute necessity.”<sup>202</sup> But Beccaria and his co-authors were quick to note:

[I]n the peaceful circumstances of our society, and with the regular administration of justice, we could not think of any case of absolute necessity other than the situation in which the accused, in plotting the subversion of the state, was capable, either through his external or internal relationships, of disturbing and endangering society even while imprisoned and closely watched.<sup>203</sup>

Citing “the Austrian and Tuscan codes that we have received as models,” Beccaria and his two colleagues felt compelled “to expose candidly and succinctly” their anti-death penalty views.<sup>204</sup> “[W]e believe that the death penalty is not suitable,” they wrote, “because it is not just, since it is not necessary”; “because it is less efficacious than perpetual punishment equipped with a good deal of continuous publicity”; and “because it cannot be undone.”<sup>205</sup>

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Right from its publication, *On Crimes and Punishments*—as Beccaria no doubt expected—generated enormous controversy and decidedly mixed reviews.<sup>206</sup> The Venetian Inquisition blocked importation of the book into Venetian territory in August 1764; an Italian monk, Ferdinando Facchinei, anonymously published a harsh rebuke of it in 1765; the Roman Inquisition banned the book in February 1766; and in 1777, a Spanish translation of the book was banned in Spain.<sup>207</sup> Voltaire, however, adored Beccaria’s book, and drew on his own considerable fame to promote it.<sup>208</sup> In Milan, the

<sup>202</sup> *Id.* at 153–55.

<sup>203</sup> *Id.* at 154.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 154. “[W]e should suppress the death penalty” in favor of “perpetual enslavement,” the minority report concluded, recommending that prisons be set up in several cities “so as to make sure that the punishment is clear for all to see.” *Id.* at 155, 158.

<sup>206</sup> MAESTRO, *supra* note 1, at 35–39. One critic called Beccaria “an enemy of Christianity, a wicked man and a poor philosopher” as well as “a declared enemy of the Supreme Being.” *Id.* at 35. Beccaria’s book would spark controversy for decades to come. One of Beccaria’s biggest critics was Immanuel Kant, a death penalty advocate. *Id.* at 128–29. Kant—who believed all murderers should be executed—said Beccaria’s anti-death penalty arguments amounted to “sophistry.” IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE* 141–42 (John Ladd, trans., 2d ed. 1999).

<sup>207</sup> BECCARIA (Thomas trans.), *supra* note 1, at xxiii–xxiv, xxvi; MAESTRO, *supra* note 1, at 128–29; *see also* BECCARIA (Paolucci trans.), *supra* note 42, at xi (“The Church of Rome had placed the treatise on the Index in 1766, condemning it for its extremely rationalistic presuppositions.”). In *Notes and Observations on the Book Entitled ‘On Crimes and Punishments,’* Ferdinando Facchinei dismissed Beccaria’s book, saying it had not proved “that the death penalty and torture are useless.” BECCARIA (Thomas trans.), *supra* note 1, at 100. This scathing review prompted a lengthy written response, also anonymously published, from Pietro and Alessandro Verri. *Id.* at 102–112. That response, drafted as if it had come from the author of *On Crimes and Punishments*, *id.* at 172 n.8, painted the reviewer as out of touch, saying “[m]y accuser scarcely knows the temperament of today’s sovereigns.” *Id.* at 107. In a note “To the Reader” that accompanied later editions of *On Crimes and Punishments*, Beccaria referenced that response, adopting it as his own and emphasizing that he had given “public affirmation of my religion and of my obedience to my sovereign in the reply to the *Notes and Observations.*” *Id.* at 7–8.

<sup>208</sup> BECCARIA (Thomas trans.), *supra* note 1, at xxvii; *see also* Schwartz & Wishingrad, *supra* note 75, at 812. Voltaire’s 1766 commentary on Beccaria’s book was frequently reprinted with it in later editions. “I was engrossed by a reading of *On Crimes and Punishments*,” Voltaire’s passionate commentary begins. BECCARIA (Thomas trans.), *supra* note 1, at 113. “It was tyranny in particular,” Voltaire declared, “that first decreed the death penalty for those who differed with the established Church on some dogmas.” *Id.* at



reformer Count Carlo Firmian, the plenipotentiary of Empress Maria Theresa, defended Beccaria against charges of subversion and sacrilege.<sup>209</sup>

¶47 Beccaria's book quickly garnered the attention of monarchs<sup>210</sup> and led to calls for criminal law reform and the death penalty's abolition in Europe.<sup>211</sup> The book even led Empress Catherine II to invite Beccaria to assist in the reform of Russia's penal code—an offer he considered for some time before turning it down.<sup>212</sup> In pre- and post-revolutionary America, Beccaria's novel ideas also shaped the views of the Founding Fathers—determined men who risked everything, including being hanged, to form a new republic.<sup>213</sup> Beccaria's book would be read and admired by this illustrious group of well-educated men—men who felt intense anger at the way the English crown had treated them and who were highly receptive to an Enlightenment agenda.<sup>214</sup>

### C. *The Abolition Movement in the United States*

¶48 George Washington and Thomas Jefferson both bought copies of Beccaria's book, most likely in 1769,<sup>215</sup> and by the 1770s it was clear that Beccaria's calls for criminal justice reform were having a major impact across the Atlantic.<sup>216</sup> Between 1776 and 1779, Thomas Jefferson absorbed *On Crimes and Punishments*, intensely studying Beccaria's book as he drafted a bill calling for more proportionate punishments in

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115. "It is clear," Voltaire added, "that twenty robust thieves, sentenced to labour on some public works for all of their lives, serve the state through their suffering, and that their deaths will only benefit the public executioner, who is paid to kill people in public." *Id.* at 128–29. "The compassionate author of *On Crimes and Punishments*," Voltaire explained, "is more than justified to complain that punishment is too often excessive in relation to the crime, and that sometimes it is even detrimental to the state it was intended to benefit." *Id.* at 114–15. Reciting the adage that "a hanged man is good for nothing," *id.* at 128, Voltaire urged his readers to "read and reread the work of this lover of humanity." *Id.* at 132.

<sup>209</sup> BECCARIA (Paolucci trans.), *supra* note 42, at xi; BECCARIA (Thomas trans.), *supra* note 1, at 172 n.6; MAESTRO, *supra* note 1, at 4, 36–37.

<sup>210</sup> Maria Theresa Habsburg (the Holy Roman Empress) of Austria and Grand Duke Leopold of Tuscany both expressed their admiration for Beccaria's ideas. BECCARIA (Paolucci trans.), *supra* note 42, at x; BECCARIA (Bellamy ed.), *supra* note 1, at xxxvii.

<sup>211</sup> BECCARIA (Young trans.), *supra* note 1, at xxviii–xxix. The book also garnered accolades and generated an invitation from French intellectuals for Beccaria to visit Paris. The young Beccaria, however, was not at ease in the limelight. He was persuaded to go to Paris in October 1766 with Alessandro Verri to meet his French admirers, but after spending a few weeks in France, he became anxious and decided to return to Italy to be with his wife and family. Beccaria went on to accept an appointment as a professor of political economy at the Palatine School in Milan and, later, one in the Habsburg administration working as a member of the Supreme Economic Council of Milan. *Id.* at xxviii; MAESTRO, *supra* note 1, at 74, 95–96; BECCARIA (Paolucci trans.), *supra* note 42, at xi; BECCARIA (Bellamy ed.), *supra* note 1, at 129.

<sup>212</sup> MAESTRO, *supra* note 1, at 68–71.

<sup>213</sup> Benjamin Franklin would famously remark, "We must all hang together, or assuredly we shall all hang separately." MARKUS HÜNEMÖRDER, *THE SOCIETY OF THE CINCINNATI: CONSPIRACY AND DISTRUST IN EARLY AMERICA* 49 (2006).

<sup>214</sup> BECCARIA (Young trans.), *supra* note 1, at xxix; *Special Collections Focus*, *supra* note 126, at 2.

<sup>215</sup> BANNER, *supra* note 1, at 91; *see also* MASUR, *supra* note 1, at 175 n.10.

<sup>216</sup> In 1776, the Philadelphia Society for Relieving Distressed Prisoners was formed, and reform efforts picked up steam from there. The Philadelphia Society for Alleviating the Miseries of Public Prisons, for example, was organized in 1787, and anti-death penalty agitation grew stronger over the coming decades. *See* Jill M. Cochran, *Courting Death: 30 Years Since Furman, Is the Death Penalty Any Less Discriminatory? Looking at the Problem of Jury Discretion in Capital Sentencing*, 38 VAL. U. L. REV. 1399, 1406 n. 36 (2004); *see also* BANNER, *supra* note 1, at 88 ("In the 1760s and 1770s . . . many Americans started to question whether death was too great a punishment for property crimes like burglary and grand larceny. By the 1780s and 1790s the propriety of capital punishment for any crime, even murder, was a bitterly contested issue."); Bigel, *supra* note 144, at 39–40.

Virginia.<sup>217</sup> Other American leaders—both before and after the 1770s—called for reform of death penalty laws or engaged in individual acts of mercy.<sup>218</sup> For example, early American presidents—who often used or threatened military force or called out the militia to put down rebellious activities<sup>219</sup>—frequently made use of the clemency powers granted by Article II of the Constitution.<sup>220</sup> They showed this lenience in spite of a long-standing tradition of using the death penalty to punish rebels.<sup>221</sup>

<sup>217</sup> RANDALL, *supra* note 113, at 298. Randall writes: “Between 1776 and 1779, Jefferson gave more time to researching the criminal laws than to any other segment of revisions. He systematically studied Anglo-Saxon laws, medieval authorities like Bracton, and the chief foreign writers, including Beccaria. The finely crafted bill he submitted in advance to George Wythe was a model of elegant, plain writing. He wrote footnotes in Anglo-Saxon characters, in Latin, and in old French and English.” *Id.*

<sup>218</sup> BANNER, *supra* note 1, at 88.

<sup>219</sup> This happened in response to Pennsylvania’s “Whiskey Rebellion” of 1794 and in the wake of “Fries Rebellion” in eastern Pennsylvania (led, ironically, by a militia captain who aided President Washington during the Whiskey Rebellion). It also happened with respect to western Massachusetts’ Shays’ Rebellion of 1786-87, seeking to halt foreclosures and demanding the printing of money to ease farmers’ debts, thus leading to the Constitutional Convention. See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1493 (1997); Donald W. Dowd, *The Relevance of the Second Amendment to Gun Control Legislation*, 58 MONT. L. REV. 79, 91–92 (1997); Nigel Anthony Sellars, *Treasonous Tenant Farmers and Seditious Sharecroppers: The 1917 Green Corn Rebellion Trials*, 27 OKLA. CITY U. L. REV. 1097, 1104–05 (2002).

<sup>220</sup> See Jerry Carannante, *What to Do About the Executive Clemency Power in the Wake of the Clinton Administration*, 47 N.Y.L. SCH. L. REV. 325, 331 (2003) (noting that George Washington pardoned leaders of the Whiskey Rebellion in 1795, John Adams pardoned members of an insurrection in Pennsylvania, and Thomas Jefferson granted clemency to persons convicted under the Alien and Sedition Act); Jaired Stallard, *Abuse of the Pardon Power*, 1 DEPAUL BUS. & COM. L.J. 103, 107–08 & n.32 (2002) (noting that John Adams pardoned John Fries after he was sentenced to death for leading what became known as Fries’ Rebellion, in which many homeowners refused to pay taxes and were incarcerated, with Fries leading a mob of approximately 150 men to free tax evaders); Darryl W. Jackson, Jeffrey H. Smith, Edward H. Sisson & Helene T. Krasnoff, *Bending Towards Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1251, 1263–64 (1999) (noting that President Madison issued a pardon to the Baratarians Pirates of Louisiana who fought to defend New Orleans in 1815); KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 51 (1989) (“In order to fill up the army ranks to fight the War of 1812, President James Madison pardoned deserters and, after the war, pardoned Lafitte’s pirates.”); Hon. Andrew S. Effron, *Military Justice: The Continuing Importance of Historical Perspective*, 2000 ARMY LAWYER 1, 5 (2000) (noting that Madison remitted the death sentence of Brigadier General William Hull after he was sentenced to be shot); George Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850*, 16 FED. SEN’G. REP. 212, 214 (Feb. 1, 2004) (noting that Jefferson set aside the death sentence of burglar Samuel Miller and pardoned a slave convicted of having “burglariously broken and entered” a home, and that Madison set aside the death sentence of a career burglar who broke into a store); Walter Nelles, *The First American Labor Case*, 41 YALE L.J. 165, 171 (1931) (noting John Adams’ pardons of rioters sentenced to death).

<sup>221</sup> In that era, death was seen as an appropriate punishment for British soldiers or traitors, though not by all. Compare Dowd, *supra* note 219, at 92 n.50 (Samuel Adams, a leader of the American Revolution, expressed the view that “[i]n monarchy the crime of treason may admit of being pardoned or lightly punished . . . but the man who dares rebel against the laws of a republic ought to suffer death”) and HENRY MAYER, A SON OF THUNDER, PATRICK HENRY AND THE AMERICAN REPUBLIC 347 (2001) (noting that Patrick Henry helped draft a law allowing the governor to forcibly remove those who refused Virginia’s oath of allegiance to positions behind enemy lines and order the death penalty for anyone who refused to go) with Dowd, *supra* note 219, at 92 n.50 (quoting Thomas Jefferson as saying, “To punish these errors too severely would be to suppress the only safeguard of the public liberty. A little rebellion now and then is a good thing. . . . [A]n observation of this truth should render honest republican governors so mild in their punishment of rebellions as not to discourage them too much.”); see also JAMES HAW, JOHN & EDWARD RUTLEDGE OF SOUTH CAROLINA 84, 159 (1997) (noting that John Rutledge, a delegate from South Carolina to the 1787 Constitutional Convention and that state’s first leader, signed an act prescribing the death penalty for anyone who aided the British cause and once suggested that “to stop the Enemy from burning Houses” a British regular officer be hanged for every house burned); James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. PITT. L. REV. 99,

President George Washington—a death penalty supporter<sup>222</sup> who had to oversee the articles of war and cases of desertion<sup>223</sup>—felt executions were too frequently employed. He sometimes favored setting aside soldiers’ death sentences,<sup>224</sup> and in 1778 he called for more proportionate punishments<sup>225</sup> and the curtailment of death sentences.<sup>226</sup> In his

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117 n.78 (1983) (“After a young slave led an unsuccessful revolt in 1800, James Monroe wrote Jefferson, asking him how the many hundreds of slaves should be punished. Jefferson recommended that Monroe exercise whatever mercy he could.”).

<sup>222</sup> George Washington believed executions deterred crime and preserved order. BANNER, *supra* note 1, at 91; Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 6 n.26 (2002); see also Letter from George Washington to William Heath (Nov. 5, 1780) in 20 THE WRITINGS OF GEORGE WASHINGTON 298 (John C. Fitzpatrick ed., 1937) (“Previous to yours of the 1st. Inst. I had requested you, to use your discretion in the execution of such of the prisoners under sentence of death, as you considered proper objects for Capital punishment.”); Letter from George Washington to William Livingston (Jan. 12, 1782) in 23 THE WRITINGS OF GEORGE WASHINGTON 444–445 (John C. Fitzpatrick ed., 1937) (“It is in vain to expect that pernicious and growing traffic will ever be stopped, untill [sic] the States pass laws agt. it, making the penalty, *death*. This I long ago foresaw and recommended.”); Letter from George Washington to Horatio Gates (Feb. 14, 1778) in 10 THE WRITINGS OF GEORGE WASHINGTON 456, 457 (John C. Fitzpatrick ed., 1937) (“[I] do not conceive I could with propriety, alter the capital punishment into a corporal one.”); Letter from George Washington to Anne Cesare, Chevalier de la Luzerne (Nov. 13, 1782) in 25 THE WRITINGS OF GEORGE WASHINGTON 334 (John C. Fitzpatrick ed., 1937) (“I have at various periods of the War written to Congress and to the States, endeavouring [sic] to convince them of the necessity of passing the most rigorous Laws to prevent the Inhabitants from furnishing the Enemy with Provisions. I will write them again, and will use every argument I am master of for that purpose. In all other Nations, I believe, the persons guilty of that crime are punished with death . . .”). ACCORD 6 THE WRITINGS OF GEORGE WASHINGTON 497 (John C. Fitzpatrick ed., 1937), 12 *id.* at 14, and 13 *id.* at 135, 139–40 (letters of George Washington confirming or ordering the execution of spies); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 22 (2d ed. 1920) (noting that the Continental Congress passed a law in 1776 to subject spies to the punishment of death under the Articles of War).

<sup>223</sup> Letter from George Washington to William Smallwood (Feb. 21, 1778) in 10 THE WRITINGS OF GEORGE WASHINGTON 487, 488 (John C. Fitzpatrick ed., 1937) (discussing capital punishment in the context of “the operation of our articles of war, with regard to intentional, or attempted desertion”); Letter from George Washington to John Lacey Jr. (Feb. 21, 1778) in 10 THE WRITINGS OF GEORGE WASHINGTON 492 (John C. Fitzpatrick ed., 1937) (“If there is any of them, who appear to be great offenders, and to be proper objects for Capital punishment, you will send them to Head Quarters with the witnesses, that he may be tried by a General Court Martial here.”); Letter from George Washington to William Livingston (Apr. 26, 1778) in 11 THE WRITINGS OF GEORGE WASHINGTON 310 (John C. Fitzpatrick ed., 1937) (saying “it is the practice of War” to execute “immediately” any “Deserters attending Flags”).

<sup>224</sup> For instance, Washington wrote a letter in April 1778 to express his preference for “detention and confinement” over “capital punishment” for an enlisted soldier. Letter from George Washington to William Livingston (Apr. 26, 1778), *supra* note 223. He also penned a clemency order in February 1780 for another soldier. Letter from George Washington to Lewis Nicola (Feb. 5, 1780) in 17 THE WRITINGS OF GEORGE WASHINGTON 491 (John C. Fitzpatrick ed., 1937). In the 1780 letter, Washington’s merciful act was tempered by the fact that he sought to ensure the prisoner’s “future good conduct” by authorizing the letter’s recipient to keep the pardon secret “for a few days” before letting the prisoner know his life had been spared. *Id.*

<sup>225</sup> Despite his approval of executions, George Washington wrote to the Continental Congress on January 29, 1778 to propose more proportionate offenses to reform army discipline: “Several new regulations will, I imagine, be found useful in the articles of war; which the Judge Advocate, from his official experience of the deficiency, can more accurately indicate. One thing, we have suffered much from, is the want of a proper gradation of punishments: the interval between a hundred lashes and death is too great and requires to be filled by some intermediate stages. Capital crimes in the army are frequent, particularly in the instance of desertion: actually to inflict capital punishment upon every deserter or other heinous offender, would incur the imputation of cruelty, and by the familiarity of the example, destroy its efficacy; on the other hand to give only a hundred lashes to such criminals is a burlesque on their crimes rather than a serious correction, and affords encouragement to obstinacy and imitation. The Courts are often in a manner compelled by the enormity of the facts, to pass sentences of death, which I am as often obliged to remit, on account of the number in the same circumstances, and let the offenders pass wholly unpunished. This

seventh annual message to Congress, delivered in Philadelphia on December 8, 1795, President Washington also said this in regard to the pardoning of capital offenders:

It is a valuable ingredient in the general estimate of our welfare that the part of our country which was lately the scene of disorder and insurrection now enjoys the blessings of quiet and order. The misled have abandoned their errors, and pay the respect to our Constitution and laws which is due from good citizens to the public authorities of the society. These circumstances have induced me to pardon generally the offenders here referred to, and to extend forgiveness to those who had been adjudged to capital punishment. For though I shall always think it a sacred duty to exercise with firmness and energy the constitutional powers with which I am vested, yet it appears to me no less consistent with the public good than it is with my personal feelings to mingle in the operations of Government every degree of moderation and tenderness which the national justice, dignity, and safety may permit.<sup>227</sup>

Washington thus viewed executions as a last resort—and then only if he felt them absolutely necessary.<sup>228</sup>

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would be avoided, if there were other punishments short of the destruction of life, in some degree adequate to the crime; and which might be with propriety substituted. Crimes too are so various in their complexions and degrees, that to preserve the just rule of proportion, there ought to be a gradual scale of punishments; in order to which, whipping should be extended to any number at discretion, or by no means, limited lower than five hundred lashes.” Letter from George Washington to Continental Congress Conference Committee (Jan. 29, 1778) in 10 *THE WRITINGS OF GEORGE WASHINGTON* 362, 402–03 (John C. Fitzpatrick ed., 1937).

<sup>226</sup> Having read Beccaria’s views on proportionate punishments, George Washington wrote to the Continental Congress on August 31, 1778, saying this about the use of capital punishment: “The frequent condemnations to capital punishment, for want of some intermediate one between that and a Hundred lashes (the next highest under our present military articles) and the necessity of frequent pardons in consequence, induced me a few days ago, to lay the matter before a Board of Officers for them to consider, whether some mode might not be devised of equal or greater efficacy for preventing crimes and punishing Delinquents when they had happened, less shocking to humanity and more advantageous to the States, than that of Capital execution. The inclosed paper No. 3, contains the opinion of the Board upon the subject, which with all deference I submit to the consideration of Congress and doubt not but they will adopt the expedient suggested, if it shall appear in anywise calculated to promote the service. I will only observe before I conclude upon this occasion, that when I call the Board to consult upon the point, there were Eleven prisoners under sentence of death, and probably many more for trial, in the different guards on charges that would effect their lives.” Letter from George Washington to Continental Congress (Aug. 31, 1779) in 10 *THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799* (John C. Fitzpatrick ed., 1937), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field\(DOCID+@lit\(gw120409\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw120409))). The enclosure, Paper No. 3, was a copy of the proceedings of the Council of General Officers dated August 20, 1778. That document noted that “his Excellency” had requested the Council’s sentiments on “the expediency of punishment by hard and severe labor, instead of death,” and in it, the Council reported that it was unanimously decided that “severe hard labour be recommended . . . to be the intermediate punishment between one hundred Lashes, and Death.” See Council of General Officers, Paper No. 3, <http://memory.loc.gov/mss/mgw/mgw4/051/0400/0456.jpg> (last visited Aug. 31, 2009).

<sup>227</sup> The Papers of George Washington, Washington’s Seventh Annual Message to Congress, 8 Dec. 1795, Philadelphia, <http://gwpapers.virginia.edu/documents/union/state7.html> (last visited Aug. 31, 2009).

<sup>228</sup> This seems particularly clear from a communication Washington sent to the Continental Congress just days after the signing of the Declaration of Independence. In discussing the capture, plunder and murder of some Americans by Indians, Washington expressed a willingness to resort to capital punishment to punish those posing a challenge to the young nation’s security: “The Inhuman Treatment to the whole, and Murder

¶150 Alexander Hamilton—another death penalty supporter<sup>229</sup>—also made clear before the century’s end that he, too, felt death sentences could be too harsh in some instances. A defender of the presidential pardoning power,<sup>230</sup> Hamilton did not hesitate to support the use of capital punishment if he felt it would be effective. For example, Hamilton—who served as a general of the army under President Adams—wrote in support of using executions to prevent desertion:

I have heretofore spoken to you of the frequency of desertion, and of the necessity of repressing it by severe punishment. It is not my wish to influence opinion in any particular case, but I believe that a few examples of capital punishment, perhaps one in each regiment, will be found indispensable.<sup>231</sup>

¶151 Yet Hamilton, like others in early America, also recognized that “[t]he temper of our country is not a little opposed to the frequency of capital punishment,”<sup>232</sup> and recommended in 1799 that a deserter’s life be spared.<sup>233</sup> In that case, after John Adams reluctantly approved the death sentence for a deserter, Sergeant Richard Hunt, Adams wrote a letter to Secretary of War James McHenry: “Yet if you and General Hamilton, think that one example, may suffice, for the purposes of public justice, the execution of Hunt . . . may yet be respited.”<sup>234</sup> Upon receiving the death warrant, Hamilton, in turn, wrote to McHenry—a signer of the U.S. Constitution and an army surgeon who studied

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of part of our People after their Surrender and Capitulation, was certainly a flagrant violation of that Faith which ought to be held sacred by all civilized nations, and founded in the most Savage barbarity. It highly deserved the severest reprobation, and I trust the Spirited Measures Congress have adopted upon the Occasion, will prevent the like in future: But if they should not, and the claims of humanity are disregarded, Justice and Policy will require recourse to be had to the Law of retaliation, however abhorrent and disagreeable to our natures in cases of Torture and Capital Punishments.” Letter from George Washington to Continental Congress (July 15, 1776) in 5 THE WRITINGS OF GEORGE WASHINGTON 362, 279–80 (John C. Fitzpatrick ed., 1937).

<sup>229</sup> Alexander Hamilton, who believed in duels to resolve insults and who was famously killed in one, saw death sentences as part of the fabric of the criminal law. For example, he applauded the 1776 execution of Thomas Hickey, a soldier who plotted to murder George Washington. See Roger P. Alford, *Roper v. Simmons and Our Constitution in International Equipose*, 53 UCLA L. REV. 1, 11 n.48 (2005).

<sup>230</sup> Hamilton defended the presidential pardoning power in Federalist Paper No. 74, saying: “Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance.” THE FEDERALIST NO. 74 (Alexander Hamilton). In 1787, James Wilson also argued that “[p]ardon is necessary for cases of treason.” 2 JONATHAN ELLIOT, ED., THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 549 (1881); Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 591 n.132 (1991).

<sup>231</sup> XXIII THE PAPERS OF ALEXANDER HAMILTON 496 (Harold C. Syrett ed., 1976); see also *id.* at 275–76 (noting Hamilton’s approval of a death sentence by shooting for a deserter, private Joseph Perkins).

<sup>232</sup> Letter from Alexander Hamilton to Secretary of War (July 29, 1799) in 7 THE WORKS OF ALEXANDER HAMILTON 100 (Henry Cabot Lodge ed., G. P. Putnam’s Sons, 1971) (1904).

<sup>233</sup> *Id.* at 101.

<sup>234</sup> THE PAPERS OF ALEXANDER HAMILTON, *supra* note 231, at 286.

medicine under Dr. Benjamin Rush in Philadelphia.<sup>235</sup> In that letter, Hamilton laid out his view that the death penalty should be used sparingly, arguing that public opinion “is not wholly to be disregarded” and that there must be “some caution not to render our military system odious by giving it the appearance of being sanguinary.” “The idea of cruelty,” Hamilton wrote, “inspires disgust, and ultimately is not much more favourable to authority than the excess of lenity.”<sup>236</sup> “To disseminate the examples of executions so far as they shall be indispensable,” Hamilton emphasized, “will serve to render them more efficacious.”<sup>237</sup> Hamilton ended his letter by urging mercy for the soldier:

Under these impressions, if I hear nothing to the contrary from you by the return of the post, I shall issue an order to the following effect: “That, though the President has fully approved the sentence of Sergeant Hunt, and, from the heinous nature of his conduct, considers him a very fit subject for punishment; yet, being unwilling to multiply examples of severity, however just, beyond what experience may show to be indispensable, and hoping that the good faith and patriotism of the soldiery will spare him the painful necessity of frequently resorting to them, he has thought fit to authorize a remission of the punishment; directing, nevertheless, that Sergeant Hunt be degraded from his station.”<sup>238</sup>

President Adams ultimately went along with Hamilton’s proposal.<sup>239</sup>

¶52

Even Southern Founding Fathers, such as Charles Pinckney and Pierce Butler of South Carolina, opposed capital punishment for certain categories of offenders—at least when it came to punishing whites.<sup>240</sup> Pierce Butler, one of South Carolina’s four delegates at the 1787 Constitutional Convention, actually wrote a letter in 1791 to his quick-tempered friend, Col. James Gunn, in which he advised against capital punishment for a man alleged to have had an affair with the colonel’s wife. As Butler wrote: “The chastising of a bad Man, or still worse, putting him to death will not restore to You the domestic happiness You have lost.”<sup>241</sup> Another Southerner, William Few of Georgia, no doubt also felt ambivalent about capital punishment. Although Few, a signer of the U.S.

<sup>235</sup> Letter from Alexander Hamilton to Secretary of War (July 29, 1799) in *THE WORKS OF ALEXANDER HAMILTON*, *supra* note 232, at 100–01; BERNARD C. STEINER, *LIFE AND CORRESPONDENCE OF JAMES MCHENRY: SECRETARY OF WAR UNDER WASHINGTON AND ADAMS* 4 (2007).

<sup>236</sup> Letter from Alexander Hamilton to Secretary of War (July 29, 1799) in *THE WORKS OF ALEXANDER HAMILTON*, *supra* note 232, at 100–01.

<sup>237</sup> *Id.* Hamilton also opposed the execution of Charles Asgill, who was once slated to be executed in retaliation for the execution of another man, Joshua Huddy, a militia artillery captain. MASUR, *supra* note 1, at 56–58.

<sup>238</sup> Letter from Alexander Hamilton to Secretary of War (July 29, 1799) in *THE WORKS OF ALEXANDER HAMILTON*, *supra* note 232, at 101.

<sup>239</sup> STEINER, *supra* note 235, at 302.

<sup>240</sup> See MARTY D. MATTHEWS, *FORGOTTEN FOUNDER: THE LIFE AND TIMES OF CHARLES PINCKNEY*, at xvi, 53, 94, 121 (2004) (noting that Charles Pinckney, a signer of the Constitution, had sought to implement penal reform by restricting capital punishment to only the severest of offenses, that “the death penalty for slaves was not uncommon,” and that Pinckney called for it to be a capital offense to introduce “free person[s] of color or slave” from the West Indies).

<sup>241</sup> Letter from Pierce Butler to Colonel Gunn (Aug. 31, 1791) in *THE LETTERS OF PIERCE BUTLER 1790-1794: NATION BUILDING AND ENTERPRISE IN THE NEW AMERICAN REPUBLIC* 113 (Terry W. Lipscomb ed., 2008).

Constitution and later a superior court judge in Georgia, sentenced a murderer and a horse thief to death (sentences that were later set aside), his elder brother, James, had been executed on the orders of a Tory governor. In fact, Few's biographer notes that Few himself often called for sentences he handed down to be remitted.<sup>242</sup>

#### D. From Dr. Benjamin Rush to *Furman v. Georgia*

¶53

Dr. Benjamin Rush, a signer of the Declaration of Independence, was one of the first Americans to call for the death penalty's total abolition.<sup>243</sup> He spoke out against the death penalty for murderers at the end of a paper advocating private punishments that was read at Benjamin Franklin's house on March 9, 1787.<sup>244</sup> And he elaborated on his ideas in an essay titled "Considerations of the Injustice and Impolicy of Punishing Murder by Death," published in the July 1788 edition of *American Museum* magazine.<sup>245</sup> Dr. Rush distributed these essays and America's abolitionist campaign, focused initially in New York and Pennsylvania, took off, soon to be joined and invigorated by other leaders.<sup>246</sup>

<sup>242</sup> See MILDRED CROW SARGENT, 2 WILLIAM FEW, A FOUNDING FATHER: A BIOGRAPHICAL PERSPECTIVE OF EARLY AMERICAN HISTORY 893, 898, 1055 (2006) (noting a murderer Few sentenced to die on March 11, 1797, a horse thief Few sentenced to die on May 26, 1797, and citing Executive Minutes of Georgia, 1796–97, at 155, 164–65, 206–07 (Georgia Division of Archives and History)). James Few was killed after the Battle of Alamance, on May 16, 1771, in North Carolina, leaving behind twins that needed childrearing. *Id.* at 601; see also JIM WISE, DURHAM: A BULL CITY STORY 24 (2002) ("Colonial administration in the back country proved oppressive and corrupt. In 1771, the Fews joined many of their neighbors in the Regulator uprising, smashed by Governor William Tryon and the provincial militia at the Battle of Alamance. William Few's brother James was hanged, the family farm was destroyed, and his father fled to Georgia."); THE WAY WE LIVED IN NORTH CAROLINA 102 (Joe A. Mobley, ed.) (2003) ("One of the six hanged was James Few, brother of William Few. Though a Quaker, James proclaimed himself 'sent by heaven to release the world of oppression and to begin in Carolina.' The remaining Few family moved to Georgia, where William became a leader in the American Revolution.")

<sup>243</sup> Eugene G. Wanger, *Historical Reflections on Michigan's Abolition of the Death Penalty*, 13 T.M. COOLEY L. REV. 755, 757–58 (1996). Several signers of the Declaration of Independence opposed capital punishment either categorically or for certain crimes. See Jupiter, *supra* note 9, at 478. Dr. Rush, however, was certainly not the first American to advocate the total or partial abolition of capital punishment. See BANNER, *supra* note 1, at 100; *Furman*, 408 U.S. at 336 (Marshall, J., concurring). Indeed, in the 1600s, Quaker William Penn, Pennsylvania's founder and first governor, had compiled a criminal code providing that the death penalty would only be inflicted for treason and deliberate murder. But Queen Anne thought Penn's approach so at variance with English custom and law that she annulled it. MAESTRO, *supra* note 1, at 16–17, 138; Schwartz & Wishingrad, *supra* note 75, at 820–21; see also *Furman*, 408 U.S. at 335–36 (Marshall, J., concurring).

<sup>244</sup> Rush's March 9 essay, "An Enquiry into the Effects of Public Punishments upon Criminals, and upon Society," appeared in the *American Museum* magazine. See Benjamin Rush, *An Enquiry into the Effects of Public Punishments upon Criminals, and upon Society*, 2 AMERICAN MUSEUM 142, 142–43 (Mar. 9, 1787); Wanger, *supra* note 243, at 758. See also Douglas, *supra* note 112, at 159 ("Rush challenged the widely held view that the executioner was God's servant, labeling it sacrilegious for public officials to claim that they shared with God the right to punish by death."). Beccaria and Rush—though both death penalty foes—did part ways in one respect. Whereas Beccaria favored public punishments, BECCARIA (Thomas ed.), *supra* note 1, at 86, Rush favored private ones. BESSLER, DEATH IN THE DARK, *supra* note 31, at 40. Rush asked rhetorically, "How often do we find pockets picked under a gallows, and highway robberies committed within sight of the gibbet?" *Id.*

<sup>245</sup> BANNER, *supra* note 1, at 332 n.32; Schwartz & Wishingrad, *supra* note 75, at 823. This essay, along with Rush's first essay, was reprinted by Rush, with revisions, in pamphlet form before his death in 1813. The 1806 text of both essays can be found at BENJAMIN RUSH, ESSAYS LITERARY, MORAL AND PHILOSOPHICAL 79–105 (Michael Meranze ed. 1988).

<sup>246</sup> Wanger, *supra* note 243, at 757–58. Even before the publication of Dr. Rush's essays, Pennsylvania had witnessed some reform. See BANNER, *supra* note 1, at 97 ("Pennsylvania's 1786 penal reform, the first of many that would follow in the United States over the course of the next century, abolished capital

Due to Dr. Rush's advocacy, in 1794, the year of Beccaria's death, Pennsylvania took the novel step of dividing murder into degrees and restricted capital punishment to first-degree murder.<sup>247</sup>

¶54 In the 1790s and early 1800s, significant efforts were made in many locales, including Pennsylvania, New York and Louisiana, to curtail or end capital punishment altogether.<sup>248</sup> In fact, America's abolition movement greatly intensified in the 1830s, with considerable anti-death penalty agitation taking place in many parts of the country.<sup>249</sup> By the 1840s, anti-gallows societies had been formed in Massachusetts and New York,<sup>250</sup> though success would first be obtained far away, in the Upper Midwest. In 1846, Michigan became the first American state—indeed, the first English-speaking jurisdiction—to abolish capital punishment for murder.<sup>251</sup> In the 1850s two other states, Rhode Island and Wisconsin, followed suit, with societies for the abolition of capital punishment steadily growing in number nationwide.<sup>252</sup>

¶55 The anti-death penalty crusade, however, soon came to an abrupt halt. The onset of the Civil War delayed the progress of America's abolition movement,<sup>253</sup> with abolition

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punishment for robbery, burglary, sodomy, and buggery.”); *see also id.* at 98 (“Between 1794 and 1798 five states abolished the death penalty for all crimes other than murder, and three of the five even abolished it for certain kinds of murder. The first was Pennsylvania, which in 1794 provided prison sentences in place of death for treason, manslaughter, rape, arson, and counterfeiting. Murder remained the sole capital crime, and even murder, for the first time in any jurisdiction with a legal system based on that of England, was divided into degrees. . . . Two years later Virginia enacted a similar statute.”).

<sup>247</sup> Binder, *supra* note 150, at 119. Dr. Rush never credited Voltaire with influencing his views on capital punishment. *See* Kastenbergh, *supra* note 51, at 69. However, Dr. Rush specifically made reference to Beccaria and his thinking was clearly influenced by European ideas. *See, e.g., id.* at 68–69.

<sup>248</sup> In 1790, Pennsylvania—with its heavy Quaker influence—abolished the death penalty for robbery, burglary, and sodomy. FRIEDMAN, *supra* note 61, at 73. Also, New York governors unsuccessfully battled New York's legislature over the issue, and Edward Livingston—an American lawyer, who later became Secretary of State and Andrew Jackson's Minister to France—proposed the total abolition of the death penalty in a draft penal code for the State of Louisiana. *Furman*, 408 U.S. at 337 (Marshall, J., concurring); *see also* BANNER, *supra* note 1, at 138 (noting that Edward Livingston of Louisiana pressed for the abolition of capital punishment in the 1820s and 1830s).

Beccaria's most important disciple in New York was Thomas Eddy. *See* EDWIN G. BURROWS & MIKE WALLACE, *GOHAM: A HISTORY OF NEW YORK CITY TO 1898*, 366 (1999); *see also* *United States v. Blake*, 89 F. Supp.2d 328, 342–43 (E.D.N.Y. 2000) (“At the end of the eighteenth century, New York had an extremely long list of capital crimes including housebreaking and malicious mischief; lesser criminals were subject to corporal punishment or—if granted by a magistrate—confinement at hard labor.” Eddy proposed changing those laws in the mid-1790s and the reform efforts led to the 1796 abolition of corporal punishment and “the reduction of capital offenses to treason, murder, and theft from church.”).

<sup>249</sup> *Furman*, 408 U.S. at 337–38 (Marshall, J., concurring); *see also* Beth A. Berkowitz, *Negotiating Violence and the Word in Rabbinic Law*, 17 *YALE J.L. & HUMAN.* 125, 127 (2005) (“Criticism of the death penalty in America can be traced back to the Founding Fathers, and in the 1830s and 1840s penal reform organizations were created. The Bible became the field on which the debates were fought, with each side using it as justification for their view.”).

<sup>250</sup> BESSLER, *DEATH IN THE DARK*, *supra* note 31, at 44. Charles Spear, a Massachusetts minister, published *Essays on the Punishment of Death*, an anti-death penalty book, and became a leading nineteenth-century abolitionist. Douglas, *supra* note 112, at 160.

<sup>251</sup> *See* Wanger, *supra* note 243, at 765. Michigan's law, which provided that first-degree murder “shall be punished by solitary confinement at hard labor in the state prison for life,” actually took effect on March 1, 1847. *Id.* at 765 n.59. The imposition of lifetime solitary confinement was later abandoned. *See* Harold M. Helfman, *A Forgotten Aftermath to Michigan's Abolition of Capital Punishment*, 40 *MICH. HIST. MAG.* 203, 203–14 (1956) (providing an overview of the history of the death penalty in Michigan).

<sup>252</sup> BESSLER, *DEATH IN THE DARK*, *supra* note 31, at 44; *Furman*, 408 U.S. at 338 (Marshall, J., concurring).

<sup>253</sup> BESSLER, *DEATH IN THE DARK*, *supra* note 31, at 45; Kirchmeier, *supra* note 222, at 8 (“During the war,



efforts, led by Wisconsin state legislator Marvin Bovee, not resuming until after the war.<sup>254</sup> Bovee even delayed the publication of his anti-death penalty manifesto until 1869,<sup>255</sup> saying that to have presented such a work during the Civil War “would have been ‘ill-timed,’ to say the least.”<sup>256</sup>

¶56 It took some time for the abolitionist movement to regain its footing, but once it did, things moved rapidly. In the Progressive Era, ten states abolished the death penalty, though widespread societal fears quickly overcame that momentum, with all but two of those states soon reinstating capital punishment.<sup>257</sup> America’s entry into World War I and the country’s hard economic times, culminating in the Great Depression, dealt another blow to the movement, making criminal law reform excruciatingly difficult. The country’s focus on the war and people’s struggle to find work and support their families ultimately deflated the abolitionist cause, at least for a time.<sup>258</sup>

¶57 Although the privatization of executions reduced public consciousness of them, the end of World War II saw a rebirth of the anti-death penalty movement.<sup>259</sup> From 1958 to 1965, four states—Delaware, Oregon, Iowa and West Virginia—abandoned capital punishment, executions became less frequent, and it looked to many in the media and in the courts like the beginning of the end for America’s death penalty.<sup>260</sup> Oregon’s abolition had come through a public referendum and public opinion was turning against capital punishment.<sup>261</sup>

¶58 Other developments in the turbulent 1960s also pointed to the death penalty’s demise. The first edition of Hugo Adam Bedau’s influential book, *The Death Penalty in*

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any tragic aspects of the execution of criminals paled in comparison to the deaths of the heroes in the fields.”). Wars have frequently slowed anti-death penalty agitation. *Id.* at 102 (pointing to prior wars that have halted moratorium movements).

<sup>254</sup> See, e.g., PHILIP ENGLISH MACKEY, *VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT 1787-1975* (1976); see also Louis Filler, *Movements to Abolish the Death Penalty in the United States*, *ANNALS AM. ACAD. POL. & SOC. SCI.* (Nov. 1952).

<sup>255</sup> MARVIN H. BOVEE, *CHRIST AND THE GALLOWES; OR, REASONS FOR THE ABOLITION OF CAPITAL PUNISHMENT* (1869); BESSLER, *DEATH IN THE DARK*, *supra* note 31, at 46.

<sup>256</sup> BESSLER, *DEATH IN THE DARK*, *supra* note 31, at 46.

<sup>257</sup> Kirchmeier, *supra* note 222, at 10; see also JOHN F. GALLIHER, ET AL., *AMERICA WITHOUT THE DEATH PENALTY: STATES LEADING THE WAY* (Northeastern, 2002) (examining why twelve states and the District of Columbia do not impose the death penalty); John Galliher, Gregory Ray & Brent Cook, *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 *J. OF CRIM. L. & CRIMINOLOGY* 538 (1992) (cataloging the abolishment and reinstatement of the death penalty in American states).

<sup>258</sup> As one well-respected scholar points out: “In time of war, use of the death penalty generally becomes more frequent and the safeguards surrounding its use less stringent.” SCHABAS, *supra* note 3, at 211. “[I]t is in time of war when the greatest abuse of the death penalty occurs. Criteria of expediency and State terror stampede panicked governments towards inhumane excesses that would be unthinkable in time of peace.” *Id.* at 369.

<sup>259</sup> For example, Albert Camus, a death penalty foe, published his essay “Réflexions sur la guillotine” in the 1950s. OLIVER TODD, *ALBERT CAMUS: A LIFE* 359, 364 (Benjamin Ivry trans., 1997). In that time frame, Arthur Koestler—another writer—also published an influential anti-death penalty title. See ARTHUR KOESTLER, *REFLECTIONS ON HANGING* (1957).

<sup>260</sup> Kirchmeier, *supra* note 222, at 11–12. See Corinna Barrett Lain, *Furman Fundamentals*, 82 *WASH. L. REV.* 1, 19 (2007) (footnotes omitted) (“In the 1930s, the average number of executions per year was 167; in the 1940s, the average was 128. By the 1950s, that figure had dropped to 72. In 1962, there were only 47 executions, and the numbers plummeted from there—1963 had 21 executions, 1964 had 15, 1965 had 7, 1966 had one, 1967 had two, and from 1968 until the death penalty was reinstated in 1976, there were none.”).

<sup>261</sup> Kirchmeier, *supra* note 222, at 11–12.

*America*, hit shelves in 1964,<sup>262</sup> and in 1966, more people opposed the death penalty than favored it.<sup>263</sup> In 1968—the same year that United States Attorney General Ramsey Clark asked Congress to abolish the federal death penalty<sup>264</sup>—the Supreme Court itself observed that death penalty advocates were a “distinct and dwindling minority.”<sup>265</sup> The number of executions fell off still more, then came to a complete standstill as the NAACP,<sup>266</sup> a handful of lawyers, and the crusading law professor Anthony Amsterdam led a litigation effort that culminated with the Supreme Court’s landmark decision in *Furman v. Georgia*.<sup>267</sup>

#### IV. THE POST-*FURMAN* PERIOD

##### A. *The Supreme Court’s Ruling in Furman v. Georgia*

¶59

Modern death penalty jurisprudence traces its origins to *Furman*, the case that declared death penalty laws nationwide unconstitutional as applied.<sup>268</sup> At stake in *Furman* was the fate of three black defendants: a convicted murderer and two men sentenced to death for raping white women.<sup>269</sup> By a five-to-four vote, the Supreme Court set aside all three death sentences, though the rationales for the Court’s judgment varied considerably, with all nine Justices issuing their own individual opinions.<sup>270</sup> In a terse, one-paragraph *per curiam* ruling, the majority held simply that “the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”<sup>271</sup> After reversing the

<sup>262</sup> THE DEATH PENALTY IN AMERICA (Hugo Adam Bedau, ed., 2d. ed. 1967).

<sup>263</sup> Kirchmeier, *supra* note 222, at 12.

<sup>264</sup> *Id.*

<sup>265</sup> Witherspoon v. Illinois, 391 U.S. 510, 520 (1968).

<sup>266</sup> The NAACP played an important role in *Furman*, just as it had in challenging lynchings prior to that time. *Graham v. Collins*, 506 U.S. 461, 481 (1993) (Thomas, J., concurring) (“The unquestionable importance of race in *Furman* is reflected in the fact that three of the original four petitioners in the *Furman* cases were represented by the NAACP Legal Defense and Educational Fund, Inc. This representation was part of a concerted ‘national litigative campaign against the constitutionality of the death penalty’ waged by a small number of ambitious lawyers and academics on the Fund’s behalf. Although their efforts began rather modestly, assisting indigent black defendants in isolated criminal cases—usually rape cases—where racial discrimination was suspected, the lawyers at the Fund ultimately devised and implemented (not without some prompting from this Court) an all-out strategy of litigation against the death penalty.”) (citing Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1745 (1987)); see generally MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973); Eric L. Muller, *The Legal Defense Fund’s Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE L. & POL’Y REV. 158 (1985)).

<sup>267</sup> 408 U.S. 238 (1972); see also MELTSNER, *supra* note 266.

<sup>268</sup> For a recent summary of the Supreme Court’s death penalty jurisprudence, see James S. Liebman, *Slow Dancing With Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 COLUM. L. REV. 1 (2007).

<sup>269</sup> RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 148 (3d ed. 2006).

<sup>270</sup> *Furman*, 408 U.S. at 240.

<sup>271</sup> *Id.* at 239. Whether an action is “unusual”—one of the terms used in the Eighth Amendment—depends upon “the frequency of its occurrence or the magnitude of its acceptance.” *Thompson v. Oklahoma*, 487 U.S. 815, 822, n.7 (1988) (plurality opinion); compare *Furman*, 408 U.S. at 377 (Burger, C.J., dissenting) (“There was no discussion of the interrelationship of the terms ‘cruel’ and ‘unusual,’ and there is nothing in the debates supporting the inference that the Founding Fathers would have been receptive to torturous or excessively cruel punishments even if usual in character or authorized by law.”) with *Trop v. Dulles*, 356 U.S. 86, 100 n.32 (1958) (plurality opinion) (“Whether the word ‘unusual’ has any qualitative meaning

judgments and cursorily remanding the cases, the Court punctuated its decision with every winning lawyer's favorite words: "So ordered." But the concurring and dissenting opinions, full of back-and-forth sparring, took up more than 200 pages, a record length.<sup>272</sup> *Furman* effectively set aside every U.S. death sentence, more than 500 in all, thus clearing out America's death row.<sup>273</sup>

¶60 The Justices' opinions in *Furman* reflected Americans' own diverse and conflicted views on capital punishment. Justice William O. Douglas said death penalty statutes were "pregnant with discrimination" and "unconstitutional in their operation."<sup>274</sup> It violates the Eighth Amendment, he wrote, to apply the death penalty "selectively to minorities."<sup>275</sup> Justice Brennan, in his opinion, concluded that "the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments."<sup>276</sup> "A punishment is 'cruel and unusual,'" Brennan wrote, "if it does not comport with human dignity."<sup>277</sup> Calling the "calculated killing of a human being" by the State "uniquely degrading to human dignity," he said the death penalty was rare, unnecessary, and "smacks of little more than a lottery system."<sup>278</sup> "[I]t is certainly doubtful," Brennan

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different from 'cruel' is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. . . . If the word 'unusual' is to have any meaning apart from the word 'cruel,' however, the meaning should be an ordinary one, signifying something different from that which is generally done."). The proper interpretation of "unusual," at least from a constitutional perspective, has been highly contentious. Compare John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008) (arguing that the word "unusual" means contrary to "long usage" and that the word "unusual" was included in the Eighth Amendment to direct courts to give scrutiny to new or innovative punishments that deviated from long-established punishments) and Joshua L. Shapiro, *And Unusual: Examining the Forgotten Prong of the Eighth Amendment*, 38 U. MEM. L. REV. 465, 471-72 (2008) (arguing that "the appropriate benchmark for determining whether a punishment is unusual is when three-fourths of the states forbid its imposition") with Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 486 (2005) ("An 'unusual' punishment is one that is out of the ordinary, one that is not regularly employed."); *id.* at 503 (arguing that "the available evidence indicates that the Founders understood" the terms "cruel" and "unusual" to "capture the same meaning," and that "[t]he history of the English Bill of Rights reinforces the conclusion that the phrases 'cruel and unusual' and 'cruel or unusual' were understood to capture the same meaning").

<sup>272</sup> Nicci Lovre-Laughlin, *Lethal Decisions: Examining the Role of Prosecutorial Discretion in Capital Cases in South Dakota and the Federal Justice System*, 50 S.D. L. REV. 550, 555 n.44 (2005).

<sup>273</sup> BESSLER, DEATH IN THE DARK, *supra* note 31, at 131. Shortly before the *Furman* decision, the California Supreme Court held that capital punishment violated that state's constitution. *People v. Anderson*, 100 Cal. Rptr. 152 (1972). That California decision had already reduced America's death row population by more than a hundred people. *Furman*, 408 U.S. at 314 n.1 (Marshall, J., concurring).

<sup>274</sup> *Furman*, 408 U.S. at 256-57 (Douglas, J., concurring). Racial discrimination in the administration of capital punishment dates back many centuries. Slave codes enacted in the 1600s, for example, punished black offenders more harshly than white offenders and made crimes committed by slaves death-eligible—something not always true for whites. CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY 2 (Bryan Vila & Cynthia Morris, eds., 1997).

<sup>275</sup> *Furman*, 408 U.S. at 245 (Douglas, J. concurring). Douglas pointed out that all three men were black and went on to describe each man's background. Lucious Jackson, Jr., 21, was said to have "escaped from a work gang" after being convicted for auto theft; William Furman, 26, only "finished the sixth grade" and had been shown to need psychiatric care; and Elmer Branch had "well below the average IQ of Texas prison inmates," the equivalent of five and half years of grade school, and was "in the lowest fourth percentile of his class." *Id.* at 252-53.

<sup>276</sup> *Furman*, 408 U.S. at 270 (Brennan, J., concurring). Brennan noted that one of the historic concerns behind the clause was "a safeguard against arbitrary punishments." *Id.* at 274.

<sup>277</sup> *Id.* at 270.

