

# The Death Penalty as Torture

**Also by John D. Bessler**

*Death in the Dark: Midnight Executions in America*

*Kiss of Death: America's Love Affair with the Death Penalty*

*Legacy of Violence: Lynch Mobs and Executions in Minnesota*

*Writing for Life: The Craft of Writing for Everyday Living*

*Cruel and Unusual: The American Death Penalty and the Founders'  
Eighth Amendment*

*The Birth of American Law: An Italian Philosopher and the American Revolution*

*Against the Death Penalty* (editor)

# The Death Penalty as Torture

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*From the Dark Ages to Abolition*

John D. Bessler



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*For all victims of torture*



*“Can the state, which represents the whole of society and has the duty of protecting society, fulfill that duty by lowering itself to the level of the murderer, and treating him as he treated others? The forfeiture of life is too absolute, too irreversible, for one human being to inflict it on another, even when backed by legal process.”*

— U.N. Secretary-General Kofi Annan

*“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 Cardozo





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# Acknowledgments

I began writing about the death penalty back in the early 1990s, and since 1998 I've taught a capital punishment seminar at various law schools. My first book, *Death in the Dark: Midnight Executions in America*, explored why U.S. executions take place within prisons and out of the public eye, sometimes scheduled for one minute after midnight. And my other books explore other aspects of capital punishment and lynching, from their sordid history, to their discriminatory use, to their cruelty and torturous barbarity. In *The Birth of American Law: An Italian Philosopher and the American Revolution*, I traced the Italian philosopher Cesare Beccaria's influence on the law, with a particular focus on Beccaria's anti-death penalty advocacy. In *Legacy of Violence: Lynch Mobs and Executions in Minnesota*, I explored the history of lynchings and state-sanctioned killing in my home state. In *Kiss of Death: America's Love Affair with the Death Penalty*, I laid out the reasons why I personally oppose capital punishment. And in *Cruel and Unusual: The American Death Penalty and the Founders' Eighth Amendment*, I explained why Americans — including U.S. Supreme Court Justices — should find the death penalty to be a violation of the U.S. Constitution's Cruel and Unusual Punishments Clause.

The ideas in *The Death Penalty as Torture* broaden the focus of my prior inquiries and are the culmination of my thinking on the subject of capital punishment. I first spoke on the topic of torture and the death penalty in June 2013 at a panel at the 5th World Congress Against the Death Penalty in Madrid, Spain. In December 2015, I also spoke on that subject in Norway at the 3rd Oslo Symposium on Capital Punishment — a symposium that brought together experts on the death penalty from Africa, Asia, Australia, Europe and the United States. I would particularly like to thank Rosalyn Park at The Advocates for Human Rights, a non-profit organization headquartered in Minneapolis, Minnesota, for her assistance in providing information in the lead up to my presentation in Madrid, the place where I first previewed some of the ideas in this book. In addition, I would like to thank Lill Scherdin at the University of Oslo for planning and hosting incredibly well-organized and highly informative symposiums on capital punishment; my friends, colleagues and fellow death penalty opponents for their encouragement and support of my scholarship; two of my former students, Alex Powell and Valerie Bonk, for their superb research assistance; and Rose McMunn, my executive assistant.

Over the years, I have been privileged to teach — and learn from — many law students at five different law schools: the University of Minnesota Law School, the George Washington University Law School, the Georgetown University Law Center, the University of Baltimore School of Law, and Rutgers School of Law. The dialogue and extended conversations I've had with those students over the years has helped me to clarify my own thinking on the law of capital punishment and torture. I have also had the opportunity to travel abroad and to interact, whether as a student or a fellow symposium participant, with two of the world's leading international law experts on capital punishment: William Schabas and Roger Hood. Bill Schabas is the author of *The Abolition of the Death*

*Penalty in International Law*, and Roger Hood — along with his co-author, Carolyn Hoyle — just published the fifth edition of *The Death Penalty: A Worldwide Perspective*. Both books are tremendous resources, and I am indebted to these scholars for their outstanding contributions to the literature on the death penalty in the international context. I have also benefitted enormously from my association with, and from the outstanding writings of, David Weissbrodt, a Regents Professor of Law at the University of Minnesota Law School and one of the world's leading authorities on torture.