<sup>278</sup> *Id.* at 290-91, 304, 293. "When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year," Brennan wrote, "the inference is strong that the punishment is not being regularly and fairly applied." *Id.* at 293.

concluded, “that the infliction of death by the State does in fact strengthen the community’s moral code; if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for human life and brutalize our values.”<sup>279</sup>

¶161 Justice Potter Stewart called capital punishment “unique in its total irrevocability” and felt death sentences were cruel and unusual “in the same way that being struck by lightning is cruel and unusual.”<sup>280</sup> “For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these,” Justice Stewart wrote, “the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”<sup>281</sup> “[I]f any basis can be discerned for the selection of these few to be sentenced to die,” Stewart noted, “it is the constitutionally impermissible basis of race.”<sup>282</sup> “I simply conclude,” Stewart wrote, “that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”<sup>283</sup>

¶162 For Justice Byron White, death sentences were so infrequently imposed that they became “pointless and needless,” with White concluding that “the threat of execution is too attenuated to be of substantial service to criminal justice.”<sup>284</sup> For Justice Thurgood Marshall, the question was “not whether we condone rape or murder, for surely we do not; it is whether capital punishment is ‘a punishment no longer consistent with our own self-respect’ and, therefore, violative of the Eighth Amendment.”<sup>285</sup> “The criminal acts with which we are confronted are ugly, vicious, reprehensible acts,” Marshall wrote, adding that “[t]heir sheer brutality cannot and should not be minimized.”<sup>286</sup> But to Marshall, “[t]he ‘cruel and unusual’ language limits the avenues through which vengeance can be channeled.”<sup>287</sup> “Were this not so,” he wrote, “the language would be empty and a return to the rack and other tortures would be possible in a given case.”<sup>288</sup> Finding death sentences to be imposed in a discriminatory manner, mostly upon “the poor” and “the ignorant,” Marshall found evidence that innocent people had been executed<sup>289</sup> and concluded that “the death penalty is an excessive and unnecessary punishment.”<sup>290</sup>

¶163 Justice Marshall—who, along with Justice Brennan, relentlessly contended that the death penalty is unconstitutional *per se*<sup>291</sup>—set forth an extended discussion of his views on the Cruel and Unusual Punishments Clause. “[T]he Eighth Amendment is our

<sup>279</sup> *Id.* at 303.

<sup>280</sup> *Furman*, 408 U.S. at 306, 309 (Stewart, J., concurring).

<sup>281</sup> *Id.* at 309–10.

<sup>282</sup> *Id.* at 310.

<sup>283</sup> *Id.*

<sup>284</sup> *Furman*, 408 U.S. at 312–13 (White, J., concurring). White found that “the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.” *Id.* at 313.

<sup>285</sup> *Id.* at 315 (Marshall, J., concurring).

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 345.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 365–66.

<sup>290</sup> *Id.* at 358–59.

<sup>291</sup> See MICHAEL MELLO, *AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL* (1996); Bigel, *supra* note 144, at 13; Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment*, 22 FLA. ST. U. L. REV. 591 (1995).

insulation from our baser selves,” Justice Marshall wrote,<sup>292</sup> adding that “whether or not a punishment is cruel and unusual depends, not on whether its mere mention ‘shocks the conscience and sense of justice of the people,’ but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust and unacceptable.”<sup>293</sup> “Assuming knowledge of all the facts presently available regarding capital punishment,” Marshall wrote, “the average citizen would, in my opinion, find it shocking to his conscience and sense of justice.”<sup>294</sup> “There is no rational basis for concluding that capital punishment is not excessive,” Marshall held.<sup>295</sup> “The point has now been reached,” he opined, “at which deference to the legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the Constitution.”<sup>296</sup>

¶64 Justice Marshall opined that “a penalty that was permissible at one time in our Nation’s history is not necessarily permissible today.”<sup>297</sup> He also wrote that capital punishment “violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.”<sup>298</sup> For Marshall, public opinion polls were not decisive. Instead, Marshall’s analysis focused on whether people, if fully informed, would find the death penalty unjust and unacceptable.<sup>299</sup> “So few people have been executed in the past decade,” Marshall explained, “that capital punishment is a subject only rarely brought to the attention of the average American.”<sup>300</sup> Accurate information about capital punishment, Marshall believed, would convince Americans that the death penalty was “unwise” and “immoral.”<sup>301</sup> Marshall concluded: “In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute.”<sup>302</sup>

¶65 On the flip side, the dissenters in *Furman* saw the majority’s position as an affront to legislative judgments. Chief Justice Warren Burger found “no authority suggesting that the Eighth Amendment was intended to purge the law of its retributive element,”<sup>303</sup> and concluded that “the constitutional prohibition against ‘cruel and unusual punishments’ cannot be construed to bar the imposition of the punishment of death.”<sup>304</sup> He lamented that only one year earlier, in *McGautha v. California*,<sup>305</sup> the Court had

<sup>292</sup> *Furman*, 408 U.S. at 345 (Marshall, J., concurring).

<sup>293</sup> *Id.* at 361. The notion that an informed electorate would find the death penalty unacceptable has been termed “the Marshall hypothesis.” See Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171 (1976).

<sup>294</sup> *Furman*, 408 U.S. at 369 (Marshall, J., concurring).

<sup>295</sup> *Id.* at 359.

<sup>296</sup> *Id.* The concept of judicial review of legislative enactments by the Supreme Court dates back more than 200 years. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

<sup>297</sup> *Furman*, 408 U.S. at 329 (Marshall, J., concurring).

<sup>298</sup> *Id.* at 360.

<sup>299</sup> *Id.* at 361–62.

<sup>300</sup> *Id.* at 361 & n.145.

<sup>301</sup> *Id.* at 363.

<sup>302</sup> *Id.* at 371.

<sup>303</sup> *Id.* at 394 (Burger, C.J., dissenting).

<sup>304</sup> *Id.* at 375.

<sup>305</sup> 402 U.S. 183 (1971). The Supreme Court held in *McGautha* that the Fourteenth Amendment was not violated by giving jurors the discretion to decide a criminal defendant’s fate. *Id.* at 196. The Eighth

upheld the prevailing sentencing scheme in capital cases, finding it “impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.”<sup>306</sup> Burger believed jurors were “the keystone in our system of criminal justice,”<sup>307</sup> and thought it “remarkable” that “it should now be suggested that we take the most sensitive and important of all decisions away from them.”<sup>308</sup> Burger, in fact, saw the rarity of death sentences as a good thing, not a constitutional infirmity. “The very infrequency of death penalties imposed by jurors attests their cautious and discriminating reservation of that penalty for the most extreme cases,” Burger wrote.<sup>309</sup>

¶166 The other dissenters echoed Burger’s sentiments. Justice Powell saw the majority ruling as “the very sort of judgment that the legislative branch is competent to make and for which the judiciary is ill-equipped,”<sup>310</sup> and Justice Rehnquist wrote that the task of judging “must surely be approached with the deepest humility and genuine deference to legislative judgment.”<sup>311</sup> Although Justice Harry Blackmun personally “rejoice[d]” at the Court’s result,<sup>312</sup> he, too, found himself unable to accept that result “as a matter of history, of law, or of constitutional pronouncement.”<sup>313</sup> While he agreed that the Cruel and Unusual Punishments Clause “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” he took umbrage with “the suddenness of the Court’s perception of progress in the human attitude since decisions of only a short while ago.”<sup>314</sup> “We should not,” he concluded, “allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these.”<sup>315</sup>

¶167 Despite his disagreement with the Supreme Court’s ruling, Justice Blackmun took time to give a lengthy explanation of his personal opposition to capital punishment. Foreshadowing his later rejection of capital punishment before his retirement, Blackmun forcefully wrote:

Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed,

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Amendment was not at issue in the case.

<sup>306</sup> *Id.* at 207. In the United States, the common-law rule imposing mandatory death sentences on all convicted murderers had been unpopular. To avoid the problem of jury nullification, state legislatures had granted juries—who, over time, gradually took over capital sentencing responsibilities from judges—virtually unlimited discretion. *Furman*, 408 U.S. at 245–47 (Douglas, J., concurring); *McGautha*, 402 U.S. at 199–200 (noting this trend in the law, which began in the 1830s). Today, of course, juries continue to play the predominant role in death penalty cases in deciding who lives and who dies. *See Ring v. Arizona*, 536 U.S. 584 (2002).

<sup>307</sup> *Furman*, 408 U.S. at 402 (Burger, C.J., dissenting).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* Although Chief Justice Burger disagreed with the majority’s ruling, he announced that he was “not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough reevaluation of the entire subject of capital punishment.” *Id.* at 403. “If legislatures come to doubt the efficacy of capital punishment,” he added, “they can abolish it, either completely or on a selective basis.” *Id.* at 404.

<sup>310</sup> *Furman*, 408 U.S. at 418 (Powell, J., dissenting).

<sup>311</sup> *Furman*, 408 U.S. at 468 (Rehnquist, J., dissenting).

<sup>312</sup> *Furman*, 408 U.S. at 414 (Blackmun, J., dissenting).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 410.

<sup>315</sup> *Id.* at 411.

abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of "reverence for life." Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and adopted in the several opinions filed by the Justices who vote to reverse these judgments.<sup>316</sup>

### B. *The Aftermath of Furman*

¶168 The *Furman* decision, though closely divided, was widely seen as the death knell for America's death penalty. When the first English-language biography of Cesare Beccaria was published in Philadelphia in 1973, the well-known University of Chicago criminologist, Norval Morris, wrote the foreword, referring to America's death penalty in the past tense. "Beccaria was, of course, one of the leading early opponents of capital punishment," Morris wrote, confidently proclaiming, "[t]he final vindication by the Supreme Court of his view of the social inutility of this punishment, and of its unconstitutionality, confirmed the quality of Beccaria's perceptive vision."<sup>317</sup> Even many of the Justices themselves privately predicted that America would never witness another execution.<sup>318</sup> But state legislatures around the country did not see it that way, with thirty-five States quickly reenacting death penalty laws—all in response to the *Furman* decision.<sup>319</sup> This would lead to yet another round of high-profile, high-stakes litigation before the nation's highest court.

¶169 As Americans prepared for Bicentennial picnics and celebrations, the Supreme Court reversed course on capital punishment in *Gregg v. Georgia*,<sup>320</sup> handed down on July 2, 1976. In that case, the Court defined a "cruel" punishment as one "so totally without penological justification that it results in the gratuitous infliction of suffering."<sup>321</sup> Though mandatory death penalty laws were struck down that same day in cases originating in Louisiana and North Carolina,<sup>322</sup> *Gregg* and two other simultaneously issued rulings, *Jurek v. Texas*<sup>323</sup> and *Proffitt v. Florida*,<sup>324</sup> upheld capital punishment statutes that guided, or channeled, sentencing discretion.<sup>325</sup> *Gregg* upheld the

<sup>316</sup> *Id.* at 405–06.

<sup>317</sup> Norval Morris, *Foreword* in MAESTRO, *supra* note 1, at vii–x.

<sup>318</sup> DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD: INSIDE DEATH ROW* 162 (1996).

<sup>319</sup> BESSLER, *DEATH IN THE DARK*, *supra* note 31, at 133.

<sup>320</sup> 428 U.S. 153 (1976).

<sup>321</sup> *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion); *see also* *Hudson v. McMillian*, 503 U.S. 1, 5 (1992) ("[T]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment.").

<sup>322</sup> *See* *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

<sup>323</sup> 428 U.S. 262 (1976).

<sup>324</sup> 428 U.S. 242 (1976).

<sup>325</sup> *See* Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 *FORDHAM URB. L.J.* 347, 374–75 (1999) ("[I]n a set of five capital cases in 1976, the Supreme Court struck down mandatory death penalty statutes in *Woodson* and *Roberts*, while it upheld 'guided discretion' statutory structures in *Gregg*, *Proffitt*, and *Jurek*." (citations omitted)). According to the

constitutionality of Georgia's new death penalty law, which required jurors to find at least one "aggravating circumstance" before imposing a death sentence.<sup>326</sup> The Court ruled that "the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance."<sup>327</sup> "No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines," the Court ruled, finding that "a large proportion of American society" continues to regard executions "as an appropriate and necessary criminal sanction."<sup>328</sup>

¶70

Apart from the recent Eighth Amendment challenge to lethal injection, *McCleskey v. Kemp*<sup>329</sup> was the last major systemic challenge to the death penalty to be heard by the Supreme Court. In that case, an African-American, Warren McCleskey, argued that Georgia's capital punishment scheme was administered in a racially discriminatory fashion. The Court, however, rejected reliance on reliable statistical data from the Baldus study showing that blacks who killed whites were sentenced to death "at nearly 22 times the rate of blacks who kill blacks, and more than 7 times the rate of whites who kill blacks."<sup>330</sup> The majority opinion held that, troubling statistics notwithstanding, McCleskey had to prove discriminatory motive in his case, blandly noting that "[a]t most, the Baldus study indicates a discrepancy that appears to correlate with race," and stating with bald resignation that racial disparities in sentencing "are an inevitable part of our criminal justice system."<sup>331</sup> Years later, Justice Lewis Powell—the author of the

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Supreme Court: "*Gregg* instructs that capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2661 (2008).

<sup>326</sup> *Gregg*, 428 U.S. at 164–65. One commentator has called the *Gregg* decision "an act of judicial reductionism reminiscent of the *Dred Scott* misjudgment of 1857, in that both cases involved a choice rejecting the higher in favor of the lower evaluation of human dignity available to the judges." Dr. James J. Megivern, *Our National Shame: The Death Penalty and the Disuse of Clemency*, 28 CAP. U. L. REV. 595, 595 (2000).

<sup>327</sup> *Gregg*, 428 U.S. at 195.

<sup>328</sup> *Id.* at 179, 206–07.

<sup>329</sup> 481 U.S. 279 (1987).

<sup>330</sup> *Id.* at 327 (Brennan, J., dissenting). The Baldus study showed that "after taking into account some 230 nonracial factors that might legitimately influence a sentence, the jury *more likely than not* would have spared McCleskey's life had his victim been black." *Id.* at 325. Multiple studies have shown that those who kill whites are much more frequently charged with capital crimes and sentenced to death than those who kill minorities. David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 202-03 (2003); Maxine Goodman, *A Death Penalty Wake-Up Call: Reducing the Risk of Racial Discrimination in Capital Punishment*, 12 BERKELEY J. CRIM. L. 29, 37–38 (2007); Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2106–07 (2004). This very real phenomenon, which demonstrates just how much racial bias still infuses the death penalty's administration, has been termed "race-of-the-victim discrimination." See David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1411 (2004).

<sup>331</sup> *McCleskey*, 481 U.S. at 312. The Court in *McCleskey* framed the issue this way: "Statistics at most may show only a likelihood that a particular factor entered into some decisions. There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials. The question 'is at what point that risk becomes constitutionally unacceptable.'" *Id.* at 308–09 (citation omitted) (quoting *Turner v. Murray*, 476 U.S. 28, 36 n.8 (1986)).



*McCleskey* opinion and the deciding vote in that sharply divided 5-4 decision—would actually express regret at his vote in the case.<sup>332</sup>

¶71 The *Gregg* and *McCleskey* cases, which dashed abolitionist hopes that death sentences would be outlawed once and for all, forced death penalty opponents to open new fronts. Capital litigation continued unabated in individual cases, as it does today, but abolitionists had no choice but to find new ways to press their cause. In fact, the abolition movement—and its companion campaign, seeking a moratorium on executions—has only intensified in the last two decades.<sup>333</sup> Not only has the abolition movement attracted new leadership, but it has also witnessed some important milestones since the late 1980s as death penalty foes have begun appealing directly to the American public.

¶72 Some specific events stand out, though any movement's success is always, in the end, a collective effort. Certainly much credit goes to Sister Helen Prejean for bringing new energy to the abolitionist fight. Sister Prejean's 1993 book, *Dead Man Walking*,<sup>334</sup> became an instant *New York Times* bestseller and was made into an Academy Award-winning motion picture; her many speeches and public appearances have inspired a new generation of abolition leaders.<sup>335</sup> Also, in 1994, Justice Harry Blackmun—still a sitting member of the Supreme Court—followed up, roundly condemning the death penalty in one of his judicial opinions. In his now famous dissent in *Callins v. Collins*,<sup>336</sup> Blackmun succinctly stated:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and

<sup>332</sup> Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 474 (1995) (citing JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994)). Justice Powell, shortly after retiring from the Court, spoke to the Criminal Justice Section of the American Bar Association and later reiterated his view that “the death penalty may be imposed lawfully under our Constitution.” However, in that speech, Powell expressed serious concerns relating to the way in which “the system malfunctions” and ended his speech by pondering if “Congress and the state legislatures should take a serious look at whether the retention of a punishment that is being enforced only haphazardly is in the public interest.” See Lewis F. Powell, Jr., *Capital Punishment*, 102 HARV. L. REV. 1035, 1045–46 (1989). In indicating that he regretted his vote in *McCleskey*, Powell expressed the view that the death penalty could not be fairly administered. Kirchmeier, *supra* note 222, at 28 & nn.164–65.

<sup>333</sup> See James S. Liebman, *The New Death Penalty Debate: What's DNA Got to Do with It?*, 33 COLUM. HUM. RTS. L. REV. 527, 527–28 (2002).

<sup>334</sup> HELEN PREJEAN, *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* (1993). Sister Helen Prejean's moving book and her regular media and public appearances no doubt jump-started the abolitionist cause, leading to Sister Prejean being nominated four times—in 1998, 1999, 2000 and 2001—for the Nobel Peace Prize.

<sup>335</sup> Kirchmeier, *supra* note 222, at 5, 22–24; see Edward McGlynn Gaffney, Jr., Review Essay, 16 J.L. & RELIGION 393, 394 (2001) (noting that *Dead Man Walking* sold 30,000 copies before the book was released and “ten times that number since”).

<sup>336</sup> 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.<sup>337</sup>

The American Bar Association, after studying the issue, stepped into the fray in 1997, calling for a moratorium on executions and setting off yet another round of questions and introspection about America's death penalty.<sup>338</sup>

¶73

Anti-death penalty efforts in the last ten years have been particularly notable. Bills to abolish the death penalty were considered in twelve states in 1999 alone;<sup>339</sup> in 2000, Illinois Governor George Ryan imposed a statewide moratorium on executions,<sup>340</sup> and that same year New Hampshire's legislature voted for abolition, though the state's governor later vetoed the bill.<sup>341</sup> As the twenty-first century began, at least 1000 grassroots organizations were pushing for a moratorium on executions,<sup>342</sup> and in 2007, the State of New Jersey—led by Governor Jon Corzine—abolished capital punishment entirely.<sup>343</sup> More recently, Governor Bill Richardson of New Mexico signed a bill

<sup>337</sup> *Id.* Justice Blackmun explained that “[e]xperience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing.” *Id.* at 1144 (citations omitted). Saying “[t]he path the Court has chosen lessens us all,” Blackmun concluded “that the decision whether a human being should live or die is so inherently subjectively—rife with all of life’s understandings, experiences, prejudices, and passions—that it inevitably defies the rationality and consistency required by the Constitution.” *Id.* at 1153, 1159.

<sup>338</sup> Kara Thompson, *The ABA’s Resolution Calling for a Moratorium on Executions: What Jurisdictions Can Do to Ensure that the Death Penalty Is Imposed Responsibly*, 40 ARIZ. L. REV. 1515, 1515 (1998). The ABA’s Death Penalty Moratorium Implementation Project, launched in September 2001, is led by its director, Sarah Turberville, and encourages other bar associations and state government leaders to press for moratoriums in their jurisdictions. See generally Death Penalty Moratorium Implementation Project, <http://www.abanet.org/moratorium/> (last visited Aug. 31, 2009). The ABA also has a Death Penalty Representation Project, created in 1986 and directed by Robin Maher, which recruits lawyers for unrepresented death row inmates. See generally Death Penalty Representation Project, <http://www.abanet.org/deathpenalty/> (last visited Aug. 31, 2009). Many death row inmates, after they exhaust their direct appeals, suddenly find themselves without counsel and without the financial means to hire one. See Chris Adams, *Condemned to Die Alone: Injustice on Death Row in Alabama*, 25 CHAMPION 12, 13 (Nov. 2001).

<sup>339</sup> James S. Liebman & Lawrence C. Marshall, *Life Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1654 (2006).

<sup>340</sup> Governor Ryan, a Republican, imposed the moratorium in Illinois after a spate of death row exonerations in that state. Since the death penalty’s reinstatement in Illinois, twelve executions had been carried out but a larger number of condemned inmates, thirteen, had been exonerated. *Id.* at 1655. Ryan later cleared Illinois’s death row, commuting more than 160 death sentences to life-without-parole terms and releasing four men—Madison Hobbey, Stanley Howard, Aaron Patterson, and LeRoy Orange—from death row altogether. Those men were released on grounds of innocence and for what Governor Ryan called “manifest injustice” due to police brutality and coerced confessions. Randall Coyne, *Dead Wrong in Oklahoma*, 42 TULSA L. REV. 209, 223 n.163 (2006); Hugo Adam Bedau, Michael L. Radelet & Constance E. Putnam, *Convicting the Innocent in Capital Cases: Criteria, Evidence, and Inference*, 52 DRAKE L. REV. 587, 593 (2004); Joshua Herman, *Death Denies Due Process: Evaluating Due Process Challenges to the Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777, 1784 (2004).

<sup>341</sup> Kirchmeier, *supra* note 222, at 3. The New Hampshire legislature was the first state legislature to vote to abolish the death penalty since the Supreme Court’s decision in *Gregg*. *Id.*

<sup>342</sup> *Id.* at 4.

<sup>343</sup> Death Penalty Information Center, Legislative Activity, <http://www.deathpenaltyinfo.org/article.php?did=2208> (last visited Aug. 31, 2009). Maryland’s Governor, Martin O’Malley, also recently called for the death penalty’s abolition. Death Penalty Information Center, State Action, <http://www.deathpenaltyinfo.org/article.php?did=2209> (last visited Aug. 31, 2009).

outlawing executions in that state.<sup>344</sup> Multiple Supreme Court Justices have added their own voices to the debate, questioning the death penalty's continued use.<sup>345</sup> Meanwhile, a spate of exonerations has laid bare the criminal justice system's human imperfections,<sup>346</sup> with DNA evidence proving beyond any doubt that innocent people have been sent to death row.<sup>347</sup>

¶74 Indeed, as death row exonerations have surpassed one hundred,<sup>348</sup> the number of death sentences handed out by American juries has fallen precipitously. From 1993 to 2000, more than 200 death sentences were handed out each year, with the number actually exceeding 300 in 1994, 1995, 1996, and 1998.<sup>349</sup> But the number of American death sentences fell to 167 in 2001, to 153 by 2003, and to 115 in 2006.<sup>350</sup> This decline reflects the American public's growing ambivalence toward the death penalty itself.

¶75 In a 2006 Gallup Poll, when offered a choice, forty-eight percent of survey respondents chose life-without-parole over death sentences; in contrast, only forty-seven percent of respondents chose the death penalty.<sup>351</sup> That marked the first time in twenty

<sup>344</sup> Human Rights Now, *New Mexico Abolishes the Death Penalty*, <http://blog.amnestyusa.org/deathpenalty/new-mexico-abolishes-death-penalty/> (last visited Aug. 31, 2009).

<sup>345</sup> Justice Ruth Bader Ginsburg expressed her support for a moratorium on executions in April 2001, saying that she has "yet to see a death penalty case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well-represented at trial." Ruth Bader Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United States*, 7 WASH. U. J.L. & POL'Y 1, 10 (2001). In July of that same year, Justice Sandra Day O'Connor—in a speech in Minnesota—said there are "serious questions" about whether the death penalty is administered fairly. O'Connor added that Minnesotans "must breathe a big sigh of relief every day" because the state no longer has capital punishment. Kirchmeier, *supra* note 222, at 30–31. Justice John Paul Stevens also has noted that the "recent development of reliable scientific evidentiary methods has made it possible to establish conclusively that a disturbing number of persons who had been sentenced to death were actually innocent." Craig M. Cooley, *Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists*, 30 OKLA. CITY U. L. REV. 23, 29 n.25 (2005). Federal judges in the lower courts also have begun to speak out against the death penalty. Kirchmeier, *supra* note 222, at 34.

<sup>346</sup> See Barry Scheck, *Innocence, Race, and the Death Penalty*, 50 HOW. L.J. 445 (2007); Bruce P. Smith, *The History of Wrongful Execution*, 56 HASTINGS L.J. 1185 (2005); Bedau et al., *supra* note 340. One study found that from 1989 to 2003 there were 205 exonerations of defendants convicted of murder. See Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil, *Exonerations in the United States, 1989 through 2003*, 95 J. OF CRIM. L. & CRIMINOLOGY 523, 528 (2005). The founding fathers were, of course, equally concerned with the problem of wrongful convictions. See 9 ALBERT HENRY SMYTH, *THE WRITINGS OF BENJAMIN FRANKLIN* 293 (1906) ("That it is better 100 guilty Persons should escape than that one innocent Person should suffer, is a Maxim that has been long and generally approved.").

<sup>347</sup> The Innocence Project reports that there have been 220 post-conviction DNA exonerations in the United States and that 17 of the 220 people exonerated served time on death row. Innocence Project, *Facts on Post-Conviction DNA Exonerations*, [www.innocenceproject.org/Content/351.php](http://www.innocenceproject.org/Content/351.php) (last visited Aug. 31, 2009). One national study, of death sentences imposed from 1973 to 1995, also found an extraordinarily high reversal rate in capital cases. Of the capital judgments that were reversed and retried, eighty-two percent of them resulted in a sentence less than death or no sentence whatsoever. Seven percent of the reversals led to "not guilty" determinations on retrial. JAMES S. LIEBMAN, JEFFREY FAGAN & VALERIE WEST, *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995* (2000), *reprinted in part in* James S. Liebman, et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1846–49, 1852 (2000).

<sup>348</sup> The Death Penalty Information Center lists 129 inmates who have been released from death row since 1973. Death Penalty Information Center, *Innocence: Lists of Those Freed from Death Row*, <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited Aug. 31, 2009).

<sup>349</sup> See DEATH PENALTY INFO. CTR., *FACTS ABOUT THE DEATH PENALTY* 3 (Jan. 30, 2009).

<sup>350</sup> *Id.*

<sup>351</sup> DEATH PENALTY INFO. CTR., *A CRISIS OF CONFIDENCE: AMERICANS' DOUBTS ABOUT THE DEATH*

years that the death penalty came in second place.<sup>352</sup> A 2007 poll also found that eighty-seven percent of Americans believe innocent people have been executed in recent years; that sixty percent of respondents either strengthened their opposition to the death penalty or reduced their support for it because of news of wrongful convictions; and that fifty-eight percent of respondents were supportive of imposing a moratorium on executions.<sup>353</sup>

## V. THE INFLUENCE OF INTERNATIONAL LAW

### A. *The Right to “Life” in International Human Rights Law*

¶176

Before World War II, international law failed to systematically address human rights issues and was silent on the death penalty.<sup>354</sup> Sovereign states treated their citizens as they pleased, with Nazi courts and dictators like Stalin routinely imposing death sentences.<sup>355</sup> Hitler and the Holocaust, however, changed all that, sparking worldwide calls for an end to such atrocities.<sup>356</sup> The United Nations Charter, requiring states to

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PENALTY 7 (2007). Every death penalty state now has a life-without-parole sentencing law in place. *Id.* at 7–8, 17. Texas, the last state to enact such a law, did so in 2005. *Id.* at 8.

<sup>352</sup> *Id.* at 7.

<sup>353</sup> *Id.* at 5, 10, 15. That same poll found thirty-nine percent of respondents—including disproportionate numbers of African Americans, Catholics and women—believed that they would be disqualified from serving on a jury in a death penalty case because of their moral beliefs. *Id.* at 2. Unfortunately, that poll result reflects a disturbing reality. While the Supreme Court has said that the death penalty should reflect the “conscience of the community,” *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968), it allows capital juries to be “death-qualified.” See *Lockhart v. McCree*, 476 U.S. 162, 165 (1986) (holding that the Constitution does not “prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial”); *Buchanan v. Kentucky*, 483 U.S. 402, 415 (1987) (“The Court’s reasoning in *McCree* requires rejection of petitioner’s claim that ‘death qualification’ violated his right to a jury selected from a representative cross section of the community. It was explained in *McCree* that the fair cross section requirement applies only to venires, not to petit juries.”); see also Deborah L. Mahoney, *Capital Defendants Permitted Reverse-Witherspoon “Life Qualifying” Questions on Voir Dire*, 32 WASHBURN L.J. 278, n.6 (1992) (“Every state that allows capital punishment permits juries to be ‘death qualified.’”).

As a result, scores of prospective jurors—including many women and minorities who find capital punishment morally repugnant or unnecessary—are excluded from sentencing juries. See Cochran, *supra* note 216, at 1444; Sheri Lynn Johnson, *Race and Recalcitrance: The Miller-El Remands*, 5 OHIO STATE J. CRIM. L. 131, 135–36 (2007) (describing the policy of the Dallas County District Attorney’s Office at the time of El-Miller’s trial of excluding blacks from juries and noting that the state in Miller-El’s case used peremptory challenges to exclude ninety-one percent of the eligible black jurors).

<sup>354</sup> A notable exception was international humanitarian law, or what is commonly known as “the law of war.” The 1907 Hague Regulations codified fifty-six articles on the laws and customs of land warfare, with Article 23 proscribing the random and arbitrary execution of prisoners of war. Abuses during World War I also led to the prohibition on reprisals against prisoners of war in Article 2 of the 1929 Geneva Convention on Prisoners of War. Burrus M. Carnahan, *Reason, Retaliation, and Rhetoric: Jefferson and the Quest for Humanity in War*, 139 MIL. L. REV. 83, 129–30 nn.178–79 (1993) (citing 1907 Hague Regulations, annexed to the Hague Convention IV, on the Laws and Customs of War on Land, Oct. 18, 2007, 36 Stat. 2277, T.S. 539 & Geneva Convention on Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. 847); SCHABAS, *supra* note 3, at 10, 366 (citing the 1907 Hague Regulations and the 1929 Geneva Convention).

<sup>355</sup> SCHABAS, *supra* note 3, at 238; Robert A. Kushen, *The Death Penalty and the Crisis of Criminal Justice in Russia*, 19 BROOK. J. INT’L L. 523, 530–31 (1993). One estimate puts the number of executions during Stalin’s reign at one million. *Id.* at 531 n.24; compare Kiriakova, *supra* note 33, at 488 (“From 1934 until Stalin’s death in 1953 the death penalty was applied frequently in an extrajudicial manner. By some accounts, one million executions occurred in 1937–38.”).

<sup>356</sup> SCHABAS, *supra* note 3, at 1. In *Mein Kampf*, Adolf Hitler, an avid death penalty supporter, wrote nonchalantly of the execution of 10,000 people. ADOLF HITLER, *MEIN KAMPF* 545 (1943). Nazi war

promote human rights, was adopted in 1945,<sup>357</sup> and in 1948 the post-war Universal Declaration of Human Rights proudly proclaimed, “[e]veryone has the right to life, liberty and security of the person.”<sup>358</sup> That landmark declaration was shepherded through the United Nations by Eleanor Roosevelt,<sup>359</sup> who successfully moved to delete any reference to the death penalty in that document because of the “movement underway in some states to wipe out the death penalty completely.”<sup>360</sup>

¶77 Other instruments of international law have also sought to end the culture of State impunity and to safeguard the right to life, thus shaping world opinion. The Geneva Conventions, for example, provide procedural protections for prisoners of war and civilians relative to the imposition of the death penalty.<sup>361</sup> One article states that “[t]o the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence relating to the armed conflict” and that “[t]he death penalty for such offences shall not be executed on such women.”<sup>362</sup> Likewise, another article states: “The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.”<sup>363</sup>

¶78 The United States itself has recognized the “right to life” in the context of international law. In 1966, the United Nations General Assembly adopted a binding treaty, the International Covenant on Civil and Political Rights (ICCPR), which specifically instructs that “[e]very human being has the inherent right to life” and

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criminals, of course, would ultimately be put on trial at Nuremberg, with Nazi officials accused, among other things, of cavalierly resorting to the use of death penalty. The Nuremberg Tribunal’s charter authorized capital punishment, and several Nazi leaders were in fact executed as a result of that tribunal’s judgments. SCHABAS, *supra* note 3, at 6, 37, 236–39.

<sup>357</sup> U.N. Charter art. 55(c).

<sup>358</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at art. 3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

<sup>359</sup> Eleanor Roosevelt was elected chair of the United Nations Commission on Human Rights, and she also headed the United States delegation to the Third Committee of the General Assembly, which debated the final draft of the Universal Declaration before its final adoption in 1948. See William A. Schabas, *International Law, the United States of America and Capital Punishment*, 31 SUFFOLK TRANSNAT’L L. REV. 377, 381 (2008).

<sup>360</sup> U.N. ESCOR, 1st Sess., 2d mtg. at 10, U.N. Doc. E/CN.4/AC.1/SR.2 (1947); SCHABAS, *supra* note 3, at 383–84 (“In the Drafting Committee, Eleanor Roosevelt commented that there was a movement underway in some states to abolish the death penalty. She suggested that it might be better not to use the term ‘death penalty’ in the Universal Declaration.”); see also Kevin Reed, Richard Wilson & Joan Fitzpatrick, *Panel Discussion: Race, Criminal Justice and the Death Penalty*, 15 WHITTIER L. REV. 395, 415 (1994). Notably, Roosevelt also played a role in condemning lynchings, calling them unlawful and unacceptable and working behind the scenes—albeit unsuccessfully—for a federal anti-lynching bill. See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 150, 202 (2001); Martha L. Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 725 (1991).

<sup>361</sup> SCHABAS, *supra* note 3, at 414–15 (citing Articles 3, 87, 100, 101 and 107 of the Geneva Convention Relative to the Treatment of Prisoners of War and Articles 3, 68, 74 and 75 of the Geneva Convention Relative to the Protection of Civilians, both of which entered into force in 1950).

<sup>362</sup> *Id.* at 420 (citing Article 76 to Protocol Additional I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts).

<sup>363</sup> *Id.* (citing Article 77 to Protocol Additional I). In addition, Protocol Additional II to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts provides: “The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.” *Id.* at 421.

provides that “[n]o one shall be arbitrarily deprived of his life.”<sup>364</sup> The United States ratified that treaty,<sup>365</sup> which also prohibits “torture” and “cruel, inhuman or degrading treatment or punishment”<sup>366</sup> and bars the execution of pregnant women and those committing crimes below the age of eighteen.<sup>367</sup>

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The Optional Protocol to the ICCPR, entered into force in 1976,<sup>368</sup> authorized individual communications or petitions to the Human Rights Committee for treaty violations,<sup>369</sup> and the Second Optional Protocol, adopted at the United Nations in 1989, is specifically aimed at the abolition of the death penalty.<sup>370</sup> The United Nations General Assembly has also adopted resolutions pertaining to the death penalty’s abolition,<sup>371</sup> with

<sup>364</sup> International Covenant on Civil and Political Rights (“ICCPR”), art. 6(1), Mar. 23, 1976, 993 U.N.T.S. 171. That treaty further states: “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide.” *Id.*, at art. 6(2).

<sup>365</sup> The United States ratified the ICCPR in 1992, though it made reservations to Articles 6 and 7 of the treaty. SCHABAS, *supra* note 3, at 79–80.

<sup>366</sup> ICCPR, art. 7. The United States reservation to Article 7 indicated that the United States considered itself bound by Article 7 only to the extent that “cruel, inhuman or degrading treatment or punishment” means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth or Fourteenth Amendments to the U.S. Constitution. SCHABAS, *supra* note 3, at 382. The United States also entered a global reservation to the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, a treaty the United States ratified in 1994. *Id.* at 196, 403. In that reservation, the United States government stated: “The United States understands that international law does not prohibit the death penalty, and does not consider this convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.” *Id.* at 403.

<sup>367</sup> ICCPR, art. 6(5). The U.S. reservation to the treaty stated: “The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.” SCHABAS, *supra* note 3, at 382.

<sup>368</sup> The United States has not ratified this Optional Protocol. Office of the High Commissioner of Human Rights, Status of the Ratifications of the Principal Human Rights Treaties, <http://www.unhchr.ch/pdf/report.pdf> (last visited Aug. 31, 2009).

<sup>369</sup> More than one hundred communications have been presented to the Human Rights Committee thus far by persons facing or threatened by the death penalty. SCHABAS, *supra* note 3, at 389.

<sup>370</sup> *Id.* at 23, 180. The Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, entered into force on July 11, 1991, states in Article 1(1): “No one within the jurisdiction of a State Party to the present Optional Protocol shall be executed.” *Id.* at 397. Article 2(1) of the Second Optional Protocol further provides: “No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.” *Id.* The United States has not ratified the Second Optional Protocol either. Office of the High Commissioner of Human Rights, Status of the Ratifications of the Principal Human Rights Treaties, <http://www.unhchr.ch/pdf/report.pdf> (last visited Aug. 31, 2009).

<sup>371</sup> In 1971, the U.N. General Assembly adopted a resolution asserting that “the main objective to be pursued is that of progressively restricting the number of offenses for which capital punishment may be imposed,” with the aim of “abolishing this punishment in all countries.” G.A. Res. 2857 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, at 94, U.N. Doc. A/8429 (1971). United Nations Secretary-General Kofi Annan also expressed his support for a moratorium on executions in 2000 when a petition signed by 3.2 million people was presented to him. Kirchmeier, *supra* note 222, at 69. “The forfeiture of life,” he declared, “is too absolute, too irreversible, for one human being to inflict it on another, even when backed by legal process. And I believe that future generations, throughout the world, will come to agree.” Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1131 (2002).

one U.N. body, the Economic and Social Council, adopting specific safeguards pertaining to the death penalty's imposition and use.<sup>372</sup> Indeed, in December 2007, the General Assembly passed a resolution calling upon member states that retain the death penalty “[t]o establish a moratorium on executions with a view to abolishing the death penalty.”<sup>373</sup>

### B. *International and Regional Human Rights Treaties*

¶80 The U.N. Convention on the Rights of the Child (CRC), entered into force in 1990<sup>374</sup> and ratified by every country save the United States and Somalia,<sup>375</sup> expressly forbade capital punishment for juvenile offenders. According to Article 37 of the CRC: “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment shall be imposed for offences committed by persons below 18 years of age.”<sup>376</sup> This treaty, barring the execution of children and highlighting how out of step the United States has become in the world's eyes, no doubt played a role in the Supreme Court's decision to bar the practice.<sup>377</sup>

¶81 International tribunals formed to prosecute genocide, crimes against humanity, and war crimes also no longer allow death sentences. Article 77 of the Rome Statute of the International Criminal Court, which came into force in 2002, made “life imprisonment” the maximum penalty.<sup>378</sup> Other ad hoc tribunals of international justice, including the ones for Rwanda and the former Yugoslavia, have not allowed the imposition of the

<sup>372</sup> The “Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,” drafted by the U.N. Committee on Crime Prevention and Control, provide in part: “In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes, with lethal or other extremely grave consequences.” SCHABAS, *supra* note 3, at 155, 169–73, 413. Those Safeguards, which are not a treaty, also address procedural issues, such as the burden of proof necessary for the death penalty's imposition and the rights of those convicted to appeal and seek pardon or commutation of sentence. *Id.* at 173, 413. The Safeguards further provide: “Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death penalty be carried out on pregnant women, or on new mothers or on persons who have become insane.” *Id.* at 413. The Safeguards also provide: “Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.” *Id.*

<sup>373</sup> Moratorium on the Use of the Death Penalty, G.A. Res. 62/149, U.N. Doc A/RES/62/149 (Dec. 18, 2007).

<sup>374</sup> SCHABAS, *supra* note 3, at 406.

<sup>375</sup> Emily H. Wood, *Economic, Social, and Cultural Rights and the Right to Education in American Jurisprudence: Barriers and Approaches to Implementation*, 19 HASTINGS WOMEN'S L.J. 303, 310 (2008).

<sup>376</sup> SCHABAS, *supra* note 3, at 406 (citing Convention on the Rights of the Child, G.A. Res. 45/25, art. 37, U.N. Doc. A/RES/44/25 (Dec. 12, 1989)).

<sup>377</sup> See *Roper v. Simmons*, 543 U.S. 551, 577 (2005) (citing the CRC).

<sup>378</sup> SCHABAS, *supra* note 3, at 235, 251, 422. This is in stark contrast to the prior practices of war crimes tribunals. Not only did executions take place as a result of the Nuremberg judgments, but also Union soldiers, for example, were executed with some regularity during President Lincoln's administration under the Lieber Code, an early codification of the laws and customs of war. *Id.* at 235, 258. The United States signed onto the Rome Statute, thus agreeing to participate in the International Criminal Court, on December 31, 2000, the last day it was permissible to do so. See Megan E. Lantto, *The United States and the International Criminal Court: A Permanent Divide?*, 31 SUFFOLK TRANSNAT'L L. REV. 619, 619 (2008). The Rome Statute, however, has never been ratified by the United States, and in 2002, President George W. Bush instructed John Bolton, the Under Secretary of State for Arms Control and International Security, to notify Kofi Annan of the United States nullification of any intention to participate with the International Criminal Court. *Id.* at 619, 626.

death penalty either.<sup>379</sup> This means that the world's worst human rights offenders—including men such as Slobodan Milosevic, whose trial in The Hague came to an abrupt end after he was found dead in his cell<sup>380</sup>—no longer face capital charges.

¶82 Regional human rights systems have also contributed to reform efforts by adopting treaties restricting the death penalty's use. In Europe, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty came into force in 1985.<sup>381</sup> That protocol, now ratified by forty-six countries,<sup>382</sup> explicitly provides in Article 1: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."<sup>383</sup> The only circumstances under which the death penalty can be imposed under Protocol No. 6 are set forth in Article 2, which reads: "A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions."<sup>384</sup>

¶83 But Europe went even further at the dawn of the new century. Protocol No. 13 to the European Convention, adopted in 2003 and quickly ratified by forty countries,<sup>385</sup> now unequivocally—even in wartime—bars the punishment of death. It eliminates any caveat or exception and simply reads: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."<sup>386</sup> The European Union now actively pushes for the death penalty's abolition elsewhere, including in China and the United States,

<sup>379</sup> SCHABAS, *supra* note 3, at 247, 356. The Statute of the Special Court for Sierra Leone also makes a term of imprisonment the maximum penalty. See Olympia Bekou & Sangeeta Shah, *Realising the Potential of the International Criminal Court: The African Experience*, 6 HUM. RTS. L. REV. 499, 519 (2006).

<sup>380</sup> Lawrence G. Albrecht et al., *International Human Rights*, 41 INT'L LAW. 643, 647 (2007).

<sup>381</sup> SCHABAS, *supra* note 3, at 14, 368, 424–26. The European Convention on Human Rights, which came into force in 1953, protects "[e]veryone's right to life" and provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." *Id.* at 259, 423 (citing Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) art. 2 & 3, Nov. 4, 1950, Europ. T.S. 005). That treaty, when promulgated, contemplated the death penalty's infliction, providing that "[n]o one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." *Id.* at 423 (citing European Convention on Human Rights, *supra*, at art. 2).

<sup>382</sup> Council of Europe, Ratification Information on Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=114&CM=8&DF=9/14/2008&CL=ENG> (last visited Aug. 31, 2009). Russia signed Protocol No. 6 in 1997, but has yet to ratify the protocol. *Id.*

<sup>383</sup> SCHABAS, *supra* note 3, at 424 (citing Council of Europe, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Apr. 28, 1983, Europ. T.S. 114).

<sup>384</sup> *Id.*

<sup>385</sup> Council of Europe, Ratification Information on Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=187&CM=8&DF=9/14/2008&CL=ENG> (last visited Aug. 31, 2009). Five countries—Armenia, Italy, Latvia, Poland and Spain—have signed but not yet ratified Protocol No. 13. *Id.*

<sup>386</sup> Council of Europe, Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, May 26, 2003, Europ. T.S. 187, 2246 U.N.T.S. 112, *available at* <http://conventions.coe.int/treaty/EN/Treaties/html/187.htm>. The Charter of Fundamental Rights of the European Union also provides that "[e]veryone has the right to life," that "[n]o one shall be condemned to the death penalty, or executed," and that "[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." SCHABAS, *supra* note 3, at 430 (citing Charter of Fundamental Rights of the European Union, art. 2 & 19, 2000 O.J. (C 364) 1).



spending substantial sums of money towards that end and even appearing as *amicus curiae* before the Supreme Court.<sup>387</sup>

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A large number of countries in the Organization of American States (OAS) have also abolished the death penalty.<sup>388</sup> The Inter-American human rights system specifically protects “the right to life,”<sup>389</sup> and the American Convention on Human Rights bars the death penalty’s infliction in certain instances.<sup>390</sup> Article 4(2) of that Convention provides that “[i]n countries that have not abolished the death penalty, it may be imposed only for the most serious crimes.”<sup>391</sup> Article 4(3) states that “[t]he death penalty shall not be reestablished in states that have abolished it.”<sup>392</sup> Article 4(4) states that “[i]n no case shall capital punishment be inflicted for political offenses or related common crimes.”<sup>393</sup> And Article 4(5) reads: “Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.”<sup>394</sup> An Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, entered into force in 1991, categorically forbids the death penalty in times of peace.<sup>395</sup>

¶85

African and Arab countries have also promulgated treaties that impose certain restrictions on the death penalty’s imposition. The African Charter on the Rights and Welfare of the Child, which came into force in 1999, states that “[e]very child has an inherent right to life” and further provides: “Death sentence shall not be pronounced for crimes committed by children.”<sup>396</sup> The Arab Charter on Human Rights, which entered

<sup>387</sup> SCHABAS, *supra* note 3, at 306–07.

<sup>388</sup> *Id.* at 332.

<sup>389</sup> In particular, the American Declaration on the Rights and Duties of Man, adopted in 1948 (the same year the United States signed the OAS charter), provides that “[e]very human being has the right to life, liberty and the security of his person.” *Id.* at 435 (citing Article 1). The American Convention on Human Rights, which the United States signed but never ratified, further provides: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of life.” SCHABAS, *supra* note 3, at 436 (citing Article 4); Mirah A. Horowitz, *Kids Who Kill: A Critique of How the American Legal System Deals with Juveniles Who Commit Homicide*, 63 LAW & CONTEMP. PROBS. 133, 152 (2000).

<sup>390</sup> Because the United States has not ratified the American Convention on Human Rights, it has not subjected itself to the jurisdiction of the Inter-American Human Rights Court. Reed, Wilson & Fitzpatrick, *supra* note 360, at 401; *see also* Colm Campbell & Ita Connolly, *A Deadly Complexity: Law, Social Movements and Political Violence*, 16 MINN. J. INT’L L. 265, 308 (2007) (noting that because the United States is not a party to the American Convention on Human Rights and has not submitted itself to the jurisdiction of the Inter-American Human Rights Court, cases involving U.S. human rights obligations can only be heard by the Inter-American Commission on Human Rights).

<sup>391</sup> SCHABAS, *supra* note 3, at 436.

<sup>392</sup> *Id.* This provision means that, once abolished by a signatory country, the death penalty cannot be brought back, effectively making such countries “abolitionist at international law.” *Id.* at 332. More than twenty countries have now ratified the American Convention on Human Rights. Organization of American States, Ratification Information on the American Convention on Human Rights (Pact of San Jose, Costa Rica), <http://www.oas.org/juridico/english/Sigs/b-32.html> (last visited Aug. 31, 2009).

<sup>393</sup> SCHABAS, *supra* note 3, at 436.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 438–39. As of 2008, eleven countries had ratified the Additional Protocol. Organization of American States, Ratification Information on the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, <http://www.oas.org/juridico/english/Sigs/a-53.html> (last visited Aug. 31, 2009). The most recent country to ratify the Additional Protocol was Chile in 2008. *Id.*

<sup>396</sup> SCHABAS, *supra* note 3, at 360, 441. A child is defined as any human being below the age of eighteen. *Id.* at 361. As of 2008, twenty-one African countries had ratified the African Charter on the Rights and Welfare of the Child. University of Minnesota, Human Rights Library, Ratification Information on the African Charter on the Rights and Welfare of the Child,

into force in 2008,<sup>397</sup> states that “[e]very human being has the inherent right to life,” that “[t]his right shall be protected by law,” and that “[n]o one shall be arbitrarily deprived of his life.”<sup>398</sup> The Arab Charter further provides that “[s]entence of death may be imposed only for the most serious crimes,” and that “[a]nyone sentenced to death shall have the right to seek pardon or commutation of the sentence.”<sup>399</sup> In addition, the Arab Charter states that “[s]entence of death shall not be imposed on persons under 18 years of age, unless otherwise stipulated in the laws in force at the time of the commission of the crime,” and that “[t]he death penalty shall not be inflicted on a pregnant woman prior to her delivery or on a nursing mother within two years from the date of her delivery.”<sup>400</sup>

### C. *The Global Decline of the Death Penalty*

¶86

Around the globe, the death penalty is being utilized in fewer countries—and for fewer and fewer offenses. Saudi Arabia still beheads people,<sup>401</sup> and China still frequently conducts executions<sup>402</sup> using mobile execution vehicles to facilitate the harvest of organs for sale on the black market.<sup>403</sup> It is increasingly clear, however, that capital punishment is falling out of favor around the world. According to Amnesty International, in 2008 at least 8864 people were sentenced to death in fifty-two countries. Perhaps more telling, only twenty-five countries actually carried out executions in 2008, and of the 2390 known executions that year ninety-three percent of them took place in just five nations: China, Iran, Saudi Arabia, Pakistan, and the United States.<sup>404</sup> In 1999, the African Commission on Human and Peoples’ Rights took the extraordinary step of adopting a

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<http://www1.umn.edu/humanrts/instree/afchildratifications.html> (last visited Aug. 31, 2009).

The African Charter of Human and Peoples’ Rights makes no mention of the death penalty, but does contain more general protections. Article 4 of that Charter provides: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.” SCHABAS, *supra* note 3, at 15, 355, 440. Article 5 further provides: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.” *Id.* at 440.

<sup>397</sup> On January 30, 2008, the U.N. High Commissioner for Human Rights, Louise Arbour, announced that the Arab Charter on Human Rights had entered into force following its seventh ratification. Louise Arbour, U.N. High Commissioner for Human Rights, Statement on the Entry into Force of the Arab Charter on Human Rights (Jan. 30, 2008).

<sup>398</sup> League of Arab States, Revised Arab Charter on Human Rights art. 5, May 22, 2004, *reprinted in* 12 INT’L HUM. RTS. REP. 893 (2005), *available at*

<http://www1.umn.edu/humanrts/instree/loas2005.html?msource=UNWDEC19001&tr=y&auid=3337655>.

<sup>399</sup> *Id.* at art. 6.

<sup>400</sup> *Id.* at art. 7.

<sup>401</sup> Rachel Saloom, *Is Beheading Permissible under Islamic Law? Comparing Terrorist Jihad and the Saudi Arabian Death Penalty*, 10 UCLA J. INT’L L. & FOREIGN AFF. 221, 244–45 (2005) (“Saudi Arabia has been called the beheading capital of the world. The exact numbers of beheadings in Saudi Arabia are unknown because of the secretive nature of the Saudi regime. However, Amnesty International claims there were at least 560 executions in Saudi Arabia from 1990-97.”).

<sup>402</sup> AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS IN 2008, at 8, *available at* [http://www.amnestyusa.org/abolish/annual\\_report/DeathSentencesExecutions2008.pdf](http://www.amnestyusa.org/abolish/annual_report/DeathSentencesExecutions2008.pdf). Amnesty International reports that China carried out at least 1718 executions in 2008. *Id.*

<sup>403</sup> *China Makes Ultimate Punishment Mobile*, USA TODAY, June 15, 2006, *available at* [http://www.usatoday.com/news/world/2006-06-14-death-van\\_x.htm](http://www.usatoday.com/news/world/2006-06-14-death-van_x.htm).

<sup>404</sup> AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS IN 2008, at 5, *available at* [http://www.amnestyusa.org/abolish/annual\\_report/DeathSentencesExecutions2008.pdf](http://www.amnestyusa.org/abolish/annual_report/DeathSentencesExecutions2008.pdf).

resolution specifically urging African countries to put a moratorium on executions and to “reflect on the possibility of abolishing the death penalty.”<sup>405</sup>

¶87

In Africa and Asia, the death penalty is still in use, but the abolitionist movement is taking hold even on those continents. “An emerging international trend towards abolition has found support on African soil,” writes Frans Vilgoen at the University of Pretoria’s Centre for Human Rights.<sup>406</sup> Although death sentences under Islamic, or *Shari’a*, law are still common in places like Nigeria and Sudan,<sup>407</sup> the country of Liberia—with its historic U.S. ties<sup>408</sup>—chose to ban executions in 2005, further lengthening the list of abolitionist countries in Africa.<sup>409</sup> In South Korea, a strong anti-death penalty campaign has emerged, and no execution has taken place since December 1997.<sup>410</sup> Executions are also waning in Central and South America,<sup>411</sup> though many Caribbean countries continue to resist legal reform.<sup>412</sup> Even China—the world’s execution leader<sup>413</sup>—is considering reform.<sup>414</sup>

<sup>405</sup> SCHABAS, *supra* note 3, at 357–58.

<sup>406</sup> Frans Vilgoen, *Preface* to LILIAN CHENWI, *TOWARDS THE ABOLITION OF THE DEATH PENALTY IN AFRICA: A HUMAN RIGHTS PERSPECTIVE*, at vii (2007); *see also* CHENWI, *supra*, at 7–8 (noting that the African Commission on Human and Peoples’ Rights has acknowledged the trend toward abolition of the death penalty and has been supportive of that trend by encouraging African countries to refrain from using capital punishment).

<sup>407</sup> *Id.* at 24 (“Regarding the Islamic system, capital punishment is considered an integral part of the law.”). Under Islamic law, many acts are punishable by death—and offenders are often punished in barbaric ways. *See* Jennifer F. Cohen, *Islamic Law in Iran: Can It Protect the International Legal Right of Freedom of Religion and Belief?*, 9 CHI. J. INT’L L. 247, 260 (2008) (noting that “apostasy” is punishable by death); Nicola Browne et al., *Capital Punishment and Mental Health Issues: Global Examples*, 25 ST. LOUIS U. PUB. L. REV. 383, 391 (2006) (noting that in Afghanistan converting to Christianity is a crime punishable by death); CHENWI, *supra* note 406, at 48 (“Some countries in Africa, especially in North Africa, maintain the death penalty for sexual offences owing to the influence of Islamic Law. . . . Capital sexual offences include: adultery—where the offender is married; conviction for homosexuality for the third time; incest or gross indecency that amounts to adultery or homosexuality; abduction combined with rape; aggravated rape or rape of a minor; sodomy, and unlawful sexual intercourse with a prisoner.”); *id.* at 49 (“The death penalty for religious dissent is common in Muslim countries.”); *id.* at 140 (noting that “stoning” for “offences such as adultery” is “common in states that apply the *Shari’a* law,” including Mauritania, Nigeria and Sudan).

<sup>408</sup> *See* Rena L. Scott, *Moving from Impunity to Accountability in Post-War Liberia: Possibilities, Cautions, and Challenges*, 33 INT’L J. LEGAL INFO. 345, 352–53 (2005).

<sup>409</sup> The number of African countries that have abolished capital punishment is growing as the number of executions decline. CHENWI, *supra* note 406, at 29–30 (“Thirteen countries have abolished the death penalty for all crimes, 19 have abolished it in practice and 21 still retain and use the death penalty.”). Presidents in Malawi and Zambia have actually refused to sign death warrants. *Id.* at 54.

<sup>410</sup> BAE, *supra* note 47, at 64–77.

<sup>411</sup> ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 61, 64–65 (4th ed. 2008).

<sup>412</sup> *See* Brian D. Tittmore, *The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections*, 13 WM. & MARY BILL RTS. J. 445 (2004).

<sup>413</sup> More than sixty crimes—including economic and non-violent crimes—are punishable by death in China, a country that reportedly executes more people than the rest of the world’s nations combined. COYNE & ENTZEROTH, *supra* note 269, at 1036; Matthew Bloom, *A Comparative Analysis of the United States’s Response to Extradition Requests from China*, 33 YALE J. INT’L L. 177, 179 n.11 (2008); *see also* COYNE & ENTZEROTH, *supra* note 269, at 1038 (noting the annual number of executions in China is estimated to be 10,000 or 15,000).

<sup>414</sup> *See* HOOD & HOYLE, *supra* note 411, at 100 (“the last few years have witnessed a distinct change in the discourse, evidenced by the willingness of the Chinese authorities to discuss the death penalty in human rights seminars and dialogues with European countries. . . . Abolition of the death penalty for all economic crimes is now being openly discussed and a book of essays entitled *The Road to Abolition*, as a signifier of

¶88 America's death penalty, plagued by wrongful convictions, legal errors, and the intractable problems of arbitrariness, unfairness and racial bias,<sup>415</sup> has come under intense criticism both at home and abroad. Not only do executions raise all manner of moral questions, but death sentences cost more to carry out than life-without-parole sentences—and oftentimes condemned prisoners die of natural causes due to inevitable delays.<sup>416</sup> A recent report on California's death penalty, issued in 2008, found that thirty persons have been on California's death row for more than twenty-five years; 119 for more than twenty years; and 240 for more than fifteen years.<sup>417</sup> The national average for time elapsing between sentencing and execution is approximately twelve years.<sup>418</sup>

¶89 Foreign courts even recognize what is known as “the death row phenomenon”—the prolonged wait between sentence and execution that America's condemned inmates face.<sup>419</sup> In *Soering v. United Kingdom*,<sup>420</sup> the European Court of Human Rights refused to extradite a German national from the United Kingdom to Virginia out of concern over the prolonged stay on death row an individual would face if sentenced to death.<sup>421</sup> A number of foreign governments—U.S. allies like Canada, England, Italy and France—

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the final goal, was published by the People's Security University Press in 2004.”)

Notably, the U.S. government long ago sought to ensure that U.S. citizens residing in China would not be subject to “barbarous and cruel punishments.” Peter Nicolas, *American-Style Justice in No Man's Land*, 36 GA. L. REV. 895, 997–98 (2002) (“In 1844, the United States entered into the Treaty of Wang Hiya, which secured the right of extraterritoriality for U.S. citizens residing in China. The rationale for entering into the treaty was to protect U.S. nationals from what was perceived to be ‘barbarous and cruel punishments inflicted’ by the courts of non-Christian countries, such as China. Under the terms of the treaty, citizens of the United States who committed any crime in China could be tried and punished only by U.S. authorities.”) (quoting *In re Ross*, 140 U.S. 453, 463 (1891)).

<sup>415</sup> See JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000), available at <http://www2.law.columbia.edu/instructionalservices/liebman>; JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT (2002), available at <http://www2.law.columbia.edu/brokensystem2/report.pdf>.

<sup>416</sup> Judge Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697, 711 (2007).

<sup>417</sup> CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA 26–27 (June 30, 2008).

<sup>418</sup> *Id.* at 7, 22. Although California's death row continues to grow in size, in the last ten years fewer California death sentences have been handed out. Whereas forty death sentences were meted out in California in 1997, only twenty death sentences were handed out in that state in 2007. *Id.* at 19. The California commission that issued the 2008 report had this to say about capital punishment's significant financial costs: “With a dysfunctional death penalty law, the reality is that most California death sentences are actually sentences of lifetime incarceration. The defendant will die in prison before he or she is ever executed. The same result can be achieved at a savings of well over one hundred million dollars by sentencing the defendant to lifetime incarceration without possibility of parole.” *Id.* at 75–76. For further information on the death row phenomenon, see Eva Rieter, *ICCPR Case Law on Detention, the Prohibition of Cruel Treatment and Some Issues Pertaining to the Death Row Phenomenon*, 2002 J. INST. JUST. INT'L STUD. 83 (2002).

<sup>419</sup> SCHABAS, *supra* note 3, at 19. Thus far, U.S. courts have refused to recognize Eighth Amendment claims associated with prolonged stays on death row, though Justices Breyer and Stevens have both expressed interest in reviewing such a claim. See Jeremy Root, *Cruel and Unusual Punishment: A Reconsideration of the Lackey Claim*, 27 N.Y.U. REV. L. & SOC. CHANGE 281, 282 (2002).

<sup>420</sup> App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989).

<sup>421</sup> *Id.* It was noted in *Soering* that persons in Virginia wait an average of six to eight years prior to execution or other resolution of their death sentences. *Id.* In 1993, the Judicial Committee of the Privy Council—the court of last resort for member countries of the British Commonwealth—ruled that holding Jamaican prisoners on death row for several years was inhuman punishment, even if the prisoners' own appeals caused the delay in execution. See *Pratt & Morgan v. Attorney General for Jamaica*, 3 SLR 995, 2 AC 1, 4 All ER 769 (Privy Council 1993) (en banc).

have actually refused to extradite people to the United States in the absence of assurances that the death penalty would not be sought.<sup>422</sup>

¶90 As a result of another line of cases, the United States has also come under criticism—and been rebuked by the International Court of Justice (ICJ)—for its handling of foreign nationals arrested for capital crimes. Article 36 of the Vienna Convention on Consular Relations requires that governments notify detainees from foreign countries of their right to consular assistance.<sup>423</sup> The failure to do so for dozens of foreigners who landed on American death rows led Paraguay, Germany and Mexico to file actions before the ICJ.<sup>424</sup> The ICJ—or the World Court, as it is commonly known—expressly determined that the United States violated international law in its handling of these death row inmates.<sup>425</sup> Because American courts have sentenced to death more than 100 foreign nationals,<sup>426</sup> the United States—in carrying out such executions—has drawn the ire of a number of countries, strained diplomatic relations, and lost respect in the international community.<sup>427</sup>

## VI. THE EIGHTH AMENDMENT

### A. *The Origins of the “Cruel and Unusual Punishments” Clause*

¶91 Within the United States, the U.S. Constitution’s Eighth Amendment has been a focal point of the contentious death penalty debate. The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>428</sup> The idea behind the Eighth Amendment—of not inflicting draconian punishments—has been around in one form or another for centuries, easily pre-dating Beccaria’s writings. The Magna Carta of 1215 guaranteed proportionate fines,<sup>429</sup>

<sup>422</sup> See *United States v. Burns* [2001] S.C.C. 7; [2001] 5 L.R.C. 19; Michael Mello, *Certain Blood for Uncertain Reasons: A Love Letter to the Vermont Legislature on Not Reinstating Capital Punishment*, 32 VT. L. REV. 765, 787 (2008). France actually refused to cooperate in the Zacarias Moussaoui terrorism investigation—thus hindering U.S. law enforcement efforts—once the U.S. decided to seek Moussaoui’s execution. *Id.*; see also Thomas Michael McDonnell, *The Death Penalty—An Obstacle to the “War Against Terrorism”*, 37 VAND. J. TRANSNAT’L L. 353 (2004).

<sup>423</sup> 596 UNTS 261 (1963), art. 36(1)(b).

<sup>424</sup> SCHABAS, *supra* note 3, at 17–18; see also Eric Engle, *Death Is Unconstitutional: How Capital Punishment Became Illegal in America—A Future History*, 6 PIERCE L. REV. 485, 501–502 (2008); Susan L. Karamanian, *Briefly Resuscitating the Great Writ: The International Court of Justice and the U.S. Death Penalty*, 69 ALB. L. REV. 745, 751–62 (2006).

<sup>425</sup> SCHABAS, *supra* note 3, at 18; accord Engle, *supra* note 424, at 503 (citing *Avena & Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31)). After the ICJ’s *Avena* decision, the Supreme Court held that the decision was not directly enforceable in a case litigated by a Mexican national, Jose Ernesto Medellin, and the State of Texas. See *Medellin v. Texas*, 128 S. Ct. 1346, 1348 (2008). Medellin was later executed. Scotus Blog, Update: Medellin Executed as Court Refuses Delay, <http://www.scotusblog.com/wp/final-filings-in-medellin-case/> (last visited Aug. 31, 2009).

<sup>426</sup> SCHABAS, *supra* note 3, at 18.

<sup>427</sup> See William A. Schabas, *International Law, Politics, Diplomacy and the Abolition of the Death Penalty*, 13 WM. & MARY BILL OF RTS. J. 417 (2004); Mark Warren, *Death, Dissent and Diplomacy: The U.S. Death Penalty as an Obstacle to Foreign Relations*, 13 WM. & MARY BILL OF RTS. J. 309, 337 (2004).

<sup>428</sup> U.S. CONST., amend. VIII. The Eighth Amendment is applicable to the States through the Fourteenth Amendment. *Roper*, 543 U.S. at 560; *Robinson v. California*, 370 U.S. 660, 666 (1962). Prior to the adoption of the Fourteenth Amendment, however, the Eighth Amendment was only held applicable to the federal government. *Pervear v. Commonwealth*, 72 U.S. (5 Wall.) 475, 480 (1866); *Ex Parte Watkins*, 32 U.S. (7 Pet.) 568 (1833); accord *Barker v. People*, 3 Cow. 686 (N.Y. Sup. Ct. 1824).

<sup>429</sup> *Solem v. Helm*, 463 U.S. 277, 284–85 (1983). In England, royal courts relied on such provisions to

tying the fine to the “magnitude” or “degree” of the offense.<sup>430</sup> The prohibition on “cruel” punishments first found its way into American law through a Puritan attorney, the Cambridge-educated Rev. Nathaniel Ward of Ipswich, Massachusetts. A draft legal code prepared by Ward was enacted into law in 1641 under the title “Body of Liberties”—clause 46 of which reads: “For bodily punishments we allow amongst us none that are inhumane, barbarous or cruel.”<sup>431</sup>

¶92 The English Bill of Rights of 1689<sup>432</sup>—the predecessor of the Eighth Amendment and similar state constitutional provisions<sup>433</sup>—was enacted after William of Orange took the English throne in 1688.<sup>434</sup> It provided: “[E]xcessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.”<sup>435</sup> The driving force behind it was abuses by Lord Chief Justice George Jeffreys of the King’s Bench during the Stuart reign of James II.<sup>436</sup> Jeffreys presided over the “Bloody Assizes” after the Duke of Monmouth’s rebellion in 1685, and a commission he led tried, convicted and oversaw the execution of hundreds of suspected rebels.<sup>437</sup> Many of those rebels were executed by horrific means such as disembowelment, beheading, drawing

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invalidate disproportionate punishments. *Id.* at 285 (citing *Le Gras v. Bailiff of Bishop of Winchester*, Y.B.Mich. 10 Edw. II, pl. 4 (C.P. 1316), reprinted in 52 Selden Society 3 (1934) & Earl of Devon’s Case, 11 State Trials 133, 136 (1689)).

<sup>430</sup> *Wheeler*, 175 P.3d 438, 442 & n.2. The Magna Carta was invoked by an Englishman, Sir Robert Beale, in the late sixteenth century to question the monarchy’s power to inflict cruel punishments. *Furman*, 408 U.S. at 316 (Marshall, J., concurring). Beale, an Oxford-educated member of Parliament and a lawyer who opposed torture, had written a manuscript in 1583 that attacked the English crown’s right to punish persons for ecclesiastical offenses. The Clerk of the Privy Council, Beale represented Puritan ministers deprived of their benefices, argued in vain that the use of torture to extract confessions violated the Magna Carta, and in 1592 was banished from the Royal Court. The Archbishop of Canterbury, John Whitgift, admonished Beale that had he “condemne (without exception of any cause) the racking of grievous offenders as being cruel, barbarous, contrary to law, and unto the liberty of English subjects.” See *id.*; Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441, 460 n.161 (1997); Scott A. Trainor, *A Comparative Analysis of a Corporation’s Right Against Self-Incrimination*, 18 FORDHAM INT’L L.J. 2139, 2153–54 (1995).

<sup>431</sup> Anthony Granucci, “Nor Cruel and Unusual Punishments Inflicted”: *The Original Meaning*, 57 CAL. L. REV. 839, 850–51 (1969). The prohibition against “inhumane, barbarous or cruel” punishments was later incorporated into the Massachusetts Bay Colony’s Code of 1648—which prescribed the punishment of death for cursing one’s parents or rebelling against one’s father—and into Connecticut’s Code of 1672. *Id.* at 860; Christopher Collier, *The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights*, 76 CONN. B.J. 1, 12–13 (2002); Mark D. Cahn, *Punishment, Discretion, and the Codification of Prescribed Penalties in Colonial Massachusetts*, 33 AM. J. LEGAL HIST. 107, 132 (1989); Simeon E. Baldwin, *Whipping and Castration as Punishments for Crime*, 8 YALE L.J. 371, 380–81 (1899).

<sup>432</sup> Bill of Rights (1689), reprinted in SOURCES OF OUR LIBERTIES 247 (Richard L. Perry ed., 1959).

<sup>433</sup> *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (“The history of the Eighth Amendment is well known. The text was taken, almost verbatim, from a provision of the Virginia Declaration of Rights of 1776, which in turn derived from the English Bill of Rights of 1689. The English version, adopted after the accession of William and Mary, was intended to curb the excesses of English judges under the reign of James II.”); *Trop*, 356 U.S. at 100 (plurality opinion) (citing 1 Wm. & Mary, 2d Sess. (1689), c. 2); *accord In re Kemmler*, 136 U.S. 436, 446 (1890); *Solem*, 463 U.S. at 285–86; *Furman*, 408 U.S. at 242 (Douglas, J., concurring). A more complete history of the language found in the Eighth Amendment is found elsewhere. See, e.g., Granucci, *supra* note 431; Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 853–55 (1972); see also Schwartz & Wishingrad, *supra* note 75, at 823–26.

<sup>434</sup> Ray S. Pierce, *Now You Can’t Do That: Disproportionate Prison Sentences as Cruel and Unusual Punishment*, 24 U. ARK. LITTLE ROCK L. REV. 775, 781 (2002).

<sup>435</sup> 1 W & M, sess. 2, ch. 2 (1689) (quoted in *Solem*, 463 U.S. at 285).

<sup>436</sup> *Harmelin v. Michigan*, 501 U.S. 957, 967 (1991).

<sup>437</sup> *Id.* at 968.

and quartering, and the burning of female offenders—common punishments at the time, but ones that would later fall into disrepute.<sup>438</sup>

¶93 It was actually Jeffreys' arbitrary use of power in the case of Titus Oates—power traditionally exercised by ecclesiastical courts—that led to England's "cruell and unusuall Punishments" provision.<sup>439</sup> Oates, a Protestant cleric, had been convicted of two counts of perjury in 1685 and was sentenced to be pilloried four times a year and stripped of his clerical position.<sup>440</sup> Oates had made false allegations in 1678, causing the execution of fifteen Catholics for allegedly organizing a "Popish Plot" to overthrow King Charles II.<sup>441</sup> Sentenced to be whipped by "the common hangman," Oates did not die from these corporal punishments, and he petitioned both houses of Parliament to set aside his sentence as illegal after the adoption of the English Bill of Rights.<sup>442</sup>

¶94 The House of Lords affirmed the judgment, but a minority of the Lords dissented, calling Oates' punishment "barbarous, inhuman, and unchristian" and "contrary" to the English Bill of Rights, adding that "there is no Precedent to warrant the Punishments of whipping and committing to Prison for Life, for the Crime of Perjury." The dissenters saw the judgment of the King's Bench, which divested Oates of "his canonical and priestly Habit," as "a Matter wholly out of their Power, belonging to the Ecclesiastical Courts only." "Unless this Judgment be reversed," the dissenters intoned, "cruel, barbarous and illegal Judgments" would be encouraged. The House of Commons, after conducting its review, passed a bill to annul Oates' sentence, and Oates was released in 1689. The House of Commons specifically invoked England's new "cruell and unusuall" punishments clause, calling Oates' punishment "barbarous," an "ill Example to future

<sup>438</sup> *Id.* Those who adopted the Eighth Amendment expressed particular concern about the modes of punishment—something reflected in early commentary on the amendment. See J. BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 154 (2d ed. 1840) (cited in *Harmelin*, 501 U.S. at 981); B. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 186 (1832) (cited in *Harmelin*, 501 U.S. at 981). However, legal scholars have noted that some of the Framers may have misinterpreted English law in concluding that the parallel provision in the English Bill of Rights was originally intended to ban particularly vile methods of punishment. See, e.g., Granucci, *supra* note 431, at 843; cf. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1006, at 170–71 (Carolina Acad. Press 1987) (1833) (citing Blackstone and saying the Eighth Amendment was adopted "as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reign of some of the Stuarts").

<sup>439</sup> See Laurence Claus, *Methodology, Proportionality, Equality: Which Moral Question Does the Eighth Amendment Pose?*, 31 HARV. J.L. & PUB. POL'Y 35, 40 (2008) ("As William Blackstone made clear to lawyers in the American Founding era, the English Bill of Rights did not condemn methods of punishment—not even the grotesque practice of drawing and quartering traitors."). Indeed, such brutal methods of execution as drawing and quartering traitors—not repealed until the 1800s—remained legal in England long after the English Bill of Rights was promulgated. *Id.* at 40 n.22. Instead, it was Jeffreys' imposition of penalties not authorized by common-law precedent in the Oates' case that drew the attention of England's Parliament. See LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 236 (1999); see also Case of Titus Oates, 10 Howell's State Trials 1079, 1314 (K.B. 1685), reprinted in THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987), available at <http://press-pubs.uchicago.edu/founders/documents/amendVIII1.html>.

<sup>440</sup> Stinneford, *supra* note 271, at 1760–61.

<sup>441</sup> *Id.* at 1760.

<sup>442</sup> *Harmelin*, 501 U.S. at 968–75; Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 42, 43–44 (2000); Granucci, *supra* note 431, at 853–860; James J. Brennan, *The Supreme Court's Excessive Deference to Legislative Bodies Under Eighth Amendment Sentencing Review*, 94 J. CRIM. L. & CRIMINOLOGY 551, 553 (2004); Pierce, *supra* note 434, at 781–83.

Ages” and “unusual” in that “an Englishman should be exposed upon a Pillory, so many times a Year, during his Life.”<sup>443</sup>

¶95 The U.S. Constitution’s Eighth Amendment—added to assuage the concerns of Anti-federalists who worried about abuses of power<sup>444</sup>—was adopted against that historical backdrop. In 1791, when the Eighth Amendment was ratified, five state constitutions already prohibited “cruel or unusual punishments”<sup>445</sup> and two others prohibited merely “cruel” punishments.<sup>446</sup> The Eighth Amendment, however, was directly based on the Virginia Declaration of Rights, authored by George Mason, which prohibited “cruel and unusual punishments.”<sup>447</sup> Mason, a plantation owner from Fairfax County, had no formal training in law, and had simply adopted verbatim the language of the English Bill of Rights.<sup>448</sup> This has led one scholar to conclude that the “cruel and unusual punishments” language—particularly to non-lawyers like George Mason—might have been seen as constitutional “boilerplate.”<sup>449</sup> Indeed, Thomas Jefferson later pointed out that when it came time to reform Virginia’s laws, Mason withdrew from the task—seeing himself as unqualified because of his lack of legal training.<sup>450</sup>

¶96 In drafting Virginia’s declaration, Mason wanted to ensure that American colonists would be on equal footing with other English subjects. Mason had asserted as early as 1766 that American colonists “claim Nothing but the Liberty & Privileges of Englishmen, in the same degree, as if we had still continued among our Brethren in Great Britain.”<sup>451</sup> Indeed, in 1774, Mason had stated that colonists were entitled to all the “Privileges, Immunities and Advantages” of English law,<sup>452</sup> and certainly felt it important enough to include the “cruel and unusual punishments” language to protect Virginians’

<sup>443</sup> *Harmelin*, 501 U.S. at 968–75; Parr, *supra* note 442, at 43–44; Granucci, *supra* note 431, at 853–860; Brennan, *supra* note 442, at 553; Pierce, *supra* note 434, at 781–83.

<sup>444</sup> Stinneford, *supra* note 271, at 1803.

<sup>445</sup> See Del. Declaration of Rights, § 16 (1776); Md. Declaration of Rights, art. XXII (1776); Mass. Declaration of Rights, art. XXVI (1780); N.C. Declaration of Rights, § X (1776); N.H. Bill of Rights, art. XXXIII (1784).

<sup>446</sup> See PA. CONST., art. IX, § 13 (1790); S.C. CONST., art. IX, § 4 (1790).

<sup>447</sup> See Va. Declaration of Rights, § 9 (1776); *Harmelin*, 501 U.S. at 966; *Solem*, 463 U.S. at 285 n.10; *Furman*, 408 U.S. at 319–20 (Marshall, J., concurring). In contrast, the Northwest Ordinance of 1787, enacted under the auspices of the Articles of Confederation, had prohibited “cruel or unusual punishments.” See *Furman*, 408 U.S. at 243–44 (Douglas, J., concurring); Ordinance of 1787: The Northwest Territorial Government (July 13, 1787), art. II.

<sup>448</sup> Granucci, *supra* note 431, at 840; see also Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1242 (1987).

<sup>449</sup> See Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL’Y 119, 129 (2004) (“For many in the founding generation, it had become the verbiage of civility, and they were intent on employing it for whatever it was worth. Like the Latin Mass, it was valued by those for whom it was cultural heritage, whether understood or not. When George Mason and his fellow Virginians sat down to draft a Declaration of Rights in 1776, they had just spent over a decade declaring at every opportunity that all they sought were the ‘rights of Englishmen.’ Now that the bonds with Britain were broken, they described the rights they claimed as natural rather than English, but the content of those rights did not change. The language of the English Bill of Rights meant for the Founders whatever it meant for the English.”).

<sup>450</sup> See Thomas Jefferson, *Autobiography Draft Fragment*, Jan. 6–July 27, 1821, <http://memory.loc.gov/> (follow “List all Collections” hyperlink; then follow “Jefferson, Thomas ~ Papers ~ 1606-1827” hyperlink; then search “autobiography” in “Search Collection”; then follow “Thomas Jefferson, July 27, 1821, *Autobiography Draft Fragment*, January 6 through July 27”) (last visited Aug. 31, 2009).

<sup>451</sup> Massey, *supra* note 448, at 1242.

<sup>452</sup> *Id.*



rights.<sup>453</sup> “We have received the ancient constitutional and common-law rights of Englishmen from our Ancestors,” Mason said, adding that “with God’s Leave, we will transmit them, unimpaired to our Posterity.”<sup>454</sup>

¶197

It is clear that many early American lawyers and jurists viewed the Eighth Amendment as barring vile methods of punishment—a fact revealed by a review of early American case reports. An 1801 case report from North Carolina cites a lawyer’s argument that the common law punishment of “pressing to death” would violate the “cruel and unusual punishments” clause of the state constitution.<sup>455</sup> A court decision from 1824, interpreting Virginia’s cruel and unusual punishments clause, likewise opined that the provision was “merely applicable to the modes of punishment.”<sup>456</sup> The court ruled that “the best heads and hearts of the land of our ancestors, had long and loudly declaimed against the wanton cruelty of many of the punishments practised in other countries,” with the court declaring that the clause “was framed effectually to exclude these, so that no future Legislature, in a moment perhaps of great and general excitement, should be tempted to disgrace our Code by the introduction of any of those odious modes of punishment.”<sup>457</sup>

¶198

Although the Framers—men like James Madison, the principal drafter of the Constitution,<sup>458</sup> and James Wilson, a gifted lawyer and legal scholar<sup>459</sup>—despised

<sup>453</sup> Consistent with a natural rights tradition, the Virginia Declaration of Rights he drafted also contained strong language on the right to life, stating: “all men . . . have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact deprive or divest their posterity, namely the enjoyment of life and liberty.” Gilreath, *supra* note 137, at 574. Notably, the Pennsylvania Constitution of 1776 contained somewhat similar language on the right to life, providing, “That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty.” SOURCES OF OUR LIBERTIES 329 (Richard L. Perry ed., 1959).

<sup>454</sup> Massey, *supra* note 448, at 1243.

<sup>455</sup> State v. Gainer, 3 N.C. 140, 1801 WL 710 \*1 (N.C. Super. L. & Eq.), 2 Hayw. (NC) 140 (1801).

<sup>456</sup> Aldridge v. Commonwealth, 2 Va. Cas. 447, 1824 WL 1072 \*3 (Gen. Ct. Va. 1824).

<sup>457</sup> *Id.* Compare Commonwealth v. Wyatt, 6 Rand 694, 27 Va. 694, 1828 WL 860 \*1 (Va. Gen. Ct. 1828) (upholding the constitutionality of an act of 1823 providing that persons convicted may be imprisoned for up to six months and may receive “stripes” at the discretion of the court, to be inflicted at one time, or at different times, providing they did not exceed thirty-nine at any one time). In *Wyatt*, the General Court of Virginia summarized the defendant’s lawyer’s unsuccessful arguments as follows: “[I]t is perfectly evident that the Court, by virtue of this Law, might exercise its discretion to subserve vindictive passions, and so as to direct the party convicted to be subjected to thirty-nine stripes every day of the six months, which would inevitably terminate in death; a death produced by the most *cruel torture*. That by the Bill of Rights, properly regarded as part of the Constitution of Virginia, the General Assembly is restrained from authorising by Law, ‘cruel and unusual punishments (to be) inflicted,’ and that therefore the authority delegated to the Courts, as above described by the Act aforesaid, being prohibited to the Legislature, by the Constitution, cannot by it be delegated to the Courts, and that the Act aforesaid is therefore void, and ought so to be regarded by this Court.” *Id.* at \*4.

<sup>458</sup> James Madison—the primary architect of the Constitution that emerged from the Convention in Philadelphia in 1787—had the responsibility of defending that document in Virginia, his home state. Virginia’s ratification convention endorsed the Constitution in 1788, but appended to its approval a list of proposed amendments, collectively described as “a declaration or bill of rights.” Thirteenth on the list was the language from Virginia’s own declaration: “That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Delegates from state ratifying conventions in New York, North Carolina, Rhode Island and Pennsylvania also wanted language resembling that of section 10 of the English Bill of Rights. When drafting amendments for presentation to the First Congress in 1789, Madison thus naturally looked to Virginia’s declaration, making only one modification. He substituted the mandatory declarative “shall not” for the more discretionary and less binding “ought not to,” leading to what is today the language of the Eighth Amendment. See Claus, *supra* note 449, at 127–28.

<sup>459</sup> James Wilson served in the Second Continental Congress, played a leading role in the ratification of the Constitution, and was one of only six men to sign both the Declaration of Independence and the

governmental abuses of power and excessive punishments,<sup>460</sup> there exists very little legislative history as regards the Eighth Amendment.<sup>461</sup> The only recorded materials in the debates of the First Congress on the Bill of Rights are two comments about the vagueness of the clause by opponents of it.<sup>462</sup> This is all that appears:

Mr. Smith, of South Carolina, objected to the words ‘nor cruel and unusual punishments;’ the import of them being too indefinite.

Mr. Livermore [of New Hampshire]: The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.<sup>463</sup>

The record reveals that after these brief comments were made, the Eighth Amendment “was agreed to by a considerable majority.”<sup>464</sup>

¶99

The absence of such a restraint in the Constitution as originally conceived is mentioned in only two of the state ratifying conventions. At the Massachusetts convention, Abraham Holmes spoke out against the possibility of barbaric punishments. An Anti-federalist and one of 364 delegates to the Massachusetts ratifying convention,

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Constitution. Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 144–45 (2003).

<sup>460</sup> In 1787, constitutional convention attendees George Mason of Virginia and Elbridge Gerry of Massachusetts moved to include a Bill of Rights in the U.S. Constitution—something Mason said “would give great quiet to the people.” THE DECLARATION OF INDEPENDENCE, *supra* note 97, at 32, 34–35. That effort was rejected, but it wasn’t long before a consensus developed that a Bill of Rights was necessary. Schwartz & Wishingrad, *supra* note 75, at 826–29; see also Mark A. Garber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357, 381 (2007) (“Madison’s proposed Bill of Rights was aimed at simultaneously appeasing Anti-federalists and preserving Federalist institutions. His plan, Madison told Jefferson, was to provide those ‘alterations most called for by the opponents of the Government and least objectionable to its friends.’”). As one Supreme Court Justice later wrote, “[p]reconstitutional American history reeked with cruel punishment to such an extent that, in 1791, the Eighth Amendment to the Constitution of the United States expressly imposed upon federal agencies a mandate that ‘Excessive bail shall not be required, nor excessive finds imposed, nor cruel and unusual punishments inflicted.’” *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 473 (1947) (Burton, J., dissenting).

<sup>461</sup> *Weems v. United States*, 217 U.S. 349, 368 (1910) (“The provision received very little debate in Congress.”); *Furman v. Georgia*, 408 U.S. 238, 258 (1972) (Brennan, J., concurring).

<sup>462</sup> *Furman*, 408 U.S. at 262 (Brennan, J., concurring).

<sup>463</sup> *Furman*, 408 U.S. at 244 (Douglas, J., concurring) (citing 1 ANNALS OF CONG. 754 (1789)).

<sup>464</sup> 1 ANNALS OF CONG. 754 (1789).

Holmes expressed concern that the “diabolical institution” of the Spanish Inquisition—what he called “the disgrace of Christendom”—might be replicated in America.<sup>465</sup> Holmes protested:

What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kinds of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline.<sup>466</sup>

¶100 At Virginia’s convention, Patrick Henry also expressed the fear that Congress would have unlimited power to prescribe punishments. Henry vehemently objected to the lack of a Bill of Rights, fearing “tortures” and “cruel and barbarous” punishments.<sup>467</sup> Henry emphasized: “What has distinguished our ancestors? That they would not admit of tortures, or cruel and barbarous punishment.”<sup>468</sup> For example, Henry feared that Congress might “introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime.”<sup>469</sup> In discussing the proposed power of Congress to raise armies, Henry added:

Your men who go to Congress are not restrained by a bill of rights. They are not restrained from inflicting unusual and severe punishments, though the bill of rights of Virginia forbids it. What will be the consequence? They may inflict the most cruel and ignominious punishments on the militia, and they will tell you that it is necessary for their discipline.<sup>470</sup>

“[W]hen we come to punishments,” Henry said, “no latitude ought to be left, nor dependence put on the virtue of representatives.”<sup>471</sup> Emphasizing that Virginia barred “cruel and unusual punishments,” Henry passionately pled his case: “Are you not, therefore, now calling on those gentlemen who are to compose Congress, to . . . define punishments without this control?”<sup>472</sup>

¶101 In the same debate, George Mason also expressed the view that “there were few clauses in the Constitution so dangerous as that which gave Congress exclusive power of legislation within ten miles square” as it “may, like the custom of the superstitious days

<sup>465</sup> Michael J. Zydney Mannheimer, *When the Federal Death Penalty Is “Cruel and Unusual,”* 74 U. CIN. L. REV. 819, 834 (2006); Roger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35, 79–81 (2005).

<sup>466</sup> *Furman*, 408 U.S. at 258–59 (Brennan, J., concurring) (citing 2 J. ELLIOT’S DEBATES 111 (2d ed. 1876)).

<sup>467</sup> Granucci, *supra* note 431, at 840, 841 & n.10 (citing JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447–48 (2d ed. 1881)).

<sup>468</sup> *Furman*, 408 U.S. at 259–60 (Brennan, J., concurring).

<sup>469</sup> *Id.* at 260 n.2.

<sup>470</sup> 3 ELLIOT’S DEBATES 412 (2d ed. 1836).

<sup>471</sup> *Furman*, 408 U.S. at 259 (Brennan, J., concurring).

<sup>472</sup> *Id.*

of our ancestors, become the sanctuary of the blackest crimes.”<sup>473</sup> “Now, sir,” Mason argued, “if an attempt should be made to establish tyranny over the people, here are ten miles square where the greatest offender may meet protection.”<sup>474</sup> Mason further opined that the Virginia Declaration of Rights prohibited torture, arguing in Virginia’s ratifying convention in 1788 that a “clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.”<sup>475</sup>

### B. *The Founding Fathers’ Ambivalence Toward Capital Punishment*

¶102 Many Founding Fathers, including signers of the U.S. Constitution, did not oppose executions for certain crimes.<sup>476</sup> For example, John Jay, the first President of the Continental Congress and the first Chief Justice of the Supreme Court, was asked whether he thought the death penalty violated the commandment against taking life. Jay replied it did not, saying, “[a]s to murderers, I think it not only lawful for government, but that it is the duty of government, to put them to death.”<sup>477</sup> Indeed, the First Congress made several crimes punishable by hanging, among them treason, murder on federal land, forgery, uttering forged securities, counterfeiting, and piracy on the high seas.<sup>478</sup> However, many of America’s Founders were deeply troubled by capital punishment for other classes of offenders. For instance, as New York’s governor, Jay opposed capital punishment for lower-level offenders, arguing that “establishments for confining, employing, and reforming criminals” were “indispensible.”<sup>479</sup>

¶103 According to one historian, James Madison—principal author of the U.S. Constitution and central actor in framing the Bill of Rights—“favored abandoning capital punishment altogether,” though Madison himself wrote little on the subject and may not, in fact, have opposed executions for every category of offender.<sup>480</sup> After Jefferson’s bill

<sup>473</sup> 3 ELLIOT’S DEBATES 412 (2d ed. 1836).

<sup>474</sup> *Id.*

<sup>475</sup> Granucci, *supra* note 431, at 841–42. Another delegate, George Nicholas, quickly agreed with that interpretation, but felt that the protection had been frequently ignored. See Virginia Ratifying Convention (June 16, 1788), reprinted in THE FOUNDERS’ CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987), available at [http://press-pubs.uchicago.edu/founders/documents/a2\\_2\\_1s6.html](http://press-pubs.uchicago.edu/founders/documents/a2_2_1s6.html).

<sup>476</sup> RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 3 (1991); see also 8 AMERICAN STATE TRIALS: A COLLECTION OF THE IMPORTANT AND INTERESTING CRIMINAL TRIALS WHICH HAVE TAKEN PLACE IN THE UNITED STATES, FROM THE BEGINNING OF OUR GOVERNMENT TO THE PRESENT DAY 7 (John D. Lawson ed., 1917) (noting that New Hampshire Governor John Langdon, one of the signers of the Constitution, allowed the execution of Josiah Burnham to proceed after granting a four-week reprieve).

<sup>477</sup> WALTER STAHR, JOHN JAY: FOUNDING FATHER 379 (2005).

<sup>478</sup> See Mannheimer, *supra* note 465, at 823. In 1897, Congress reduced the number of capital crimes to five.

<sup>479</sup> STAHR, *supra* note 477, at 345. New York’s legislature would agree, passing a law restricting capital punishment to four crimes: treason, murder, abetting murder, and stealing from a church. *Id.*

<sup>480</sup> BANNER, *supra* note 1, at 88; Jack N. Rakove, Book Review, *Two Foxes in the Forest of History*, 11 YALE J.L. & HUMAN. 191, 192 (1991); see also Betty B. Fletcher, *The Death Penalty in America: Can Justice Be Done?*, 70 N.Y.U. L. REV. 811, 811–12 (1995) (“James Madison might be surprised to hear the topic I have chosen for the lecture that bears his name. Madison neither championed nor deplored the death penalty. He apparently gave it little thought, for there is almost no reference to it in his voluminous writings. It is not discussed in *The Federalist Papers*. The Constitution mentions it only by implication in the Fifth Amendment, forbidding the deprivation of life without due process of law. Madison did promote Thomas Jefferson’s legal reforms for Virginia, which included a provision to restrict capital punishment to murder and treason. But Madison criticized this provision because he felt that it would unduly ‘tie the hands of Government.’”).

for more proportionate punishments failed by a single vote in 1785, for example, Madison lamented to Jefferson that “our old bloody code is by this event fully restored.”<sup>481</sup> Madison also told Dr. Benjamin Rush that he favored reforming criminals instead of executing them.<sup>482</sup> Likewise, in 1788, Madison—concerned about the severity of executions yet maybe still unsure of where he himself stood on the issue—made these remarks on a draft Virginia constitution prepared by Thomas Jefferson:

It is at least questionable whether death ought to be confined to “Treason and murder.” It would not therefore be prudent to tie the hands of Government in the manner here proposed. The prohibition of pardon, however specious in theory would have practical consequences which render it inadmissible. A single instance is a sufficient proof. The crime of treason is generally shared by a number, and often a very great number. It would be politically if not morally wrong to take away the lives of all even if every individual were equally guilty. What name would be given to a severity which made no distinction between the legal & the moral offence—between the deluded multitude and their wicked leaders. A second trial would not avoid the difficulty; because the oaths of the jury would not permit them to hearken to any voice but the inexorable voice of the law.<sup>483</sup>

¶104 Perhaps the best statement of Madison’s views on the death penalty was expressed privately. After he finished his presidential term, Madison wrote a letter to a war veteran who had solicited Madison’s views on the subject. In 1823, G. F. H. Crockett, a Kentuckian, wrote to Madison, enclosing a copy of Crockett’s address to the Kentucky legislature on the abolition of capital punishment.<sup>484</sup> Madison wrote back later that year, noting receipt of Crockett’s letter and his legislative address and referring to his “enlightened opinions.”<sup>485</sup> Madison noted the “innovations” that can be brought about by “the legislative power” of “each confederated member”—a clear reference to federalism—with Madison emphasizing the potential “extension” of such policies “to the whole if found to be improvements.”<sup>486</sup> Madison then commented:

<sup>481</sup> See RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 162 (1990).

<sup>482</sup> See MASUR, *supra* note 1, at 62 (1989).

<sup>483</sup> James Madison, Observations on the “Draught of a Constitution for Virginia,” in 5 *THE WRITINGS OF JAMES MADISON, 1787-1790*, at 288 (Gaillard Hunt ed., 1904); see also Matthew T. Norman, *Standards and Procedures for Determining Whether a Defendant Is Competent to Make the Ultimate Choice – Death; Ohio’s New Precedent for Death Row Volunteers*, 13 *J.L. & HEALTH* 103, 108 (1998-1999) (“In drafting a state constitution for Virginia, Thomas Jefferson provided capital punishment for the crimes of treason and murder. But, James Madison believed that this provision in the state’s constitution would ‘unduly tie the hands of Government.’ Madison was concerned that juries would not be able to impose capital punishment in a fair and reliable manner and would have much difficulty determining who deserved the death penalty and who did not.” (citing Madison, *supra*, at 284, 288–89)).

<sup>484</sup> Letter from G. F. H. Crockett to James Madison (Sept. 24, 1823) (Madison Papers, Library of Congress), available at <http://memory.loc.gov/master/mss/mjm/20/0500/0570d.jpg>; see also CAPITAL PUNISHMENT: A BIBLIOGRAPHY WITH INDEXES 36 (C. Cliff ed., 2nd ed. 2003).

<sup>485</sup> Letter from James Madison to G.F.H. Crockett (Nov. 6, 1823) (Madison Papers, Library of Congress), available at <http://memory.loc.gov/master/mss/mjm/20/0600/0621d.jpg>.

<sup>486</sup> *Id.*

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. But it is not my purpose to enter into the important discussion. Nor do I know that I could furnish you with any new ideas or hints such as you ask, if there were time for the task. You seem to have consulted some of the sources where they were most likely to be found.<sup>487</sup>

Elsewhere, Madison would describe “capital punishments” as “one of the most solemn acts of sovereign authority.”<sup>488</sup>

¶105 Another leading founder, James Wilson, expressed the view that America’s criminal law “greatly needs reformation.” He said that “the seeds of reformation are sown” but quickly cautioned: “Those seeds, and the tender plants which from some of them are now beginning to spring, let it be our care to discover and to cultivate.”<sup>489</sup> After calling the law of England “defective to a degree both gross and cruel” and citing Sabacos, who, in Egypt, replaced capital punishment with life sentences to be carried out “in the publick works,” Wilson called for proportionate punishments and expressed the view that “[p]unishments ought unquestionably to be moderate and mild.”<sup>490</sup> Although Wilson supported the passage of the Pennsylvania law limiting the death penalty to first-degree murder, he acknowledged in his extensive writings that premeditated murder was still commonly punished by death.<sup>491</sup>

¶106 But Wilson also took pride in progressive ideas and how few American crimes were punishable by death. In charging a Virginia grand jury in 1791, Wilson began with two directives: “To prevent crimes is the noblest end and aim of criminal jurisprudence.” “To punish them is one of the means necessary for the accomplishment of this noble end and aim.”<sup>492</sup> Near the end of his address, Wilson specifically invoked Beccaria, calling him “eloquent and benevolent,” and echoed Beccaria’s approach, saying, “[I]et the punishment be proportioned—let it be analogous—to the crime.”<sup>493</sup> Wilson also proudly proclaimed: “How few are the crimes—how few are the capital crimes, known to the laws of the United States, compared with those known to the laws of England!”<sup>494</sup>

¶107 In discussing punishments, Wilson contrasted “moderate and mild” sentences with more severe sanctions, noting how “one degree of severity opens and smooths the way for another, till, at length, under the specious appearance of necessary justice, a system of cruelty is established by law.”<sup>495</sup> Telling grand jurors that “cruelty” is the “parent of

<sup>487</sup> *Id.* Madison’s letter further stated, “I must ask the favor of you to make no possible use of this letter,” adding that his letter was “meant merely” as a “friendly” reply. *Id.*

<sup>488</sup> JAMES MADISON: WRITINGS, 1772-1836, at 488 (1999).

<sup>489</sup> 2 COLLECTED WORKS OF JAMES WILSON, *supra* note 88, at ch. I.

<sup>490</sup> *Id.*; see also HERODOTUS: THE HISTORIES 150 (Robin Waterfield, trans. 1998).

<sup>491</sup> 2 COLLECTED WORKS OF JAMES WILSON, *supra* note 88, at ch. IV (“Of Crimes Against the Right of Individuals to Personal Safety”); Binder, *supra* note 150, at 119 (noting that Wilson and others promoted the law dividing murder into degrees).

<sup>492</sup> 1 COLLECTED WORKS OF JAMES WILSON (Kermit L. Hall & Mark David Hall, eds. 2007), available at [http://oll.libertyfund.org/index.php?option=com\\_staticxt&staticfile=show.php%3Ftitle=2072&Itemid=27](http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=2072&Itemid=27).

<sup>493</sup> *Id.*

<sup>494</sup> *Id.*

<sup>495</sup> *Id.*

*slavery*,” Wilson called “cruel” punishments “dastardly and contemptible.”<sup>496</sup> “It is the opinion of some writers, highly respected for their good sense, as well as for their humanity,” Wilson noted, no doubt alluding once more to Beccaria, “that capital punishments are, in no case, necessary. It is an opinion, which I am certainly well warranted in offering—that nothing but the most absolute necessity can authorize them.”<sup>497</sup> Decrying any “tyrant” who gave “standing instructions to his executioners” to “protract the expiring moments of the tortured criminal” and to “manage the butchering business with such studied and slow barbarity” as to prolong the pain, Wilson also added, speaking again of executions: “Another opinion I am equally warranted in offering—that they should not be aggravated by any sufferings, except those which are inseparably attached to a violent death.”<sup>498</sup>

### C. *The Constitutional Convention and the Founders’ Debates*

¶108 Even though the punishment of crime is a central role of government, federal criminal law issues were debated only modestly at the Constitutional Convention.<sup>499</sup> The words “punish” and “Punishment” appear in the Constitution, but capital punishment is not mentioned in connection with those particular references.<sup>500</sup> Limited discussion of the death penalty, however, did occur at the Convention on clauses other than the Eighth Amendment.<sup>501</sup> For instance, the Bankruptcy Clause was adopted on September 3, 1787 over the recorded dissent of Roger Sherman<sup>502</sup> of Connecticut: “Mr. Sherman observed that Bankruptcies were in some cases punishable with death by the laws of England & He did not chuse to grant a power by which that might be done here.”<sup>503</sup> Similarly, the

<sup>496</sup> *Id.*

<sup>497</sup> *Id.*

<sup>498</sup> *Id.*

<sup>499</sup> See Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 25–26 (1996) (“Debate on substantive criminal law issues almost exclusively consisted of four main topics: piracy, crimes against the law of nations, treason, and counterfeiting.”).

<sup>500</sup> See U.S. CONST., art. I, § 3, cl. 7 (impeached person who is convicted “shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law”); U.S. CONST., art. I, § 8, cl. 6 (“Congress shall have Power . . . To Provide for the Punishment of counterfeiting the Securities and current Coin of the United States.”); U.S. CONST., art. I, § 8, cl. 10 (“Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”); U.S. CONST., art. III, § 3, cl. 2 (“Congress shall have Power to declare the Punishment of Treason.”).

<sup>501</sup> See Randolph J. Haines, *The Uniformity Power: Why Bankruptcy Is Different*, 77 AM. BANKR. L.J. 129, 153 (2003) (“The only reservation expressed at the Convention about the Bankruptcy Clause, by Roger Sherman, did not focus upon its uniformity provision, but rather that Congress might include a death penalty for fraudulent debtors as did the English model.”); Ryan Norwood, *None Dare Call It Treason: The Constitutionality of the Death Penalty for Peacetime Espionage*, 87 CORNELL L. REV. 820, 845 n.170 (2002) (“Some of the Framers apparently believed that th[e] constitutional definition of treason itself foreclosed the death penalty for other crimes against the state. During a debate over the treason clause, Rufus King warned that ‘the controversy relating to Treason might be of less magnitude than was supposed; as the legislature might punish capitally under other names than Treason.’” (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 347 (Max Farrand ed., 1966))).

<sup>502</sup> *Ry. Labor Executives’ Ass’n v. Gibbons*, Trustee, 455 U.S. 457, 472 (1982); see Mark Bradshaw, *The Role of Politics and Economics in Early American Bankruptcy Law*, 18 WHITTIER L. REV. 739, 741 n.12 (1997) (noting that Roger Sherman’s concern was “likely based on an English bankruptcy law passed in 1705, which gave the English courts the power to charge a debtor with a felony if he failed to surrender his property and disclose his affairs”).

<sup>503</sup> 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 501, at 489. After Sherman’s comment

debate over the Treason Clause centered on how “Treason” should be defined and “whether treason committed against a State (as opposed to against the United States) could be separately punished.”<sup>504</sup> After the Framers debated the scope of the Treason Clause, the First Congress passed a law making treason punishable by death—though, at the Constitutional Convention of 1787, the Framers themselves rejected an attempt to exclude “cases of treason” from the President’s pardoning power.<sup>505</sup>

¶109 Outside the Convention, anti-Federalist George Mason feared that Congress would use the Necessary and Proper Clause to create “new Crimes” or “inflict unusual and severe Punishments.”<sup>506</sup> In the campaign for ratification of the original Constitution, James Iredell, an ardent Federalist writing under the alias of “Marcus,” replied to Mason’s concern, trying to meet it: “The expressions ‘unusual and severe’ or ‘cruel and unusual’ surely would have been too vague to have been of any consequence, since they admit of no clear and precise signification.”<sup>507</sup> “If to guard against punishments being too severe, the Convention had enumerated a vast variety of cruel punishments, and prohibited the use of any of them, let the number have been ever so great,” Iredell mused, “an inexhaustible fund must have been unmentioned, and if our government had been disposed to be cruel their invention would only have been put to a little more trouble.”<sup>508</sup> Iredell—who thought “a labyrinth of detail” in “the original constitution of a government would have appeared perfectly ridiculous”—thus believed the amendment unnecessary,

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and before the vote, another delegate—Gouverneur Morris of Pennsylvania—had attempted to reassure Sherman. As it was reported: “Mr. GOVR. MORRIS said this was an extensive & delicate subject. He would agree to it because he saw no danger of abuse of the power by the Legislature of the U.S.” Frederick P. Corbit, *The Founding Fathers’ Influence on Bankruptcy Law*, 26 AM. BANKR. INST. J. 50, 50 n.4 (2007) (citing The Avalon Project: Madison Debates, Sept. 3, 1787, Yale Law School, [http://avalon.law.yale.edu/18th\\_century/debates\\_903.asp](http://avalon.law.yale.edu/18th_century/debates_903.asp)).