I hope to live to see the day that capital punishment is abolished worldwide. That may be a lofty goal, but I believe it is a worthy one. Death sentences and executions — used for centuries to quash political dissent, to suppress minorities and people of different faiths, and to kill criminals (and sometimes, by mistake, innocent people) — only coarsen and brutalize the societies that still use them. The time has come, I believe, to call capital punishment for what it is — a torturous punishment — and to work for its complete abolition in international law. That day may not come soon enough, but I believe it will come — and that one day the Roman Coliseum will be lit up in recognition of the last country to abolish the death penalty for all crimes and under all circumstances. The death penalty — like other acts of cruelty and torture — has already claimed enough casualties over the centuries, and its time has passed. It should be relegated to the history books, serving only as a bleak and chilling reminder of the inhumanity which human beings are capable of in their darkest of hours.

# Introduction

The law treats extrajudicial killings very differently than state-sanctioned executions, with capital punishment — or aspects of it — viewed quite dissimilarly in different parts of the world.<sup>1</sup> The U.S. Supreme Court has found capital punishment to be constitutional, but courts in other countries have declared it not to be.<sup>2</sup> Lynchings and homicides are universally condemned worldwide, with murders accompanied by aggravating circumstances treated as acts of torture-murder. But death sentences and executions are considered *lawful* in some jurisdictions and *unlawful* in others, raising important questions in the field of international human rights law and for the death penalty debate and the law of torture. For example, consider someone who locks another person in a small room, say a 6' × 10' cell,<sup>3</sup> then tells that person that, on a fixed or unspecified future date, he or she will be beheaded, electrocuted, hanged or shot, or will be killed by lethal gas or lethal injection. If that threat is made or actually carried out — whether days, weeks, months, years, or even decades later — is that *torture*? Alternatively, would those actions be classified as *cruel, inhuman or degrading treatment or punishment*? Or would such conduct — whether carried out in Iran, China or Japan, in Saudi Arabia, Western Europe or war-torn Syria, or on American soil in a maximum-security prison — be classified as *both* or *neither*?

At present, the answers to these questions depend on (1) what country or state's laws — or what regional human rights regime, judicial rulings, or treaty body's pronouncements — one consults; (2) the length and conditions of the actual confinement; and (3) whether the actions in holding the person in confinement, then threatening and killing that person, are done by a *private actor* or a *state actor*.<sup>4</sup> If a *non-state actor*, whether an ISIS or Al-Qaeda terrorist or a demented killer, engages in torturous, homicidal behavior, no one hesitates to use the rubric of *torture* to describe the psychological or physical torment that accompanies a brutal murder. Thus, ISIS beheadings are regularly described as acts of torture, with ISIS militants, in one report, said to have “tortured and executed the antiquities chief of the ancient city of Palmyra.” When ISIS operatives, in 2015, burned alive in a cage a 26-year-old fighter pilot, Muath Al-Kasasbeh, Jordanian officials quickly declared — and rightfully so — that terrorists had “tortured” their pilot.<sup>5</sup> And many American homicides — from a horrific murder committed in California precipitated by a stolen PlayStation III to a murder in Florida where the victim was repeatedly struck with a chain belt and night stick, burned with lit cigarettes and lighters, and had a chair leg rammed into her vagina — have been adjudicated as being accompanied by torturous acts, thus aggravating the nature of the crimes.<sup>6</sup> “Serial killers typically kill without remorse and have no compassion for human suffering,” one source observes of that category of murderers.<sup>7</sup>

The *torture* terminology is used in different contexts, both legal and non-legal and in both international and domestic law. In the United States, American lawmakers and courts regularly use the term “torture-murder”<sup>8</sup> to describe killings by *non-state actors* that are aggravated by acts of torture. This is so even though *torture*, as traditionally understood

under international law principles, involves intentional *official* acts.<sup>9</sup> For example, the U.S. Court of Appeals for the Third Circuit pointed out in 2008 that torture under international law “involves intentional governmental acts” not “acts by private individuals not acting on behalf of the government.” “The requirement that torture be inflicted by or with the acquiescence of a public official is met,” the Third Circuit clarified, however, “if the government is willfully blind to a group’s activities whether or not it is actually aware of the conduct that constitutes torture.” From time to time, ordinary citizens and media outlets — even U.S. jurists — have described the death penalty or particular methods of execution as torturous.<sup>10</sup> But capital punishment has not, customarily, been treated under international or domestic law as an act of torture even though it is, decidedly, an official, governmental act. For instance, in 2004, the U.S. Court of Appeals for the Eighth Circuit ruled that “[t]he pain or suffering inherent in a lawfully imposed death penalty is not considered torture.”<sup>11</sup>