When Congress put in place a bankruptcy code, it did not provide for the death penalty for debtors—a fact at least a couple of the Founding Fathers would no doubt have seen as enlightened policy, especially after a financial ruin, driven by speculation, in 1797. See Rhet Frimet, *The Birth of Bankruptcy in the United States*, 96 COM. L.J. 160, 166–67 (1991) (noting that James Wilson fled to North Carolina to avoid imprisonment in Pennsylvania for unpaid debts and that Robert Morris, a financier of the American Revolution, was incarcerated in Philadelphia); see also BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 103–06 (2002) (noting that a lawyer, death penalty opponent William Keteltas, campaigned against imprisonment for debtors through a newspaper, *Forlorn Hope*, published in 1800, and even reprinted a chapter from Beccaria’s book, in which Beccaria asked “upon what barbarous pretence” an “honest bankrupt” is “ranked with criminals”).

<sup>504</sup> See Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice’s Role*, 26 FORDHAM URB. L.J. 347, 361 n.52 (1999). “Treason against the United States,” as set forth in Article III of the Constitution, “shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.” U.S. CONST. art. III, § 3. According to the Treason Clause: “No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt act, or on Confession in open Court.” *Id.*

<sup>505</sup> See 1 Stat. 122, ch. 9 § 1 (1790); Todd David Peterson, *Congressional Power Over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1230 (2003). In the United States, no one has actually been executed for treason in many decades. Wilson, *supra* note 221, at 156.

<sup>506</sup> See U.S. CONST. art. 1, § 8, cl. 18 (“Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”); Mannheim, *supra* note 465, at 865 & n.253 (quoting George Mason, *Objections to the Constitution of Government Formed by the Convention* (1787), reprinted in 2 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST 13 (1981)).

<sup>507</sup> Claus, *supra* note 449, at 132.

<sup>508</sup> Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 544 n.119 (2003); Jack Balderson, Jr., *Temporal Units of Prosecution and Continuous Acts: Judicial and Constitutional Limits*, 36 SAN DIEGO L. REV. 195, 219 (1999).



saying, “Let us also remember, that as those who are to make those laws must themselves be subject to them, their own interest and feelings will dictate to them not to make them unnecessarily severe . . . .”<sup>509</sup>

#### D. *The Eighth Amendment in Context*

¶110 What can be said with certainty about the Eighth Amendment is that in America’s founding era the words “cruel” and “unusual” had a number of common, everyday uses, as is still the case today.<sup>510</sup> Benjamin Franklin, for instance, called it “unjust and cruel” to punish a man on account of the guilt of another, and he referred to “cruel, unjust and barbarous Tempers.”<sup>511</sup> He also penned phrases such as “cruel Animosities,”<sup>512</sup> “cruel Captivity,”<sup>513</sup> and “cruel treatment,”<sup>514</sup> and even referred to a “cruel Mother-in-Law.”<sup>515</sup> In his writings, he also used the phrases “cruel Murders,”<sup>516</sup> “that cruel Disease,”<sup>517</sup> and “that cruel Gout,”<sup>518</sup> and made reference to “unusual Treatment,”<sup>519</sup> “unusual Quantities of Ice,”<sup>520</sup> and “unusual Words in the Pamphlet.”<sup>521</sup> In an American case reporter, published in 1796, a solicitor-general referred to a “beating” as “cruel or unusual.”<sup>522</sup>

<sup>509</sup> Claus, *supra* note 449, at 132. See Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 MICH. L. REV. 239, 314 n.284 (1989). William Randolph agreed, stating that “[b]efore these cruel punishments can be inflicted, laws must be passed, and judges must judge contrary to justice. This would excite universal discontent and detestation of the members of the government. They might involve their friends in the calamities resulting from it, and could be removed from office. I never desire a greater security than this, which I believe to be absolutely sufficient.” *Id.* (citing 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 468 (Jonathan Elliot ed, 2d ed. 1836)).

<sup>510</sup> See, e.g., Granucci, *supra* note 431, at 860 (“In the seventeenth century, the word ‘cruel’ had a less onerous meaning than it has today. In normal usage it simply meant severe or hard. The *Oxford English Dictionary* quotes as representative Jonathan Swift, who wrote in 1710, ‘I have got a cruel cold, and staid within all this day.’ Sir William Blackstone, discussing the problem of ‘punishments of unreasonable severity,’ uses the word ‘cruel’ as a synonym for severe or excessive.”). It is thus clear that the Framers understood that in using the word “cruel” they were putting a word in the Constitution that, in the future, would be subject to varying interpretations.

<sup>511</sup> See Benjamin Franklin, *A Defense of Mr. Hemphill’s Observations* (1735), <http://www.franklinpapers.org/franklin/framedVolumes.jsp> (last visited Aug. 31, 2009).

<sup>512</sup> Letter from Benjamin Franklin to Richard Jackson, June 25, 1764, <http://www.franklinpapers.org/franklin/framedVolumes.jsp> (last visited Aug. 31, 2009).

<sup>513</sup> Letter from Benjamin Franklin to John Jay, Apr. 24, 1782, <http://www.franklinpapers.org/franklin/framedVolumes.jsp> (last visited Aug. 31, 2009).

<sup>514</sup> Letter from Benjamin Franklin and others to Philip Schuyler, May 11, 1776, <http://www.franklinpapers.org/franklin/framedVolumes.jsp> (last visited Aug. 31, 2009).

<sup>515</sup> Letter from Benjamin Franklin to David Hartley, Feb. 12, 1778, <http://www.franklinpapers.org/franklin/framedVolumes.jsp> (last visited Aug. 31, 2009).

<sup>516</sup> Letter from Benjamin Franklin to Richard Oswald, July 28, 1782, <http://www.franklinpapers.org/franklin/framedVolumes.jsp> (last visited Aug. 31, 2009).

<sup>517</sup> Letter from Benjamin Franklin to Joseph Galloway, Feb. 6, 1772, <http://www.franklinpapers.org/franklin/framedVolumes.jsp> (last visited Aug. 31, 2009).

<sup>518</sup> Letter from Benjamin Franklin to Mary Stevenson, Mar. 14, 1764, <http://www.franklinpapers.org/franklin/framedVolumes.jsp> (last visited Aug. 31, 2009).

<sup>519</sup> *The Pennsylvania Gazette*, Oct. 7, 1742, <http://www.franklinpapers.org/franklin/framedVolumes.jsp> (last visited Aug. 31, 2009).

<sup>520</sup> Letter from Benjamin Franklin to Richard Jackson, Dec. 6, 1753, <http://www.franklinpapers.org/franklin/framedVolumes.jsp> (last visited Aug. 31, 2009).

<sup>521</sup> Letter from Benjamin Franklin to David Hume, Sept. 27, 1760, <http://www.franklinpapers.org/franklin/framedVolumes.jsp> (last visited Aug. 31, 2009).

<sup>522</sup> *State v. Norris*, 2 N.C. 429, 1796 WL 327, at \*5 (N.C. Super. L. & Eq. 1796); cf. *Commonwealth v. Tilton*, 8 Metcalf 232, 234, 1844 WL 4263, at \*3 (Mass. 1844) (referring to the sport of cockfighting as

There is even evidence that the framers of the English Bill of Rights and the Eighth Amendment may have understood the concept of “cruel and unusual” punishments as a unitary concept of inhumane or cruel punishment.<sup>523</sup>

¶111 Interestingly, some state constitutional provisions enacted shortly before and after the Eighth Amendment’s ratification simply prohibited “cruel punishments,” dropping any reference to the term “unusual.”<sup>524</sup> This suggests that some legislators may have viewed the “unusual” language as mere surplusage. Over time, of course, the various language variants—“cruel or unusual,” “cruel and unusual,” and simply “cruel”—all persisted, even finding their way into federal and state laws.<sup>525</sup> By 1790, nine states had constitutional provisions barring “cruel and unusual,” “cruel or unusual,” or “cruel” punishments.<sup>526</sup> And by the time the Fourteenth Amendment was adopted in 1868, seventeen state constitutions banned cruel *and* unusual punishments, fourteen state constitutions banned cruel *or* unusual punishments, and four state constitutions banned cruel punishments without any reference to the “unusual” terminology.<sup>527</sup> Although a “cruel” or “unusual” punishment may itself imply a disproportionate one, some state

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“barbarous and cruel”).

<sup>523</sup> See Stacy, *supra* note 271, at 504–05, 531. As one commentator, Tom Stacy, has explained: “The history of the English Bill of Rights reinforces the conclusion that the phrases ‘cruel and unusual’ and ‘cruel or unusual’ were understood to capture the same meaning. Just months after the House of Lords approved the Bill’s prohibition against ‘cruel and unusual punishments,’ a group of Lords filed a dissenting statement in the case of Titus Oates. The dissenting Lords concluded that the punishments imposed in Oates’s case violated the Bill of Rights, which they described as providing that neither ‘cruel nor unusual punishments [be] inflicted.’ Their mistake suggests that they understood prohibitions of ‘cruel and unusual’ and ‘cruel or unusual’ punishments as equivalents.” *Id.* at 503–04; *but see* Turnipseed v. State, 6 Ala. 664, 1844 WL 301, at \*1 (Ala. 1844) (interpreting a state statute prohibiting “cruel or unusual punishment” and holding that “[t]rue, the statute makes two offences, or rather does not require that the punishment inflicted upon a slave shall be both cruel and unusual to subject the offender to its sanctions: it is enough if the proof show it to be either the one or the other.”); Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 RUTGERS L.J. 929 (2002). But this line of argument is far from settled. For example, in discussing the difference between “cruel and unusual” and “cruel or unusual,” the Supreme Court of Michigan stated, “it seems self-evident that any adjectival phrase in the form ‘A or B’ necessarily encompasses a broader sweep than a phrase in the form ‘A and B.’ The set of punishments which are either ‘cruel’ or ‘unusual’ would seem necessarily broader than the set of punishments which are both ‘cruel’ and ‘unusual.’” *People v. Bullock*, 485 N.W.2d 866, 872 n.11 (Mich. 1992).

<sup>524</sup> Stacy, *supra* note 271, at 504 (noting that Pennsylvania and South Carolina enacted constitutions in 1790 that simply prohibited “cruel punishments” and that Delaware and Kentucky enacted constitutions in 1792 that prohibited “cruel punishments” and that “[n]umerous state constitutions enacted after the Founding period used this same language”).

<sup>525</sup> See *Turnipseed*, 6 Ala. at 664, 1844 WL 301, at \*1 (noting provision of penal code declaring that “[n]o cruel or unusual punishment shall be inflicted on any slave”); *State v. Wilson*, 25 S.C.L. 163, 1840 WL 2007, at \*1 (S.C. App. L. 1840) (referencing a 1740 law punishing anyone who “shall . . . cut out the tongue, put out the eye, castrate, or cruelly scald, burn, or deprive any slave of any limb or member, or shall inflict any other cruel punishment, other than by whipping, or beating with a horse-whip, cow-skin, switch or small stick, or by putting irons on, or confining, or imprisoning such slave . . .”); *United States v. Winn*, 28 F. Cas. 732, 732 (C.C. Mass. 1838) (referencing “the act of March 3, 1835, § 3 [4 Stat. 776]” making it unlawful for “any master or other officer of any American ship or vessel on the high seas” to “inflict” upon any “crew” member “of such ship or vessel” any “cruel and unusual punishment”); *Markham v. Close*, 2 La. 581, 1831 WL 877, at \*3 (La. 1831) (discussing “16th section of the Black Code,” which penalized anyone who “should inflict any cruel punishment, except flogging, or striking with a whip, leather thong, switch or small stick, or putting in irons, or confining such slave . . .”).

<sup>526</sup> Stinneford, *supra* note 271, at 1798–99.

<sup>527</sup> Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 8, 78 (2008).

constitutions, including New Hampshire's 1783 constitution, specifically called for "proportioned" punishments.<sup>528</sup>

¶112 Recently, the Eighth Amendment's use of the word "unusual" has attracted a lot of scholarly attention.<sup>529</sup> One academic writes that "unusual" as used in the Eighth Amendment was "a term of art that referred to government practices that are contrary to 'long usage' or 'immemorial usage.'"<sup>530</sup> "The opposite of a practice that enjoyed 'long usage,' law professor John Stinneford wrote in 2008, "was an 'unusual' practice, or in other words, an innovation."<sup>531</sup> The term "unusual" itself, of course, has always had—and continues to have—a straightforward dictionary definition.<sup>532</sup> In common parlance, the word simply means "not usual," "not common" or "rare."<sup>533</sup>

## VII. THE SUPREME COURT'S EIGHTH AMENDMENT JURISPRUDENCE

### A. *Judicial Construction of the Eighth Amendment*

¶113 The meaning of the Eighth Amendment and similar state-law provisions has been the subject of much controversy. "The feeling that modern Eighth Amendment jurisprudence has gone off the rails," notes one commentator, "has arisen, at least in part, from the wildly inconsistent rulings that have emanated from the Supreme Court over the past few decades, particularly regarding proportionality in sentencing and the death penalty."<sup>534</sup> That commentator also writes that "[a] number of scholars have previously pointed out the cruel irony inherent in the fact that the evolving standards of decency test ties the rights of criminal defendants to the very same majority opinion from which the Eighth Amendment is supposed to protect them."<sup>535</sup>

<sup>528</sup> See, e.g., N.H. CONST. art. XVIII ("No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason . . . . [A] multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind."); see also Calabresi & Agudo, *supra* note 527, at 83 ("Only nine states out of thirty-seven in 1868—a minority of slightly less than one-quarter of the states then in the Union—explicitly required in their state constitutions that all penalties and punishments be proportioned to the offense.").

<sup>529</sup> See, e.g., Stinneford, *supra* note 271, at 1744.

<sup>530</sup> *Id.* at 1745, 1770.

<sup>531</sup> *Id.* at 1745.

<sup>532</sup> *Id.* at 1767 ("In the seventeenth and eighteenth centuries, the term 'unusual' had many of the meanings we currently associate with the term: 'rare,' 'uncommon,' 'out of the ordinary.'").

<sup>533</sup> See *United States v. Dyers*, No. 1:06-MJ-455-AJB, 2007 WL 397109, at \*8 (N.D. Ga. Jan. 30, 2007); *Adair v. United States*, 70 Fed. Cl. 65, 72 (2006); *Brown v. Imperial Trading Co.*, 815 So.2d 1084, 1088 (La. App. 2002); *People v. Frost*, No. 213983, 1999 WL 33328872, at \*1 (Mich. Ct. App. Dec. 7, 1999). The word "unusual" has also been variously defined by American courts to mean "being out of the ordinary," "uncommon," "deviating from the norm," "strange," "exceptional," "being unlike others" or "not in accordance with usage, custom, or habit." *Jones v. State*, 701 So. 2d 76, 85 n.22 (Fla. 1997); *Downs v. J. & J. Maint., Inc.*, 702 So. 2d 845, 848 (La. Ct. App. 1997); *People v. Sharp*, 481 N.W.2d 773, 775 (Mich. App. 1992); *State v. Beyer*, 441 N.W.2d 919, 922 (N.D. 1989); *Commonwealth v. McDonald*, 19 Pa. D. & C.2d 253, 255 (Pa. Quar. Sess. 1959).

<sup>534</sup> Stinneford, *supra* note 271, at 1740.

<sup>535</sup> *Id.* at 1754 n.81; cf. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1942) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

¶114 Judicial decisions give some flavor for how the Eighth Amendment was understood in the early days of the republic. For example, in 1825, the Pennsylvania Supreme Court struck down the punishment of Nancy James. Adjudged “a common scold” in 1824, James had been sentenced “to be placed in a certain engine of correction, called a cucking or ducking-stool . . . and being so placed therein, to be plunged three times into the water.”<sup>536</sup> In striking down the punishment, the Pennsylvania Supreme Court did not rely on constitutional grounds but noted:

The object of the framers of the act of 1790, was the abolition of all infamous, disgraceful, public punishments—all cruel and unnatural punishments—for all the classes of minor offences and misdemeanors, to which they had been before applied.

.....

In coming to the conclusion, that the ducking-stool is not the punishment of scolds, I do not take into consideration the humane provisions of the constitutions of the United States and of this state, as to cruel and unusual punishments, further than they show the sense of the whole community. If the reformation of the culprit, and prevention of the crime, be the just foundation and object of all punishments, nothing could be further removed from these salutary ends, than the infliction in question. It destroys all personal respect; the women thus punished would scold on for life, and the exhibition would be far from being beneficial to the spectators. What a spectacle would it exhibit!<sup>537</sup>

¶115 The Supreme Court first examined the Eighth Amendment’s history in *Weems v. United States*.<sup>538</sup> In that case, the Court held that a fifteen-year sentence in irons and shackles<sup>539</sup> for falsifying a document was excessive.<sup>540</sup> “[I]t is a precept of justice,” the Court ruled, echoing back to Beccaria, “that punishment for crime should be graduated and proportioned to offense.”<sup>541</sup> After citing a legal scholar for the proposition that the

<sup>536</sup> *James v. Commonwealth*, 12 Serg. & Rawle 220, 1825 WL 1899, at \*1 (Pa. 1825).

<sup>537</sup> *Id.* at \*10, 13.

<sup>538</sup> 217 U.S. 349 (1910).

<sup>539</sup> *Id.* at 358. At issue in *Weems* was a “cadena temporal” sentence imposed by a Philippine court. *See Solem v. Helm*, 463 U.S. 277, 287 (1983); *see also id.* at 306–07 (Burger, C.J., dissenting) (“In *Weems*, the Court had struck down as cruel and unusual punishment a sentence of cadena temporal imposed by a Philippine Court. This bizarre penalty, which was unknown to Anglo-Saxon law, entailed a minimum of 12 years’ imprisonment chained day and night at the wrists and ankles, hard and painful labor while so chained, and a number of ‘accessories’ including lifetime civil disabilities.”).

<sup>540</sup> *Weems*, 217 U.S. at 357, 382; *see also Solem*, 463 U.S. at 287 (discussing *Weems*); *id.* at 290 (“we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted”).

<sup>541</sup> *Weems*, 217 U.S. at 367; *see also* Schwartz & Wishingrad, *supra* note 75 (discussing *Weems*). It is clear that the Eighth Amendment protects everyone. *See Roper v. Simmons*, 543 U.S. 511, 560 (2005). Academics have diverged over whether the Eighth Amendment should be read to contain a proportionality requirement. *Compare* Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 841 (1972) (finding the Eighth Amendment restricts the nature and amount of punishment), *and* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 646 (2005) (“It is

Eighth Amendment was “‘adopted as an admonition to all departments of the national government, to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts,’”<sup>542</sup> the Court held that “a principle, to be vital, must be capable of wider application than the mischief which gave it birth.”<sup>543</sup>

¶116 The Court in *Weems* found that the Eighth Amendment was originally motivated by a distrust of power—a distrust deeply felt by Patrick Henry and others.<sup>544</sup> “[I]t was believed,” the Court explained, “that power might be tempted to cruelty.”<sup>545</sup> In fact, as Virginia’s governor, Patrick Henry himself had advocated for reform of the state’s death penalty laws. As one of Henry’s biographers has written:

As governor, Henry attempted to reform a number of British laws he considered harsh. The death penalty, for example, was imposed for many felonies, regardless of the severity of the crime. This was a practice that Henry felt was both unjust and cruel. He thus developed a plan of granting pardons, after hard labor, for lesser crimes. Writing to Charles Pearson, who was in charge of the pardoned prisoners, Henry commanded him “to observe such a degree of humanity towards these people as their condition will permit, in everything that relates to them.” They are to have “plenty of wholesome food” and their clothes are to be “warm and comfortable.”<sup>546</sup>

¶117 After noting the Founders’ distrust of power, the Supreme Court in *Weems* then offered its own interpretive guidance. “Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken,” the Court ruled.<sup>547</sup> “This is peculiarly true of constitutions,” the Court went on to explain, adding: “They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, ‘designed to approach immortality as nearly as human institutions can approach it.’”<sup>548</sup> In other words, the Constitution must be viewed as a vibrant, living document, not an antiquated catalog of eighteenth-century thought.

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particularly important to recognize retributive proportionality limits on lengthy prison terms under the Eighth Amendment.”), with Charles W. Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 419–20 (1980) (arguing that judicial restraint counsels against recognizing a proportionality limitation). However, the Supreme Court has made clear that in capital cases, the Eighth Amendment requires that a punishment must be “proportioned” to the offense. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008) (citations omitted).

<sup>542</sup> *Weems*, 217 U.S. at 371 (quoting 2 JOSEPH STORY, ON THE CONSTITUTION § 1903 (5th ed. 1891)).

<sup>543</sup> *Id.* at 373.

<sup>544</sup> *Id.* at 372–73.

<sup>545</sup> *Id.* at 373.

<sup>546</sup> See DAVID J. VAUGHAN, GIVE ME LIBERTY: THE UNCOMPROMISING STATESMANSHIP OF PATRICK HENRY 175–76 (1997).

<sup>547</sup> *Weems*, 217 U.S. at 373. The Court emphasized that “time works changes, brings into existence new conditions and purposes.” *Id.*

<sup>548</sup> *Id.* As the Court explained: “The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.” *Id.* Had a purely “historical” interpretation of the Eighth Amendment

¶118 The Supreme Court has thus held that the Eighth Amendment bars not only “barbaric” punishments but also those that are “excessive” or “disproportionate” to the crime.<sup>549</sup> Under *Gregg*, a punishment is “excessive” if it (1) “makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless infliction of pain and suffering,” or (2) “is grossly out of proportion to the severity of the crime.”<sup>550</sup> Whether a death sentence is “disproportionate” to the crime committed depends on societal standards, controlling precedents, and the individual views of the Supreme Court Justices themselves.<sup>551</sup> A government must—it has been said more than once—exercise its power to punish “within the limits of civilized standards.”<sup>552</sup>

### B. Human Dignity and the Evolving Standards of Decency

¶119 A claim that a punishment is excessive is not judged by the standards that prevailed in pre-Revolutionary War times or when the Bill of Rights was adopted.<sup>553</sup> Instead, the “basic concept” underlying the Eighth Amendment is “human dignity,” and the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>554</sup> The Supreme Court thus looks to the “norms” that “currently prevail,”<sup>555</sup> frequently trying to discern whether or not there is a “national consensus” against one kind of punishment or another.<sup>556</sup> But “[c]onsensus is not dispositive,” and in assessing whether a punishment is disproportionate to the crime, it is “the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose” that must be consulted.<sup>557</sup> The “standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment,” the Court

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prevailed in *Weems*, Justice Brennan noted in *Furman*, the “Cruel and Unusual Punishments” clause “would have been effectively read out of the Bill of Rights.” *Furman v. Georgia*, 408 U.S. 238, 265 (1972) (Brennan, J., concurring).

<sup>549</sup> *Kennedy*, 128 S. Ct. at 2649 (citing *Weems* with approval); *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Solem v. Helm* 463 U.S. 277, 284 (1983); see also *Furman*, 408 U.S. at 244–45 (Douglas, J., concurring). In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court put it this way: “Thus, we have read the text of the Amendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.” *Id.* at 311 n.7.

<sup>550</sup> *Coker*, 433 U.S. at 592. Seven Justices recently reiterated that the Eighth Amendment forbids prison sentences that are grossly disproportionate to the crime. *Ewing v. California*, 538 U.S. 11, 23 (2003) (plurality opinion); *id.* at 35 (Breyer, J., dissenting).

<sup>551</sup> *Kennedy*, 128 S. Ct. at 2650.

<sup>552</sup> *Id.* at 2658 (quoting *Trop v. US*, 356 U.S. 86, 99 (1958)).

<sup>553</sup> *Kennedy*, 128 S. Ct. at 2649; *Atkins*, 536 U.S. at 311.

<sup>554</sup> *Trop*, 356 U.S. at 100–01; see also *Kennedy*, 128 S. Ct. at 2649 (quoting *Trop* with approval). The Supreme Court has stated that punishment is justified under one or more of three principle rationales: rehabilitation, deterrence and retribution. *Kennedy*, 128 S. Ct. at 2649. The last of these justifications, the Court has noted, however, can sometimes “contradict the law’s own ends,” particularly in the capital punishment context. *Id.* at 2650. “When the law punishes by death,” the Court emphasized in 2008, “it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.” *Id.*

<sup>555</sup> *Kennedy*, 128 S. Ct. at 2649; cf. *id.* at 2656.

<sup>556</sup> *Id.* at 2651, 2657–58.

<sup>557</sup> *Id.* at 2650; *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (“The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded.”).

has emphasized, explaining that “[t]he standard itself remains the same, but its applicability must change as the basic mores of society change.”<sup>558</sup>

¶120 To assess the proportionality of a particular punishment, the Supreme Court once noted that “Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices,” but “should be informed by objective factors to the maximum extent possible.”<sup>559</sup> While Supreme Court Justices now explicitly reserve the right to consult their own sense of morality in making these judgments, more often than not the Court weighs a host of “objective” criteria before reaching its decisions.<sup>560</sup> As the Court has held: “When sentences are reviewed under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized.”<sup>561</sup>

¶121 Over the years, the nation’s highest court has consulted many different measures. In its cases, the Supreme Court has examined the gravity of the offense,<sup>562</sup> a penalty’s severity,<sup>563</sup> the circumstances of the defendant’s crime,<sup>564</sup> public attitudes,<sup>565</sup> state practice,<sup>566</sup> legislative acts,<sup>567</sup> and jury verdicts.<sup>568</sup> The Court has also compared the sentences imposed on other criminals in the same jurisdiction or in other jurisdictions.<sup>569</sup> But no one factor or criterion is dispositive in a given case,<sup>570</sup> no penalty is *per se* constitutional, and it is the “independent judgment” of Justices themselves that must be brought to bear in deciding a punishment’s acceptability under the Eighth Amendment.<sup>571</sup>

<sup>558</sup> *Kennedy*, 128 S. Ct. at 2649 (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (Burger, C. J., dissenting)).

<sup>559</sup> *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *see also Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citations omitted).

<sup>560</sup> The independent judgment and the “objective” criteria that the Supreme Court Justices consult are addressed elsewhere in this article.

<sup>561</sup> *Solem v. Helm* 463 U.S. 277, 290 (1983).

<sup>562</sup> *Id.* at 290–91.

<sup>563</sup> *Id.* at 291.

<sup>564</sup> *Id.*

<sup>565</sup> *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

<sup>566</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008).

<sup>567</sup> *Id.* The Supreme Court has stated that the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” *Atkins v. Georgia*, 536 U.S. 304, 312 (2002).

<sup>568</sup> *Coker*, 433 U.S. at 592; *see also Thompson v. Oklahoma*, 487 U.S. 815, 822 n. 7, 852 (citations omitted).

<sup>569</sup> *Solem v. Helm*, 463 U.S. 277, 291 (1983). Occasionally, the Supreme Court has even cited foreign law in support of its conclusions. *See id.* at 292 (citing *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982)). Indeed, in *Roper*, the Supreme Court, citing international treaties, outlawed the execution of juvenile offenders and noted that its ruling found “confirmation” in the fact that “the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” *Roper v. Simmons*, 543 U.S. 551, 575–78. “It is proper we acknowledge the overwhelming weight of international opinion against the juvenile death penalty,” the Court concluded. *Id.* at 578.

<sup>570</sup> *Solem*, 463 U.S. at 290 n.17; *see also Kennedy*, 128 S. Ct. at 2658. In *Atkins*, in examining “a much broader social and professional consensus,” the Supreme Court even referenced positions taken by professional organizations and religious groups, polling data, and the views of the “world community” opposing the death penalty’s imposition on mentally retarded offenders. *Atkins v. Virginia*, 536 U.S. 304, 316–317 n.21 (2002). Although the Court in *Atkins* emphasized “these factors are by no means dispositive,” the Court noted that “their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.” *Id.*; *see also Thompson*, 487 U.S. at 830–31 n.31.

<sup>571</sup> *Kennedy*, 128 S. Ct. at 2650; *see also Roper*, 543 U.S. at 564; *Solem*, 463 U.S. at 290; *Coker*, 433 U.S. at 597; *Atkins*, 536 U.S. at 321.

¶122 Ironically, by allowing the use of “death-qualified” juries, whereby death penalty opponents are excluded from capital juries, the Supreme Court has skewed some of the very data it considers in making Eighth Amendment judgments. Indeed, because capital juries are usually required to reach unanimous verdicts, death-qualified juries lead to more death sentences than might otherwise be expected as any potential hold-outs are eliminated from the jury pool at the outset.<sup>572</sup> “Litigation involving both challenges for cause and peremptory changes,” Justice John Paul Stevens has written, “has persuaded me that the process of obtaining a ‘death qualified jury’ is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction.”<sup>573</sup> “The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors,” Justice Stevens concluded, “should be viewed as objective evidence supporting the conclusion that the penalty is excessive.”<sup>574</sup>

### C. *The Supreme Court’s Eighth Amendment Cases*

¶123 Since *Weems*, the Eighth Amendment has been interpreted—and applied—in a variety of contexts by the Supreme Court. In *Trop v. Dulles*,<sup>575</sup> a U.S. Army private was court-martialed, convicted of desertion, given a dishonorable discharge, and sentenced to “three years at hard labor” with “forfeiture of all pay and allowances.”<sup>576</sup> He was also stripped of his American citizenship.<sup>577</sup> Finding an Eighth Amendment violation, the Supreme Court held that “the total destruction of the individual’s status in organized society” is “a form of punishment more primitive than torture.”<sup>578</sup> “[T]he expatriate has lost the right to have rights,” the Court ruled.<sup>579</sup> The scope of the Eighth Amendment, the Court emphasized, “is not static,” with the Court noting that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”<sup>580</sup> “While the State has the power to punish,” the Court stated, “the Amendment stands to assure that this power be exercised within the limits of civilized standards.”<sup>581</sup> The Court also remarked that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”<sup>582</sup>

<sup>572</sup> Stanton D. Krauss, *The Witherspoon Doctrine at Witt’s End: Death Qualification Reexamined*, 24 AM. CRIM. L. REV. 1, 2 (1986) (noting the unanimous verdict requirement in criminal cases); see also *Uttecht v. Brown*, 127 S. Ct. 2218, 2238 (2007) (Stevens, J., dissenting) (arguing that “[m]illions of Americans oppose the death penalty” and that “[a] cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases”).

<sup>573</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1550 (2008) (Stevens, J., concurring). Although the Supreme Court has ruled that a capital defendant may challenge for cause any prospective juror who would automatically vote for death if the defendant were convicted of a capital crime, see *Morgan v. Illinois*, 504 U.S. 719 (1992), there are probably very few people who fall into that category.

<sup>574</sup> *Baze*, 128 S. Ct. at 1550 (Stevens, J., concurring). Beccaria himself believed that “[t]he law whereby each man should be judged by his peers is a very useful one.” BECCARIA (Thomas ed.), *supra* note 1, at 30.

<sup>575</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>576</sup> *Id.* at 88.

<sup>577</sup> *Id.* at 87–88.

<sup>578</sup> *Id.* at 101.

<sup>579</sup> *Id.* at 101–02.

<sup>580</sup> *Id.* at 100–01.

<sup>581</sup> *Id.* at 100.

<sup>582</sup> *Id.* at 102.



¶124 Also in the non-capital context, *Robinson v. California*<sup>583</sup> struck down a criminal sentence and held that while “imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual,” it may not be imposed for the “status” of being “addicted to the use of narcotics.”<sup>584</sup> As Justice Stewart explained in *Robinson*: “Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”<sup>585</sup> And in *Solem v. Helm*,<sup>586</sup> the Court held that imposing a life-without-possibility-of-parole sentence upon a repeat offender for uttering a \$100 no-account check was prohibited by the Eighth Amendment.<sup>587</sup> “Incarcerating him for life without possibility of parole,” the Court ruled, “is unlikely to advance the goals of our criminal justice system in any substantial way” and was found to be “disproportionate” and “therefore prohibited by the Eighth Amendment.”<sup>588</sup>

¶125 In capital cases, the Supreme Court has frequently used the Eighth Amendment to restrict the categories of death-eligible offenses.<sup>589</sup> *Ford v. Wainwright*<sup>590</sup> barred the execution of the insane.<sup>591</sup> *Atkins v. Virginia*,<sup>592</sup> in which the Court overruled a prior

<sup>583</sup> *Robinson v. California*, 370 U.S. 660 (1962).

<sup>584</sup> *Id.* at 666–67.

<sup>585</sup> *Id.* at 667.

<sup>586</sup> 463 U.S. 277 (1983).

<sup>587</sup> *Id.* at 296, 303. The Court classified the defendant’s previous offenses as “nonviolent” and “all relatively minor.” *Id.* at 296–97. In making its ruling, the Court in *Solem* called the sentence at issue “far more severe than the life sentence we considered in *Rummel v. Estelle*.” *Solem*, 463 U.S. at 297. The criminal in *Rummel v. Estelle*, 445 U.S. 263 (1980), the Court emphasized, was parole-eligible in twelve years whereas Jerry Helm, barring executive clemency, would spend “the rest of his life in the state penitentiary.” *Solem*, 463 U.S. at 297, 301–02 (citing *Rummel*, 445 U.S. at 280).

<sup>588</sup> *Solem*, 463 U.S. at 297 n.22, 303. In other non-capital cases, the Supreme Court has rejected some prisoners’ Eighth Amendment claims. See *Overton v. Bazzetta*, 539 U.S. 126, 136–37 (2003) (the Eighth Amendment did not restrict the ability of prison officials to suspend an inmate’s visitation privileges as a means of ensuring prison discipline); *Ewing v. California*, 538 U.S. 11 (2003) (the Eighth Amendment did not prohibit the State of California from sentencing a repeat offender to life imprisonment without the possibility of parole for the theft of \$1200 worth of golf clubs under the state’s “Three Strikes and You’re Out” law); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (life-without-parole sentence for possession of cocaine upheld as constitutional even for offender with no prior criminal record); *Whitley v. Albers*, 475 U.S. 312, 319–21 (1986) (shooting of prisoner to quell riot did not violate a prisoner’s right to be free from cruel and unusual punishment; only “unnecessary and wanton infliction of pain” is forbidden); *Rhodes v. Chapman*, 452 U.S. 337, 339, 352 (1981) (housing two prisoners in one cell did not constitute “cruel and unusual punishment”); *Hutto v. Davis*, 545 U.S. 370 (1982) (per curiam) (upholding forty year sentence for possession and distribution of nine ounces of marijuana); *Graham v. West Virginia*, 224 U.S. 616, 631 (1912) (life sentence for a recidivist horse thief did not violate the Eighth Amendment).

<sup>589</sup> The Supreme Court has specifically held, in fact, that capital punishment must “be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” *Kennedy v. Louisiana*, 128 S. Ct. 2641, at 2650 (2008) (citing *Roper v. Simmons*, 543 U.S. 551, 568 (2005)). In other words, “the Court insists upon confining the instances in which the punishment can be imposed.” *Kennedy*, 128 S. Ct. at 2650.

<sup>590</sup> 477 U.S. 399 (1986).

<sup>591</sup> *Id.* at 409–10.

<sup>592</sup> 536 U.S. 304 (2002). The *Atkins* ruling certainly has the potential to lead other categories of offenders, such as those suffering from schizophrenia or other forms of mental illness, to raise Eighth Amendment claims. See Helen Shin, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants*, 76 *FORDHAM L. REV.* 465 (2007); Ronald S. Honberg, *The Injustice of Imposing the Death Penalty on People with Severe Mental Illnesses*, 54 *CATH. U. L. REV.* 1153 (2005). Already, there is a palpable and growing distaste for the execution of the mentally ill, and future litigation over capital punishment and mental illness seems inevitable. Richard C. Dieter, *The Path to an Eighth Amendment Analysis of Mental Illness and Capital Punishment*, 54 *CATH. U. L. REV.* 1117, 1121 (2005) (predicting that “eventually state and federal legislation will emerge to provide the Court with an objective basis for sparing the mentally ill from the death penalty”). In 1997, the U.N.

precedent, citing a “dramatic shift in the state legislative landscape,”<sup>593</sup> outlawed the execution of the mentally retarded.<sup>594</sup> *Roper v. Simmons*<sup>595</sup> barred the execution of offenders who were under the age of eighteen at the time of their crimes.<sup>596</sup> *Enmund v. Florida*<sup>597</sup> forbade the execution of a defendant who aided and abetted a robbery during which a murder took place but in which that defendant did not take life, attempt to kill, or intend that lethal force be used in the commission of the crime.<sup>598</sup> The thread running through these Supreme Court cases is that the offender—as the Court itself has acknowledged—had “a diminished personal responsibility for the crime.”<sup>599</sup>

¶126 In *Coker v. Georgia*,<sup>600</sup> the Supreme Court also held that a death sentence was “grossly disproportionate and excessive punishment” for the rape of an “adult woman.”<sup>601</sup> Emphasizing that Georgia, where the rape took place, was the sole U.S. jurisdiction authorizing a sentence of death for that crime,<sup>602</sup> the Court held that the sentence violated

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Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions specifically asked countries that execute the mentally ill “to bring their domestic legislation into conformity with international legal standards.” Vidisha Barua, “*Synthetic Sanity: A Way Around the Eighth Amendment?*,” 44 CRIM. LAW BULLETIN 4 (2008).

<sup>593</sup> The Court in *Atkins* overruled *Penry v. Lynaugh*, 492 U.S. 302 (1989), in which the Supreme Court declined to find unconstitutional the execution of the mentally retarded. Although federal law and two states, Georgia and Maryland, barred death sentences for the mentally retarded as of 1989, see *Atkins*, 536 U.S. at 313–14, & nn. 9–11, *Penry* held that such enactments, “even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus.” *Penry*, 492 U.S. at 334.

<sup>594</sup> The Court in *Atkins* emphasized that, since *Penry*, “state legislatures across the country began to address the issue.” The Court in *Atkins* pointed out that in that time fifteen states—Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina—had passed laws exempting the mentally retarded from death sentences. *Atkins*, 536 U.S. at 313–15.

<sup>595</sup> 543 U.S. 551 (2005).

<sup>596</sup> A divided Supreme Court had previously found no national consensus prohibiting the execution of juvenile offenders over the age of fifteen. *Stanford v. Kentucky*, 492 U.S. 361 (1989). The majority opinion in *Roper* overruled *Stanford*. *Roper*, 543 U.S. at 556, 564. The Supreme Court’s plurality opinion in *Thompson v. Oklahoma* had previously determined that the Eighth Amendment barred the execution of offenders under the age of sixteen. *Thompson v. Oklahoma*, 487 U.S. 815 (1988). That plurality opinion emphasized that juries only rarely imposed the death penalty on offenders under age sixteen and that the last execution of such an offender had been carried out in 1948, forty years earlier. *Id.* at 832–33.

<sup>597</sup> 458 U.S. 782 (1986).

<sup>598</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008) (citing *Enmund*, 458 U.S. at 793); cf. *Cabana v. Bullock*, 474 U.S. 376 (1986) (holding that there is no constitutional bar to an appellate court finding that a defendant killed, attempted to kill, or intended to kill, as *Enmund* required for the imposition of the death penalty in felony murder cases). In *Tison v. Arizona*, 481 U.S. 137 (2008), by contrast, the Supreme Court “allowed the defendants’ death sentences to stand where they did not themselves kill the victims but their involvement in the events leading up to the murders was active, recklessly indifferent, and substantial.” *Kennedy*, 128 S. Ct. at 2650 (citing *Tison*, 481 U.S. at 138).

<sup>599</sup> *Kennedy*, 128 S. Ct. at 2650.

<sup>600</sup> 433 U.S. 584 (1977).

<sup>601</sup> *Id.* at 592. Four justices were part of the plurality opinion in *Coker*. *Id.* at 586. Two other justices, William Brennan and Thurgood Marshall, wrote short concurring opinions expressing their view that the death penalty was cruel and unusual in all circumstances and therefore violated the Eighth Amendment. *Id.* at 600 (Brennan, J., concurring); *id.* (Marshall, J., concurring). Justice Powell also concurred in the judgment of the Court and in the plurality’s reasoning that death is a disproportionate punishment for the crime of raping an adult woman. *Id.* at 601 (Powell, J., concurring in part and dissenting in part).

<sup>602</sup> *Id.* at 595–96. The rape victim in *Coker* was actually just sixteen years of age, *id.* at 605 (Powell, J., concurring in part and dissenting in part), but was treated as an adult under Georgia law. The plurality opinion in *Coker* also pointed out that “at least 9 out of 10” Georgia juries did not impose death sentences for rape, *id.* at 596–97, adding that “in light of the legislative decisions in almost all of the States and in

the Eighth Amendment's cruel and unusual punishments clause.<sup>603</sup> As the Court ruled: "The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair."<sup>604</sup> And in 2008, the *Coker* ruling was extended to acts of child rape.<sup>605</sup> The Court held that, at least with respect to cases that involve individual crimes, the death penalty would not be permitted for a non-homicidal act.<sup>606</sup>

¶127 The Supreme Court has also used the Eighth Amendment to "ensure consistency in determining who receives a death sentence."<sup>607</sup> To guarantee "restraint and moderation in use of capital punishment,"<sup>608</sup> the Supreme Court has insisted on judging the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."<sup>609</sup> Thus, a defendant in a capital trial has the right to raise as a mitigating factor any aspect of his or her character or record and any circumstances of the offense that might be a basis for a sentence less than death.<sup>610</sup> The inherent conflict between these constitutional principles—that defendants be treated alike, to avoid racial bias and other inequities, yet also be treated as individuals, to recognize their humanity and unique characteristics—led Justice Blackmun to conclude the death penalty itself is unconstitutional.<sup>611</sup>

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most of the countries around the world, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system." *Id.* at 592 n.4. As the plurality opinion emphasized: "It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue." *Id.* at 595 n.10.

<sup>603</sup> *Id.* at 592. Only three of the thirty-five states that reenacted death penalty statutes in the wake of *Furman* permitted death sentences for an adult woman's rape. *Id.* at 594. In North Carolina and Louisiana, the death penalty was mandatory for those found guilty, and prior to *Coker* both of those mandatory death penalty statutes were struck down as unconstitutional. See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976). That left Georgia's law as the only one allowing for the punishment at issue. The Supreme Court, looking back, noted in 2002 in a subsequent case: "In *Coker*, we focused on the then-recent legislation that had been enacted in response to our decision 10 years earlier in *Furman* . . . to support the conclusion that the 'current judgment,' though 'not wholly unanimous' weighed very heavily on the side of rejecting capital punishment as a 'suitable penalty for raping an adult woman.'" *Atkins*, 536 U.S. at 312 (citations omitted).

<sup>604</sup> *Coker*, 433 U.S. at 598. "We have the abiding conviction," the Court ruled, "that the death penalty, which 'is unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take human life." *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)).

<sup>605</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646 (2008).

<sup>606</sup> *Id.* at 2646, 2659. After the *Kennedy* decision, the State of Louisiana filed a petition for rehearing after learning through a blog posting that the death penalty was a permissible punishment for child rape under U.S. military law. Petition for Rehearing, 2008 WL 2847069 \*1–2 (July 21, 2008). The State of Louisiana, the petition said, "regrettably did not know of this Federal provision," acknowledging "a significant error" and accepting "full responsibility" for the failure to bring the law to the Court's attention in its prior briefs. *Id.* On October 1, 2008, however, the Supreme Court denied the motion for rehearing. The Court held that although "[t]he military death penalty for rape has been the rule for more than a century," the death penalty "has not been carried out against a military offender for almost 50 years." The Court also emphasized that it was applying the Eighth Amendment to "civilian law" and not in the context of a military case. See *Kennedy v. Louisiana*, 129 S. Ct. 1, 1–2 (2008).

<sup>607</sup> *Kennedy*, 128 S.Ct. at 2658 (citing *California v. Brown*, 479 U.S. 538, 541 (1987) and *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) (requiring a State to give narrow and precise definition to aggravating factors)).

<sup>608</sup> *Id.* at 2659.

<sup>609</sup> *Woodson*, 428 U.S. at 304; *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978) (plurality opinion).

<sup>610</sup> *Lockett*, 438 U.S. at 604; *Eddings v. Oklahoma*, 455 U.S. 104, 110–12 (1982).

<sup>611</sup> *Callins v. Collins*, 510 U.S. 1141, 1144–45 (1994) (Blackmun, J., dissenting from denial of certiorari).

*D. The Supreme Court's Interpretive Approach*

¶128 In its rulings, the Supreme Court often starts by looking at how many states either prohibit or permit a particular punishment.<sup>612</sup> When *Atkins* was decided in 2002, the Court noted that thirty states, including twelve abolitionist ones, prohibited the death penalty for mentally retarded offenders, whereas only twenty states permitted that punishment.<sup>613</sup> When *Roper* was handed down in 2005, the Court observed that thirty states prohibited the death penalty for juveniles, whereas only twenty states authorized such a sentence.<sup>614</sup> In *Enmund*, the Court also emphasized that only eight jurisdictions authorized a death sentence solely for participation in a robbery during which an accomplice committed a murder.<sup>615</sup> And in *Kennedy* the Court emphasized that “it is of significance that, in forty five jurisdictions, petitioner could not be executed for child rape of any kind”—a number that “surpasses the 30 States in *Atkins* and *Roper* and the 42 States in *Enmund* that prohibited the death penalty under the circumstances those cases considered.”<sup>616</sup>

¶129 The counting of states permitting or prohibiting a death sentence is definitely part of the Eighth Amendment calculus, but the Supreme Court’s opinions make clear that such a mechanical count is not the decisive factor. For example, in *Atkins*, after noting that fifteen states had recently barred the execution of the mentally retarded,<sup>617</sup> the Court held that “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”<sup>618</sup> Likewise, in *Roper*, the Court acknowledged that “the rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it,” had been “slower” than in the mental retardation

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The desire to achieve uniform outcomes in cases while also mandating that defendants be treated in an individualized fashion has led to results that the Court admits are “not all together satisfactory.” *Kennedy*, 128 S. Ct. at 2659 (citing *Tuilaepa v. California*, 512 U.S. 967, 973 (1994) (“The objectives of these two inquiries can be in some tension, at least when the inquiries occur at the same time.”) and *Walton v. Arizona*, 497 U.S. 639, 664–65 (1990) (Scalia, J., concurring in part) (“The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve.”)); see also *Walton*, 497 U.S. at 664 (Scalia, J., concurring) (“To acknowledge that ‘there perhaps is an inherent tension’” between *Furman* and the *Woodson-Lockett* line of cases “is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers n World War II”) (citing *McCleskey*, 481 U.S. at 363 (Blackmun, J., dissenting)). In *Kennedy*, the Court noted that the *Woodson-Lockett* line of cases “is still in search of a unifying principle” but that its response “has been to insist upon confining the instances in which capital punishment may be imposed.” *Kennedy*, 128 S. Ct. at 2659.

<sup>612</sup> *Roper*, 543 U.S. at 564.

<sup>613</sup> *Kennedy*, 128 S. Ct. at 2653.

<sup>614</sup> *Id.*

<sup>615</sup> *Id.*

<sup>616</sup> *Id.*

<sup>617</sup> *Atkins*, 536 U.S. at 314–15.

<sup>618</sup> *Id.* at 315. As the Court ruled in *Atkins*: “Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition. Moreover, even in those states that allow the execution of mentally retarded offenders, the practice is uncommon. . . . The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.” *Id.* at 315–16 (footnotes omitted).

context,<sup>619</sup> but noted the “less dramatic” change was still “significant” and that “the same consistency of direction of change has been demonstrated.”<sup>620</sup> In *Kennedy*, after acknowledging that a handful of states had passed new laws making child rape a capital crime,<sup>621</sup> the Court put it this way: “The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it.”<sup>622</sup> Thus, the fact that one or more states permit a particular punishment is not dispositive.<sup>623</sup>

¶130 The Court also looks carefully at how often a particular punishment is actually meted out. In *Enmund*, only six defendants could be identified who had been sentenced to death between 1954 and 1982 for felony murder where the defendant did not personally commit the homicidal act.<sup>624</sup> In *Roper*, though just five additional states had outlawed juvenile executions in the preceding fifteen years,<sup>625</sup> the evidence showed the execution of juvenile offenders was extremely rare.<sup>626</sup> In the prior ten years, only three states, Oklahoma, Texas and Virginia, had executed juvenile offenders.<sup>627</sup> In *Atkins*, only five states had executed offenders known to have an IQ below seventy<sup>628</sup> between 1989 and 2002.<sup>629</sup> And in *Kennedy*, the Court emphasized that “[s]tatistics about the number of executions may inform the consideration whether capital punishment for the crime of child rape is regarded as unacceptable in our society.”<sup>630</sup> The Court noted that “no

<sup>619</sup> *Roper*, 543 U.S. at 565.

<sup>620</sup> *Id.* at 565–66. The Court emphasized that “[s]ince *Stanford*, no State that previously prohibited capital punishment for juveniles had reinstated it.” *Id.* at 566. “This fact, coupled with the trend toward abolition of the juvenile death penalty,” the Court ruled, “carries special force in light of the general popularity of anticrime legislation, and in light of the particular trend in recent years toward cracking down on juvenile crime in other respects.” *Id.* (citations omitted). “Any difference between this case and *Atkins* with respect to the pace of abolition,” the Court ruled, “is thus counterbalanced by the consistent direction of the change.” *Id.* The Court also noted that when Congress enacted the Federal Death Penalty Act in 1994, it determined that the death penalty should not apply to juveniles. *Id.* at 567.

<sup>621</sup> *Kennedy*, 128 S. Ct. at 2656.

<sup>622</sup> *Id.* at 2653. The Court in *Kennedy* pointed out that “[t]he total number of States to have made child rape a capital offense after *Furman* is six.” *Id.* at 2657. “This is not an indication of a trend or change in direction comparable to the one supported by data in *Roper*,” the Court concluded. *Id.*

<sup>623</sup> *Id.* at 2656 (“The small number of States that have enacted this penalty, then, is relevant to determining whether there is a consensus against capital punishment for this crime.”).

<sup>624</sup> *Enmund*, 458 U.S. at 794.

<sup>625</sup> *Roper*, 543 U.S. at 565. The lack of more states outlawing the execution of juvenile offenders did not stop the Court from finding the practice unconstitutional. As the Court concluded: “A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.” *Id.* at 568.

<sup>626</sup> *Id.* at 565.

<sup>627</sup> *Id.* at 564–65.

<sup>628</sup> The mean score for intelligence is an IQ of 100. The Diagnostic and Statistical Manual of Mental Disorders—commonly known as the DSM-IV—defines a mentally retarded individual as someone who has “significantly subaverage intellectual functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.” Scores below 70 are indicative of mental retardation, the categories of which are “mild,” “moderate,” “severe” and “profound.” COYNE & ENTZEROTH, *supra* note 269, at 319.

<sup>629</sup> *Atkins*, 536 U.S. at 316.

<sup>630</sup> *Kennedy*, 128 S. Ct. at 2657.

individual has been executed for the rape of an adult or child since 1964” and that “no execution for any other non-homicide offense has been conducted since 1963.”<sup>631</sup>

¶131 Although it has found capital punishment in these situations to violate the Eighth Amendment, the Supreme Court has indicated that the death penalty is not per se unconstitutional.<sup>632</sup> For example, in *Trop*, the Court stated in dicta:

Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.<sup>633</sup>

In *Gregg*, the Supreme Court also stated that “[t]he Court on a number of occasions has both assumed and asserted the constitutionality of capital punishment”—though the Court, in upholding Georgia’s death penalty law, acknowledged that until *Furman* it had not “confronted squarely” the claim that the death penalty was per se unconstitutional.<sup>634</sup> The *Baze* decision, which set off a new round of American executions,<sup>635</sup> also reaffirmed that the Supreme Court now does not view the death penalty itself as unconstitutional.<sup>636</sup>

¶132 The Supreme Court, in fact, has upheld the constitutionality of more than one method of execution. In *Wilkerson v. Utah*,<sup>637</sup> the Court approved the use of a public firing squad, finding that execution by shooting or hanging was a customary military practice.<sup>638</sup> In *In re Kemmler*,<sup>639</sup> the Court rejected an Eighth Amendment challenge to

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<sup>631</sup> *Id.* The majority opinion in *Kennedy* also pointed out that “Louisiana is the only State since 1964 that has sentenced an individual to death for the crime of child rape; and petitioner and Richard Davis, who was convicted and sentenced to death for the aggravated rape of a 5-year-old child by a Louisiana jury in December 2007 are the only two individuals now on death row in the United States for a nonhomicide offense.” *Id.*

<sup>632</sup> *Coker*, 433 U.S. at 591.

<sup>633</sup> *Trop*, 356 U.S. at 99. “But it is equally plain,” the Court clarified, “that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.” *Id.*

<sup>634</sup> *Gregg*, 428 U.S. at 168–69.

<sup>635</sup> Since *Baze* was decided on April 16, 2008, fifty-nine executions have taken place in the United States. See Death Penalty Information Center, Searchable Execution Database, <http://deathpenaltyinfo.org/executions> (last visited Aug. 31, 2009). The last execution that took place before *Baze* was of Michael Richard in Texas. He was executed on September 25, 2007, after his lawyers missed a 5:00 p.m. filing deadline by less than a half hour due to a computer crash. The Texas Court of Criminal Appeals in Austin refused to stay open for a few extra minutes to accept the filing. Mello, *supra* note 422, at 766 n.9. That case illustrates, perhaps as well as any other, the sheer arbitrariness of America’s death penalty system.

<sup>636</sup> *Baze*, 128 S. Ct. at 1529, 1537 (plurality opinion).

<sup>637</sup> 99 U.S. 130 (1878).

<sup>638</sup> *Id.* at 134. Although the Court approved that particular method of execution, the Court went on to say that “[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.” *Id.* at 135–36. After citing a legal commentator who mentioned cases where prisoners were “drawn” and “quartered,” “dragged to the place of execution,” “emboweled alive,” “beheaded,” or publicly dissected or burned alive, the Court in *Wilkerson* stated in dicta that “it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty,” are “forbidden” by the Eighth Amendment. *Id.* at 135–36.

<sup>639</sup> 136 U.S. 436 (1890).

the use of the electric chair.<sup>640</sup> *Holden v. Minnesota*<sup>641</sup> approved laws requiring private, nighttime executions,<sup>642</sup> thus accelerating the passage of such laws.<sup>643</sup> Another Eighth Amendment challenge, to a New York law requiring solitary confinement of convicted murderers prior to their execution, was rejected in *McElvaine v. Brush*.<sup>644</sup> In *Louisiana ex rel. Francis v. Resweber*,<sup>645</sup> the Court held that it was not “cruel and unusual punishment” to carry out an inmate’s execution after the first attempt to electrocute him failed to cause the inmate’s death.<sup>646</sup> And in *Baze*, the Supreme Court upheld Kentucky’s lethal injection protocol.<sup>647</sup> What remains to be seen, of course, is how the Supreme Court will deal with future challenges, whether to other lethal injection protocols,<sup>648</sup> to the execution of mentally ill inmates,<sup>649</sup> or to the death penalty itself.

<sup>640</sup> *Id.* at 447–49. The Court in *In re Kemmler* emphasized that the legislative act in question “was passed in the effort to devise a more humane method” of execution, pointing out that New York’s governor, in commending the legislation, had stated that “[t]he present mode of executing criminals by hanging has come down to us from the dark ages.” *Id.* at 444, 447. The Court did note, however, that “burning at the stake, crucifixion, breaking on the wheel, or the like” would fall within the meaning of “cruel and unusual” punishments. *Id.* at 446–47. In its opinion, the Court emphasized: “Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.” *Id.* at 447.

<sup>641</sup> 137 U.S. 483 (1890).

<sup>642</sup> The Court in *Holden* ruled: “Whether a convict, sentenced to death, shall be executed before or after sunrise, or within or without the walls of the jail, or within or outside of some other inclosure, and whether the inclosure within which he is executed shall be higher than the gallows, thus excluding the view of persons outside, are regulations that do not affect his substantial rights. The same observation may be made touching the restriction . . . as to the number and character of those who may witness the execution, and the exclusion altogether of reporters or representatives of newspapers. These are regulations which the Legislature, in its wisdom, and for the public good, could legally prescribe in respect to executions.” *Id.* at 491.

<sup>643</sup> BESSLER, DEATH IN THE DARK, *supra* note 31, at 88–89.

<sup>644</sup> 142 U.S. 155, 158–60 (1891).

<sup>645</sup> 329 U.S. 459 (1947).

<sup>646</sup> *Id.* at 463. In that case, Willie Francis—described as “a colored citizen of Louisiana”—was convicted of murder and sentenced to die by electrocution. *Id.* at 460. On May 3, 1946, he was put in the electric chair, but because of some mechanical difficulty, his death did not result once the switch was thrown. Consequently, he was removed from the chair and returned to his cell. *Id.* at 460–61. Louisiana’s governor subsequently issued a new death warrant, but Francis claimed that, were he executed, the Eighth Amendment would be violated “because he had once gone through the difficult preparation for execution and had once received through his body a current of electricity intended to cause death.” *Id.* at 461.

Rejecting that argument, the Supreme Court held: “We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense.” *Id.* at 463. In so ruling, the Court stated: “The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. . . . Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseen accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block.” *Id.* at 463–64.

<sup>647</sup> *Baze*, 128 S. Ct. at 1531 (plurality opinion).

<sup>648</sup> See Deborah W. Denno, *Symposium: The Lethal Injection Debate*, 35 FORDHAM URB. L.J. 701, 702 (2008) (“The road leading to *Baze* is well traveled with lethal injection litigation; yet, post-*Baze*, there appear to be many more litigation miles still to go.”).

<sup>649</sup> The exact number of death row inmates with severe mental illnesses is unknown. See Eileen P. Ryan & Sarah B. Berson, *Mental Illness and the Death Penalty*, 25 ST. LOUIS U. PUB. L. REV. 351, 365 (2006)

VIII. FROM BECCARIA TO *BAZE*A. *The Influence of Cesare Beccaria*

¶133 The young Italian philosopher, Cesare Beccaria, identified or anticipated nearly all of the problems that have plagued—and continue to plague—capital punishment. He identified the barbaric example that the death penalty sets, arguing that executions do not deter crime any better than life imprisonment.<sup>650</sup> “[T]he strongest impediment to crimes is not the terrible and fleeting spectacle of death of a wretch,” Beccaria believed, “but the long and repeated example of a man deprived of his liberty. . . .”<sup>651</sup> He condemned the arbitrariness and unfettered discretion that is so often present in the law—and that has particularly deadly consequences when a person’s life is at stake.<sup>652</sup> He railed against the inequalities he saw in the legal system<sup>653</sup>—prejudices that have been associated with capital punishment for centuries.<sup>654</sup> And he recognized the death penalty’s

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(“There is very little research on the incidence of severe mental illness in death row inmates. The American Civil Liberties Union estimates that five to ten percent of prisoners on death row have a serious mental illness. . . .”). What is clear is that the American Bar Association, the American Psychological Association, the American Psychiatric Association, and the National Alliance for the Mentally Ill have all called for a stop to the execution of those inmates who are seriously mentally ill. In 2007, North Carolina’s legislature considered a bill seeking to prohibit the execution of those who had a “severe mental disability” at the time of the commission of the crime. See S.1075, 2007 Gen. Assem., Reg. Sess. (N.C. 2007). And in 2008, two other organizations—Murder Victims’ Families for Human Rights and the National Alliance on Mental Illness—also launched a national project concerned with the death penalty’s intersection with the mentally ill. See Death Penalty Information Center, Murder Victim’s Families for Human Rights and the National Alliance on Mental Illness to Launch National Project, <http://www.deathpenaltyinfo.org/murder-victims'-families-human-rights-and-national-alliance-mental-illness-launch-national-project> (last visited Aug. 31, 2009).

<sup>650</sup> BECCARIA (Thomas ed.), *supra* note 1, at 50 (“As punishments become more cruel, the minds of men, which like fluids always adjust to the level of the objects that surround them, become hardened, and the ever lively force of passions is such that after a hundred years of cruel punishments, breaking on the wheel causes no more fear than imprisonment previously did. For a punishment to achieve its objective, it is only necessary that the harm that it inflicts outweighs the benefit that derives from the crime, and into this calculation ought to be factored the certainty of punishment and the loss of the good that the commission of the crime would produce. Everything beyond this is superfluous and, therefore, tyrannical.”). *Id.*

<sup>651</sup> *Id.* at 156.

<sup>652</sup> *Id.* at 14. As Beccaria wrote: “Everyone has his own point of view, and everyone has a different one at different times. . . . Hence, we see how the fate of a citizen changes several times as he moves through the courts, and how the lives of poor wretches fall victim to false reasoning or to the momentary bad mood of a judge, who mistakes for a legitimate interpretation of the law the hazy product of that confused series of notions that influence his mind. Thus, we see the same crimes punished differently at different times by the same court. . . .” *Id.* at 14–15.

<sup>653</sup> *Id.* at 41 (“[T]he rich and the powerful should not be able to make amends for assaults against the weak and the poor by naming a price.”); *id.* at 42 (“[P]unishments should be the same for the highest as they are for the lowest of citizens.”).

<sup>654</sup> During the reign of Henry VIII, an estimated 72,000 English subjects were put to death for a whole array of offenses, many of which we would today consider lower-level crimes. COYNE & ENTZEROTH, *supra* note 269, at 4. It is still the case that the most heinous crimes are not always punished with death—a fact that will remain so, especially since international law no longer permits the death penalty’s use for the most serious crimes: genocide, crimes against humanity, and war crimes. See Matthew R. Wilmot, *Sparing Gary Ridgway: The Demise of the Death Penalty in Washington State?*, 45 WILLAMETTE L. REV. 435, 435–36 (2005) (noting that Gary Ridgway, the “Green River Killer,” killed at least forty-nine women but was spared the death penalty through a plea agreement with prosecutors resulting in a life sentence).

Even co-defendants may receive different punishments, one death and one life, for the very same actions. See 11 GA. PROC. CRIM. PROC. § 28:60 (2008); Thomas Aumann, *Death by Peers: The Extension of the Sixth Amendment to Capital Sentencing in Ring v. Arizona*, 34 LOY. U. CHI. L.J. 845, 856 n.73 (2003) (noting that sentencing disparities among co-defendants often correlates with their race).



“irreparability,” the ever-present possibility of human error, and thus the continual risk of condemning or executing the innocent.<sup>655</sup>

¶134 Beccaria’s part utilitarian/part retributivist philosophy<sup>656</sup> was focused not only on enforcing the rule of law and punishing crime, but also on preventing crime. Swift, proportionate punishments, not barbaric ones, Beccaria believed, were “more just and useful.”<sup>657</sup> Today, of course, the handful of inmates who are executed in America—and often in the most arbitrary and capricious manner imaginable<sup>658</sup>—spend years on death row before being executed.<sup>659</sup> “Do you want to prevent crimes?” Beccaria wrote. “Then see to it that enlightenment accompanies liberty.”<sup>660</sup> Beccaria saw education as a key to

<sup>655</sup> BECCARIA (Thomas ed.), *supra* note 1, at 156. As Beccaria and his colleagues wrote in their report on the reform of the criminal justice system in Austrian Lombardy: “In almost all nations, it is not unheard of to find examples in which the apparently guilty were sentenced to death because they were shown to be so according to these supposedly incontrovertible proofs. Nor do we intend to attribute this to the incompetence, negligence, or bad will of the judges, but to the necessary imperfection of the law.” *Id.* at 157.

<sup>656</sup> Cesare Beccaria and Jeremy Bentham are frequently described as “utilitarian” in their approach to criminal justice issues. See Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 116–17 (2000); Hirsch, *supra* note 103, at 1195. This is an oversimplification, however. See Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 Nw. U. L. Rev. 843, 867–68 n.128 (2002) (“As distinct from a thoroughgoing utilitarian, Beccaria prohibits punishment even where its consequences are good or useful if the punishment is unjust.”); compare David Young, *Cesare Beccaria: Utilitarian or Retributivist?*, 11 J. CRIM. JUST. 317 (1983).

The utilitarian approach holds that “[i]f punishment can be shown to promote effectively the interests of society it is justifiable, otherwise it is not.” John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 5 (1955). As one scholar has noted: “For the utilitarian, punishment is forward-looking. Its basic purpose is the reduction of crimes, and hence pain, in the future. From this perspective, past wrongs cannot be undone, merely prevented from reoccurring by making illegal actions less attractive than legal ones.” BECCARIA (Bellamy ed.), *supra* note 1, at xxi. Bentham drew heavily on Beccaria in his formulation of the utility principle, and Beccaria, in his writing, drew upon the Frenchman Claude Adrien Helvétius, who, in turn, was influenced by the Scottish philosopher David Hume. BECCARIA (Bellamy ed.), *supra* note 1, at xxxvi, 122; Binder & Smith, *supra*, at 156; see also *id.* at 156–66.

“Retributivism” holds that “the reason to punish is desert—wrongdoing merits punishment, and punishing a wrongdoer is good, irrespective of any consequences of punishing that wrongdoer.” William L. Barnes, Jr., *Revenge on Utilitarianism: Renouncing a Comprehensive Economic Theory of Crime and Punishment*, 74 IND. L.J. 627, 635 (1999); see also BECCARIA (Bellamy ed.), *supra* note 1, at xxi (“For the retributivist, in contrast, punishment is backward-looking. It follows from guilt and aims to ensure that wrongdoers suffer in proportion to their wrongdoing.”). “The law is replete with retributivist influences, including the *lex talionis* of Early Roman law, the ‘eye for an eye, tooth for a tooth’ concept found in the Old Testament, and the influential writings of the philosopher Immanuel Kant.” Barnes, *supra*, at 635. Beccaria’s philosophy certainly contains retributivist strains in that Beccaria thought punishments should be proportionate to crimes and that there should be a clear “connection between a misdeed and its punishment, namely, that punishment should conform as far as is possible to the nature of the crime.” BECCARIA (Thomas ed.), *supra* note 1, at 41.

<sup>657</sup> BECCARIA (Thomas ed.), *supra* note 1, at 39–41.

<sup>658</sup> As just one example, a husband and wife, Tony and Rebecca Machetti, both received death sentences after plotting to kill—and then murdering—Rebecca Machetti’s former husband to collect life insurance proceeds. However, it was attorney error, not the nature of the crime itself, that led to different results on appeal after the cases were tried separately. It was clear that unconstitutionally composed juries had sentenced each of them to death. But only one set of lawyers challenged the jury composition at trial. Rebecca Machetti’s lawyers objected, leading to a retrial and a life sentence, whereas Tony Machetti’s lawyers failed to do so, unaware of a new Supreme Court case issued just five days before trial. Because the error was not preserved, Tony Machetti’s death sentence was affirmed on appeal and he was executed in 1983. COYNE & ENTZEROTH, *supra* note 269, at 709–12.

<sup>659</sup> See *supra* text accompanying notes 417–18 (citing statistics).

<sup>660</sup> BECCARIA (Thomas ed.), *supra* note 1, at 80.

preventing crime,<sup>661</sup> and viewed executions as unnecessary and ineffective deterrents.<sup>662</sup> He went on to say: “[W]hile the death penalty may be the most rapid way of getting rid of guilty people, it is not the most useful to deter crimes.”<sup>663</sup>

¶135 Beccaria detailed his ideas in *On Crimes and Punishments*. “For the death penalty to be deemed necessary to serve as an example capable of discouraging the most serious crimes,” Beccaria wrote, “it would be necessary to prove with facts, showing that where the death penalty has been most frequently employed, such crimes were far fewer in number than in places where the same death penalty was used less or not at all.”<sup>664</sup> Just as Beccaria found the opposite to be true,<sup>665</sup> modern-day statistics consistently show that, in America, death penalty states have far worse homicide rates than abolitionist states.<sup>666</sup> Some studies even conclude that executions, far from deterring crime, actually have a brutalizing effect, causing more homicides.<sup>667</sup> The long-standing and persistent focus on

<sup>661</sup> *Id.* at 84. The lack of education among those who land on death row is striking. See, e.g., Ray Sebastian Pantle, *Blacker Than Death Row: How Current Equal Protection Analysis Fails Minorities Facing Capital Punishment*, 35 CAP. U. L. REV. 811, 825 (2007) (“[M]ost individuals on death row fall below the poverty line, and many can neither read nor write”); Laura M. Argys & H. Naci Mocan, *Who Shall Live and Who Shall Die? An Analysis of Prisoners on Death Row in the United States*, 33 J. LEGAL STUD. 255, 267 (2004) (“[J]ust under half of the prisoners on death row have less than a high school education, and only 8 percent have attended college.”); John M. Fabian, *Death Penalty Mitigation and the Role of the Forensic Psychologist*, 27 LAW & PSYCHOL. REV. 73, 109 n.258 (2003) (“Nearly twenty-seven percent of death row inmates in Mississippi have verbal IQ scores of seventy-four or below, which is in the mild mental retardation-borderline intelligent ranges. In addition, most death row inmates have lower levels of formal education, having reached only the ninth grade.”).

<sup>662</sup> The deterrence debate still rages on today. See Charles Fried, *Reflections on Crime and Punishment*, 30 SUFFOLK U. L. REV. 681, 694 n.36 (1997) (citations omitted). The Supreme Court itself has stated that “[t]he theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct.” *Atkins v. Virginia*, 536 U.S. 304, 320 (2001). Despite recent data showing the death penalty does not deter homicides any better than life-without-parole sentences, a recent series of articles in the *Stanford Law Review* illustrates the ongoing and contentious debate over the morality of capital punishment and whether executions deter or actually cause more murders. See Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005) (arguing death sentences are obligatory if they save lives); Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005) (arguing executions are morally wrong irrespective of any supposed deterrent effect); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 841 (2005) (reviewing studies and finding that data on the death penalty’s deterrent effect is profoundly uncertain); Cass R. Sunstein & Adrian Vermeule, *Deterring Murder: A Reply*, 58 STAN. L. REV. 847, 848 (2005) (stating “[w]e do not know whether deterrence has been shown” and adding that “[o]ur minimal claim is that, in evaluating criminal penalties, deterrence should play a significant role in moral judgments”).

<sup>663</sup> BECCARIA (Thomas ed.), *supra* note 1, at 159.

<sup>664</sup> *Id.* at 155.

<sup>665</sup> As Beccaria wrote: “Now, if we look with the impartial and peaceful eye of the legislator and at bygone times, as well as to those countries both near and far where the death penalty has been restricted to serious crimes, we will find exactly the contrary: where punishments have been more moderate, and for that very reason more strictly applied against delinquents (there being fewer reasons to let them go unpunished), crimes have become less frequent because the nature of man has slowly and surely been shaped by the moderation of the law.” *Id.*

<sup>666</sup> See John D. Bessler, *America’s Death Penalty: Just Another Form of Violence*, 82 PHI KAPPA PHI FORUM 13, 14 (2002) (FBI data show that over the last twenty years, death penalty states’ average murder rates have been, on a per capita basis, 48% to 101% higher than in non-death penalty states).

<sup>667</sup> See BESSLER, *DEATH IN THE DARK*, *supra* note 31, at 184–86. Not surprisingly, the turbulence of the deterrence debate—rife with competing statistical analyses by economists—has spilled into the nation’s highest court. In a 2008 case, Justice Stevens, citing research by Justin Wolfers, found “no reliable statistical evidence that capital punishment in fact deters potential offenders.” *Baze*, 128 S. Ct. at 1547–48

statistical data, of course, glosses over the real moral and human rights issues raised by the death penalty.

¶136 Beccaria's far-reaching influence on Anglo-American law—and on the death penalty debate—is demonstrated by the sheer number of references to him. Many American judges have cited Beccaria,<sup>668</sup> and his name appears in multiple Supreme Court cases.<sup>669</sup> In *Ullmann v. United States*,<sup>670</sup> for example, the petitioner claimed that the Immunity Act of 1954, making it a crime to refuse to testify about matters of national security, violated the Fifth Amendment privilege against self-incrimination.<sup>671</sup> The Supreme Court upheld the Act,<sup>672</sup> but Justices William O. Douglas and Hugo Black dissented, invoking Beccaria, calling for the reversal of the petitioner's conviction, and arguing that "[t]he Fifth Amendment was designed to protect against infamy<sup>673</sup> as well as prosecution."<sup>674</sup> Beccaria was "well known" in America, particularly to Jefferson, the

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n.13 (Stevens, J., concurring). In that same case, Justice Scalia, referring to studies cited in Cass Sunstein's writings, invoked what he called "a significant body of recent research" purporting to show "that capital punishment may well have a deterrent effect, possibly a quite powerful one." *Id.* at 1553 (Scalia, J., dissenting). It took an op-ed piece authored by both Wolfers and Sunstein to set the record straight, with the two academics concluding that, at this time, "the best reading of the accumulated data is that they do not establish a deterrent effect of the death penalty." Cass R. Sunstein & Justin Wolfers, *A Death Penalty Puzzle: The Murky Evidence for and Against Deterrence*, WASH. POST, June 30, 2008, at A11.

<sup>668</sup> *E.g.*, *Khouzam v. Ashcroft*, 361 F.3d 161, 163 (2d Cir. 2004); *United States v. McCusker*, Nos. Crim. A 92-33-04 & Civ. A. 95-3494, 1995 WL 613103 (E.D. Pa. Oct. 19, 1995); *see also Holt v. Sarver*, 442 F.2d 304, 310 n.1 (8th Cir. 1971); *Sands v. Wainwright*, 357 F. Supp. 1062, 1095 (D.C. Fla. 1973); *People v. Graves*, 29 P.2d 807, 813 (Cal. App. 1934); *State v. Gaylord*, 890 P.2d 1167, 1185 (Hawaii 1995); *Emerson v. State*, 348 N.E.2d 48, 54 (Ind. App. 1976); *Smith v. State*, 398 A.2d 426, 434 (Md. App. 1979); *Commonwealth v. O'Neal*, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, C.J., concurring); *People v. Babcock*, 666 N.W.2d 231, 263 (Mich. 2003); *State v. Delk*, 194 S.E. 94, 96 (N.C. 1937); *McCoy v. Harris*, 160 P.2d 721, 724 (Utah 1945); *Dreiling v. Jain*, 93 P.3d 861, 866 (Wash. 2004)..

<sup>669</sup> Beccaria's "decisive" and "classic work," *Dei delitti e delle pene*, has also been cited—and referred to in those words—in the European Court of Human Rights. *See Streletz, Kessler and Krenz v. Germany*, Application Nos. 34044/96, 35532/97 & 44801/98, European Court of Human Rights, Judgment dated 22 March 2001 (Zupancic, J., concurring); *Zdanoka v. Latvia*, Application No. 58278/00, European Court of Human Rights, Judgment dated 16 March 2006 (Zupancic, J., dissenting).

<sup>670</sup> 350 U.S. 422 (1956).

<sup>671</sup> The petitioner in *Ullmann* was convicted of contempt after refusing to answer questions by a grand jury relating to his knowledge of subversive activities and pertaining to membership in the Communist Party. *Id.* at 424. The Petitioner had invoked the privilege against self-incrimination in refusing to answer the questions, but was then ordered to answer the questions by the district court. *Id.* at 424–25.

<sup>672</sup> *Id.* at 423–39.

<sup>673</sup> In *On Crimes and Punishments*, Beccaria wrote about "infamy," calling it a "civil stain." BECCARIA (Thomas ed.), *supra* note 1, at 33. Infamy is "[a] qualification" of a person's status produced by a conviction of "an infamous crime and the consequent loss of honor and credit," which at common law rendered the person incompetent as a witness. *See Cottrell v. National Collegiate Athletic Ass'n*, 975 So.2d 306, 345–46 (Ala. 2007) (citing BLACK'S LAW DICTIONARY (4th ed. 1968)); *see also* BLACK'S LAW DICTIONARY 335 (5th ed. 1979) ("[a] crime punishable by imprisonment in the state prison or penitentiary, with or without hard labor, is an infamous crime") (cited in *Kirby v. State*, 426 A.2d 423, 426 (Md. App. 1981)). "The history of infamy as a punishment was notorious," Douglas wrote in dissent in *Ullmann*. *Ullmann*, 350 U.S. at 450 (Douglas, J., dissenting).

<sup>674</sup> *Ullmann*, 350 U.S. at 450 (Douglas, J., dissenting). In particular, they cited a piece of scholarship by Professor Mitchell Franklin of Tulane. *Id.* (citing *The Encyclopediste Origin and Meaning of the Fifth Amendment*, 15 LAWYERS GUILD REV. 41 (1955)). The dissent argued: "The Beccarian attitude toward infamy was a part of the background of the Fifth Amendment. The concept of infamy was explicitly written into it. We need not guess as to that. For the first Clause of the Fifth Amendment contains the concept in haec verba: 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury \* \* \*.' (emphasis added) (alterations in original). And the third Clause, the one we are concerned with here—'No person \* \* \* shall be compelled in any criminal

dissenters argued, noting that the Italian thinker “was the main voice against the use of infamy as punishment.”<sup>675</sup>

¶137 The other Beccaria mentions are brief, but still show the man’s considerable influence among liberals and conservatives alike. In *Furman v. Georgia*,<sup>676</sup> Beccaria was relegated to a footnote, cited by Justice Thurgood Marshall for the proposition that “[p]unishment as retribution has been condemned by scholars for centuries.”<sup>677</sup> And in *Payne v. Tennessee*,<sup>678</sup> Chief Justice William Rehnquist invoked Beccaria in finding that the Eighth Amendment did not prohibit sentencing juries from considering victim impact evidence.<sup>679</sup> As Chief Justice Rehnquist wrote: “Writing in the 18th century, the Italian criminologist Cesare Beccaria advocated the idea that ‘the punishment should fit the crime.’ He said that ‘[w]e have seen that the true measure of crimes is the injury done to society.’”<sup>680</sup>

### B. The Legal Challenge to Lethal Injection

¶138 Since Beccaria’s time, American judges have become key participants in the death penalty debate. In *Baze v. Rees*,<sup>681</sup> death row inmates claimed that Kentucky’s three-drug, lethal injection protocol violated the Eighth Amendment’s cruel and unusual punishments clause.<sup>682</sup> The prisoners claimed that Kentucky’s protocol posed an unacceptable risk of significant pain.<sup>683</sup> Although Kentucky’s law did not specify a particular protocol that had to be followed,<sup>684</sup> state officials developed a protocol that

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case to be a witness against himself \* \* \*’ also reflects the revulsion of society at infamy imposed by the State.” *Ullmann*, 350 U.S. at 451–52 (Douglas, J., dissenting) (alterations in original).

<sup>675</sup> *Id.* at 452 (citing GILBERT CHINARD, *THE COMMONPLACE BOOK OF THOMAS JEFFERSON* (1926), at 298 et seq.). The dissent noted that “Beccaria seems to have been principally introduced to America by Voltaire.” *Id.* at 452 n.6 (citing MARY-MARGARET H. BARR, *VOLTAIRE IN AMERICA* 23–24 (1941)). According to Barr: “Beccaria’s *Essay on Crimes and Punishment* with its famous commentary by Voltaire was known in America immediately after its first appearance in France and was the first of Voltaire’s works to be published in America. It was popular in lending libraries and as a quickly sold item in bookstores, because of general interest in the formation of a new social order. A separate monograph would be necessary to trace the influence of this epoch-making tract.” *Id.* The dissenters in *Ullmann* pointed out that “great infamy” was involved in *Ullmann* as “[t]he disclosure that a person is a Communist practically excommunicates him from society” and meant he would not be able to get a job, could have lost a professional license or have been put on a black list. *Ullmann*, 350 U.S. at 453 (Douglas, J., dissenting).  
<sup>676</sup> 408 U.S. 238 (1972).

<sup>677</sup> *Id.* at 343 & n.85 (Marshall, J., concurring) (citing BECCARIA (Paolucci, trans.), *supra* note 42).

<sup>678</sup> 501 U.S. 808 (1991).

<sup>679</sup> See *Payne v. Tennessee*, 501 U.S. 808 (1991). The *Payne* decision overruled two earlier cases that—utilizing the Eighth Amendment—had barred the admission of victim impact evidence in capital cases. See *South Carolina v. Gathers*, 490 U.S. 805 (1989); *Booth v. Maryland*, 482 U.S. 496 (1987).

<sup>680</sup> *Payne*, 501 U.S. at 820 (citing JAMES ANSON FARRER, *CRIMES AND PUNISHMENTS* 199 (1880)). In a fourth case that mentions Beccaria, *Solem v. Helm*, 463 U.S. 277 (1983), Chief Justice Warren Burger’s dissent footnoted a 1975 law review article that contained Beccaria’s name in the title. *Id.* at 312 n.5 (Burger, C.J., dissenting) (citing Schwartz & Wishingrad, *supra* note 75).

<sup>681</sup> 128 S. Ct. 1520 (2008).

<sup>682</sup> *Id.* at 1526. Lethal injection as a method of execution originated in Oklahoma, where state legislators first proposed it after they consulted with the anesthesiology department at the University of Oklahoma College of Medicine. *Id.* Kentucky’s lethal injection protocol—as well as the protocols of other states—adopted variations on Oklahoma’s protocol without independent review of the procedure and without considering alternatives to it. *Id.* at 1527 n.1; *id.* at 1545 (Stevens, J., concurring).

<sup>683</sup> *Id.* at 1526.

<sup>684</sup> The state law provided only that “every death sentence shall be executed by continuous intravenous injection of a substance or combination of substances sufficient to cause death.” KY. REV. STAT. ANN. §

called for the injection of 2 grams of sodium thiopental, 50 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride.<sup>685</sup> Sodium thiopental is a fast-acting sedative that, if properly administered, induces a deep, coma-like unconsciousness;<sup>686</sup> pancuronium bromide is a paralytic agent that suppresses muscle movements and stops respiration; and potassium chloride induces cardiac arrest.<sup>687</sup> The death-row inmates in *Baze* contended that improper administration of sodium thiopental would cause them to suffer severe pain and that the State of Kentucky had failed to take adequate precautions to protect inmates from excruciatingly painful executions.<sup>688</sup>

¶139 Part of the inmates' challenge targeted the poor training of execution participants.<sup>689</sup> In Kentucky, doctors play no role in executions because a state statute bars physicians from participating in the "conduct of an execution," except to certify the cause of death.<sup>690</sup> A certified phlebotomist and an emergency medical technician were instead tasked with performing the venipunctures necessary for the catheters, with other personnel loading the chemicals into the syringes.<sup>691</sup> In order to reduce the risk of maladministration of the protocol, Kentucky required IV team members to have at least one year of professional experience and to participate, along with other team members, in at least ten practice sessions per year.<sup>692</sup> The protocol also called for the IV team to establish both primary and back-up lines and prepare two sets of the lethal injection drugs. These measures were intended to ensure that if an insufficient dose of sodium thiopental was initially administered an additional dose could be given through the back-up line.<sup>693</sup>

¶140 The *Baze* case generated multiple opinions. In a plurality opinion authored by Chief Justice John Roberts, the Supreme Court held that Kentucky's protocol was acceptable and that the state's failure to adopt an alternative, assertedly more humane protocol did not render Kentucky's scheme unconstitutional.<sup>694</sup> "[A]n inmate cannot succeed on an Eighth Amendment claim," Chief Justice Roberts wrote, "simply by showing one more step the State could take as a failsafe for other, independently

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431.220(1)(a) (West 2006).

<sup>685</sup> *Baze*, 128 S. Ct. at 1528. As a result of the lawsuit, state officials later chose to increase the amount of sodium thiopental to 3 grams. *Id.*

<sup>686</sup> *Id.* at 1527. The proper administration of the first drug is intended to ensure that condemned prisoners do not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs. *Id.*

<sup>687</sup> *Id.* Between injections, members of the execution team would flush the IV, or intravenous, lines with 25 milligrams of saline to prevent clogging of the lines by precipitates that might be formed if residual sodium thiopental mixed with pancuronium bromide. *Id.* at 1528.

<sup>688</sup> *Id.* at 1533.

<sup>689</sup> *Id.*

<sup>690</sup> KY. REV. STAT. ANN. § 431.220(3) (West 2009).

<sup>691</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1528 (2008). These personnel were said by the Court in *Baze* to have "daily experience establishing IV catheters for inmates in Kentucky's prison population." *Id.* at 1533. A "phlebotomist" has been defined as "an individual performing an invasive procedure to withdraw blood from the human body to collect samples for the practice of clinical laboratory science, including but not limited to, clinical laboratory testing for analysis, typing and cross-matching of blood for medical examination and human transfusion." LA. REV. STAT. ANN. § 37:1313(13) (2008).

<sup>692</sup> *Baze*, 128 S. Ct. at 1533–34.

<sup>693</sup> *Id.* at 1534.

<sup>694</sup> *Id.* at 1531–38. The judgment and opinion written by Chief Justice Roberts was joined by Justice Alito and Justice Kennedy. *Id.* at 1525.

adequate measures.”<sup>695</sup> “It is clear,” Roberts wrote, “that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.”<sup>696</sup>

¶141 Kentucky’s death row inmates had proposed an alternative, one-drug protocol that would have dispensed with the use of pancuronium and potassium chloride—a protocol never adopted or tested by any State for executions.<sup>697</sup> In support of this approach, they pointed out that a barbiturate-only protocol is used routinely by veterinarians in putting animals to sleep and that twenty-three States actually bar veterinarians from using a neuromuscular paralytic agent like pancuronium bromide.<sup>698</sup> Affirming the lower court’s judgment, however, the Supreme Court ruled that the inmates “have not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment.”<sup>699</sup>

## IX. WHERE WE STAND

### A. *The Death Penalty in the United States*

¶142 In the United States, approximately 3300 people live on death row, though fifteen states and the District of Columbia have now done away with capital punishment.<sup>700</sup> Thirty-five states, plus the federal government and the U.S. military, still authorize the death penalty,<sup>701</sup> though federal executions are infrequent.<sup>702</sup> Kansas, New Hampshire and the U.S. military—all of which authorize executions—have actually not seen one in over three decades.<sup>703</sup> Since 1976, there have been more than 1100 executions in the

<sup>695</sup> *Id.* at 1537. The Court specifically held that the risk of improper mixing of chemicals and the risk of improper setting of IVs could not be characterized as “objectively intolerable.” *Id.* at 1537.

<sup>696</sup> *Id.* at 1529.

<sup>697</sup> *Baze*, 128 S. Ct. at 1526, 1531. A study published in 2005 in a respected medical journal, *The Lancet*, had set off a heated controversy about the effectiveness of lethal injection protocols. *Id.* at 1532 n.2. A toxicology study drew blood samples from executed death-row inmates and found that “most of the executed inmates” had concentrations of sodium thiopental that “would not be expected to produce a surgical plane of anesthesia” and that 43 percent of those executed “had concentrations consistent with consciousness.” *Id.* The controversial study was cited in motions around the country to stay executions even as others questioned the study’s findings and its reliability. *Id.*

<sup>698</sup> *Id.* at 1535.

<sup>699</sup> *Id.* at 1526. Prior to the Supreme Court’s ruling in *Baze*, only one Kentucky prisoner, Eddie Lee Harper, had been executed using Kentucky’s three-drug protocol, apparently without reported problems. *Id.* at 1528.

<sup>700</sup> DEATH PENALTY INFO. CTR, FACTS ABOUT THE DEATH PENALTY (2009), available at <http://www.deathpenaltyinfo.org/FactSheet.pdf>. The states that no longer authorize the death penalty are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *Id.*

<sup>701</sup> *Id.* The states that authorize the death penalty are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. *Id.*

<sup>702</sup> See Death Penalty Information Center, Federal Executions 1927-2003, <http://www.deathpenaltyinfo.org/federal-executions-1927-2003> (last visited Aug. 31, 2009) (listing thirty-seven federal executions that took place between 1927 and 2003).

<sup>703</sup> DEATH PENALTY INFO. CTR, FACTS ABOUT THE DEATH PENALTY (2009), available at <http://www.deathpenaltyinfo.org/FactSheet.pdf>.

U.S., with the annual number peaking at ninety-eight in 1999.<sup>704</sup> But executions have trailed off since 1999, with the number declining to forty-two in 2007 and falling even further in 2008 as executions were put on hold while the Court considered the challenge to lethal injection.<sup>705</sup>

¶143 Although *Baze* paved the way for more executions by upholding Kentucky's lethal injection protocol, that case drew two dissenters.<sup>706</sup> Justice John Paul Stevens—writing with candor and passion, though concurring in the result—criticized the way in which capital punishment laws are enforced. He emphasized that America's decision to retain the death penalty is “the product of habit and inattention rather than an acceptable deliberative process,”<sup>707</sup> and he said that “the imposition of the death penalty represents ‘the pointless and needless extinction of life.’”<sup>708</sup> Noting that Kentucky barred veterinarians from using neuromuscular paralytic agents like pancuronium bromide for animal euthanasia, Justice Stevens wrote pointedly: “It is unseemly—to say the least—that Kentucky may well kill petitioners using a drug that it would not permit to be used on their pets.”<sup>709</sup>

¶144 Already, the death penalty is largely a regional phenomenon. Just ten states, Alabama, Florida, Georgia, Louisiana, Missouri, Oklahoma, North Carolina, South Carolina, Texas, and Virginia, account for more than eighty percent of all executions nationwide since 1976.<sup>710</sup> Since executions resumed in America in 1977 with Gary Gilmore's execution in Utah,<sup>711</sup> Texas alone has carried out over 400 executions (more than one-third of *all* executions)—making Texas the nation's undisputed execution capital.<sup>712</sup> In fact, since *Baze*, the first twenty executions all took place in the South, with forty percent of them again taking place in just one locale, the State of Texas.<sup>713</sup>

<sup>704</sup> *Id.*

<sup>705</sup> See Death Penalty Information Center, Executions in the United States, <http://www.deathpenaltyinfo.org/executions-united-states> (last visited Aug. 31, 2008).

<sup>706</sup> See *Baze*, 128 S. Ct. at 1567 (Ginsburg, J., dissenting). Justice Ginsburg wrote the dissent, joined by Justice Souter, opining that Kentucky's protocol “lacks basic safeguards used by other States to confirm that an inmate is unconscious before injection of the second and third drugs.” *Id.* According to the dissent: “Kentucky's protocol does not specify the rate at which sodium thiopental should be injected. The executioner, who does not have any medical training, pushes the drug ‘by feel’ through five feet of tubing. In practice sessions, unlike in an actual execution, there is no resistance on the catheter, thus the executioner's training may lead him to push the drugs too fast.” *Id.* at 1572 (citations omitted).

<sup>707</sup> *Baze*, 128 S. Ct. at 1546 (Stevens, J., concurring). Citing juror studies and polls showing reduced support for capital punishment when life-without-parole sentences were an alternative, as well as a lack of credible data showing that the death penalty deters crime any better than life sentences, Justice Stevens declared that state-sanctioned executions are “becoming more and more anachronistic.” *Id.* at 1546–48.

<sup>708</sup> *Id.* at 1551.

<sup>709</sup> *Id.* at 1543.

<sup>710</sup> See Death Penalty Information Center, Executions in the United States, 1608-1967, By State, <http://deathpenaltyinfo.org/executions-united-states-1608-1976-state> (last visited Aug. 31, 2009).

<sup>711</sup> Gilmore was convicted of murder and sentenced to death on October 7, 1976. He thereafter decided not to appeal his sentence, stated that he did not “care to languish in prison for another day,” and tried to commit suicide. See *Gilmore v. Utah*, 429 U.S. 1012, 1012–15 & nn.4–5 (1976). Although Gilmore had tried to kill himself, the Supreme Court nevertheless found that Gilmore “made a knowing and intelligent waiver of any and all federal rights he might have asserted after the Utah trial court's sentence was imposed, and, specifically, that the State's determinations of his competence knowingly and intelligently to waive any and all such rights were firmly grounded.” *Id.* at 1013.

<sup>712</sup> See Death Penalty Information Center, Executions in the United States, 1608-1967, By State, <http://deathpenaltyinfo.org/executions-united-states-1608-1976-state> (last visited Aug. 31, 2009).

<sup>713</sup> See Death Penalty Information Center, Executions: 100% in the South, <http://deathpenaltyinfo.org/executions-100-south> (last visited Aug. 31, 2009).

¶145 But even in the Lone Star State—where public opinion polls have consistently shown strong support for capital punishment—things are changing. In 2007, the *Dallas Morning News*, unable to reconcile the death penalty’s imperfections and its irreversibility, changed its position and now advocates abolition. “We do not believe that any legal system devised by inherently flawed human beings can determine with moral certainty the guilt of every defendant convicted of murder,” the editorial board wrote.<sup>714</sup> And in 2008, after yet another inmate’s exoneration, Dallas County District Attorney Craig Watkins announced that his office would review nearly forty death penalty convictions for potential errors and, if necessary, halt executions pending the review.<sup>715</sup>

### B. *The Global Trend Toward Abolition*

¶146 It is clear, now more than ever, that a worldwide trend toward the death penalty’s abolition is afoot.<sup>716</sup> The sheer number of countries that have outlawed executions since 1975, in fact, demonstrates just how far the world’s abolitionist movement has come.<sup>717</sup> In the late 1970s, Portugal, Denmark, Luxembourg, Nicaragua and Norway abolished the death penalty for all crimes, and Brazil, Fiji and Peru outlawed death sentences for ordinary crimes.<sup>718</sup> In the 1980s, France, The Netherlands, Australia, Haiti, Liechtenstein, the German Democratic Republic, Cambodia, New Zealand, Romania and Slovenia abolished capital punishment for all crimes, and Cyprus, El Salvador and Argentina did away with death sentences for ordinary crimes.<sup>719</sup>

¶147 This abolitionist trend continued unabated in the 1990s, with thirty-two countries and Hong Kong abolishing capital punishment for all crimes<sup>720</sup> and several other countries forbidding death sentences for ordinary crimes.<sup>721</sup> In the twenty-first century, as of 2008, fifteen more countries abolished the death penalty for all crimes,<sup>722</sup> with others outlawing capital punishment for ordinary crimes.<sup>723</sup> Given what has happened thus far, it seems likely that other countries around the world will follow suit in the years to come. For America itself, it is an undeniable reality that the debate is shifting and that many changes have taken place since the time of Beccaria and the Founding Fathers.

<sup>714</sup> RICHARD C. DIETER, DEATH PENALTY INFO. CTR., A CRISIS OF CONFIDENCE: AMERICANS’ DOUBTS ABOUT THE DEATH PENALTY 13 (2007).

<sup>715</sup> Jennifer Emily & Steve McGonigle, *Dallas County DA Wants to Re-examine Nearly All of the Pending Death Row Cases*, DALLAS MORNING NEWS, Sept. 16, 2008, at 1A.

<sup>716</sup> SCHABAS, *supra* note 3, at xiii. Treaties outlawing or restricting capital punishment are now laying a solid foundation for an emerging international norm against the use of executions. *Id.* at 369.

<sup>717</sup> The early history of the abolitionist movement has drawn considerable attention in recent years. Indeed, a recently published, seven-volume compilation collects important sources from debates about capital punishment in Great Britain and the United States in the eighteenth and nineteenth centuries. *See generally* THE DEATH PENALTY: DEBATES IN BRITAIN AND THE U.S., 1725-1868 (James E. Crimmins, ed., 2003).

<sup>718</sup> Death Penalty Information Center, Abolitionist and Retentionist Countries, <http://www.deathpenaltyinfo.org/article.php?scid=30&did=140> (last visited Aug. 31, 2009); *see also supra* note 44 (defining “ordinary crimes”).

<sup>719</sup> Amnesty International, Abolitionist and Retentionist Countries, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (last visited Aug. 31, 2009).

<sup>720</sup> *Id.*

<sup>721</sup> *Id.*

<sup>722</sup> *Id.* Those countries were Cote D’Ivoire, Malta, Bosnia-Herzegovina, the Federal Republic of Yugoslavia (now Serbia and Montenegro), Cyprus, Bhutan, Samoa, Senegal, Turkey, Liberia, Mexico, Philippines, Albania, Rwanda, and Uzbekistan. *Id.*

<sup>723</sup> *Id.*



### C. *The Transformation of American Executions*

¶148 Executions in the United States were once rowdy, public affairs, often attended by hundreds or thousands of spectators, and these spectacles were frequently replete with drunkenness, merriment and even acts of crime committed in the very shadow of the gallows.<sup>724</sup> At the 1822 execution of John Lechler in Pennsylvania, pickpockets worked the crowd and at least fifteen of the 20,000 spectators were arrested, one for larceny, another for murder, and still others for assault and battery or vagrancy.<sup>725</sup> The widespread belief that such scenes only brutalized society is actually what largely prompted legislators to relocate executions indoors, behind thick prison walls.<sup>726</sup>

¶149 As American executions moved into prisons, state legislatures often simultaneously enacted “gag” laws—such as Minnesota’s “midnight assassination law,” which required private, nighttime executions that could only be witnessed by a few people—to strictly regulate attendance at executions.<sup>727</sup> Such laws generally limited attendance to six to twelve “reputable” or “respectable” citizens,<sup>728</sup> often barred newspaper reporters from attending executions or otherwise restricted media access, and even made it a crime to report the details of executions.<sup>729</sup> Politicians became so concerned after these spectacles that, in 1893, Connecticut, for example, passed a private execution law that only permitted “adult males” to attend executions.<sup>730</sup> The ritual of American executions has thus evolved, and is now hidden from public view, visible only to a handful of prison officials, hand-picked media representatives, and official witnesses.<sup>731</sup>

¶150 Not only did the privatization of executions radically alter America’s death penalty debate, but two other developments—the move to nighttime executions and changes in the method of execution—also shaped that debate in significant ways.<sup>732</sup> The passage of nighttime execution laws, requiring hangings “before sunrise” or between, say, midnight and 3:00 a.m., as Delaware law provides,<sup>733</sup> made clear that legislators wanted to shield

<sup>724</sup> Annulla Linders, *The Execution Spectacle and State Legitimacy: The Changing Nature of the American Execution Audience, 1833-1937*, 36 LAW & SOC’Y REV. 607, 617–20 (2002).

<sup>725</sup> *Id.* at 618–19.

<sup>726</sup> BESSLER, DEATH IN THE DARK, *supra* note 31, at 37–39, 42–44.

<sup>727</sup> See John D. Bessler, *The “Midnight Assassination Law” and Minnesota’s Anti-Death Penalty Movement, 1849-1911*, 22 WM. MITCHELL L. REV. 577 (1996).

<sup>728</sup> BESSLER, DEATH IN THE DARK, *supra* note 31, at 4.

<sup>729</sup> *Id.* at 49–56. During the heyday of public executions, civic leaders grew ashamed of the carnival-like atmosphere that often accompanied these events and worried about the ever-present prospect of “botched” or “bungled” executions. *Id.* at 67–71; see also Linders, *supra* note 724, at 630, 637–38.

<sup>730</sup> BESSLER, DEATH IN THE DARK, *supra* note 31, at 68.

<sup>731</sup> State legislatures and prison officials have specifically barred cameras from execution chambers to ensure state-sanctioned secrecy. See John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 FED. COMM. L.J. 355 (1993). This black-out of executions from the public’s consciousness has led to public apathy and—as Austin Sarat writes—“the modern bureaucratization of capital punishment,” transforming every execution “from an arousing public spectacle of vengeance to a soothing matter of mere administration.” SARAT, *supra* note 54, at 189.

<sup>732</sup> For a comprehensive history of those changes, including the legislative history behind laws requiring private, nighttime executions, see BESSLER, DEATH IN THE DARK, *supra* note 31; Michael Maddow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 BUFF. L. REV. 461 (1995). Public executions—which drew people to the abolitionist cause, but which came to an end in the 1930s—were once fixtures in America life. See generally MASUR, *supra* note 1 (recounting early American executions).

<sup>733</sup> BESSLER, DEATH IN THE DARK, *supra* note 31, at 81–82; see also DEL. CODE, tit. 11, § 4209(f). The

the public and the press from these gruesome events.<sup>734</sup> Such laws, first passed in the 1880s in the Midwestern states of Ohio, Indiana, and Minnesota, were soon enacted around the country, forcing executions into the dead of night.<sup>735</sup> From 1977 to 1995, more than eighty percent of all American executions took place between the hours of 11:00 p.m. and 7:30 a.m., with over half taking place between midnight and 1:00 a.m.<sup>736</sup> Americans, in other words, were often fast asleep when executions took place.

¶151 The continual search for—and implementation of—more “humane” ways to put inmates to death shows the discomfort associated with state-sanctioned killing. The preferred method of execution shifted from the noose<sup>737</sup> and firing squad<sup>738</sup> to electrocution<sup>739</sup> and the gas chamber<sup>740</sup> to what we predominately use today: lethal

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State of Louisiana amended its laws requiring executions between “12:00 o’clock midnight and 3:00 a.m.” in 1999, and now requires executions to be conducted “between the hours of 6:00 p.m. and 9:00 p.m.” LA. REV. STAT. ANN., tit. 15, § 569.1.

<sup>734</sup> JOHN D. BESSLER, *KISS OF DEATH: AMERICA’S LOVE AFFAIR WITH THE DEATH PENALTY* 87–88 (2003) [hereinafter BESSLER, *KISS OF DEATH*].

<sup>735</sup> BESSLER, *DEATH IN THE DARK*, *supra* note 31, at 84–90.

<sup>736</sup> *Id.* at 6.

<sup>737</sup> *Baze v. Rees*, 128 S. Ct 1520, 1526 (2008) (quoting *Campbell v. Wood*, 511 U.S. 1119 (1994) (Blackmun, J., dissenting from denial of certiorari)); *see also* Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 364 (1997) (identifying forty-eight States and Territories that used hanging as a method of execution). Hanging is now authorized only in New Hampshire and the State of Washington. *See* N.H. REV. STAT. ANN. § 630:5 (2007); WASH. REV. CODE § 10.95.180 (2006); *see also* Death Penalty Information Center, *Methods of Execution*, <http://www.deathpenaltyinfo.org/methods-execution> (last visited Aug. 31, 2009). Although hangings are now extremely rare, hangings still sometimes occur, even in the United States. In 1994, the Supreme Court refused to grant certiorari and stay an execution in the State of Washington to be carried out by hanging, drawing a sharp dissent from Justice Blackmun. *See Campbell v. Wood*, 511 U.S. 1119 (Blackmun, J., dissenting) (“Forty-six of the forty-eight States that once imposed hanging have rejected that punishment as unnecessarily tortuous, brutal, and inhumane. I can only conclude that today in the United States of America, hanging is cruel and unusual punishment.”).

<sup>738</sup> Firing squads were frequently used to execute Union deserters during the Civil War. *See* ROBERT I. ALOTTA, *CIVIL WAR JUSTICE: UNION ARMY EXECUTIONS UNDER LINCOLN* 202–09 (1989). A firing squad was also used to execute Gary Gilmore, the first man to be executed after *Furman*, and firing squads are still authorized in Idaho and Oklahoma. BESSLER, *DEATH IN THE DARK*, *supra* note 31, at 167–68; IDAHO CODE § 19-2716 (Lexis 2004); *see also* Death Penalty Information Center, *Methods of Execution*, <http://www.deathpenaltyinfo.org/methods-execution> (last visited Aug. 31, 2009).

<sup>739</sup> In 1888, New York became the first state to authorize the use of electrocution as a method of punishment. *Baze*, 128 S. Ct. at 1526. By 1915, eleven other states had adopted that method, motivated by the belief that electrocution was “less painful and more humane than hanging.” *Id.* (quoting *Malloy v. South Carolina*, 237 U.S. 180 (1915)). *But see* *Glass v. Louisiana*, 471 U.S. 1080 (Brennan, J., dissenting from denial of certiorari) (graphically describing what happens to an inmate’s body during an electrocution and arguing that the Supreme Court should have considered the question whether death by electrocution violates the Eighth Amendment as it is “the contemporary technological equivalent of burning people at the stake”). “For me,” Justice Brennan wrote in his dissent in *Glass*, “arguments about the ‘humanity’ and ‘dignity’ of any method of officially sponsored executions are a constitutional contradiction in terms.” *Id.* at 1093–94. Today, nine states still theoretically authorize electrocutions—though lethal injection is the standard practice in all of those states. *See* Death Penalty Information Center, *Methods of Execution*, <http://www.deathpenaltyinfo.org/methods-execution> (last visited Aug. 31, 2009).

<sup>740</sup> The original idea for death by lethal gas “was not a gas chamber but a cell with poison gas pipes so that the inmate could be painlessly dispatched while he slept.” Jonathan I. Groner, *The Hippocratic Paradox: The Role of the Medical Profession in Capital Punishment in the United States*, 35 FORDHAM URB. L.J. 883, 889 (2008). That proved unworkable, however, “as the gas would also endanger prison guards or other inmates who were not scheduled to die,” thus leading to the construction of sealed, octagonal gas chambers such as the one at San Quentin. *Id.* The gas chamber, of course, also conjures up the most disturbing images imaginable. In Nazi Germany, gas chambers were used extensively at concentration camps to kill men, women and children as part of Hitler’s diabolical plot to exterminate Jews and other

injection.<sup>741</sup> Chemically induced death—now the preferred method of execution—attempts to clinically mask the horror of state-sponsored killings, even as many physicians categorically refuse to participate in these veiled rituals that predate the Dark Ages.<sup>742</sup>

#### D. *The Assault on Habeas Corpus and the Abolitionist Movement*

¶152 In the last few decades, yet another U.S. development is of note: the frontal assault on habeas corpus. It began with a series of Supreme Court cases curtailing the availability of that venerable, centuries-old remedy.<sup>743</sup> The Court in *Coleman v. Thompson*,<sup>744</sup> for example, refused to consider a death-row inmate's claims after his lawyer filed the notice of appeal three days late.<sup>745</sup> In other cases, death-row inmates' claims have been denied on the basis of complex legal doctrines such as the *Teague v. Lane*<sup>746</sup> "non-retroactivity" principle.<sup>747</sup> In one case, the Supreme Court even held that

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minorities. See Justin H. Roy, *Strengthening Human Rights Protection: Why the Holocaust Slave Labor Claims Should Be Litigated*, 1 SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 153, 158–59 (1999). Today, only five American states—including California and Missouri—still authorize the use of lethal gas. See CAL. PENAL CODE ANN. § 3604 (West 2000); MO. REV. STAT. § 546.720 (2007); see also Death Penalty Information Center, Methods of Execution, <http://www.deathpenaltyinfo.org/methods-execution> (last visited Aug. 31, 2009).

<sup>741</sup> As of 2008, thirty-six states had adopted lethal injection as the exclusive or primary means of execution. *Baze*, 128 S. Ct. at 1526. The federal government also uses lethal injection at the Federal Execution Center in Terre Haute, Indiana. *Id.*; see also 18 U.S.C. § 3591 et seq. As of 2008, nine states allowed for lethal injection in addition to an alternate method such as electrocution, hanging, lethal gas or firing squad. *Baze*, 128 S. Ct. at 1527 n.1. Nebraska was, until recently, the only state whose law specified electrocution as the sole method of execution, see NEB. REV. STAT. § 29-2532 (1995), though the Nebraska Supreme Court had struck down that method under the Nebraska Constitution. See *State v. Meta*, 745 N.W.2d 229, 261–62 (Neb. 2008). Nebraska now authorizes lethal injection. Death Penalty Information Center, State by State Database, [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state) (last visited Aug. 31, 2009).

<sup>742</sup> See Leigh B. Bienen, *Anomalies: Ritual and Language in Lethal Injection Regulations*, 35 FORDHAM URB. L.J. 857, 861 (2008) ("Every professional medical society has forbidden doctors to participate in executions performed by the state."); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 123 (2007) ("On February 20, 2006, Michael Morales was hours away from execution when two anesthesiologists declined to participate in the lethal injection procedure."). Doctors who do participate in executions in violation of the AMA's code take extreme measures to shield their identities. See Death Penalty Information Center, Executions News and Developments: 2007, "Florida Doctors Wear 'Moon Suits' to Hide Participation in Lethal Injections," <http://www.deathpenaltyinfo.org/executions-news-and-developments-2007> (last visited Aug. 31, 2009).

<sup>743</sup> See Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CAL. L. REV. 485, 486 (1995) ("Almost two decades ago . . . the Court signaled its intention to impose strict limitations upon the availability of the writ.").

<sup>744</sup> 501 U.S. 722 (1991).

<sup>745</sup> See Rae K. Inafuku, *Coleman v. Thompson - Sacrificing Fundamental Rights in Deference to the States: The Supreme Court's 1991 Interpretation of the Writ of Habeas Corpus*, 34 SANTA CLARA L. REV. 625, 652 (1994).

<sup>746</sup> 489 U.S. 288 (1989) (plurality). *Teague* held that, in certain circumstances, a "new" constitutional rule of criminal procedure would not be applied "retroactively" in cases on collateral review. See also *Danforth v. Minnesota*, 128 S. Ct. 1029, 1032 (2008). Thus, an inmate seeking habeas relief may not rely upon a rule of law announced in a Supreme Court decision handed down after his or her conviction becomes final upon the completion of any direct appeal. *Teague's* bar on retroactive application of "new rules of constitutional criminal procedure" has two exceptions. First, the bar does not apply to rules forbidding punishment of "certain primary conduct" or for certain classes of defendants "because of their status or offense." *Beard v. Banks*, 542 U.S. 406, 416 (2004). The second exception is for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* at 417; *Tyler v. Cain*, 533 U.S. 656, 665 (2001).

death row inmates—who have no realistic ability to vindicate their habeas corpus rights without a lawyer—have no constitutional right to counsel in habeas corpus proceedings.<sup>748</sup>

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The assault continued with the passage of the Antiterrorism and Effective Death Penalty Act of 1996.<sup>749</sup> That Act contains a one-year statute of limitations, makes it more onerous to file habeas petitions, and requires federal courts to give greater deference to state courts—all in an effort to streamline court proceedings to speed up executions.<sup>750</sup> The culmination of the assault on habeas corpus came when the Bush Administration

Under the Supreme Court's jurisprudence, whether a rule is classified as substantive or procedural carries considerable weight. "New *substantive* rules generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). According to the Court, substantive rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or "faces a punishment that the law cannot impose upon him." *Id.* at 352. In contrast, "[n]ew rules of procedure" are not applied retroactively for the stated reason that "[t]hey do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.*

<sup>747</sup> The Supreme Court has decided many such cases, making life-and-death decisions hinge on a doctrine that even many lawyers find indecipherable. *See* *Beard v. Banks*, 542 U.S. 406, 408 (2004) (*Mills v. Maryland*, 486 U.S. 367 (1988) held not retroactive in a death penalty case); *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (*Ring v. Arizona*, 536 U.S. 584 (2002) did not apply retroactively to a death penalty case already final on direct review); *O'Dell v. Netherland*, 521 U.S. 151, 153 (1997) (*Simmons v. South Carolina*, 512 U.S. 154 (1994) was a "new" rule and therefore could not be used to disturb a petitioner's death sentence in a habeas corpus proceeding); *Lambrix v. Singletary*, 520 U.S. 518, 539 (1997) (*Espinosa v. Florida*, 505 U.S. 1079 (1992) announced a "new" rule that could not be used on collateral review in a death penalty case); *Graham v. Collins*, 506 U.S. 461, 463 (1993) (concluding that death row inmate's claim was barred by *Teague*); *Sawyer v. Smith*, 497 U.S. 227, 232, 245 (1990) (holding that *Caldwell v. Mississippi*, 472 U.S. 320 (1985) could not be used retroactively by a state prisoner seeking habeas relief); *Butler v. McKellar*, 494 U.S. 407, 408–09 (1990) (death row inmate could not use decision in *Arizona v. Roberson*, 486 U.S. 675 (1988) retroactively); *Saffle v. Parks*, 494 U.S. 484 (1990) (rejecting death row inmate's claim on collateral review as barred by the *Teague* doctrine).

<sup>748</sup> *Murray v. Giarratano*, 492 U.S. 1 (1989) (plurality opinion). In 1991, a majority of the Supreme Court then cited *Giarratano* for the proposition that "[t]here is no constitutional right to an attorney in state post-conviction proceedings." *See* *Coleman v. Thompson*, 501 U.S. 722, 752 (1991).

Obviously, unless a lawyer agrees to take on a death row inmate's post-conviction case on a *pro bono* basis, there is no practical way for a death row inmate to exercise habeas corpus rights. Death row inmates are typically confined to their cells for twenty-three hours a day, and they almost always lack the mental faculties to wade through—let alone understand—the complex morass of laws, rules and procedures that lawyers and judges call "death penalty jurisprudence." *See, e.g.,* Clive A. Stafford Smith & Remy Voisin Starns, *Folly by Fiat: Pretending that Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 LOY. L. REV. 55 (1999); John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 950 n.54 & 966 (2005).

Capital litigation—with lots of traps for the unwary, like procedural bars and retroactivity and exhaustion of remedies rules—is difficult enough for experienced lawyers to navigate, let alone inmates with little education and low IQ scores. *See, e.g.,* Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015 (1993). In Mississippi, Willie Russell, an unrepresented man who tested in the range of mental retardation in school, once came within forty-five minutes of being executed without a lawyer. Smith & Starns, *supra*, at 58. Not surprisingly, Mississippi death row inmates, who were once administered the Law School Admission Test as part of a study of their intellectual functioning, scored abysmally on that exam. *Id.* at 67–73.

<sup>749</sup> Pub. L. 104-132, 110 Stat. 1214 (1996).

<sup>750</sup> 28 U.S.C. § 2244(d)(1); 28 U.S.C. § 2254(d); *see also* JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 3.2 (5th ed. 2005) (providing an overview of AEDPA's provisions). Ironically, the attempt to streamline habeas corpus procedures and speed up executions came at the same time that increasing numbers of death row inmates were being exonerated through the very habeas corpus process the Act sought to short-circuit. *See* Death Penalty Information Center, *Innocence: Those Freed From Death Row*, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Aug. 31, 2009).

determined that detainees in U.S. custody could be held for indefinite periods of time without charge.<sup>751</sup> Only in 2008 did the Supreme Court step in and rule that Guantánamo Bay detainees—some held for over six years—have the constitutional right to file habeas corpus petitions to challenge the legality of their detention.<sup>752</sup>

¶154 Although George W. Bush oversaw many Texas executions as governor and the Bush Administration fervently backed capital prosecutions,<sup>753</sup> the abolitionist movement in the United States—and around the world<sup>754</sup>—is still very much alive. The National Coalition to Abolish the Death Penalty<sup>755</sup> does advocacy work and puts out alerts, and dozens of affiliates and other national and state organizations, including the Campaign to End the Death Penalty<sup>756</sup> and The Moratorium Campaign,<sup>757</sup> also work to end capital punishment.<sup>758</sup> The ACLU also seeks a national moratorium on executions; Murder Victims' Families for Reconciliation,<sup>759</sup> comprised of the family members of homicide victims, opposes capital punishment; and Amnesty International regularly opposes executions and tracks death penalty developments.<sup>760</sup> Another non-profit, the Death Penalty Information Center, maintains a comprehensive website providing the latest information on death penalty issues.<sup>761</sup> All of these entities are harnessing the power of the Internet and combating capital punishment with another powerful tool: the facts.

<sup>751</sup> The Bush Administration repeatedly ignored basic human rights, authorizing torture and permitting the use of extraordinary renditions that resulted in torture. See Rosemary Foot, *Exceptionalism Again: The Bush Administration, the "Global War on Terror" and Human Rights*, 26 LAW & HIST. REV. 707, 712–14 (2008); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L. 585, 590–98 (2006).

<sup>752</sup> *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). The Court ruled that “[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.” *Id.* at 2244. For information on the battle leading up to that case, see JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006).

<sup>753</sup> Obviously, the use of the federal death penalty pre-dates the Bush Administration. A recent report shows that, from 1989 to 2007, there were 176 capital trials in federal courts, resulting in 61 defendants being sentenced to death. See UPDATE ON THE COST, QUALITY, AND AVAILABILITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES, PRELIMINARY REPORT ON PHASE ONE OF THE RESEARCH 11 (June 2008), available at <http://www.uscourts.gov/defenderservices/FDPC.pdf#page=16>.

<sup>754</sup> Several international organizations, including Amnesty International, Hands Off Cain, and Human Rights Watch, are actively pushing for the death penalty's abolition. See Amnesty International USA, *Death Penalty*, [http://www.amnestyusa.org/Our\\_Issues/Death\\_Penalty/page.do?id=1011005&n1=3&n2=28](http://www.amnestyusa.org/Our_Issues/Death_Penalty/page.do?id=1011005&n1=3&n2=28) (last visited Aug. 31, 2009); Nessuno Tocchi Caino, <http://english.nessunotocchicaino.it/> (last visited Aug. 31, 2009); Human Rights Watch, <http://www.hrw.org/campaigns/deathpenalty/> (last visited Aug. 31, 2009).

<sup>755</sup> National Coalition to Abolish the Death Penalty, <http://www.ncadp.org/> (last visited Aug. 3, 2008).

<sup>756</sup> Campaign to End the Death Penalty, <http://nodeathpenalty.org/content/index.php> (last visited Aug. 31, 2009).

<sup>757</sup> The Moratorium Campaign, <http://www.moratoriumcampaign.org/> (last visited Aug. 31, 2009). The Moratorium Campaign was founded by Sister Helen Prejean, author of *Dead Man Walking*.

<sup>758</sup> For links to various national and state organizations, see the list of links on the websites of the Death Penalty Information Center, <http://www.deathpenaltyinfo.org/article.php?did=547&scid=37#Abolition> (last visited Aug. 31, 2009); The Moratorium Campaign, <http://www.moratoriumcampaign.org/> (last visited Aug. 31, 2009); the National Coalition to Abolish the Death Penalty, NCADP Affiliates, <http://www.ncadp.org/index.cfm?content=55> (last visited Aug. 31, 2009); and the National Coalition to Abolish the Death Penalty, Resources, <http://www.ncadp.org/index.cfm?content=7> (last visited Aug. 31, 2009).

<sup>759</sup> See Murder Victims' Families for Reconciliation, <http://www.mvfr.org/> (last visited Aug. 31, 2009).

<sup>760</sup> See Amnesty International USA, *Death Penalty*, <http://www.amnestyusa.org/our-priorities/death-penalty/page.do?id=1011005&n1=3&n2=28> (last visited Aug. 31, 2009).

<sup>761</sup> See Death Penalty Information Center, <http://www.deathpenaltyinfo.org/> (last visited Aug. 31, 2009).

## X. WHAT LIES AHEAD?

A. *The Eighth Amendment in the Twenty-First Century*

¶155 The death penalty has been used for centuries, so it would be naïve to believe that this form of punishment will die out without a difficult and prolonged fight. In the United States, the battles over death sentences were fought first in state legislatures, then moved to the courts, culminating with the challenge to the death penalty's constitutionality in *Furman*. Although the Supreme Court has rejected constitutional challenges to the death penalty itself and to the most common method of execution—lethal injection—this does not mean that Eighth Amendment challenges are dead letters. On the contrary, the Eighth Amendment continues to have vitality, if for no other reason than because the Eighth Amendment's interpretation is tied to changing public attitudes and the “evolving standards of decency that mark the progress of a maturing society”—the touchstone that the Supreme Court itself has articulated as the law.<sup>762</sup>

¶156 While the Supreme Court may not declare the death penalty unconstitutional anytime soon, its Eighth Amendment jurisprudence is already fraught with irreconcilable contradictions brought about by the inhumanity of executions.<sup>763</sup> The Supreme Court, for example, has repeatedly made clear that the Eighth Amendment safeguards a prisoner's treatment and his or her conditions of confinement.<sup>764</sup> When someone is imprisoned, the Constitution imposes “a corresponding duty” on the government “to assume some responsibility” for that inmate's “safety and general well being.”<sup>765</sup> Thus, the Supreme Court's Eighth Amendment jurisprudence *protects* inmates from physical harm yet *permits* their execution.

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<sup>762</sup> *Atkins*, 536 U.S. at 311–12; *Trop*, 356 U.S. at 101. Whether the Supreme Court should consider only U.S. norms or should also examine international norms and developments has been hotly debated. See Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63 (2007); see also Sandra Babcock, *The Global Debate on the Death Penalty*, 34 HUM. RTS. 17, 18 (Spring 2007). It is clear that in capital cases the Supreme Court has considered non-U.S. sources from time to time. See Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553, 556–57, 571–73 (2007).

The Framers themselves looked beyond America's shores for guidance as they created America's democracy, clearly understanding that Americans would be bound by “the Law of Nations.” See U.S. CONST., art. 1, § 8, cl. 10 (giving Congress the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329, 330 (2004); Koh, *supra* note 371, at 1087–90.

<sup>763</sup> The Supreme Court itself has noted “a lack of clarity” in its Eighth Amendment jurisprudence. *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003).

<sup>764</sup> *Helling v. McKinney*, 509 U.S. 25, 31 (1993).

<sup>765</sup> *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 199–200 (1989). The government's Eighth Amendment duties include, first and foremost, the provision of a prisoner's “basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety.” *Id.* For example, the Supreme Court has held that where inmates were crowded into cells and exposed to infectious diseases such as hepatitis and venereal disease, the Eighth Amendment required a remedy. See *Hutto v. Finney*, 437 U.S. 678, 682 (1978).

On the other hand, the Eighth Amendment “does not mandate comfortable prisons.” *Peterkin v. Jeffes*, 855 F.2d 1021, 1027 (3d Cir. 1988). Thus, a lack of significant airflow to death row inmates' cells has been held not to violate the Eighth Amendment where it was found not to pose a genuine health risk, such as the development and spread of infectious respiratory diseases. The Constitution, it has been held, only mandates ventilation sufficient to support life and to prevent the spread of such diseases. *Id.* at 904–05.

¶157 In *Estelle v. Gamble*,<sup>766</sup> the Supreme Court specifically held that “deliberate indifference to serious medical needs of prisoners” violates the Eighth Amendment because it constitutes the “unnecessary and wanton infliction of pain.”<sup>767</sup> Likewise, in *Helling v. McKinney*,<sup>768</sup> the Court held that a prisoner stated a civil rights claim under the Eighth Amendment based on exposure to second-hand smoke.<sup>769</sup> In yet another case, *Hope v. Pelzer*,<sup>770</sup> the Court held that Alabama prison officials violated the Eighth Amendment when they handcuffed a shirtless inmate to a hitching post for seven hours, denied him bathroom breaks, and gave him water only once or twice, which resulted in sunburns and dehydration.<sup>771</sup> Is it not ironic that the Eighth Amendment protects inmates from second-hand smoke and gratuitous, day-long exposure to the hot sun yet allows states to deliberately kill prisoners?<sup>772</sup>

### B. *The Future of America’s Death Penalty Debate*

¶158 For now, the battle over America’s death penalty will return—as it must—to legislatures across the country. Capital punishment opponents will have to continue to push for moratoriums and continue to expose all of the death penalty’s many flaws. Wrongful convictions—such as those uncovered by Northwestern’s Center on Wrongful Convictions<sup>773</sup>—must be better publicized so that the stories of the innocent who spent

<sup>766</sup> 429 U.S. 97 (1976).

<sup>767</sup> *Id.* at 104; *see also* *Farmer v. Brennan*, 511 U.S. 825, 828–47 (1994) (where transsexual claimed that prison officials showed “deliberate indifference” by placing the petitioner in the general prison population, the Supreme Court held that prison officials may be held liable under the Eighth Amendment for denying humane conditions of confinement if they know that an inmate will face a substantial risk of harm, and disregard that risk by failing to take reasonable measures to abate it); *Hudson v. McMillian*, 503 U.S. 1, 4 (1992) (use of excessive physical force against a prisoner may constitute cruel and unusual punishment even if the prisoner does not suffer serious injury); *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (prisoners claiming that conditions of confinement constituted Eighth Amendment violation must show “deliberate indifference” on the part of prison officials).

<sup>768</sup> 509 U.S. 25 (1993).

<sup>769</sup> *Id.* at 35. In *Helling*, the Supreme Court expressly stated: “That the Eighth Amendment protects against future harm to inmates is not a novel proposition.” *Id.* at 33. As the Court ruled: “We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery. Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.” *Id.*; *accord Baze*, 128 S. Ct. at 1530 (plurality opinion) (“Our cases recognize that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment.”).

<sup>770</sup> 536 U.S. 730 (2002).

<sup>771</sup> *Id.* at 733–35 & n.2. The Supreme Court found that the facts as alleged by the inmate constituted an “obvious” Eighth Amendment violation. *Id.* at 738. The Court emphasized that the inmate was “knowingly subjected . . . to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation.” *Id.* “The use of the hitching post under these circumstances,” the Court ruled, “violated the ‘basic concept underlying the Eighth Amendment . . .’” (i.e., “human dignity” and “the dignity of man”). *Id.* at 738, 745.

<sup>772</sup> *See, e.g.*, *Weaver v. Clarke*, 45 F.3d 1253 (8th Cir. 1995) (holding that prison officials’ alleged deliberate indifference to prisoner’s smoke-induced illness violated the Eighth Amendment); *State ex rel. White v. Parsons*, 483 S.E.2d 1, 6 (W. Va. 1996) (“[P]rison officials may not be indifferent to the desire of inmates to avoid concentrations of so-called ‘second hand smoke.’”).

<sup>773</sup> Northwestern Law Center on Wrongful Convictions, <http://www.law.northwestern.edu/wrongfulconvictions> (last visited Aug. 31, 2009).

time on death row are not forgotten.<sup>774</sup> The full extent of racial discrimination in the death penalty's administration—as found in study after study and recognized by the Supreme Court itself—must be brought to the public's attention.<sup>775</sup> The arbitrary application of the death penalty—something that has not changed since *Furman* or, for that matter, since Beccaria's time—also must be highlighted,<sup>776</sup> as must the enormous financial costs of the death penalty. Dollars now spent on pursuing the death penalty could be better spent to prevent crime, to educate our children, and to further public safety in our communities in concrete ways.<sup>777</sup> Finally, the emotional toll that executions exact on judges and jurors, as well as on prison guards and executioners, must be brought to light.<sup>778</sup>

<sup>774</sup> See Richard C. Dieter, *Methods of Execution and Their Effect on the Use of the Death Penalty in the United States*, 35 FORDHAM URB. L.J. 789, 795 (2008) (“It took a series of embarrassing exonerations of death row inmates and the advent of DNA testing to change the way the death penalty was viewed. These cases of innocence revealed with sharp clarity that states were making serious errors in their administration of the death penalty.”).

<sup>775</sup> The racial discrimination associated with America's death penalty is well-documented. See SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989); Anthony G. Amsterdam, *Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34 (2007); Theodore M. Shaw, *Maintaining Hope in the Struggle Against the Constitutional Tolerance of Racial Discrimination*, 39 COLUM. HUM. RTS. L. REV. 59 (2007); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998). A 1990 study by the General Accounting Office found a pattern of racial discrimination in the charging and imposition of death sentences. GENERAL ACCOUNTING OFFICE, *DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES* (1990).

The racial bias that still exists in the death penalty's administration is reason enough to do away with it. As Justice William Brennan wrote in his dissent in *McCleskey v. Kemp*: “It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined.” 481 U.S. at 344 (Brennan, J., dissenting).

<sup>776</sup> See Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679 (1990); David McCord, *Lightning Still Strikes: Evidence from the Popular Press that Death Sentencing Continues to Be Unconstitutionally Arbitrary More Than Three Decades After Furman*, 71 BROOK. L. REV. 797 (2005); see also Janet C. Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases*, 46 B.C. L. REV. 771, 824 (2005) (arguing that “[t]he only procedure that comes close to enforcing the substantive right to a nonarbitrary verdict is review of the jurors' reasons for imposing death”).

<sup>777</sup> The Court of Appeals of New York declared that state's death penalty statute unconstitutional in 2004. *New York v. LaValle*, 817 N.E.2d 341 (N.Y. 2004). This resulted in the closure of New York's Capital Defender Office, which had opened in 1995 after the New York legislature reinstated capital punishment. The Capital Defender Office once had more than 70 staffers and a \$14 million annual budget. Since the office's opening, New York had roughly 10,000 murders, prosecutors considered bringing death penalty charges in 877 cases, district attorneys filed notices of intent to seek the death penalty in just 58 cases, and juries actually imposed death sentences in only 7 cases. No one—not one person—was ever executed in the Empire State despite the fact that some \$170 million was spent administering the statute in an effort to impose executions. The closing of New York's death row facility was also estimated to result in a savings of \$300,000 per year. See Cara H. Drinan, *The Revitalization of Ake: A Capital Defendant's Right to Expert Assistance*, 60 OKLA. L. REV. 283, 308 (2007); Legislative Activity-New York, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/article.php?did=2214> (last visited Aug. 31, 2009).

<sup>778</sup> See MOLLY TREADWAY JOHNSON & LAURAL L. HOOPER, FED. JUDICIAL CTR., *RESOURCE GUIDE FOR MANAGING CAPITAL CASES* 43 (2004) (“A number of judges conducted their capital trials on a less-than-full-time schedule. For example, several judges ran the trial from 9 to 5 four days a week, and held no trial proceedings on the fifth day. Although some judges do this as a matter of course in any long trial, other judges pointed out aspects of a death-penalty case that make taking a day off even more justified. For example, some cited the emotional toll that such cases take on everyone involved, including the attorneys, judge, and jurors. Having a day off, they reasoned, helped to alleviate some of this tension.”).



¶159 As a society, we certainly do not hold up executioners—those who deliver the deadly intravenous drugs at lethal injections—as role models for our children. Why? Because what executioners do—kill people who are strapped down on gurneys—is so undignified, so uncivilized. Even while authorizing them, those most responsible for executions like to keep a safe, respectable distance from them. Neither governors nor federal judges, for example, ever pull the switch or push the buttons that end a person’s life, as that would be far too unseemly. Instead, legislators, governors, and judges direct prison guards—whose identities are protected<sup>779</sup>—to carry out executions, something that few people would want to do themselves.<sup>780</sup> American parents may dream of their children going to college, becoming doctors or lawyers or maybe even growing up to be President one day, but I suspect no mothers or fathers want their children to grow up to be executioners.

¶160 Because we let it, the gears of America’s death penalty machine thus grind on, churning out execution after execution.<sup>781</sup> And because nothing is done to stop them, executions continue to take place using execution equipment supplied by the likes of Fred Leuchter, a Holocaust denier and designer of execution machines who was found to have practiced engineering without a license.<sup>782</sup> Meanwhile, the men and women tasked with killing killers suffer headaches, loss of sleep and recurring nightmares, even debilitating mental breakdowns after they perform the ugly work asked of them.<sup>783</sup>

¶161 Everywhere the death penalty is still in use, executioners are left to grapple with what they do—and with what they have done. In Uganda, a prison official who oversaw

<sup>779</sup> Executioners wear hoods or, in Illinois, are required by law to be paid in cash for their services to shield their identities. See BESSLER, *KISS OF DEATH*, *supra* note 734, at 110.

<sup>780</sup> Hangmen in England frequently had to be recruited from a pool of condemned inmates—inmates who were reprieved if they agreed to serve as executioners. Cottrol, *supra* note 135, at 1649.

<sup>781</sup> At last count more than 15,000 executions had taken place on American soil. M. Watt Espy & John Ortiz Smykla, *Executions in the United States, 1608-2002: The Espy File*, <http://www.deathpenaltyinfo.org/article.php?did=269&scid=> (last visited Aug. 31, 2009) (referencing “The Espy File,” which documents 15,269 executions from 1608 to 2002).

<sup>782</sup> See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 354–55 (1997); Patricia Roy, *Not So Shocking: The Death of the Electric Chair in Georgia at the Hands of the Georgia Supreme Court in Dawson v. State*, 53 MERCER L. REV. 1695, 1695 n.1 (2002); James R. Wong, *Lethal Injection Protocols: The Failure of Litigation to Stop Suffering and the Case for Legislative Reform*, 25 TEMP. J. SCI. TECH. & ENVTL. L. 263, 268–69 (2006); see also *id.* at 268 n.64 (“Leuchter’s qualifications were severely criticized when he participated in a study at the behest of neo-Nazis to prove that the Holocaust never happened. Testing the walls of concentration camps in Poland, he concluded that there was no mass killing of Jews by gas chamber because there was no evidence of lethal gas found in the walls. It was revealed that Leuchter’s only qualifications were college classes in chemistry and physics while studying for a Bachelor of Arts degree.”).

Leuchter, who produced a report for a Canadian court case alleging that no gassings ever occurred at concentration camps such as Auschwitz, was disqualified from serving as an expert witness in the case, the judge finding Leuchter not competent to render any such opinion. See Vera Ranki, *Holocaust History and the Law: Recent Trials Emerging Theories*, 9 CARDOZO STUD. L. & LITERATURE 15, 24–25 (1997).

<sup>783</sup> See Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 459 (2005); Witness to an Execution, All Things Considered, Oct. 20, 2000, available at [http://soundportraits.org/on-air/witness\\_to\\_an\\_execution/](http://soundportraits.org/on-air/witness_to_an_execution/) (last visited Aug. 31, 2009) (former corrections officer Fred Allen discusses his own mental breakdown after participating in executions); Jim Avila, Mary Harris & Chris Francescana, Interview with an Executioner ABC News, Dec. 17, 2007, available at <http://abcnews.go.com/TheLaw/Story?id=4015348&page=4>; Karen Feldschere, *The Warden*, NORTHEASTERN ALUMNI MAG., Sept. 2004, available at <http://www.northeastern.edu/magazine/0409/feature3.shtml>.

what he called a “debasement and dehumanizing” execution vowed to never attend one again, saying he did not sleep for two days after witnessing it, and that it was “particularly unnerving” to have to command others to carry it out because—as he attested in his affidavit—“my conscience tells me that killing is wrong.”<sup>784</sup> Executioners in the United States have also expressed qualms or deep personal reservations about what they do, with many coming to oppose executions altogether.<sup>785</sup> For example, Jeanne Woodford—San Quentin’s former warden—wrote that she “came to believe that the death penalty should be replaced with life without the possibility of parole.” “To take a life in order to prove how much we value another life does not strengthen our society,” she explained, saying that the death penalty “devalues our very being and detracts crucial resources from programs that could truly make our communities safer.”<sup>786</sup>

¶162 Over two centuries ago, Beccaria himself recognized the ambivalence ordinary citizens feel towards executioners. “What are the sentiments of each individual regarding the death penalty?” Beccaria asked. “We may read them,” he offered, “in the attitudes of indignation and contempt with which everyone views the hangman, who is, to be sure, an innocent executor of the public will.”<sup>787</sup> Lawyers—who keep executioners in business—would be well advised to take a cue from what is already happening in the medical profession. Physicians—who once played prominent roles at executions, standing by to pronounce the hour and minute of an inmate’s death—now regularly refuse to participate.<sup>788</sup> Following the Hippocratic Oath,<sup>789</sup> the American Medical Association considers it an ethical violation for doctors to take part in these rituals.<sup>790</sup> How long, one wonders, will it take for judges and lawyers to follow suit? Why, after all, should members of the bar have to advocate that other human beings die as part of their jobs?

¶163 In the eighteenth century, the death penalty was often used in place of imprisonment—and to prevent anarchy or revolution. Whatever rationales existed in

<sup>784</sup> CHENWI, *supra* note 406, at 146 (reprinting affidavit of the Commissioner General of Prisons in Uganda).

<sup>785</sup> See Donald Cabana, *Foreword* in ROBERT M. BOHM, *DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES*, at v (1999) (a former southern warden describes his haunting experience in overseeing executions); Jim Avila, Mary Harris & Chris Francesceni, *Interview with an Executioner*, ABC News, Dec. 17, 2007 (the former executioner for Virginia discusses his opposition to capital punishment), *available at* <http://abcnews.go.com/TheLaw/story?id=4015348&page=1>.

<sup>786</sup> See Jeanne Woodford, *Death Row Realism*, L.A. TIMES, Oct. 2, 2008, *available at* <http://www.latimes.com/news/opinion/la-oe-woodford2-2008oct02,0,4155306.story>.

<sup>787</sup> BECCARIA (Thomas ed.), *supra* note 1, at 56.

<sup>788</sup> David Waisel, *Physician Participation in Capital Punishment*, 270 JAMA 365, 365 (1993).

<sup>789</sup> LUDWIG EDELSTEIN, *THE HIPPOCRATIC OATH* 3 (1943) (“I will not give a drug that is deadly to anyone . . . nor will I suggest the way to such a counsel.”).

<sup>790</sup> See Michael K. Gottlieb, *Executions and Torture: The Consequences of Overriding Professional Ethics*, 6 YALE J. HEALTH POL’Y, L. & ETHICS 351, 366 n.71 (2006). The Council on Ethical and Judicial Affairs of the American Medical Association has also stated that physicians should not try to treat a person for the purpose of restoring that person’s competency once he or she has been declared incompetent to be executed. AM. MED. ASS’N, *CURRENT OPINIONS WITH ANNOTATIONS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS*, E-2.06 CAPITAL PUNISHMENT (2001); AM. MED. ASS’N, *CURRENT OPINIONS WITH ANNOTATIONS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS*, E-2.06 CAPITAL PUNISHMENT (2000). The American Psychological Association, the American Psychiatric Association, the American Nursing Association, the National Association of Emergency Medical Technicians, and the World Medical Association also prohibit participation in executions. See Michael K. Gottlieb, *Executions and Torture: The Consequences of Overriding Professional Ethics*, 6 YALE J. HEALTH POL’Y, L. & ETHICS 351, 366 & n.71 (2006); *Baze*, 128 S. Ct. at 1566 (Breyer, J., concurring); *id.* at 1539 (Alito, J., concurring).

Beccaria's day for the death penalty's use, however, no longer apply in the modern era. In Beccaria's time, well-developed prison systems to incarcerate criminals for long periods of time did not exist.<sup>791</sup> In contrast, the United States now has multiple maximum-security prisons capable of housing murderers, terrorists and other violent offenders. Likewise, whereas political instability and revolutions were extremely common in the eighteenth century, the United States is now a stable, well-developed democracy, the exact opposite of a country at risk of falling into a state of anarchy. Thus, executions are unnecessary and unwarranted in this day and age—a time in which we all share a heightened awareness of the concepts of human dignity and human rights.

### C. *The Composition of America's Death Rows*

¶164 The heinous crimes committed by the occupants of America's death rows—comprised mostly of men who grew up learning that violence and abuse was the way to solve problems<sup>792</sup>—are unspeakable. These murderers have, in cold blood, killed another human being, sometimes more than one. And the manner in which they have done so—with semi-automatic assault rifles or sawed-off shotguns, with switchblades or scissors, with rat poison or their own bare hands—never ceases to shock and offend our collective sensibilities and humanity.<sup>793</sup> One need only read judicial opinions in homicide cases—in particular, the portions recounting the facts of brutal, cold-blooded murders—to know the horror of any murder.

¶165 The people we execute are killers, to be sure—sometimes even grisly serial killers whose horrendous crimes have claimed multiple lives.<sup>794</sup> But convicted murderers are

<sup>791</sup> See Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1344–45 (2007) (“The American penitentiary system began to take shape in the mid-eighteenth century, continuing its transformation throughout the nineteenth century.”); James J. Willis, *Transportation Versus Imprisonment in Eighteenth- and Nineteenth-Century Britain: Penal Power, Liberty, and the State*, 39 LAW & SOC'Y REV. 171, 177 (2005) (“In the eighteenth century, prisons . . . had generally been used as a means to confine debtors, those awaiting trial, and felons awaiting the execution of their sentence.”).

<sup>792</sup> JONATHAN H. PINCUS, *BASE INSTINCTS: WHAT MAKES KILLERS KILL?* 19 (2001); RICHARD RHODES, *WHY THEY KILL: THE DISCOVERIES OF A MAVERICK CRIMINOLOGIST* 109–40 (1999) (discussing the abusive backgrounds of many killers).

<sup>793</sup> See, e.g., *Peterson v. Polk*, No. 1:03CV00651, 2007 WL 1232076, at \*1–2 (M.D. N.C. Apr. 26, 2007) (defendant sentenced to death after murdering a 67-year-old woman with a Chinese SKS semi-automatic assault rifle during a robbery that netted \$69.00); *People v. Thompson*, 853 N.E.2d 378, 382 (Ill. 2006) (noting that defendant went on a “shooting spree” with a sawed-off shotgun, first killing a police officer then two neighbors in front of their 10-year-old daughter); *Simpson v. Polk*, No. 04-3, 2005 WL 928554, at\*10 (4th Cir. 2005) (noting that the aggravating evidence leading to the imposition of the defendant's death sentence included strangling a 92-year-old reverend with the defendant's bare hands while demanding money, tying belts around the reverend's neck, and then beating him over the head with a glass bottle until it broke); *Ex parte Graves*, 70 S.W.3d 103, 105 n.3 (Tex. Ct. Crim. App. 2002) (reporting testimony at capital trial that death row inmate's switchblade matched the victims' wounds); *Fyre v. Lee*, 235 F.3d 897 (4th Cir. 2000) (defendant killed his seventy-year-old landlord by repeatedly ramming a pair of scissors into the neck and chest of his victim); *Harjo v. State*, 882 P.2d 1067, 1078 (Okla. Ct. Crim. App. 1994) (defendant strangled and suffocated a woman with his bare hands, crushing her windpipe); *Barfield v. Harris*, 540 F. Supp. 451, 460 (E.D. N.C. 1982) (defendant poisoned her boyfriend by placing arsenic-laden rat poison in his beer and tea, causing a slow and painful death).

<sup>794</sup> Studies show stronger support for the execution of serial killers than for other murderers. See Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 32 n.141 (1995). It is equally clear, however, that not all serial killers end up being executed. See Rachel King, *No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Prisoners*, 16 B.U. PUB. INT. L.J. 195, 228 (2007).

also deeply troubled people who have often suffered unspeakable acts of child abuse<sup>795</sup>—horrific abuse that is well-documented.<sup>796</sup> Those who end up on death row have so frequently suffered severe physical or sexual abuse<sup>797</sup> that the profound abuse found in the ranks of death row inmates almost qualifies as a cliché.<sup>798</sup> One study of fourteen juveniles on death row found twelve had been “brutally” abused and five had been sodomized by older family members.<sup>799</sup> Frontal lobe dysfunction and other disorders are common, with clinicians routinely identifying child abuse and traumatic brain injuries.<sup>800</sup> Once studied, the disturbing backgrounds of death row inmates give added force to the memorable lines of the poet W. H. Auden: *I and the public know / What all schoolchildren learn / Those to whom evil is done / Do evil in return.*<sup>801</sup>

¶166 Indeed, as a class, killers are often drug addicts and alcoholics,<sup>802</sup> poor and mostly uneducated,<sup>803</sup> and often suffer from head injuries and brain damage.<sup>804</sup> Many are

<sup>795</sup> Blume, *supra* note 748, at 963, 989–95 (noting instances of childhood abuse among death row inmates who “volunteered” to be executed).

<sup>796</sup> Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1166–67 (1999).

<sup>797</sup> See *Wiggins v. Smith*, 539 U.S. 510, 516–17 (2003) (Mr. Wiggins suffered “severe physical and sexual abuse . . . at the hands of his mother and while in the care of a series of foster parents,” including neglect, starvation, and reported rapes); *Penry v. Lynaugh*, 492 U.S. 302, 309 (1989) (“Penry’s mother testified at trial that Penry was unable to learn in school and never finished the first grade. Penry’s sister testified that their mother had frequently beaten him over the head with a belt when he was a child. Penry was also routinely locked in his room without access to a toilet for long periods of time.”); *State v. Lynch*, 787 N.E.2d 1185 (Ohio 2003) (death row inmate was raised by an illiterate mother who paid little attention to his well-being, was sexually abused by a teacher and a man he was sent to live with, was raped by a passing motorist who gave him a ride, and dropped out of school around the ninth grade); Laurie T. Izutsu, *Applying Atkins v. Virginia to Capital Defendants with Severe Mental Illness*, 70 BROOK. L. REV. 995, 1031–33 (2005) (discussing the case of Charles Walker, a paranoid schizophrenic whose mother whipped him with electrical cords and a dog leash, denied him food, and burned his penis with an iron).

<sup>798</sup> PINCUS, *supra* note 792, at 67–68 (“The frequent and prolonged history of physical and sexual abuse committed by a parent or parent substitute has been pervasive and extreme among the 150 or so murderers I have seen.”); see also Dorothy Otnow Lewis, Jonathan H. Pincus, Marilyn Feldman, Lori Jackson & Barbara Bard, *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838 (1986).

<sup>799</sup> Mirah A. Horowitz, *Kids Who Kill: A Critique of How the American Legal System Deals with Juveniles Who Commit Homicide*, 63 LAW & CONTEMP. PROBS. 133, 157 (2000); see also *id.* (“Looking outside the small sample of juvenile death row inmates, fifty-five percent of the homicidally aggressive children studied had been physically abused.”).

<sup>800</sup> Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 63–64 (2006).

<sup>801</sup> See Melanie L. Williams, *Then and Now: The Natural/Positivist Nexus at War: Auden’s ‘September 1, 1939*, 31 J. L. & SOCIETY 60, 61 (2004).

<sup>802</sup> PINCUS, *supra* note 792, at 84–85; Blume, *supra* note 748, at 963, 989–95 (noting instances of alcohol and drug abuse among death row inmates who “volunteered” to be executed); James R. Edmunds, *Nonconsensual U.S. Military Action Against the Columbian Drug Lords Under the U.N. Charter*, 68 WASH. U. L.Q. 129, 130 (1990); see also *Correll v. Ryan*, 539 F.3d 938, 952 (9th Cir. 2008) (noting that Correll was using alcohol and a variety of drugs by age twelve, possibly as self-medication for mental illnesses that were undiagnosed until his imprisonment).

<sup>803</sup> Smith & Starns, *supra* note 748, at 68–69 (noting that less than ten percent of Mississippi death row inmates had graduated from high school, that the IQ scores of those death row inmates were well below average, that eighty-four percent fell below the seventh-grade level and that more than half scored at or below the fourth-grade level, and that twenty-seven percent of the inmates’ scores fell within the range of mental retardation).

<sup>804</sup> Blume, *supra* note 748, at 963, 989–95 (noting instances of brain damage and brain tumors among death row inmates who “volunteered” to be executed); Lewis et al., *supra* note 798, at 838–45 (finding severe head injuries, most suffered in early childhood or during adolescence, for all fifteen death row inmates

mentally retarded,<sup>805</sup> homeless,<sup>806</sup> illiterate,<sup>807</sup> exhibit suicidal tendencies,<sup>808</sup> have profound depression or suffer from debilitating diseases like paranoid schizophrenia,<sup>809</sup>

examined). Brain injuries are common, especially among death row inmates. Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 57 (2006) (“neuropsychological studies show that the prevalence rate of brain dysfunction among criminal populations is extremely high, with prevalence rates of ninety-four percent among homicide offenders” and “[c]linical evaluations of death row inmates . . . reveal that many have a history of head injury and serious neuropsychological deficits”).

A sampling of the horrific childhoods of death row inmates demonstrates the severe head traumas and long odds against normalcy these inmates faced as children. See *Correll*, 539 F.3d at 952 (noting that convicted murderer Michael Correll “endured an abusive childhood,” with evidence of incest in the family, the neglect of his “basic needs” as a child, and further emphasizing that, at age seven, “a brick wall collapsed on his head,” rendering him unconscious though “his parents did not seek medical treatment until several days later when he was still not back to normal;” in the case “[s]everal experts testified that this type of accident and the symptoms Correll exhibited then and now indicate a high likelihood of brain impairment”); *Haliym v. Mitchell*, 492 F.3d 680, 712–14 (6th Cir. 2007) (finding ineffective assistance of counsel where “attorneys were on notice that Petitioner had shot himself in the left temple, which should have strongly suggested the need to investigate whether Petitioner had a mental defect;” the court also noted that the petitioner experimented with heroin after his father died of a heroin overdose and that “Petitioner grew up in a deeply troubled home”).

<sup>805</sup> See Carol S. Steiker, *Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1478 (2002) (noting that while the precise number of death row inmates with mental retardation is unknown, “it may well be substantial—more appropriately measured in hundreds rather than dozens”); Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After Penry v. Johnson*, 35 AKRON L. REV. 327, 327 (2002) (“Estimates of the incidence of mental retardation in America’s death row population range from 4% to as high as 20%.”); Smith & Starns, *supra* note 748, at 70 n.92 (estimates of the number of mentally retarded inmates on Georgia’s death row ranged as high as thirty percent after Georgia passed its law barring the execution of the mentally retarded). Although *Atkins* made it unconstitutional to execute the mentally retarded, many death row inmates may still have practical difficulties actually proving their retardation through established procedures. See *Application of Constitutional Rule of Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), that *Execution of Mentally Retarded Persons Constitutes “Cruel and Unusual Punishment” in Violation of Eighth Amendment*, 122 A.L.R.5th 145 (2004).

<sup>806</sup> See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 535 (2003); *Williams v. Quarterman*, 2008 WL 4280315, at \*5 (5th Cir. 2008); *Kemp v. Schriro*, 2008 WL 4183379, at \*1 (D. Ariz. 2008); *Council v. State*, 2008 WL 4111335, at \*6 (S.C. 2008); *Powell v. Warden of the Sussex I Prison*, 2005 WL 2980756, at \*22 (Va. 2005); *People v. Lewis*, 22 P.3d 392, 436 (Cal. 2001); *State v. Greene*, 967 P.2d 106, 114 (Ariz. 1998).

<sup>807</sup> See, e.g., *State v. Sonnier*, 380 So. 2d 1, 9–10 (La. 1979); *Neal v. State*, 525 So.2d 1279, 1285 (Miss. 1987) (Hawkins, J., dissenting); *Jones v. State*, 707 P.2d 1128, 1130 (Nev. 1995); *State v. Hill*, 2008 WL 2719570, at \*1 (Ohio. App. 2008); *Commonwealth v. Whitney*, 412 A.2d 1152, 1157 (Pa. 1986); *Westley v. State*, 754 S.W.2d 224, 227 & n.1 (Tex. Cr. App. 1988).

<sup>808</sup> See, e.g., *Sims v. Brown*, 425 F.3d 560, 583 (9th Cir. 2005); *State v. Boggs*, 185 P.3d 111, 128 (Ariz. 2008); see also Karl S. Myers, *Practical Lackey: The Impact of Holding Execution After a Long Stay on Death Row Unconstitutional Under Lackey v. Texas*, 106 DICK. L. REV. 647, 648 & n.13 (2002) (citing *Knight v. Florida*, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting)) (referencing a Florida study showing that thirty-five percent of inmates confined on death row attempted suicide and forty-two percent considered suicide).

<sup>809</sup> See Izutsu, *supra* note 797, at 996, 1008, 1028–29, 1032–33; Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAV. SCI. & L. 191, 193, 200 (2002) (noting that the incidence of schizophrenia among death row inmates is at least five percent and perhaps higher); see also PINCUS, *supra* note 792, at 209; Blume, *supra* note 748, at 963, 989–95; Smith & Starns, *supra* note 748, at 75 (noting that forty-three percent of Mississippi death row inmates suffer from clinical depression). It has been estimated that up to seventy percent of death row inmates suffer from some form of schizophrenia or psychosis. See Drinan, *supra* note 777, at 302. For example, in *Ake*, the defendant’s initial psychiatric report concluded that “Ake appears to be frankly delusional” and “a probable paranoid schizophrenic,” adding that “[h]e claims to be the ‘sword of vengeance’ of the Lord and that he will sit at the left hand of God in heaven.” *Ake v. Oklahoma*, 470 U.S. 68, 71 (1985). Another, more recent Supreme Court case, *Panetti v. Quarterman*, also dealt with a capital defendant who had been hospitalized over a dozen times in various institutions for schizophrenia,

Post-Traumatic Stress Disorder (PTSD)<sup>810</sup> or other severe mental illnesses.<sup>811</sup> Given their backgrounds, perhaps it should come as no surprise that many death row inmates engage in violent behavior or even go insane.<sup>812</sup>

¶167

Many death row inmates, in the depths of despair and having previously attempted to kill themselves, formally abandon their appeals and “volunteer” to die, leading to a bizarre form of state-assisted suicide.<sup>813</sup> One man, David Rice, was actually sentenced to

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schizoaffective disorder, bipolar disorder, depression, psychosis, and bizarre delusions and hallucinations. 127 S. Ct. 2842, 2848 (2007); *see also* Drinan, *supra* note 777, at 300. Panetti chose to represent himself at trial—a trial in which he wore a cowboy outfit and attempted to subpoena John F. Kennedy, the Pope, and Jesus Christ. Lauren E. Perry, *Hiding Behind Precedent: Why Panetti v. Quarterman Will Create Confusion for Incompetent Death Row Inmates*, 86 N.C. L. REV. 1068, 1068 (2008). In *Panetti*, the Supreme Court—invoking the Eighth Amendment—held that the prisoner’s documented delusions should have been considered in determining whether he was competent to be executed. 127 S. Ct. at 2847, 2860, 2862.

<sup>810</sup> *See, e.g.*, *Ringo v. Roper*, 472 F.3d 1001, 1003 (8th Cir. 2007); *Sims v. Brown*, 425 F.3d 560, 583 n.15 (9th Cir. 2005); *Funchess v. Wainwright*, 788 F.2d 1443, 1445 (11th Cir. 1986); *Ben-Sholom v. Ayers*, 2008 WL 2745460, at \*64 (E.D. Cal. 2008); *State v. Boggs*, 185 P.3d 111, 129 (Ariz. 2008); *State v. Stojetz*, 705 N.E.2d 329, 471 (Ohio 1999); *see also* Blume, *supra* note 748, at 963, 989–95. PTSD is often associated with combat. *See* *People v. Weaver*, 29 P.3d 103, 139–41 (Cal. 2001).

<sup>811</sup> Blume, *supra* note 748, at 963, 989–95 (noting that execution “volunteers” sometimes suffer from pedophilia, bipolar disorder or personality disorder, including multiple personality disorder); *see also* Lewis et al., *supra* note 798, at 840 (finding evidence of delusions and hallucinations among adult death row inmates). More than half of all prisoners and jail inmates have mental health problems. *See* Paula Shapiro, *Are We Executing Mentally Incompetent Inmates Because They Volunteer to Die?: A Look at Various States’ Implementation of Standards of Competency to Waive Post-Conviction Review*, 57 CATH. U. L. REV. 567, 567 & n.1 (2008) (citing DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006)); *cf.* Kelly A. Gabos, *The Perils of Singleton v. Norris: Ethics and Beyond*, 32 AM. J.L. & MED. 117, 119 (2006) (“A 1999 Department of Justice report found that 16% of all inmates in state and federal prisons, approximately 283,000 inmates total, were afflicted with schizophrenia, bipolar disorder, major depression, or some severe mental illness.”).

<sup>812</sup> *Compare* Liliana Lyra Jubilut, *Death Penalty and Mental Illness: The Challenge of Reconciling Human Rights, Criminal Law, and Psychiatric Standards*, 6 SEATTLE J. FOR SOC. JUST. 353, 367 (2007) (“The most conservative studies find that up to ten percent of inmates on death row suffer from serious mental illness. However, other studies suggest that the proportion of prisoners on death row who have been treated for some kind of psychiatric disorder can be as high as one-third.”) *with* Gabos, *supra* note 811, at 119 (a 2003 British Broadcasting Company study reported that ten percent of America’s death row inmates are mentally ill). As many as half of all death row inmates reportedly suffer from intermittent insanity. Smith & Starns, *supra* note 748, at 75; Barua, *supra* note 592, at 4 (citing American Civil Liberties Union, *Mental Illness and the Death Penalty in the United States* (2005), <http://www.aclu.org/capital/mentallillness/10617pub20050131.html> (last visited Aug. 31, 2009)).

The problems faced by mentally ill criminal defendants at trial are especially acute. Although mental illness is properly considered a “mitigating” factor in capital litigation, the Capital Jury Project found that many jurors—equating mental illness with future dangerousness—actually view mental illness as an “aggravating” factor in sentencing proceedings. *See* Ronald J. Tabak, *Overview of the Task Force Proposal on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1123, 1128–29 (2005). Despite the pitfalls associated with such evidence, capital defense counsel—and trained mitigation specialists—are becoming much more sophisticated in terms of presenting mental health evidence. *See generally* Sean D. O’Brian, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693 (2008).

<sup>813</sup> Blume, *supra* note 748, at 963, 989–95. Since 1976, 123 death-row inmates—commonly referred to as “volunteers”—have waived their right to post-conviction review of their sentences. *See* Shapiro, *supra* note 811, at 567. “Volunteers,” who either refuse to present mitigating evidence at trial or waive their post-conviction appeals, suffer from a wide array of mental illnesses and substance abuse disorders. *See* Kristen M. Dama, *Redefining a Final Act: The Fourteenth Amendment and States’ Obligation to Prevent Death Row Inmates from Volunteering to Be Put to Death*, 9 U. PA. J. CONST. L. 1083, 1083 (2007); Blume, *supra* note 748, at apps. A-B (listing 106 death-row inmates executed between 1973 and 2003 along with known mental illnesses and substance abuse problems, and finding that 93 of those “volunteers” had at least one

death *in absentia*—that is, not in the jury’s presence—after he ingested a nicotine drink brewed from cigarettes and had to be hospitalized.<sup>814</sup> In other cases, intermittently insane death-row inmates are forcibly medicated solely for the purpose of making them mentally competent to be executed.<sup>815</sup> That is precisely what happened in 2003 when the Eighth Circuit, on a closely divided, six-to-five vote, approved the forcible medication and execution of Charles Singleton.<sup>816</sup>

¶168 The personal histories of death row inmates stand in sharp contrast with the backgrounds of the Supreme Court Justices who sit in judgment in capital cases. The nine Justices were educated at renowned institutions of higher education, with Ivy League schools and diplomas galore. They received undergraduate degrees at Harvard College, Princeton University, Stanford University, Cornell University, Georgetown University, Holy Cross College, and The University of Chicago. They studied overseas at the London School of Economics, Oxford University, and the University of Fribourg in Switzerland. They earned law degrees from Harvard Law School, Yale Law School, Columbia Law School, and Northwestern University. Before joining the nation’s highest court, they worked as judicial clerks, as corporate counsel, at major law firms or as law professors, and as high-level officials serving the U.S. Department of Justice, the U.S. Courts of Appeals, and the President.<sup>817</sup>

¶169 It seems incongruous that judges with such respected pedigrees should spend their days donning black robes and deciding whether poor, overwhelmingly uneducated inmates, should live or die.<sup>818</sup> Isn’t there something terribly amiss when such highly

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mental illness or substance abuse disorder).

<sup>814</sup> *Rice v. Wood*, 77 F.3d 1138, 1139, 1140 (9th Cir. 1996). On appeal before the U.S. Court of Appeals for the Ninth Circuit, a group of dissenting judges in the case strongly criticized what had been permitted to happen, noting that “[t]he pronouncement of the death sentence is the most solemn moment in the lives of both the jurors and the defendant; to say that the person facing death has no connection to the people and proceedings charged with deciding his fate is to say that we are no longer human. . . . The majority’s ruling in this case is the ultimate triumph of procedure over substance: the person is now irrelevant to the process. This is the nightmare world of *The Trial*; it is not American justice. Like Josef K, David Lewis Rice was sentenced to death *in absentia*, and, like Josef K, Rice will go to his grave asking, ‘Where is the judge whom I have never seen?’” *Id.* at 1140, 1150 (Nelson, J., dissenting) (citing FRANZ KAFKA, *DER PROZESS* 194 (1935)).

<sup>815</sup> See Angela M. Kimber, *Psychotic Journeys of the Green Mile*, 22 T.M. COOLEY L. REV. 27, 27–28 & n.11 (2005); see also *Staley v. State*, 233 S.W.3d 337 (Tex. Ct. Crim. App. 2007).

<sup>816</sup> *Singleton v. Norris*, 319 F.3d 1018 (8th Cir. 2003), *cert. denied*, 540 U.S. 832 (2003). The inmate, Charles Singleton, was diagnosed as a schizophrenic during his lengthy incarceration and, left unmedicated, suffered from delusions, hallucinations and engaged in self-mutilation. See Michael K. Gottlieb, *Executions and Torture: The Consequences of Overriding Professional Ethics*, 6 YALE J. HEALTH POL’Y, L. & ETHICS 351, 358–59, 362 (2006). Judge Gerald Heaney dissented in *Singleton*, arguing that the execution of a man “who is severely deranged without treatment, and arguably incompetent when treated, is the pinnacle of what Justice Marshall called ‘the barbarity of exacting mindless vengeance.’” *Singleton*, 319 F.3d at 1030 (Heaney, J., dissenting).

<sup>817</sup> See Supreme Court of the United States, The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Aug. 31, 2009).

<sup>818</sup> The members of the Supreme Court spend much of their time dealing with capital cases. See Michael Mello, “*In the Years When Murder Wore the Mask of Law*”: *Diary of a Capital Appeals Lawyer (1983-1986)*, 24 VT. L. REV. 583, 624 (2000) (“I did not really appreciate the massive amount of time the Supreme Court Justices and their staff devote to death penalty cases before I worked through the 567 cartons of raw materials in the Thurgood Marshall papers.”); see also Judge Arthur L. Alarcón, *Remedies for California’s Death Row Deadlock*, 80 S. CAL. L. REV. 697, 715 (2007) (noting that the California Supreme Court spends about twenty percent of its time on capital cases); John M. Richardson, *Reforming the Jury Override: Protecting Capital Defendants’ Rights by Returning to the System’s Original Purpose*, 94 J. CRIM. L. & CRIMINOLOGY 455, 467 (2004) (noting that the Florida Supreme Court spends about half

educated people spend their time parsing the lexicon of death, arguing over “special issues” and “aggravating” and “mitigating” factors,<sup>819</sup> as human lives—already shattered by abuse and poverty and prison life—literally hang in the balance? It goes without saying that murderers are sick people who have committed horrific acts. After all, if not for severe mental illness, why would they have acted the way they have? When our most respected figures, our governors and our state and federal judges, execute death warrants or cause the death penalty to be carried out, what does that say about our culture and society?<sup>820</sup> And what does it say about our legal culture when four Supreme Court Justices—the number necessary for a grant of certiorari—agree to hear a death penalty case, only to have the execution go forward anyway because a fifth vote cannot be mustered to impose a stay until the appeal can be heard?<sup>821</sup>

¶170 The use of the death penalty raises all kinds of moral and ethical questions. Should we derive any satisfaction from the fact that deranged people—and no doubt a few innocent ones—are being put to death on our behalf?<sup>822</sup> Or should we take any solace in

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of its time on death penalty cases).

<sup>819</sup> See, e.g., Tex. Code Crim. Proc. Ann. art. 37.071 (1965); *Ayers v. Belmontes*, 549 U.S. 7 (2006) (holding in a capital case that a “factor (k) instruction” under California’s death penalty law is consistent with the constitutional right to present mitigating evidence). In one recent case, the Supreme Court decided that a Kansas law, providing that a death sentence was to be imposed if a unanimous jury found that “aggravating circumstances” are not outweighed by “mitigating circumstances,” or are in “equipoise,” was constitutional. See *Kansas v. Marsh*, 548 U.S. 163, 179–80 (2006). In other cases, jurors are struck from jury service as “*Witherspoon*-excludables,” when what is really happening, to use plain English, is that capital punishment opponents are being sent home, told they cannot participate and exercise their civic duties because of their anti-death penalty views. See Dean A. Strang, *The Rhetoric of Death*, 1998 WIS. L. REV. 841, 855 (1998).

One of the more striking features of judicial opinions in death penalty cases is the tendency of judges to refer to condemned inmates by three names instead of two. Bob Harris becomes Robert Alton Harris; Dave Spence becomes David Wayne Spence; and Karla Tucker becomes Karla Faye Tucker. *Id.* at 845–46. By adding the middle name and graphically describing the crime—by creating a category of *the other*—judges no doubt aim to put some emotional distance between themselves and those who will be executed as a result of their orders. But make no mistake: in the realm of the death penalty, pen strokes cause deaths to occur just as surely as knives and guns do at murder scenes.

Judicial talk of “finality” only masks the reality that human beings—including eyewitnesses and judges and jurors—inevitably make mistakes, mistakes that cannot be corrected once an execution occurs. See *id.* at 848. To speak of “finality” in the context of a death penalty case—as if the law were a branch of science or mathematics like physics or calculus—is to suggest that the definitive answer has been found and can be relied upon for all time. Of course, we know that nothing could be further from the truth. People make mistakes; they often err or exercise poor judgment; sometimes they even lie. The law is not a function of number-crunching and it is rarely subject to proofs that are one hundred percent verifiable; instead, the criminal justice system is administered by fallible human beings and there is—as in public opinion polls—a margin of error.

<sup>820</sup> The *lex talionis* doctrine, if followed to a tee, would require barbaric punishments—tortuous punishments the Supreme Court has already barred under the Eighth Amendment. The doctrine also has obvious practical limitations. It is impossible to kill multiple murderers more than once, and no system of punishment can always inflict exactly the same harm done to the victim. See BECCARIA (Bellamy ed.), *supra* note 1, at xxii (“It is unclear, for instance, what form of punishment it decrees for a toothless person who has knocked out someone else’s teeth.”). As a contemporary society, we certainly do not tolerate the raping of rapists or the maiming of those who have maimed others. Why then does society still tolerate the killing of killers?

<sup>821</sup> See Strang, *supra* note 819, at 849 n.20. This happened in the case of a Texas death row inmate who had a long history of mental illness and who was once acquitted by reason of insanity on a Florida robbery charge. *Id.* Four Supreme Justices had agreed to review the case on the basis of a petition from the inmate’s mother, but a fifth vote for a stay could not be obtained and the inmate was executed before a decision could be reached. *Id.*

<sup>822</sup> More than sixty people diagnosed as mentally ill or mentally retarded have been executed in the United



the fact that we, in executing inmates, are stooping to the level of the killers themselves? And what about the stigma and pain society inflicts on the families of those we execute?<sup>823</sup>

¶171 Just as homicides inflict untold suffering on murder victims' families, the family members of death row inmates experience grief and anguish after an execution. In fact, relatives and friends of death row inmates—stigmatized and depressed by executions—are known to have committed suicide after executions.<sup>824</sup> Given the mental distress caused by executions, perhaps it's time to ponder again the eighteenth-century words of Dr. James McHenry, a close friend of Dr. Benjamin Rush, who once said this in urging mercy for Pennsylvania mutineers: "Our national character can never be supported by a sacrifice of national humanity. I have always thought, and the history of all nations teach me that I am right that *acts of mercy* serve more to dignify and raise the character of a government than *acts of blood*."<sup>825</sup>

#### D. The Road to Abolition

¶172 The last chapter of the abolition movement has yet to be written. Even after the Supreme Court's approval of lethal injection in *Baze*, the Eighth Amendment may yet prove instrumental in future challenges to the death penalty. If enough states were to do away with capital punishment, the Supreme Court could conceivably strike down the death penalty altogether—just as it has for certain categories of offenders, such as juveniles, the mentally retarded, those who did not take life, and the insane.<sup>826</sup> Likewise, if American juries routinely stopped imposing death sentences, leaving just a small number of people sentenced to death each year, the Supreme Court might declare the death penalty unconstitutional because of how rarely it is inflicted.<sup>827</sup> Given that the federal government and thirty-five states still have death penalty laws—and that death

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States since 1983. Barua, *supra* note 592, at 4; see also John E. Theuman, *Propriety of Carrying Out Death Sentences Against Mentally Ill Individuals*, 111 A.L.R. 491 (2003). In 2000, the U.N. Commission on Human Rights asked all countries that still use the death penalty "not to impose it on a person suffering from any form of mental disorder; not to execute any such person." Amnesty International, *The Death Penalty Disregards Mental Illness* (2006), available at [http://amnestyusa.org/abolish/mental\\_illness.html](http://amnestyusa.org/abolish/mental_illness.html).

<sup>823</sup> See ELIZABETH BECK, SARAH BRITTO & ARLENE ANDREWS, *IN THE SHADOW OF DEATH: RESTORATIVE JUSTICE AND DEATH ROW FAMILIES* (2007) (discussing the effect of executions on the families of condemned inmates); see also King, *supra* note 794, at 208–18 (same).

<sup>824</sup> See Jane L. McClellan, *Stopping the Rush to the Death House: Third-Party Standing in Death-Row Volunteer Cases*, 26 ARIZ. ST. L.J. 201, 220 (1994).

<sup>825</sup> STEINER, *supra* note 235, at 357–58 (italics in original). As McHenry argued: "If a soldier falls in battle—if an honest man is killed by a robber, or murdered by his enemy, this neither injures his fame, or reflects dishonor on his relations. But the case is far otherwise if he dies under the hands of the law or the executioner. His memory thenceforward is rendered infamous, and to be his relation or to bear his name, is to carry out a mark of indelible disgrace." *Id.*

<sup>826</sup> *Solem*, 463 U.S. at 299–300. Already, a number of states have death penalty laws on the books but hardly ever use those statutes. Indeed, it is former Confederate states, plus former border states like Kentucky and Missouri, that account for the bulk of executions in the post-*Furman* era. Notably, these southern states were also the jurisdictions that most frequently witnessed lynchings. FRANKLIN ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 89–118 (2003).

<sup>827</sup> The Supreme Court recently emphasized that "[c]apital defendants have the right to be sentenced by an impartial jury," stating that "those whose scruples against the death penalty would not substantially impair the performance of their duties" cannot be excluded from capital juries. *Uttecht v. Brown*, 127 S. Ct. 2218, 2231 (2007). Yet, by continuing to allow "death-qualified" juries, the Supreme Court in effect routinely excludes jurors who are otherwise qualified to serve—but who, quite rationally and for a whole host of reasons, find capital punishment morally wrong or objectionable for pragmatic reasons.

sentences are still being handed down, if only sporadically—it seems unlikely that a categorical ruling to that effect will be made anytime soon. But the future is hard to predict, and it is certainly within the realm of possibility that the nation’s highest court will once again take up the issue of the death penalty’s constitutionality.<sup>828</sup>

¶173 Some argue that the U.S. Constitution’s text precludes the Supreme Court from ever declaring the death penalty unconstitutional.<sup>829</sup> They argue that the Framers clearly contemplated the infliction of death as a punishment, as reflected in the language of the Bill of Rights.<sup>830</sup> In particular, they cite the Constitution’s use of the words “capital,” “life,” and “life or limb,”<sup>831</sup> saying those words lead to the inexorable conclusion that the death penalty itself is constitutional.<sup>832</sup>

¶174 Though some Founders, like Dr. Benjamin Rush, categorically opposed capital punishment, it is certainly true that in the late eighteenth century the death penalty was widely accepted in American life as a punishment for murder.<sup>833</sup> However, people in the founding era also envisioned punishing people by cutting off ears and limbs—something no one today would argue is constitutionally permissible.<sup>834</sup> If the state can no longer cut

<sup>828</sup> Any number of issues, such as the execution of the mentally ill or the risk of executing the innocent, might eventually come before the Supreme Court. Thus far, lower courts have declined to extend the *Atkins* prohibition on the execution of the mentally retarded to individuals suffering from mental illness. *E.g.*, *Commonwealth v. Baumhammers*, 960 A.2d 59 (Pa. 2008); *Powers v. State*, 992 So.2d 218 (Fla. 2008); *State v. Hancock*, 840 N.E.2d 1032 (Ohio 2006). Lower courts have also rejected challenges to the death penalty’s constitutionality based solely on the risk of executing the innocent. *See, e.g.*, *United States v. Sampson*, 486 F.3d 13 (1st Cir. 2007); *United States v. Quinones*, 313 F.3d 49 (2nd Cir. 2002).

<sup>829</sup> *See Bentele, supra* note 50, at 280–81 & nn. 178–79 (citing U.S. CONST., amend. V; *Walton v. Arizona*, 497 U.S. 639, 669–71 (1990) (Scalia, J., concurring); *Gregg*, 428 U.S. at 177–78 (plurality opinion)); *see also Callins v. Collins*, 510 U.S. 1141, 1141 (Scalia, J., concurring).

<sup>830</sup> The Fifth Amendment states 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.” U.S. CONST., amend. V. It also states: “nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb,” “nor be deprived of life, liberty, or property, without due process of law.” *Id.* The Fourteenth Amendment also provides that “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST., amend. XIV, § 1.

<sup>831</sup> “Life or limb” was a phrase familiar to the Founding Fathers. *See Hon. Stephen N. Limbaugh, Jr., The Case of Ex Parte Lange (or How the Double Jeopardy Clause Lost Its “Life or Limb”)*, 36 AM. CRIM. L. REV. 53, 53 (1999).

Both Thomas Jefferson and John Adams used this phrase in their correspondence. Letter from Thomas Jefferson to George Wythe (Nov. 1, 1778), in 1 MEMOIR, CORRESPONDENCE, AND MISCELLANIES: THE PAPERS OF THOMAS JEFFERSON 119, at 121 (Thomas Jefferson Randolph ed., 1829); Letter from John Adams to Dr. J. Morse (Dec. 2, 1815), in 10 THE WORKS OF JOHN ADAMS 185 (1856). Jefferson also used the phrase “life or limb” in his bill to make punishments in Virginia more proportionate to criminal offenses. *See* 2 THE WORKS OF THOMAS JEFFERSON, *supra* note 107, at 395.

Today, the phrase “life or limb” is still found in several state constitutional or statutory provisions. It is typically found in the non-capital context to denote serious bodily harm or death in connection with workplace hazards. *See Justin W. Curtis, The Meaning of Life (or Limb): An Originalist Proposal for Double Jeopardy Reform*, 41 U. RICH. L. REV. 991, 1020 n.205 (2007).

<sup>832</sup> *See Baze*, 128 S. Ct. at 1552 (Scalia, J., concurring) (citing U.S. CONST., amend. V); *id.* at 1556 (Thomas, J., concurring) (citing U.S. CONST., amend. V).

<sup>833</sup> *Lain, supra* note 260, at 12.

<sup>834</sup> *See William J. Brennan, Jr., Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 327 (1986); Erwin Chemerinsky, *Evolving Standards of Decency in 2003—Is the Death Penalty on Life Support?*, 29 U. DAYTON L. REV. 201, 213–14 (2004); Samuel R. Gross, *Still Unfair, Still Arbitrary—But Do We Care?*, 26 OHIO N.U. L. REV. 517, 520 (2000); *Lain, supra* note 260, at 12–13; Abner J. Mikva, *Judges on Judging—Statutory Interpretation: Getting the Law to Be Less Common*, 50 OHIO ST. L.J. 979, 980 (1990); *see also Julian S. Nicholls, Too Young to Die: International Law and the Imposition of the Juvenile Death Penalty in the United States*, 5 EMORY INT’L L. REV. 617 (1991)

off body parts, as even the well-known originalist Robert Bork once conceded should not be done,<sup>835</sup> why should the state be perpetually authorized to take life?<sup>836</sup> In fact, given that the death penalty was authorized in America by numerous eighteenth-century laws, it would have been surprising had the Bill of Rights *not* guaranteed due process protections against the taking of “life,” the state’s ultimate sanction.

¶175 In fact, the Bill of Rights was put in place to *protect* individual rights, not to affirmatively deprive individuals of their property, their liberty or their lives. And the list of protected rights is impressive. The First Amendment protects the freedoms of religion, speech and the press and the right of people to assemble and petition for redress of grievances.<sup>837</sup> The Second Amendment protects “the right of the people to keep and

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(discussing the changes in juvenile sentencing since the founding of the United States); *accord Furman*, 408 U.S. at 283 n.28 (Brennan, J., concurring); *id.* at 384 (Burger, C.J., dissenting); *id.* at 430 (Powell, J., dissenting).

<sup>835</sup> See Marijane Camilleri, *Lessons in Law from Literature: A Look at the Movement and a Peer at Her Jury*, 39 CATH. U. L. REV. 557, 579 n.107 (1990) (noting that Bork has been describing as an “originalist”); see also Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (containing Bork’s defense of originalism). Relying on the text of the Fifth Amendment, Robert Bork—the former Supreme Court nominee—has argued that the death penalty is constitutional. See Ronald Dworkin, *Bork’s Jurisprudence*, 57 U. CHI. L. REV. 657, 668–73 (1990) (reviewing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990)).

Yet, in *Gregg v. Georgia*, then-Solicitor General Bork readily conceded before the Supreme Court itself that tearing a man apart limb by limb would not pass constitutional muster. See *MAY IT PLEASE THE COURT* 234 (Peter Irons & Stephanie Guitton eds., 1993). At the oral argument in *Gregg*, Justice Stewart asked this question: “What if a state said for the most heinous kind of first-degree murders we are going to inflict breaking a man on the wheel and then disemboweling him while he is still alive and then burning him up: What would you say to that?” Bork replied: “I would say that that practice is so out of step with modern morality and modern jurisprudence that the state cannot return to it. That kind of torture was precisely what the framers thought they were outlawing when they wrote the cruel and unusual punishments clause.” *Id.*

<sup>836</sup> Justice William Brennan—who thought a great deal about the death penalty and issues of constitutional interpretation—has sagely made the point that the Framers themselves deliberately left to future judges the responsibility of interpreting the “cruel and unusual punishments” clause. The Eighth Amendment does not tell us that “the definition of ‘cruel and unusual’ is to be static over time,” Justice Brennan explained, noting that unlike the Constitution’s specific dictate that no one may serve as President until attaining the age of 35, the Framers knew—and consciously chose—the abstract “cruel and unusual punishments” language, knowing full well that language could be interpreted in a number of ways. “The Framers,” Brennan emphasized, “surely understood that judging would not be easy or straightforward: no doubt that is why they took such great pains to ensure the independence of judges by providing life tenure and protecting against diminution of judges’ compensation.” Brennan, *supra* note 834, at 325–26.

Elsewhere, Brennan points out in no uncertain terms that the Eighth Amendment definition of “cruel and unusual” cannot simply be “frozen in time.” See William J. Brennan, Jr., *Neither Victims Nor Executioners*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 6 (1994). To read the Constitution as perpetually authorizing capital punishment, Brennan says, would actually do violence to the Framers’ vision—which was to leave to future judges and future generations the right to decide for themselves what constitutes “cruel and unusual” punishment: “I want to emphasize just one more time that what I am urging is respect for what I believe the Framers insisted of judges: namely, to accept the responsibility and burden and challenge of working with the majestic generalities of their magnificent Constitution. Those who would have the eighth amendment read today to bar only what was considered cruel and unusual in 1791 would, it seems to me, do violence to what they purport to embrace, namely the intent of the Framers. Does it not seem apparent that if the Framers really did intend the clause to prohibit only a closed set of brutal practices, they would have told us so? Were not these men capable of communicating specific mandates when that was their intention and desire? I think they were.” Brennan, *supra* note 834, at 326; *accord* Brennan, *supra* note 442, at 575 (“[T]he broad wording of the ‘Cruel and Unusual Punishments’ Clause was likely an intentional choice by the framers to allow future generations to define cruel and unusual punishments.”).

<sup>837</sup> U.S. CONST. amend. I.

bear Arms,<sup>838</sup> and the Fourth Amendment protects against “unreasonable searches and seizures.”<sup>839</sup> The Fifth Amendment confers due process rights, requires grand jury indictments for certain crimes, and guards against double jeopardy, self-incrimination, and takings without just compensation.<sup>840</sup> The Sixth Amendment guarantees speedy and public trials before impartial juries, the assistance of counsel, and confrontation and process rights.<sup>841</sup> The Seventh Amendment guarantees the right to trial by jury in certain cases,<sup>842</sup> and the Ninth and Tenth Amendments speak of rights “retained by the people”<sup>843</sup> or “reserved to the States . . . or to the people.”<sup>844</sup>

¶176 The Eighth Amendment—like all the others—is an integral part of the Bill of Rights that cannot be ignored by judges or legislators. Thus, if a fine is “excessive” or a punishment is found to be “cruel and unusual” it violates the Eighth Amendment and is unconstitutional—with no further analysis required. The Eighth Amendment plainly does *not* say that only those punishments deemed cruel and unusual in 1791 are prohibited. On the contrary, the Eighth Amendment uses common words like “excessive” and “cruel and unusual” that successive generations can interpret for themselves—something the Supreme Court itself has recognized in its decisions.<sup>845</sup> Indeed, early American jurists routinely used the everyday words “cruel” and “unusual” in their judicial opinions<sup>846</sup> just as legislators used—and continue to use—those words in legislation.<sup>847</sup>

<sup>838</sup> U.S. CONST. amend. II.

<sup>839</sup> U.S. CONST. amend. IV.

<sup>840</sup> U.S. CONST. amend. V. The Fourteenth Amendment also protects due process rights and guarantees the equal protection of the laws. U.S. CONST. amend. XIV.

<sup>841</sup> U.S. CONST. amend. VI. The abysmal quality of defense counsel in many capital trials—replete with incompetent or even drunk or sleeping lawyers—is nothing short of scandalous. See Jeffrey L. Kirchmeier, *Drinks, Drugs and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425 (1996); *McFarland v. Scott*, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting) (noting that defendants have been sentenced to death after being represented by counsel who failed to read the applicable death penalty statute, slept at trial, failed to investigate or present any mitigating evidence at the penalty phase, been admitted to practice for less than a year, or who lacked even a basic understanding of the applicable law).

Needless to say, the quality of representation in capital cases is not even close to that envisioned by the American Bar Association. Eric M. Freedman, *Mend It or End It?: The Revised ABA Capital Defense Representation Guidelines as an Opportunity to Reconsider the Death Penalty*, 2 OHIO ST. J. CRIM. L. 663 (2005); see also Robin M. Maher, *The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 763, 763 (2008) (noting that the ABA’s House of Delegates approved the revised ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases in 2003); *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677, 677 (2008) (noting that Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases were developed in conjunction with the ABA’s Death Penalty Representation Project).

<sup>842</sup> U.S. CONST. amend. VII.

<sup>843</sup> U.S. CONST. amend. IX.

<sup>844</sup> U.S. CONST. amend. X.

<sup>845</sup> See *Thompson*, 487 U.S. at 821 (plurality opinion) (citing *Trop*, 356 U.S. at 101 (plurality opinion)).

<sup>846</sup> Early American jurists commonly used the phrases “cruel or unusual” or “cruel and unusual” to refer to homicidal conduct or other violent acts. See *United States v. Travers*, 2 Wheeler C.C. 490, 28 F. Cas. 204, 210 (C.C. Mass. 1814); *People v. Pearce*, 2 Edm. Sel. Cas. 76 (N.Y. Sup. 1849); *People v. Sherry*, 2 Edm. Sel. Cas. 52 (N.Y. Sup. 1849); *People v. Gallagher*, 1 Edm. Sel. Cas. 578 (N.Y. Sup. 1848); *Jacob v. State*, 22 Tenn. 493, 1842 WL 1984, at \*2 (Tenn. 1842); *McWhirt v. Com.*, 3 Gratt. 594, 1846 WL 2405, at \*7 (Va. Ga. 1846); cf. *Ely v. Thompson*, 3 A.K. Marsh 70, 10 Ky. 70, 1820 WL 1161, at \*4 (Ct. App. Ky. 1820); *Fuller v. Colby*, 3 Woodb. & M. 1, 9 F. Cas. 980 (C.C. Mass. 1846); *Kelly v. State*, 1 Morr. St. Cas. 235, 1844 WL 2092, at \*5 (Miss. Err. App. 1844); *Mann v. Trabue*, 1 Mo. 709, 1827 WL 1987, at \*1 (Mo.

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In interpreting the Eighth Amendment, it is also important to keep in mind what else the Constitution does *not* say. The Constitution does not say that murderers or other criminals *shall* be punished by death,<sup>848</sup> and it certainly does not say that capital punishment *shall* be deemed constitutional *in perpetuity*, regardless of how society may evolve and change.<sup>849</sup> The Constitution and the Bill of Rights protect individual *rights*, they do not forever enshrine the death penalty in American law.<sup>850</sup> In the end, it is for the Supreme Court Justices to decide—as their solemn oaths to uphold the Constitution require<sup>851</sup>—whether death sentences constitute “cruel and unusual punishments.”<sup>852</sup>

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1827); *State v. Maner*, 2 Hill (SC) 453, 20 S.C.L. 453, 1834 WL 1528 (S.C. App. 1834);

<sup>847</sup> Such language is still found today in many provisions of federal law. See 10 U.S.C. § 855 (“Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.”); 10 U.S.C. § 949s (setting forth an identical prohibition for a “military commission”); 18 U.S.C. § 2191 (“Whoever, being the master or officer of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, flogs, beats, wounds, or without justifiable cause, imprisons any of the crew of such vessel, or withholds from them suitable food and nourishment, or inflicts upon them any corporal or other cruel and unusual punishment, shall be fined under this title or imprisoned not more than five years, or both.”); 22 U.S.C. § 6912 (a U.S. Commission “shall monitor the acts of the People’s Republic of China which reflect compliance with or violation of human rights,” including concerning “the right to be free from torture and other forms of cruel or unusual punishment”); 25 U.S.C. § 1302 (“No Indian tribe in exercising powers of self-government shall . . . inflict cruel and unusual punishments”). Federal law also bars “cruel and unusual punishments” in Guam and the Virgin Islands. See 48 U.S.C. § 1421b(h) (Guam); 48 U.S.C. § 1561 (Virgin Islands).

<sup>848</sup> Indeed, the Constitution actually never requires the imposition of the death penalty. For example, Article III, section 3, which deals with treason, provides: “The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.” U.S. CONST. art. III, § 3. Thus, even for the high crime of treason, death is not mandated in the constitutional text. The Thirteenth Amendment also speaks of punishment: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1. Again, however, the “punishment for crime” is left unspecified.

<sup>849</sup> As Justice Brennan pointed out in his concurrence in *Furman*: “We can . . . infer that the Framers recognized the existence of what was then a common punishment. We cannot, however, make the further inference that they intended to exempt this particular punishment from the express prohibition of the Cruel and Unusual Punishments Clause. Nor is there any indication in the debates on the Clause that a special exception was to be made for death. If anything, the indication is to the contrary, for Livermore specifically mentioned death as a candidate for future proscription under the Clause.” *Furman*, 408 U.S. at 283 (Brennan, J., concurring); see *supra* text accompanying note 463 (citing Livermore’s comments).

<sup>850</sup> Provisions of the Constitution other than the Bill of Rights also protect individual rights. For instance, the Suspension Clause provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9. Likewise, in cases of treason, the Constitution provides: “No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.” U.S. CONST. art. III, § 3. In addition, the Constitution grants the President the right “to grant Reprieves and Pardons for Offenses against the United States.” U.S. CONST. art. II, § 2.

<sup>851</sup> The Constitution is “the Supreme Law of the Land” and all “judicial Officers” are “bound by Oath or Affirmation, to support this Constitution.” U.S. CONST. art. VI; see also 28 U.S.C. § 453 (setting forth the oath taken by judges).

<sup>852</sup> Justice William Brennan certainly held the view that the Supreme Court will someday strike down death penalty laws. See Brennan, *supra* note 834, at 331 (1986) (“With respect to the death penalty, I believe that a majority of the Supreme Court will one day accept that when the state punishes with death, it denies the humanity and dignity of the victim and transgresses the prohibition against cruel and unusual punishment. That day will be a great day for our country, for it will be a great day for our Constitution.”).

¶178 All of the powers granted in the Constitution—as every civics student learns—come from “We the People of the United States.”<sup>853</sup> That means, of course, that so long as death penalty laws exist, it is we, the American people, who are allowing executions to occur. But do we really want our government—the one we empower—to be killing in our names? In reality, doesn’t the death penalty only demean *us*? In effect, doesn’t the death penalty only bring us down to the level of killers? By allowing executions in our constitutional form of government, it is, after all, “We the People” who become the executioners—those dark, shadowy figures from the Dark Ages who have been shunned throughout history.<sup>854</sup> Fortunately, with maximum-security prisons and life-without-parole statutes, we now have a viable alternative to executions—locking up violent offenders—that we can use.

¶179 America’s death penalty, a vestige of harsh English criminal codes that no longer exist, has corrupted Eighth Amendment jurisprudence and become our national shame. Capital punishment laws, which gratuitously take life, are morally bankrupt, do nothing to further public safety, and only lessen America’s credibility abroad when we talk about promoting human rights. There is, in fact, no persuasive scientific proof that executions deter violent crime more effectively than life-without-parole sentences.<sup>855</sup> A few recent studies, roundly criticized for their methodologies, make wild and reckless claims that frequent executions deter homicidal acts and—in the words of the researchers—“save” lives.<sup>856</sup> But such studies fail to consider the powerful deterrent effect of life-without-parole statutes and sentences.<sup>857</sup>

¶180 The “deterrence” hypothesis is particularly weak in the modern-day context in which capital punishment is administered. First, executions are now carried out in private—a change initiated by nineteenth-century American legislators who themselves

<sup>853</sup> U.S. CONST. pmbi.

<sup>854</sup> See BESSLER, *DEATH IN THE DARK*, *supra* note 31, at 150 (“Executioners, who have worn masks or hoods for centuries to prevent their recognition, have been universally despised throughout history. Daughters of executioners were forbidden to marry men outside the profession, and communities sometimes decreed that executioners’ houses had to be painted red.”).

<sup>855</sup> See Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Casual Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 271 (2006).

<sup>856</sup> See Hashem Dezhbakhsh, Paul H. Rubin & Joanna M. Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data*, 5 AM. L. & ECON. REV. 344, 373 (2003) (“[O]ur most conservative estimate is that the execution of each offender seems to save, on average, the lives of eighteen potential victims.”); H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 56 J. LAW & ECON. 453, 456 (2003) (finding that “each additional execution or commutation reduces or increases homicides by about five, while an additional removal from death row generates about one additional murder”). Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment’s Differing Impacts Among States*, 104 MICH. L. REV. 203, 247 (2005) (finding that executions deter murders in states that regularly conduct executions and that executions increase murder rates in states that do not frequently carry out executions); Johanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUDIES 283, 308 (2004) (claiming that each execution results in an average of three fewer murders); .

<sup>857</sup> See Fagan, *supra* note 855, at 270, 279. Life-without-parole sentences are far more frequently imposed in murder cases than death sentences. *Id.* at 270. In 1999, Pennsylvania had 139 life-without-parole sentences compared to 15 death sentences; in 2000, that state had 121 life sentences compared to 12 death sentences; and in South Carolina, 485 defendants received life-without-parole sentences since 1996 compared to 27 executions in that time frame. Michael Tonry, *Learning from the Limitations of Deterrence Research*, 37 CRIME & JUST. 279, 279 (2008) (finding no credible evidence that capital punishment deters better than life sentences).

found executions to be *brutalizing*.<sup>858</sup> The publicity surrounding executions is thus reduced or, in some cases, almost non-existent. Second, only a tiny percentage of American murderers are ever executed, making the “deterrence” theory all the more implausible.<sup>859</sup> It thus makes no sense to craft social policy and continue to put people to death on the basis of outlier studies purporting to find a greater deterrent effect for executions than for imprisonment.

¶181 Indeed, murderers are the exact opposite of rational actors, and the very fact that they have murdered people shows their utter lack of judgment. There is thus little reason to believe that poorly educated, hot-headed killers, who often suffer from brain damage and severe mental illnesses, ever rationally weigh the consequences of their actions—especially when drunk or on drugs, as they frequently are when they commit their crimes.<sup>860</sup> Perhaps that explains why the vast majority of police chiefs and criminologists do not believe executions effectively deter murder.<sup>861</sup> Given the lack of credible evidence demonstrating any causal relationship between death sentences and lower murder rates, it seems rather Orwellian—to say the least—to contend that state-sanctioned killing “saves” lives.<sup>862</sup>

¶182 In actuality, death sentences have become a burdensome distraction—and at times, even an outright impediment—to law enforcement efforts. The death penalty saps the resources of America’s criminal justice system, and at bottom, death sentences are only corrosive of our efforts to build a more just and less violent society. As Justice Louis Brandeis once wrote: “Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen.”<sup>863</sup> “Our government,” he explained, “is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.”<sup>864</sup>

<sup>858</sup> BESSLER, *DEATH IN THE DARK*, *supra* note 31, at 41–44.

<sup>859</sup> *Compare* U.S. Dept. of Just., Fed. Bureau of Investigation, *Crime in the U.S. 2005*, [http://www.fbi.gov/ucr/05cius/data/table\\_01.html](http://www.fbi.gov/ucr/05cius/data/table_01.html) (last visited May 13, 2009) (reporting the number of homicides in the U.S. every year from 1986 to 2005, with the number of murders and non-negligent manslaughters always exceeding 15,000 annually), *with* Death Penalty Information Center, *Death Penalty Fact Sheet*, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited May 13, 2009) (listing all the executions, just over 1100, that have occurred in total since 1977); *see also* King, *supra* note 794, at 228 (“Less than 1% of murders result in a death sentence.”).

<sup>860</sup> *See* Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 566, 585 (1995).

<sup>861</sup> *See* Michael J. Perry, *Is Capital Punishment Unconstitutional? And Even if We Think It Is, Should We Want the Supreme Court to So Rule?*, 41 GA. L. REV. 867, 894 (2007).

<sup>862</sup> Such language, if anything, resembles the manipulative party slogans from George Orwell’s famous book, 1984: “WAR IS PEACE,” “FREEDOM IS SLAVERY,” and “IGNORANCE IS STRENGTH.” *See* Judith D. Fischer, *Why George Orwell’s Ideas About Language Still Matter for Lawyers*, 68 MONT. L. REV. 129, 131 (2007); *see also* Jeffrey Fagan, Franklin E. Zimring & Amanda Geller, *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803, 1804 & nn.6–7, 1860 (2006) (finding “[t]here is simply no visible evidence of the marginal deterrent impact of the death penalty on death-eligible killings,” and concluding that “the marginal deterrent effect of the threat or example of execution on those cases at risk for such punishment is invisible”); MIKE MALES, *DEATH PENALTY AND DETERRENCE: THE LAST WORD*, available at [http://criminologie.univ-pau.fr/Statistiques/Death\\_Penalty\\_and\\_Deterrence\\_USA.pdf](http://criminologie.univ-pau.fr/Statistiques/Death_Penalty_and_Deterrence_USA.pdf) (concluding that homicide rates and executions are “unrelated”).

<sup>863</sup> *Olmstead v. United States*, 277 U.S. 428, 468 (1928) (Brandeis, J., dissenting).

<sup>864</sup> *Id.* Justice Brandeis saw “[c]onfinement in a penitentiary” as “a modern substitute for the death penalty.” *United States v. Moreland*, 258 U.S. 433, 448 (Brandeis, J., dissenting).

*E. Realizing Beccaria's Vision*

¶183 In pondering what comes next in the centuries-old death penalty debate, Americans should not delude themselves as to their own role in executions. Neither should we, as Americans, turn a blind eye to what is happening in our nation's prisons or to what is at stake from a moral standpoint. It is our nation's citizenry who, as their own governors, bear collective responsibility for the delivery of deadly chemicals to inmates strapped down on prison gurneys. Executioners may do the work, perhaps reluctantly or in conflict with their own consciences, but they do so only in accordance with statutes, death warrants, and court orders. Because the people's representatives pass those laws and issue those directives, it is not the laws or the pieces of paper that kill. Instead, it is we as American citizens who, through our authorized agents, the executioners, bear responsibility for such killings. As George Bernard Shaw, Great Britain's Nobel Laureate in Literature, once remarked: "Criminals do not die by the hands of the law. They die by the hands of other men."<sup>865</sup>

¶184 The Founding Fathers foresaw a future—for themselves and for future generations—where Americans would not only govern themselves, but would live in an enlightened, prosperous, and civilized society, where cruel and barbarous conditions would not be tolerated. The Founders—who began their struggle for human rights by signing the Declaration of Independence<sup>866</sup>—knew they would have to fight to realize their vision, but that it was one worth fighting for.<sup>867</sup> The key to that vision was—and remains—an informed citizenry. As James Madison so eloquently articulated generations ago: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."<sup>868</sup>

¶185 Ideally, the standards and mores of Americans will evolve to the point where death sentences come to be abhorred as much as lynchings are now. Until that happens, however, the lofty language in the Universal Declaration of Human Rights<sup>869</sup> about the "right to life"—as well as similar aspirational words from the Declaration of Independence<sup>870</sup>—will be mere words, nothing more than a goal to be sought after, and

<sup>865</sup> LEWIS D. EIGEN & JONATHAN P. SIEGEL, *DICTIONARY OF POLITICAL QUOTATIONS* 63 (1993). Shaw believed that "[a]ssassination on the scaffold is the worst form of assassination, because there it is invested with the approval of society." *Id.* He also said: "It is the deed that teaches, not the name we give it. Murder and capital punishment are not opposites that cancel one another, but similars that breed their kind." GEORGE BERNARD SHAW, *MAN AND SUPERMAN* 232 (1903).

<sup>866</sup> DECLARATION OF INDEPENDENCE (U.S. 1776). The Declaration of Independence—which ultimately led to the ratification of the Constitution and the guarantee in the Bill of Rights against cruel and unusual punishments—railed against the abuses of the "King of Great-Britain." Among the "long Train of abuses" cited in the Declaration was that the King "has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the Executioners of their Friends and Brethren, or to fall themselves by their Hands." *Id.*, paras. 28–29.

<sup>867</sup> See Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701, 782 (2001).

<sup>868</sup> BESSLER, *DEATH IN THE DARK*, *supra* note 31, at 211.

<sup>869</sup> UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. III (U.N. 1948).

<sup>870</sup> The Declaration of Independence, issued by the Continental Congress on July 4, 1776, forcefully proclaimed: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). "[T]o secure these Rights," the



certainly not a reality achieved. Wouldn't it be nice to see those high-minded words matched with deeds, to see that inspiring language become fully operational? If executions were at long last banned, it would finally fulfill the dreams of those Enlightenment thinkers and drafters of the Universal Declaration of Human Rights who either fought for the death penalty's abolition or foresaw the end of executions.<sup>871</sup>

¶186 If history is any indication, American executions are destined to disappear. In fact, in assessing the abolition movement's prospects of success, it may be instructive to recall another hard-fought crusade: the anti-lynching movement.<sup>872</sup> Until the NAACP launched a movement to end them, extra-judicial lynchings in America were common.<sup>873</sup> Described as "an established custom" by the end of the colonial period,<sup>874</sup> such lawless spectacles—often fueled by racism and perpetrated by groups like the Ku Klux Klan—once pockmarked the American landscape and often took place before unruly mobs.<sup>875</sup> Lynch mobs and other acts of "frontier justice"—often targeted at blacks<sup>876</sup>—grabbed newspaper headlines in the South<sup>877</sup> and West<sup>878</sup> and even as far north as Minnesota<sup>879</sup>

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Founding Fathers believed, "Governments are instituted among Men, deriving their just Powers from the Consent of the Governed." *Id.*

<sup>871</sup> It would not do violence to the "original intent" of the Framers were the members of the Supreme Court—exercising their own judgment—to declare the death penalty unconstitutional. Gilreath, *supra* note 137, at 563. Indeed, such a ruling would be fully consistent with the Declaration of Independence, which speaks of the "unalienable" right to "Life." THE DECLARATION OF INDEPENDENCE cl. 1 (U.S. 1776).

<sup>872</sup> The connection between lynchings and executions is one that has been noted before. The renowned American lawyer Stephen Bright, in fact, has aptly called the death penalty "a direct descendent of lynching and other forms of racial violence and racial oppression in America." Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 439 (1995).

<sup>873</sup> The NAACP and courageous Americans like Ida B. Wells crusaded against lynching for decades. *See generally* MARY JANE BROWN, ERADICATING THIS EVIL: WOMEN IN THE AMERICAN ANTI-LYNCHING MOVEMENT, 1892-1940 (Graham Russell Hodges ed., 2000); DONALD L. GRANT, THE ANTI-LYNCHING MOVEMENT, 1883-1932 (1975); ELAINE SLIVINSKI LISANDRELLI, IDA B. WELLS-BARNETT: CRUSADER AGAINST LYNCHING (1998); ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950 (1980). These efforts only bore fruit when Americans came to see the horrors of lynching and grew outraged.

<sup>874</sup> JACQUELINE JONES ROYSTER, ED., SOUTHERN HORRORS AND OTHER WRITINGS: THE ANTI-LYNCHING CAMPAIGN OF IDA B. WELLS, 1892-1900, at 8 (1997).

<sup>875</sup> *E.g.*, BESSLER, LEGACY OF VIOLENCE, *supra* note 128, at 188-197. Highly disturbing photographs of lynchings—some depicting lynch mob participants looking right into the camera—have been collected in recent years, giving the American public a glimpse into the brutality of these spectacles. *See* DORA APEL & SHAWN MICHELLE SMITH, LYNCHING PHOTOGRAPHS (2007); JAMES ALLEN ET AL., WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA (2000). One such photograph, taken in Duluth, Minnesota, in 1920, depicts a semi-circle of white men in hats, posing and smiling for the camera as they surround three dead African-American men who were lynched there. In the photo, two of the men's mangled bodies are still strung up on a light pole and the third man's body lies face down in the street at the feet of some of the lynch mob participants. *See* BESSLER, LEGACY OF VIOLENCE, *supra* note 128, at 196.

<sup>876</sup> MARK CURRIDEN & LEROY PHILLIPS, JR., CONTEMPT OF COURT, THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED 100 YEARS OF FEDERALISM 354-55 (2001) (referencing 3385 mob lynchings of African Americans in the U.S. between 1882 and 1935); W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930, 262 (1993) (of the 460 lynching victims in Georgia between 1880 and 1930, 441 were African Americans).

<sup>877</sup> *See generally* UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH (W. Fitzhugh Brundage ed., 1997); WILLIAM D. CARRIGAN, THE MAKING OF A LYNCHING CULTURE: VIOLENCE AND VIGILANTISM IN CENTRAL TEXAS, 1836-1916 (2004); WALTER T. HOWARD, LYNCHINGS: EXTRALEGAL VIOLENCE IN FLORIDA DURING THE 1930S (2005); JULIUS E. THOMPSON, LYNCHING IN MISSISSIPPI: A HISTORY, 1865-1965 (2006); STEWART E. TOLNAY & E.M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930 (1995); MICHAEL V. USCHAN, LYNCHING AND MURDER IN THE DEEP SOUTH (2007); MARGARET VANDIVER, LETHAL PUNISHMENT: LYNCHINGS AND LEGAL EXECUTIONS IN THE SOUTH

well into the twentieth century, with 4743 lynchings recorded nationwide from 1882 to 1968.<sup>880</sup>

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Although large segments of the American public paid little attention to the evils of lynching in the early nineteenth century,<sup>881</sup> as the anti-lynching movement gained steam, public attitudes changed and progress was gradually made. Today, of course, lynchings are a thing of the past and lynching is universally viewed with disdain and horror.<sup>882</sup> So long ago did this sad chapter in American history occur that lynching no longer draws the attention of social activists, but rather of historians.<sup>883</sup> Indeed, a widely accepted legal norm against lynchings—or any criminal proceedings dominated by a mob atmosphere—already exists in American law.<sup>884</sup> Change may come slowly or incrementally, as it did

(2006).

<sup>878</sup> See generally FREDERICK ALLEN, *A DECENT, ORDERLY LYNCHING: THE MONTANA VIGILANTES* (2004); KEN GONZALES-DAY, *LYNCHING IN THE WEST: 1850-1935* (2006); STEPHEN J. LEONARD, *LYNCHING IN COLORADO, 1859-1919* (2002).

<sup>879</sup> BESSLER, *LEGACY OF VIOLENCE*, *supra* note 128; MICHAEL FEDO, *THE LYNCHINGS IN DULUTH* (Minnesota Historical Society Press 2000) (1979).

<sup>880</sup> ROYSTER, *supra* note 874, at 10.

<sup>881</sup> In the late nineteenth and early twentieth centuries, very little—at least beyond what appeared in pamphlets, newspapers, and a few law journals and books—was actually written about lynching. See generally JAMES HARMON CHADBOURN, *LYNCHING AND THE LAW* (1933); ARTHUR FRANKLIN RAPER, *THE TRAGEDY OF LYNCHING* (1933); Charles A. Bonaparte, *Lynch Law and Its Remedy*, 8 *YALE L.J.* 335 (1899); Joseph Edwin Proffit, *Lynching: Its Cause and Cure*, 7 *YALE L.J.* 264 (1898); Wm. Reynolds, *The Remedy for Lynch Law*, 7 *YALE L.J.* 20 (1897); Charles H. Watson, *Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens*, 25 *YALE L.J.* 561 (1916). Indeed, the very idea of a federal anti-lynching law met with vigorous opposition, including from those who deplored lynching. See Walter F. Dodd, *The Growth of National Power*, 32 *YALE L.J.* 452, 456–57 (1923).

<sup>882</sup> The sustained public outrage surrounding the brutal dragging death of James Byrd by white supremacists—which reflected the racism so prevalent in the era of lynchings—is emblematic of just how much progress has been made in American life. See Pat Nolan & Marguerite Telford, *Indifferent No More: People of Faith Mobilize to End Prison Rape*, 32 *J. LEGIS.* 129, 134 (2006) (describing how James Byrd was picked up, beaten, chained to the back of a pickup truck and dragged for three miles to his death).

<sup>883</sup> Only in the last three decades has lynching really begun drawing considerable attention from historians. *E.g.*, DORA APEL, *IMAGERY OF LYNCHING: BLACK MEN, WHITE WOMEN, AND THE MOB* (2004); RICHARD M. BROWN, *STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM* (1975); CYNTHIA CARR, *OUR TOWN: A HEARTLAND LYNCHING, A HAUNTED TOWN, AND THE HIDDEN HISTORY OF WHITE AMERICA* (2007); JAMES ELBERT CUTLER, *LYNCH-LAW: AN INVESTIGATION INTO THE HISTORY OF LYNCHING IN THE UNITED STATES* (2007); PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* (2003); PAUL FINKELMAN ED., *LYNCHING, RACIAL VIOLENCE, AND LAW* (1992); RALPH GINZBURG, *100 YEARS OF LYNCHING* (Black Classic Press 1988) (1962); JACQUELINE GOLDSBY, *A SPECTACULAR SECRET: LYNCHING IN AMERICAN LIFE AND LITERATURE* (2006); SHERRILYN A. IFILL, *ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY* (2007); JAMES H. MADISON, *A LYNCHING IN THE HEARTLAND: RACE AND MEMORY IN AMERICA* (2001); JONATHAN MARKOVITZ, *LEGACIES OF LYNCHING: RACIAL VIOLENCE AND MEMORY* (2004); *THE LYNCHING OF EMMETT TILL: A DOCUMENTARY NARRATIVE* (Christopher Metress ed., 2002); NORTON H. MOSES, *LYNCHING AND VIGILANTISM IN THE UNITED STATES: AN ANNOTATED BIBLIOGRAPHY* (1997); CHARLES J. OGLETREE, JR. & AUSTIN SARAT EDS., *FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA* (2006); MICHAEL J. PFEIFER, *ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY, 1874-1947* (2004); *WITNESSING LYNCHING: AMERICAN WRITERS RESPOND* (Anne P. Rice, ed., 2003); ELIZA STEELWATER, *THE HANGMAN'S KNOT: LYNCHING, LEGAL EXECUTION, AND AMERICA'S STRUGGLE WITH THE DEATH PENALTY* (2003); *LYNCHING IN AMERICA: A HISTORY IN DOCUMENTS* (Christopher Waldrep ed., 2006); IDA B. WELLS-BARNETT, *ON LYNCHINGS* (2002); LAURA WEXLER, *FIRE IN A CANEBRAKE: THE LAST MASS LYNCHING IN AMERICA* (2003); GEORGE C. WRIGHT, *RACIAL VIOLENCE IN KENTUCKY, 1865-1940: LYNCHINGS, MOB RULE, AND "LEGAL LYNCHINGS"* (1990).

<sup>884</sup> *Ex parte Wall*, 107 U.S. 265 (1882) (an attorney's participation in a lynching is grounds for disbarment); *United States v. Shipp*, 214 U.S. 386, 425 (1909) ("It is plain that what created this mob and led to this

in Beccaria's day<sup>885</sup> or in the case of the anti-lynching movement, but one thing is for certain: change comes.<sup>886</sup> As Martin Luther King Jr. so eloquently pointed out: "The moral arc of the universe is long, but it bends towards justice."<sup>887</sup>

## XI. CONCLUSION

¶188 The death penalty has been debated for centuries, with the first recorded parliamentary debate occurring in 427 B.C. in Athens, Greece.<sup>888</sup> Cesare Beccaria, the

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lynching was the unwillingness of its members to submit to the delay required for the appeal. The intent to prevent that delay by defeating the hearing of the appeal necessarily follows from the defendants' acts, and, if the life of anyone in the custody of the law is at the mercy of a mob, the administration of justice becomes a mockery."); see also CURRIDEN & PHILLIPS, *supra* note 876 (telling the story of Supreme Court contempt proceedings which led to guilty verdicts against Chattanooga's sheriff, Joseph Shipp, his deputies and others involved in a lynching).

The Due Process Clause itself imposes certain restraints on what a government can do in any case. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

<sup>885</sup> Many Enlightenment thinkers accepted only some of Beccaria's ideas. Following the publication of *On Crimes and Punishments*, many Europeans and Americans—though still favoring capital punishment for murderers—advocated outlawing death sentences for theft and other offenses. MAESTRO, *supra* note 1, at 130–31. For example, Benjamin Franklin favored eliminating capital punishment for all crimes other than mutiny and murder. BANNER, *supra* note 1, at 88; H.W. BRANDS, *THE FIRST AMERICAN: THE LIFE AND TIMES OF BENJAMIN FRANKLIN* 503 (2002). Franklin, condemning the disproportion between crimes and punishments in England, wrote in 1785: "If we really believe, as we profess to believe, that the law of Moses was the law of God, the dictates of divine wisdom, infinitely superior to human; on what principles do we ordain death as the punishment of an offence which, according to that law, was only to be punished by a restitution of fourfold? To put a man to death for an offence which does not deserve death, is it not murder? I see in the last newspaper from London that a woman is capitally convicted at the Old Bailey for privately stealing out of a shop some gauze, value fourteen shillings and threepence; is there any proportion between the injury done by the theft, value 14/3, and the punishment of a human creature, by death, on a gibbet? Might not that woman, by her labour, have made reparation ordained by God, in paying fourfold? . . . If I think it right that the crime of murder should be punished with death, not only as an equal punishment of the crime, but to prevent other murders, does it follow that I must approve of inflicting the same punishments for a little invasion of my property by theft? If I am not myself so barbarous, so bloody-minded and revengeful, as to kill a fellow-creature for stealing from me 14/3, how can I approve of a law that does it?" MAESTRO, *supra* note 1, at 133; accord Schwartz & Wishingrad, *supra* note 75, at 822 (quoting 9 WRITINGS OF BENJAMIN FRANKLIN 292 (Smyth ed., 1907)). In the year after Franklin wrote that, Pennsylvania passed a law outlawing the death penalty for robbery, burglary and sodomy. MAESTRO, *supra* note 1, at 133. In some places reform would take longer. It was not until 1808 that Samuel Romilly succeeded in repealing English laws that punished small thefts with death; and it was not until 1832 that the death penalty was abolished for stealing a horse or a sheep. *Id.* at 137.

<sup>886</sup> It must not be forgotten—as Oxford scholars Roger Hood and Carolyn Hoyle remind us, recalling Beccaria's famous essay—"how entrenched capital punishment was until a movement for reform was generated by the liberal utilitarian and humanistic ideas spawned by the Enlightenment in Europe towards the end of the eighteenth century." HOOD & HOYLE, *supra* note 411, at 9–11. The gradual elimination of mandatory death sentences and limiting death sentences to first-degree murder are but two examples of the abolitionist movement's success. See *Furman*, 408 U.S. at 339 (Marshall, J., concurring); *McGautha*, 402 U.S. at 198.

<sup>887</sup> EDWARD O'NEIL JR., *A PRACTICAL GUIDE TO GLOBAL HEALTH SERVICE*, at xxii (2006).

<sup>888</sup> As one scholar puts it: "Diodotus successfully argued before the Athenian Assembly that the death penalty would not deter the revolutionary activities of conquered citizens and persuaded the Assembly to stay the executions of all adult males in the rebellious city of Mitylene." Hong, *supra* note 31, at 794 n.38 (citing THUCYDIDES, *THE HISTORY OF THE PELOPONNESIAN WAR* 25–50 (3d ed. 1972)). At times, the debate over capital punishment has seemed as if it would never end. In 1922, for example, Clarence Darrow—an ardent opponent of capital punishment who saw executions as "inhuman" and "too horrible a

great Italian criminologist, made the first fully formulated arguments against capital punishment and set the modern abolition movement in motion. Though Beccaria authored *On Crimes and Punishments* in his twenties, his vision was unfulfilled in his lifetime—and it was left to future generations to pick up the torch where he left off. In America, the Founding Fathers were especially intrigued by Beccaria’s ideas, and many of them came to oppose executions, either altogether or for certain categories of offenders. Though they narrowed the death penalty’s use and often expressed ambivalence towards or deep revulsion for executions, they, too, were unable to slay the death penalty beast. Instead, in drafting the Constitution and the Bill of Rights, they deliberately left it to future generations to decide what constitutes “cruel and unusual” punishment. The choice we face today—whether to retain capital punishment or to abolish it—was thus a choice our forefathers intended for us to make unrestrained by eighteenth-century mores.

¶189 Progress toward abolition has been slow until recently. Yet the anti-death penalty movement is now gathering renewed momentum and strength—rapidly in the international community and slowly but surely in American communities.<sup>889</sup> The U.N. Secretary-General has noted “a considerable shift towards the abolition of the death penalty both de jure and in practice.”<sup>890</sup> That trend is accelerating as new scientific tools, like DNA evidence, prove the law’s fallibility; the death penalty is now no longer even

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thing for the State to undertake”—would remark: “The question of capital punishment has been the subject of endless discussion and will probably never be settled as long as men believe in punishment.” COYNE & ENTZEROTH, *supra* note 269, at 3; CLARENCE DARROW ON CAPITAL PUNISHMENT 39–40 (1991). Thankfully, the complete abolition of the death penalty in Europe and elsewhere proves that the debate may conclude at an as-yet-unknown point with the death penalty’s abolition.

<sup>889</sup> The pace of abolition in the international community has accelerated rapidly and the abolition movement itself has been transformed in the process. See HOOD & HOYLE, *supra* note 411, at 14, 16, 18. An understanding of why the death penalty has been fading so fast from the international scene becomes more apparent after studying the advancement of the field of international human rights law. In Europe—the situs of the abolitionist movement’s greatest success— “[f]undamentally important was the message that had been conveyed: a principled opposition to the death penalty as a violation of fundamental human rights.” *Id.* at 25. Indeed, both the Council of Europe and the European Union publicly declared that “[t]he death penalty has no legitimate place in the penal systems of modern civilized societies, and its application may well be compared with torture and be seen as inhuman and degrading punishment.” *Id.* The recognition of the connection between the death penalty and torture—two topics Beccaria wrote about in *On Crimes and Punishments*—is, in fact, long overdue. See generally WILLIAM A. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD’S COURTS (1996). The psychological terror and adverse physical and mental health effects that accompany death sentences and prolonged stays on death row, in addition to the risk of severe pain at executions themselves, is now well-documented. See Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 FORDHAM URB. L.J. 817, 852 (2008); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 104 (2007) (discussing study published in the British medical journal, *The Lancet*, in 2005 that reported that level of sodium thiopental used in lethal injections might be insufficient, particularly in light of heightened anxiety of inmates and the potential of poorly trained executioners); Dan Crocker, *Extended Stays: Does Lengthy Imprisonment on Death Row Undermine the Goals of Capital Punishment?*, 1 J. GENDER RACE & JUST. 555, 570–72 (1998) (noting that foreign courts, including the Zimbabwe Supreme Court and the Privy Council of the British House of Lords, have found it would constitute “torture” and “inhuman and degrading punishment” to execute inmates confined on death row for prolonged periods of time); Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) (“The onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.”).

<sup>890</sup> Capital Punishment and Implementation of the Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty: Report of the Secretary-General, U.N. ESCOR, at 12, U.N. Doc. E/1995/78 (1995).

authorized by international war crimes tribunals.<sup>891</sup> With U.S. death sentences and executions down in numbers, the latest public opinion polls show that Americans are increasingly divided and ambivalent about capital punishment.<sup>892</sup>

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As the abolition movement Beccaria began braces for its 250th anniversary, abolitionists must continue to agitate and seek to re-frame the death penalty debate. As the deterrence debate rages on,<sup>893</sup> abolitionists must convince the American public that advocating life-without-parole sentences for society's worst offenders is not synonymous with being soft on crime.<sup>894</sup> As the moral and philosophical debate continues, abolitionists must convince the public that the death penalty is, fundamentally, a human rights issue and that the death penalty's abolition must be considered in that context and in the context of Martin Luther King Jr.'s non-violence movement.<sup>895</sup> Even as legal arguments about the Eighth Amendment are made by lawyers and academics,<sup>896</sup>

<sup>891</sup> See William A. Schabas, *War Crimes, Crimes Against Humanity and the Death Penalty*, 60 ALB. L. REV. 733, 733 (1997).

<sup>892</sup> See *supra* text accompanying notes 351-53.

<sup>893</sup> The modern, statistically driven debate over whether executions deter violent crime dates to Isaac Ehrlich's 1975 article claiming that every execution averted eight murders. See Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397, 398 (1975); see also Isaac Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 J. POL. ECON. 741 (1977). Ehrlich's research has been widely criticized, with more recent research showing that homicide rates are not related to executions and that executions do not deter murder any better than life-without-parole sentences. See Fagan, Zimring & Geller, *supra* note 862, at 1804 nn.6-7, 1859.

<sup>894</sup> Most of all, people want to feel safe in their homes and communities, and life-without-possibility-of-parole sentences take violent offenders off the streets for good. The Supreme Court itself has recognized that life-without-parole sentences are an important tool at the disposal of juries—so important, in fact, that courts are sometimes constitutionally required to tell jurors when a defendant would have no chance of release if convicted. See *Simmons v. South Carolina*, 512 U.S. 154 (1994); *accord* *Shafer v. South Carolina*, 532 U.S. 36 (2001).

<sup>895</sup> JOHN J. ANSBRO, MARTIN LUTHER KING, JR.: NONVIOLENT STRATEGIES AND TACTICS FOR SOCIAL CHANGE (2007). At the very end of *On Crimes and Punishments*, Beccaria previewed that view: "In order that punishment should not be an act of violence committed by one or many against a private citizen, it is essential that it be public, prompt, necessary, the minimum possible in the given circumstances, proportionate to the crimes, and established by the law." BECCARIA (Thomas ed.), *supra* note 1, at 86; see also Katherine Corry Eastman, *The Progress of Our Maturing Society: An Analysis of State-Sanctioned Violence*, 39 WASHBURN L.J. 526, 533 (2000) (rejecting the view that state-sanctioned killing is "legitimate violence" because an execution "is not an immediate response to a threat of harm" but is, instead, "a contemplated act, thought out over a period of years"; "[t]hus, this act of killing appears to be an expression of illegitimate control rather than an act of self-preservation").

<sup>896</sup> The Eighth Amendment has been—and continues to be—the subject of much academic debate. See, e.g., Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63 (2007); Kate McMahon, *Dead Man Waiting: Death Row Delays, the Eighth Amendment, and What Courts and Legislatures Can Do*, 25 BUFF. PUB. INT. L.J. 43 (2006-2007); Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 47 (2008); David J. Pfeffer, *Depriving America of Evolving Its Own Standards of Decency?: An Analysis of the Use of Foreign Law in Eighth Amendment Jurisprudence and Its Effect on Democracy*, 51 ST. LOUIS U. L.J. 855 (2007); Susan M. Raeker-Jordan, *Parsing Personal Predilections: A Fresh Look at the Supreme Court's Cruel and Unusual Death Penalty Jurisprudence*, 58 ME. L. REV. 99 (2006); Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661 (2004); Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719 (2007); Carol S. Steiker, *Panetti v. Quarterman: Is There a "Rational Understanding" of the Supreme Court's Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285 (2007); Ronald Turner, *The Juvenile Death Penalty and the Court's Consensus-Plus Eighth Amendment*, 17 GEO. MASON U. CIV. RTS. L.J. 157 (2006).

abolitionists must fight on in the legislative arena and mount challenges to the discriminatory exclusion from juries of those who oppose capital punishment.<sup>897</sup>

¶191 Juries provide a unique window into societal standards because they make real decisions in real cases. Citizen-jurors do not have the luxury of answering a series of abstract questions about the death penalty—as some Americans do in response to telephone pollsters.<sup>898</sup> Instead, they are asked by our legal system to make gut-wrenching, life-and-death decisions in concrete cases, to decide whether a particular man or woman, with a name and a family, should live or die.<sup>899</sup> Polling results may move up and down, whether in response to a horrific crime or to a series of DNA exonerations, but jurors in capital cases confront the most serious moral questions imaginable when filling out a verdict form. Since jury verdicts are such a crucial aspect of the Supreme Court’s Eighth Amendment analysis in capital litigation, the Court deserves to get an accurate picture of how randomly selected jurors in American society really feel about executions.<sup>900</sup>

¶192 A snapshot of jury decisions from randomly selected juries (as opposed to “death-qualified” ones) would reveal a sharply divided public deeply conflicted about executions.<sup>901</sup> Given the unanimity requirement for jury verdicts, many truly

<sup>897</sup> Adam M. Clark, *An Investigation of Death Qualification as a Violation of the Rights of Jurors*, 24 BUFF. PUB. INTEREST L.J. 1, 3, 38 (2006).

<sup>898</sup> When Gallup pollsters ask the abstract question, “Do you favor the death penalty for those convicted of murder?”, a substantial majority of Americans have said they do since the early 1970s, though the numbers have fluctuated and decreased somewhat over time. See Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 608 n.69 (2005). When given a choice between the death penalty and life-without-parole sentences, however, survey respondents are much more evenly split. See RICHARD C. DIETER, DEATH PENALTY INFO. CTR., SENTENCING FOR LIFE: AMERICANS EMBRACE ALTERNATIVES TO THE DEATH PENALTY (1993), available at <http://www.deathpenaltyinfo.org/sentencing-life-americans-embrace-alternatives-death-penalty>; see also DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY, available at <http://www.deathpenaltyinfo.org/FactSheet.pdf> (noting that the May 2006 Gallup Poll found overall support for capital punishment at sixty-five percent—down from eighty percent in 1994—and that more Americans preferred life-without-parole sentences than death sentences, forty-eight percent to forty-seven percent).

<sup>899</sup> Support for capital punishment typically falls when people consider the particular facts of a case. See Samuel R. Gross, *American Public Opinion on the Death Penalty—It’s Getting Personal*, 83 CORNELL L. REV. 1448, 1473 (1998). This is often true even for particularly heinous crimes, as University of Michigan law professor Samuel Gross explains: “This gulf between the abstract and the concrete comes into play directly in capital trials. It explains why jurors who are screened for their willingness to impose the death penalty nonetheless frequently refuse to do so—even for multiple or mass murderers such as Susan Smith or Terry Nichols—if the trial teaches them to view the defendant as a person.” *Id.* at 1474.

<sup>900</sup> See Jeffrey L. Kirchmeier, *Let’s Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 644 (2000). This is particularly so given that public attitudes towards the death penalty are changing and since life-without-parole sentences are widely available as an alternative. The Supreme Court itself has stated that jurors are supposed to represent the “conscience of the community,” must give a “reasoned moral response,” and have a “truly awesome responsibility” in capital cases. See *Brewer v. Quarterman*, 127 S. Ct. 1706, 1709 (2007); *Caldwell v. Mississippi*, 472 U.S. 320, 329–30 (1985); *McGautha*, 402 U.S. at 208; *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

<sup>901</sup> The “death-qualification” standard has evolved over the years. Prior to 1968, prospective jurors were routinely excluded from jury service if they had “conscientious scruples” against capital punishment. See Michael W. Peters, *Does “Death Qualification” Spell Death for the Capital Defendant’s Constitutional Right to an Impartial Jury?*, 26 WASHBURN L.J. 383 (1987). A series of Supreme Court cases, beginning with *Witherspoon* in 1968, later modified that practice and the applicable standard for juror removal—though “death-qualified” juries have remained the norm over time. See *Witherspoon*, 391 U.S. at 522, 523 n.21 (holding that “a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death

representative juries would be unable to agree on whether a death sentence should be imposed, thus resulting in more life sentences.<sup>902</sup> That would be very useful information for the Supreme Court to have as it hears future Eighth Amendment cases and makes judgments about the death penalty's constitutionality.<sup>903</sup> Thus, to get an accurate, unbiased picture of the views of American juries, the Supreme Court should no longer allow death penalty opponents to be excluded from jury service.<sup>904</sup>

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In reflecting on just how far the anti-death penalty movement has come, abolitionists should take solace and a measure of pride in what has been accomplished so far. The death penalty's long, sordid history is one marked by successive restrictions on its use—a pattern that continues today. No longer are petty thefts or non-homicidal

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penalty," but noting in a footnote that jurors can be excluded if they would refuse to "consider" all possible punishments "provided by state law," if they were "irrevocably committed, before the trial has begun, to vote against the penalty of death," if they would "automatically" vote against the imposition of the death penalty, or if "their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt"); *Wainwright v. Witt*, 469 U.S. 412, 420–31 (1985) (a juror may be excluded for cause if the juror's views would "prevent or substantially impair" the performance of the juror's duties, and it is the trial judge's duty to determine whether a given challenge to a prospective juror is proper) (citing *Adams v. Texas*, 448 U.S. 38, 45 (1980)); *Uttecht v. Brown*, 127 S. Ct. 2218, 2224 (2007) ("the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes" and "a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause"). In *Uttecht*, the Supreme Court held that it owed deference to trial court findings as to the exclusion of prospective jurors even as the Court noted that eleven days of voir dire were spent in the underlying criminal case to death-qualify the jury. *Id.* at 2225, 2231.

<sup>902</sup> By categorically excluding death penalty opponents from capital juries, death sentences become much more likely because death-qualified juries tend to be more conviction-prone and less willing to consider mitigating evidence. See Phoebe C. Ellsworth, *To Tell What We Know or Wait for Godot?*, 15 LAW & HUM. BEHAV. 77 (1991); Claudia L. Cowen et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 L. & HUM. BEHAV. 31 (1984); Craig Haney, *Juries and the Death Penalty: Readdressing the Witherspoon Question*, 26 CRIME & DELINQ. 512 (1980); George L. Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971); see also Brooke M. Butler & Gary Moran, *The Role of Death Qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 LAW & HUM. BEHAV. 175, 182–83 (2002).

<sup>903</sup> Although the Supreme Court has held that "the Constitution does not prohibit the States from 'death qualifying' juries in capital case," see *Lockhart v. McCree*, 476 U.S. 162, 172–73 (1986), there is no question that the death qualification process excludes a disproportionate number of minorities and women. See Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 315 (2008). This type of discrimination—aimed at classes of jurors who often oppose capital punishment—should not be tolerated in American society, a society built on freedom of speech and expression. See Brooke A. Thompson, *The Supreme Court Expands the Witt Principles to Exclude a Juror Who Would Follow the Law*, 30 U. ARK. LITTLE ROCK L. REV. 845, 882–83 (2008).

<sup>904</sup> Jury verdicts are, after all, one of the "objective" Eighth Amendment criteria used by the Supreme Court to gauge the death penalty's constitutionality. *Gregg v. Georgia*, 428 U.S. 153, 181 (1976); see also *Witherspoon*, 391 U.S. at 519 n.15 ("[O]ne of the most important functions any jury can perform in making such a [life and death] selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'") (quoting *Trop*, 356 U.S. at 101); *Spaziano v. Florida*, 468 U.S. 447, 485 (1984) (Stevens, J., concurring in part and dissenting in part) ("The importance of the jury to the legitimacy of the capital sentencing decision has been a consistent theme in our evaluation of post-*Furman* capital punishment statutes."); *Atkins v. Virginia*, 536 U.S. 304, 324 (2002) (Rehnquist, J., dissenting) ("In my view, these two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment.").

crimes punished by death in the United States, and no longer does American society countenance the execution of juveniles, the insane or the mentally retarded.

¶194 In fact, such modern-day developments in criminal law would hardly come as a surprise to the Framers. Enlightenment thinkers, such as Thomas Jefferson, James Madison, and Thomas Paine, recognized that all societies evolve and must think for themselves, and that to lock in future generations to eighteenth-century mores and ethics would be absurd.<sup>905</sup> For example, Jefferson foresaw that the *lex talionis* doctrine “will be revolting to the humanized feelings of modern times.” “An eye for an eye, and a hand for a hand,” he wrote in 1778, “will exhibit spectacles in execution whose moral effect would be questionable.”<sup>906</sup> Other Founding Fathers, such as James Wilson, also looked to future generations to make more enlightened social policy.<sup>907</sup> It is no accident, then, that the Constitution itself explicitly refers to future generations by referencing “our Posterity” in its preamble.<sup>908</sup>

¶195 Even the Supreme Court—which still sanctions executions—has clearly indicated that any further expansion of America’s death penalty is intolerable.<sup>909</sup> That signal—coming in 2008 in the *Kennedy* case—is significant, as is the particular language from that decision. “The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment,” the Court held, “means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application.”<sup>910</sup>

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<sup>905</sup> Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, at 631–36 (James M. Smith ed. 1995) (Jefferson notes that “the earth belongs . . . to the living”); Gilreath, *supra* note 137, at 559 (“Is it not the glory of the people of America,” James Madison wrote, “that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?”) (quoting The Federalist No. 14); THOMAS PAINE, THE RIGHTS OF MAN (1791), available at <http://www.ushistory.org/Paine/rights/c1-010.htm> (“Every age and generation must be as free to act for itself in all cases as the age and generations which preceded it. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation a property in the generations which are to follow.”).

<sup>906</sup> Letter from Thomas Jefferson to George Wythe (1778), in 2 THE PAPERS OF THOMAS JEFFERSON 230 (Julian P. Boyd ed. 1950). Madison, too, put his trust in successive generations to create a more just society. See Letter from James Madison to Thomas Jefferson (Feb. 24, 1826) (“And I indulge a confidence that sufficient evidence will find its way to another generation, to ensure, after we are gone, whatever of justice may be withheld whilst we are here.”).

<sup>907</sup> See 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 492, ch. III (“Of the Law of Nature”) (“Our progress in virtue should certainly bear a just proportion to our progress in knowledge. Morals are undoubtedly capable of being carried to a much higher degree of excellence than the sciences, excellent as they are. Hence we may infer, that the law of nature, though immutable in its principles, will be progressive in its operations and effects. Indeed, the same immutable principles will direct this progression. In every period of his existence, the law, which the divine wisdom has approved for man, will not only be fitted, to the contemporary degree, but will be calculated to produce, in future, a still higher degree of perfection.”).

<sup>908</sup> U.S. CONST. pmbl. (“secure the Blessings of Liberty to ourselves and our Posterity”).

<sup>909</sup> “As it relates to crimes against individuals,” the Court wrote in *Kennedy v. Louisiana*, “the death penalty should not be expanded to instances where the victim’s life was not taken.” 128 S. Ct. 2641, 2659 (2008). The majority opinion in *Kennedy* made only one caveat to its ruling, saying: “We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State.” *Id.*

<sup>910</sup> *Id.* at 2665. “In most cases,” the Court wrote, “justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense.” *Id.*



As the Court emphasized: “Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, a hesitation that has special force where no life was taken in the commission of the crime.”<sup>911</sup> Though the Court continues to allow executions to occur, it appears that there will be no turning back of the clock.

¶196 The death penalty has been abolished at different times in different places for different reasons. Sometimes a botched execution prompts soul-searching and a re-examination of State policy.<sup>912</sup> In my home state, the State of Minnesota, the last execution to be carried out was the bungled hanging of William Williams, who dangled on a noose for nearly fifteen minutes before dying of strangulation. The sheriff had miscalculated the length of the rope, requiring it to be manually hoisted up by his deputies as Williams hung in the air.<sup>913</sup> In other instances, the execution of innocent men has prompted reform.<sup>914</sup> In England, for example, the death penalty was abolished in 1956 after a series of cases focused public attention on wrongful convictions.<sup>915</sup>

¶197 What happened in Great Britain highlights what could happen in the United States. In one case, Timothy Evans was hanged for murder in 1950, but another man, John Halliday Christie, confessed to the murder three years later.<sup>916</sup> A mentally disabled teenager, Derek Bentley, was also hanged in 1953 for killing a police officer even though another teen had actually been the one to pull the trigger.<sup>917</sup> Because capital murder convictions often rely on the testimony of eyewitnesses or jailhouse informants whose testimony can be unreliable, wrongful convictions in the United States remain a distinct, ever-present possibility.<sup>918</sup>

¶198 When abolition occurs, it is never because guilty criminals are particularly sympathetic figures. They are not—and never will be—because their murderous acts are

<sup>911</sup> *Id.* at 2658. “It is an established principle,” the Court concluded, “that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment.” *Id.*

<sup>912</sup> See Seema Shah, *How Lethal Injection Reform Constitutes Impermissible Research on Prisoners*, 45 AM. CRIM. L. REV. 1101, 1142 (2008). A significant number of executions are bungled or botched. See MICHAEL L. RADELET, DEATH PENALTY INFORMATION CTR., SOME EXAMPLES OF POST-FURMAN BOTCHED EXECUTIONS (May 24, 2007), <http://www.deathpenaltyinfo.org/article.php?scid=8&did=478>.

<sup>913</sup> BESSLER, LEGACY OF VIOLENCE, *supra* note 128, at 150.

<sup>914</sup> See Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative “Reform” of the Death Penalty?*, 63 OHIO ST. L.J. 417, 422 (2002).

<sup>915</sup> *Id.*

<sup>916</sup> See Joseph L. Hoffmann, *Starting from Scratch: Rethinking Federal Habeas Review of Death Penalty Cases*, 20 FLA. ST. U. L. REV. 133, 161 n.113 (1992). Evans was later issued a posthumous royal pardon. See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23 (1987).

<sup>917</sup> Bentley, too, was later exonerated, this time by England’s Court of Appeal in 1998. COYNE & ENTZEROTH, *supra* note 269, at 1033 n.1; Millett, *supra* note 34, at 569–72; Bruce P. Smith, *The History of Wrongful Execution*, 56 HASTINGS L.J. 1185, 1221 (2005).

<sup>918</sup> Timothy P. O’Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 110 (2006); Steven M. Pincus, *“It’s Good to Be Free”*: An Essay About the Exoneration of Albert Burrell, 28 WM. MITCHELL L. REV. 27, 46 (2001) (in a legal case in which two death-row inmates were exonerated, an unreliable, mentally ill jailhouse informant, known in the community as “Lying” Wayne Brantley, was found to have engaged in “a bizarre and unbelievable pattern of claiming that capital murder defendants confess to him when he gets into legal trouble”); see also *United States v. Hannigan*, 27 F.3d 890, 900 (3d Cir. 1994) (Becker, J., concurring) (“Social science research . . . has established beyond peradventure that witness identifications, especially when cross-racial and based on brief moments of observation, are quite unreliable.”).

so vile and reprehensible.<sup>919</sup> On the contrary, abolition occurs because civic leaders and ordinary citizens come to see that the death penalty debases and demeans *those who inflict it*.<sup>920</sup> A society that bars executions has decided that killing deranged and mentally ill criminals who are already safely behind bars is nothing short of senseless barbarism.<sup>921</sup>

¶199

As Americans, we should continue studying criminals for clues as to why they do what they do so that we can prevent crimes in the future. Already, we have learned a great deal about brain dysfunction and head injuries and frontal-lobe damage in death row inmates.<sup>922</sup> Mental health experts are now a staple at capital trials,<sup>923</sup> and a growing body of scientific literature exists on the connection between damage to the frontal lobes of the brain and violent criminality. With Super Max prisons and life-without-parole sentences now readily available, however, it is clearer than ever that the bizarre ritual of state-sanctioned executions should be relegated to the past.<sup>924</sup> No longer should the law require lawyers to plead for their clients' lives. And no longer should the law permit

<sup>919</sup> Often only at the moment of execution—as eyewitnesses grow uncomfortable at the thought of watching someone being deliberately put to death—do condemned inmates engender a measure of empathy. At that moment, the death-row inmate becomes a particularly pathetic figure, strapped down to a gurney, heart pounding, and utterly helpless to stop his or her own death at the hands of the State. Beccaria himself saw executions as generating complex emotions among the general public, who at that time would have frequently seen executions. As Beccaria wrote: “For most people, the death penalty becomes a spectacle and for some an object of compassion mixed with indignation. Both of these sentiments occupy the minds of the spectators more than the salutary fear that the law claims to inspire.” BECCARIA (Thomas ed.), *supra* note 1, at 53. “The limit that the legislator should set on the severity of punishments,” Beccaria offered, “seems to be that point at which the feeling of compassion begins to prevail over every other in the minds of those who witness a punishment, which is inflicted more for their sake than the criminal’s.” *Id.*

<sup>920</sup> For example, when the House of Lords debated capital punishment in England, Lord Chancellor Gardiner had this to say: “When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disemboweled while still alive, and then quartered, we did not abolish the punishment because we sympathized with traitors, but because we took the view that it was a punishment no longer consistent with our self respect.” *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972) (quoting 268 Parl. Deb., H.L. (5th ser.) (1965) 703).

<sup>921</sup> There is something particularly distasteful about killing a living being that has been tied up or tied down. On a hunting trip in Mississippi, American president Theodore Roosevelt—finding it unsportsmanlike—refused to shoot a dazed black bear that had been cornered, clubbed with the butt of a gun, and tied up by a hunting party for him to shoot. EDMUND MORRIS, *THEODORE REX* 172–74 (2001). To methodically plot—month after month, and year and year—to take another person’s life after that person has already been arrested, convicted and securely caged in a prison cell is—it seems to me—bloodsport of the worst sort.

<sup>922</sup> D. Michael Bitz & Jean Seipp Bitz, *Incompetence in the Brain Injured Individual*, 12 ST. THOMAS L. REV. 205, 233 (1999). Most death row inmates with frontal lobe damage sustained brain damage in their infancy. Jonathan H. Pincus, *Aggression, Criminality, and the Frontal Lobes*, in *THE HUMAN FRONTAL LOBES: FUNCTIONS AND DISORDERS* 547, 549, 554–55 (Bruce L. Miller & Jeffrey L. Cummings eds., 1999).

<sup>923</sup> O. Carter Snead, *Neuroimaging and the “Complexity” of Capital Punishment*, 82 N.Y.U.L. REV. 1265, 1293–95 (2007). Increasingly, neuroscientists—using an array of brain-scan technologies—are testifying as experts at capital trials on behalf of violent offenders. *Id.* at 1300–02; *see also* Abram S. Barth, *A Double-Edged Sword: The Role of Neuroimaging in Federal Capital Sentencing*, 33 AM. J. L. & MED. 501, 521–22 (2007) (noting that neuroimaging evidence is introduced as mitigating evidence and that its use is growing more common in the courtroom). Indeed, a Supreme Court case, *Ake v. Oklahoma*, 470 U.S. 68 (1985), entitles indigent capital defendants to expert services at both the guilt/innocence and sentencing phases of trial, and the ABA’s new Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases specifically emphasize the importance of such expert testimony in capital cases. *See* Drinan, *supra* note 777, at 286.

<sup>924</sup> That the development of penal systems has made the death penalty obsolete was specifically noted by Pope John Paul II in his papal encyclical, *Evangelium Vitae*. Douglas, *supra* note 112, at 165–66.

human hands to sign death warrants or load syringes full of lethal chemicals deliberately calculated to take human life.

¶200 The United States has yet to abolish capital punishment, but it only seems a matter of time before the American death penalty goes the way of the stocks, the pillory, and the whipping post.<sup>925</sup> Perhaps a single event, such as the execution of an innocent man or woman, will trigger abolition, or perhaps the moratorium movement will take firmer hold and U.S. executions will simply wither away as lynchings did decades ago.<sup>926</sup> As it is, many U.S. locales no longer use capital punishment,<sup>927</sup> either because of weighty moral concerns or for practical public policy reasons. Some locales, for example, do not seek death sentences because of the views of a particular prosecutor or the prohibitive cost of capital litigation,<sup>928</sup> making the geographic disparity associated with capital punishment all the more stark with each passing year.<sup>929</sup> While some prosecutors seek the death penalty as often as the law will allow, others never seek it, making the locale of the crime—and not the crime itself—determinative as to whether a death sentence is sought.<sup>930</sup>

¶201 Down the road, the Supreme Court—using the Eighth Amendment—might declare executions unconstitutional. That may not happen soon, but if the death penalty’s use continues to decline—leaving only a handful of States or counties that inflict it—the Court might feel compelled to outlaw executions altogether, finding death sentences too

<sup>925</sup> Ironically, Dr. Benjamin Rush expressed similar hopes over 220 years ago. In 1787, in an address to the Society for Promoting Political Enquiries, Rush remarked: “I can only hope that the time is not far away when gallows, pillory, scaffold, flogging and wheel will, in the history of punishment, be regarded as the marks of the barbarity of centuries.” FOUCAULT, *supra* note 21, at 10. In earlier times, the pillory ranked as one of the world’s most dehumanizing punishments. See MAESTRO, *supra* note 1, at 13.

<sup>926</sup> Notably, the abolition of the death penalty in South Africa was preceded by an execution moratorium. See Bentele, *supra* note 50, at 266. It must also be noted that while the anti-lynching movement in the United States never succeeded in getting a federal, anti-lynching law passed, lynchings gradually disappeared—and then stopped altogether. Lynchings came to an end as more and more people joined the movement and spoke out against this grotesque and evil practice. Kirchmeier, *supra* note 222, at 90.

<sup>927</sup> The rate of executions varies widely by state, but also by counties within states. See, e.g., County of Conviction for Executed Offenders, Texas Department of Criminal Justice, <http://www.tdcj.state.tx.us/stat/countyexecuted.htm> (last visited Aug. 31, 2009). This means that, practically speaking, what side of a county line a crime is committed on often is more determinative of whether a death sentence is sought than the nature of the crime itself. See Adam M. Gershowitz, *Pay Now, Execute Later: Why Counties Should Be Required to Post a Bond to Seek the Death Penalty*, 41 U. RICH. L. REV. 861, 872 (2007); see also *id.* at 862 (“[W]hile Texas is well known as the most frequent user of the death penalty, capital cases are not initiated by the Texas Attorney General’s office but instead by a handful of Texas’s 254 counties. While a majority of Texas counties have not sought a single death sentence during the last three decades, Harris County—which includes the City of Houston—consistently has sought the death penalty more than a dozen times per year. Similarly, a disproportionate number of capital prosecutions in the State of Pennsylvania are instigated by the Philadelphia County District Attorney; most Illinois cases come from Chicago’s Cook County; and so the story goes throughout the country.”).

<sup>928</sup> An execution in North Carolina costs taxpayers \$2.16 million more than the cost of a life sentence; Florida reportedly spends \$3.2 million per execution; and each execution in Texas costs taxpayers an average of \$2.3 million. See Testimony of Richard C. Dieter, Judiciary Committee, Colorado House of Representatives, House Bill 1094, pp. 6–7, available at <http://www.deathpenaltyinfo.org/COcosttestimony.pdf>.

<sup>929</sup> See Andrew Ditchfield, *Challenging the Intrastate Disparities in the Application of Capital Punishment Statutes*, 95 GEO. L.J. 801, 803–04 (2007) (arguing that “geography, which is a powerful predictor of whether a capital crime will be charged as such, is the sort of arbitrary factor mentioned in *Furman v. Georgia*” that leads to wanton and freakish imposition of death sentences that violate the Eighth Amendment).

<sup>930</sup> See Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. 73, 74–77 (2007).

arbitrarily imposed to remain legal.<sup>931</sup> Or perhaps the death penalty—as one scholar suggests—will “fade slowly” away, going out “with a whimper and not a bang.”<sup>932</sup> Whatever the scenario, it seems inevitable that human progress will eventually claim capital punishment just as it did lynching.

¶202 In this Internet-driven era, human rights activism has proliferated and abolitionists have more and more tools at their disposal with which to build stronger networks and fight for social justice.<sup>933</sup> As the death penalty’s many flaws are exposed by NGOs, courts, and individual activists, the death penalty’s demise draws closer and closer. In fact, often all it takes is one particularly memorable event or blunder—such as Virginia Governor George Allen’s infamous use of the word “Macaca” to derogatorily describe one of his opponent’s staffers—for a news story to suddenly be everywhere, to “go viral.”<sup>934</sup> One commentator has aptly spoken of a similar “snowball effect” that followed Justice Blackmun’s dissent in *Callins v. Collins*.<sup>935</sup> Soon after that decision, the ABA sought a moratorium on executions and Governor Ryan imposed one, leading other states to consider the same thing.<sup>936</sup>

¶203 In *The Tipping Point*, best-selling author Malcolm Gladwell describes dramatic moments “when everything can change all at once.”<sup>937</sup> The question that arises in the capital punishment context is whether Americans are on the cusp of just such a moment. Will there be an event, or perhaps a series of events, that lead to that magical point-of-no-return and the death penalty’s abolition? Will Americans be horrified by a wrongful execution? Or will juries just stop sentencing people to death to such an extent that any

<sup>931</sup> The Bill of Rights—with its articulation of broad, abstract principles, conferring the rights of “due process” and “equal protection,” and sweepingly forbidding any “cruel and unusual punishments”—was certainly drafted to give flexibility to future generations. See RONALD DWORKIN, *LIFE’S DOMINION* 127 (1993). As Ronald Dworkin writes: “Each of these great constitutional clauses is abstract in a particular way; each makes crucial use of concepts that are not legal terms of art, or taken from economics or some other branch of social science, but are drawn from ordinary moral and political use: concepts like ‘liberty’ and ‘freedom’ and ‘cruel’ and ‘equal.’ Read in the most natural way, the words of the Bill of Rights do seem to create a breathtakingly abstract, principled constitution.” *Id.* at 127–28; see also Ronald Dworkin, *Comment* in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 120–21 (1997) (discussing matters of Eighth Amendment interpretation); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816) (“[t]he constitution unavoidably deals in general language”; “[t]he instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages”); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“Not the least of the reasons we honor the Constitution, then, is because we know it to be our own.”).

<sup>932</sup> VICTOR STREIB, *DEATH PENALTY IN A NUTSHELL* 300 (2008).

<sup>933</sup> In *Activists Beyond Borders*, political scientists Margaret Keck and Kathryn Sikkink write about the increasing effectiveness of transnational activism, in which advocacy networks across the globe mobilize and exert pressure on governments to change laws and enforce human rights. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998). They study historic campaigns such as the effort to end slavery in the United States, the women’s suffrage movement, and efforts by Western missionaries and Chinese reformers to stop footbinding in China, and find that one of the most important tools activists have—what they label “information politics”—is the simple reporting and dissemination of facts. *Id.* at 39, 45, 183. “As recently as 1970,” Keck and Sikkink write, “the idea that the human rights of citizens of any country are legitimately the concern of people and governments everywhere was considered radical.” *Id.* at 79. Today, of course, international NGOs and foreign governments routinely criticize America’s retention of the death penalty.

<sup>934</sup> Jack M. Balkin & Stanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 *CHI.-KENT L. REV.* 49, 54 n.31 (2007) (reprinting George Allen’s comments).

<sup>935</sup> 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

<sup>936</sup> Kirchmeier, *supra* note 222, at 101.

<sup>937</sup> MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 9 (2000).

death sentence that is handed out looks like a freakish outlier? Anything might happen, though one thing remains clear: In retaining capital punishment, America has, through its silence and inaction, chosen a path that requires the continued employment of executioners—and that lessens us all by the justice system’s resort to violence, the very thing that we condemn in killers.

¶204 Already, international law is trending heavily towards abolition, and the swiftly moving current of change has already swept many nations into the abolitionist column. America’s death penalty will no doubt eventually collapse under the heavy weight of all of its intractable problems. Over thirty-five years after *Furman*, America’s death penalty is still as arbitrary and capricious as ever. Who gets the death penalty is often more a function of poverty, geography, or the quality of the defense lawyer<sup>938</sup> than it is a function of the nature of the crime or anything having to do with logic or rationality. And nearly 250 years after the publication of Beccaria’s seminal work, the operation of the death penalty is still rife with wrongful death sentences and widespread racial discrimination and abuse.<sup>939</sup> In executing people, America now stands in the dubious company of some of the worst human rights offenders, including the People’s Republic of China—a country that has used executions for over 5000 years to terrorize its citizens and crack down on political dissidents.<sup>940</sup>

¶205 I have no doubt that a day will come—if not in this generation, then perhaps in the next—when the death penalty will be abolished in the United States and be held to violate international law.<sup>941</sup> The climb will be steep because capital punishment is so deeply engrained in American life and because the urge for revenge—to see a killer’s life cut short—runs so deep for so many people. As Benjamin Cardozo—who sought the death penalty’s demise—told a group of New York physicians back in 1928: “The thirst for vengeance is a very real, even if a hideous, thing; and states may not ignore it till humanity has been raised to greater heights than any that have yet been scaled in all the

<sup>938</sup> See Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Stephen Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679 (1990).

<sup>939</sup> See Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 575–81 (2004).

<sup>940</sup> For historical information on China’s death penalty, see Jeremy T. Monthly, *Internal Perspectives on Chinese Human Rights Reform: The Death Penalty in the PRC*, 33 TEX. INT’L L.J. 189, 190–95 (1998); Stephen B. Davis, *The Death Penalty and Legal Reform in the PRC*, 1 J. CHINESE L. 303, 305–12 (1987); Qiang Fang & Roger des Forges, *Were Chinese Rulers Above the Law? Toward a Theory of the Rule of Law in China From Early Times to 1949 CE*, 44 STAN. J. INT’L L. 101, 116, 125, 129, 140 (2008); Liam P. Deeney, *The Abolition of the Death Penalty in International Law*, 23 SUFFOLK TRANSNAT’L L. REV. 803, 812–13 (2000). The history of brutal executions that have been carried out in China—including cutting up people while alive—are starkly detailed in a recent book. See TIMOTHY BROOK, JÉRÔME BOURGON & GREGORY BLUE, *DEATH BY A THOUSAND CUTS* 1–4, 70, 188–89, 204–07 (2008); see also Joan E. Hemphill, *China’s Practice of Procuring Organs from Executed Prisoners: Human Rights Groups Must Narrowly Tailor Their Criticism and Endorse the Chinese Constitution to End Abuses*, 16 PAC. RIM L. & POL’Y J. 431, 434 (2007).

<sup>941</sup> Compare William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797 (1998) (“While it is still premature to declare the death penalty prohibited by customary international law, it is clear that we are somewhere in the midst of such a process, indeed considerably close to the goal.”), with Robert F. Drinan, S.J., *Will Religious Teachings and International Law End Capital Punishment?*, 29 ST. MARY’S L.J. 957, 968 (1998) (“The resistance by the United States to accede to world law is uniquely visible and dramatic in American’s retention of the death penalty in defiance of the decisive change in all of the nations most respected by Americans.”).

long ages of struggle and ascent.”<sup>942</sup> Those heights were not reached during the Enlightenment or in the twentieth century, and for now they still remain a somewhat distant summit in the annals of American law.

¶206

But the world community—including the United States—has already acted in concert to ratify U.N. conventions barring genocide, slavery, torture, and other forms of cruel and degrading punishments.<sup>943</sup> The death penalty’s abolition would be yet another step in the direction of a more civilized and humane world and would no doubt please Enlightenment thinkers such as Cesare Beccaria, Thomas Jefferson and Dr. Benjamin Rush, if only from the grave.<sup>944</sup> Already, modern-day Italians—the descendents of Beccaria’s fellow citizens—have lit up the Coliseum in Rome, once the venue of horrific killings, to honor countries banning executions and to pay homage to the moratorium and commutation of death sentences that took place in Illinois.<sup>945</sup>

<sup>942</sup> Benjamin Cardozo, *What Medicine Can Do for Law*, 5 BULL. OF THE N.Y. ACAD. OF MED. 581, 581, 590 (July 1929). Cardozo—who once predicted his descendants would “look back upon the penal system of today with the same surprise and horror” that his generation did upon being told that 160 crimes were once punished by death under English law—was not the first person to underestimate the staying power of capital punishment. *Id.* at 593. In 1793, Dr. Benjamin Rush, too, had confidently, if mistakenly predicted that “[h]umanity and reason are likely to prevail so far in our legislature that a law will probably pass in a few weeks to abolish capital punishment in *all cases whatever.*” BANNER, *supra* note 1, at 88–89.

Lawyers, it turns out, actually have much to learn from the medical profession, which has been intimately involved with the legal system for many years now. See Aimee Logan, *Who Says So? Defining Cruel and Unusual Punishment by Science, Sentiment, and Consensus*, 35 HASTINGS CONST. L.Q. 195, 217–18 (2008); Eileen P. Ryan & Sarah B. Berson, *Mental Illness and the Death Penalty*, 25 ST. LOUIS U. PUB. L. REV. 351, 352 (2006). “Sure, however, I am,” Benjamin Cardozo told a group of physicians in 1929, “that whatever enlightenment shall come will make its way, not through the unaided labors of the men of my profession, the judges and the advocates, but through the combined labors of men of many callings, and most of all your own.” Cardozo, *supra* note 942, at 593. “You hands must hold the torch that will explore the dark mystery of crime—the mystery, even darker, of the criminal himself, in all the deep recesses of thought and will and body,” Cardozo wrote. “The law, like medicine,” Cardozo emphasized, “has its record of blunders and blindness and superstitions and even cruelties.” “Like medicine, however,” he added, “it has never lacked the impulse of a great hope, the vision of a great ideal.” *Id.* at 594, 606.

<sup>943</sup> None of these human advancements—all reflected in international treaties—came about overnight or without a sustained fight. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277; Steve Charnovitz, *The ILO Convention on Freedom of Association and Its Future in the United States*, 102 AM. J. INT’L LAW 90 (2008) (“[T]he heroic determination of Senator William Proxmire comes to mind. Proxmire was so dedicated to U.S. ratification of the Genocide Convention that he delivered a speech on the Senate floor every day from 1967 until the resolution of ratification was adopted in 1986.”) (citing LAWRENCE J. LEBLANC, *THE UNITED STATES AND THE GENOCIDE CONVENTION* 6 (1991)); The Slavery Convention, Sept. 25, 1926, 60 U.N.T.S. 253 (generally entered into force, Mar. 9, 1927, and entered into force by the United States on Mar. 21, 1929); The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 226 U.N.T.S. 3 (generally entered into force on Apr. 30, 1957, and entered into force by the United States on Dec. 6, 1967); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (Dec. 10, 1984) (signed by the U.S. on Apr. 18, 1988 and ratified by the U.S. on Oct. 21, 1994).

<sup>944</sup> Before dying on July 4, 1826, the same day his close friend John Adams died, Thomas Jefferson came to oppose the death penalty. See Thomas Jefferson, *Autobiography Draft Fragment*, Jan. 6–July 27, 1821, <http://memory.loc.gov/> (follow “List all Collections” hyperlink; then follow “Jefferson, Thomas ~ Papers ~ 1606-1827” hyperlink; then search “autobiography” in “Search Collection”; then follow “Thomas Jefferson, July 27, 1821, *Autobiography Draft Fragment*, January 6 through July 27”) (last visited Aug. 31, 2009); see also Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 213 (2007) (noting that it was Dr. Benjamin Rush who, in 1811, helped Jefferson and Adams reconcile before they both died on the same Fourth of July).

<sup>945</sup> See Allen E. Shoemaker, *The European View of American Justice*, 36 LOY. U. CHI. L.J. 603, 603 (2005); Peter Fitzpatrick, *Life, Death and the Law—and Why Capital Punishment Is Legally Insupportable*, 47 CLEV. ST. L. REV. 483, 490–91 (1999); Gayle Young, *On Italy’s Passionate Opposition to Death*

¶207 As Americans recall the publication of *On Crimes and Punishments*, Beccaria's words—taken to heart by so many of America's Founding Fathers—are just as relevant today as they were almost 250 years ago. The future is impossible to predict, but as abolitionists everywhere look back—and simultaneously look ahead—there is much reason to hope and continue to press for reform even though America's last execution is still over the horizon. The world's anti-death penalty movement continues apace—as it has for nearly two and a half centuries—and progress, if sometimes painfully slow, is still being made. News stories about capital punishment have proliferated exponentially in just the past few years,<sup>946</sup> and there is every reason to believe that America's death penalty may finally be in its death throes. I can only say that, when the United States of America finally musters up the humanity, fortitude, and courage to do away with state-sanctioned killing, it will be a glorious sight indeed to behold the Roman Coliseum all lit up once more in bright, golden light, no doubt in Beccaria's honor.

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*Penalty*, Feb. 24, 2000, <http://www.cnn.com/SPECIALS/views/y/2000/02/young.italydeath.feb24/> (last visited Aug. 31, 2009).

<sup>946</sup> Kirchmeier, *supra* note 222, at 3 (“Since 1981, the number of news stories about the death penalty has almost doubled every five years.”). Stuart Banner’s *The Death Penalty: An American History*, which chronicles the macabre practice of capital punishment, is just one of many books devoted to the subject to have come out in recent years. BANNER, *supra* note 1. The sheer number of books and articles being written about the death penalty, in fact, confirms just how controversial executions have become in American life. That histories of capital punishment are already being written strongly suggests to me that American executions may soon *be* history, relegated to nothing more than dark, barbaric chapters in world history, as they should be.