That is the state of the law now. But American history vividly illustrates how, through the years, judges have wrestled mightily with how to classify executions, with jurists trying to determine if they are legally permissible or not. And from time to time, the legal landscape has shifted, sometimes dramatically. In 1963, U.S. Supreme Court Justice Arthur Goldberg tried to convince his colleagues that the death penalty violated the U.S. Constitution’s Eighth and Fourteenth Amendments.<sup>12</sup> He was unsuccessful that year, though his October dissent in *Rudolph v. Alabama* — joined by Justices William O. Douglas and William Brennan — reflects a split of opinion on death sentences.<sup>13</sup> But in 1972, in *Furman v. Georgia*, the Supreme Court declared America’s death penalty laws to be unconstitutional because they imposed “cruel and unusual punishments.” That hotly debated, five-to-four decision ushered in a short, *de facto* moratorium on executions, with the dissenters arguing the issue should have been left to state legislatures. In his concurrence, Justice Brennan opined that executions are “cruel and unusual” punishments that fail to comport with “human dignity,” though he employed language closely associated with the concept of torture. “No other existing punishment is comparable to death in terms of physical and mental suffering,” Brennan wrote, echoing language found in modern-day prohibitions against torture. In discussing what America’s founders meant by “cruel and unusual punishments,” Justice Brennan emphasized that Patrick Henry — the American revolutionary — referred to “tortures, or cruel and barbarous punishment.”<sup>14</sup>

But all systemic Eighth Amendment challenges to America’s death penalty — whether based on arbitrariness or race<sup>15</sup> or the asserted cruelty of lethal-injection protocols<sup>16</sup> — have failed before the nation’s highest court since it reversed course in a series of cases decided four years after *Furman*. In 1976, in *Gregg v. Georgia* and two companion cases, the Supreme Court upheld the constitutionality of death penalty laws in Georgia, Florida and Texas. State legislators had passed those statutes in the wake of *Furman* to guide juror discretion and reduce the death penalty’s arbitrariness, what Justice Potter Stewart — in his concurrence in *Furman* — likened to the risk of being “struck by lightning” because of the rarity and freakish nature of executions.<sup>17</sup> In 1987, in *McCleskey v. Kemp*, the Supreme Court rejected an Eighth and Fourteenth Amendment challenge to Georgia’s death penalty based on compelling statistical evidence of racial discrimination.<sup>18</sup> And in 2008 and 2015, in *Baze v. Rees* and *Glossip v. Gross*, the Court upheld the constitutionality of three-drug lethal injection protocols in Kentucky and Oklahoma despite the risk of inmates suffering excruciating physical pain at executions.<sup>19</sup>

Legal challenges to American executions and lethal-injection protocols continue.<sup>20</sup> There have been a well-publicized series of wrongful convictions and botched executions,<sup>21</sup> the death penalty remains as arbitrary and cruel as ever,<sup>22</sup> and the European Union has banned the export of lethal-injection drugs,<sup>23</sup> leading to severe shortages of once commonly used drugs such as sodium thiopental.<sup>24</sup> Due to the U.S. Supreme Court's prior rulings, however, neither American executions generally nor lethal injections in particular are now considered unlawful or unconstitutional by most American courts.<sup>25</sup> Meanwhile, European countries have stopped using executions altogether and have, by law, barred their use.<sup>26</sup> In *Soering v. United Kingdom*, the European Court of Human Rights — in line with rulings from other countries — also decided that an accused killer could not be extradited to the U.S. in the absence of assurances that the death penalty would not be sought.<sup>27</sup>

Traditionally, state torture is seen as an *extreme* form of cruelty, one that involves *intentional* — not negligent — government conduct.<sup>28</sup> According to a 1975 U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: “Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”<sup>29</sup> The U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the U.N. General Assembly in 1984 and signed by the United States in 1988, likewise defines “torture” as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for a prohibited purpose such as punishment or obtaining a confession.<sup>30</sup> European and U.S. law read much the same way, viewing torture as an extreme form of cruelty. “Of all the categories of ill-treatment prohibited by Article 3,” the European Court of Human Rights has written of the prohibition of torture and inhuman and degrading acts in the European Convention for the Protection of Human Rights and Fundamental Freedoms, “‘torture’ has a special stigma, attaching only to deliberate inhuman treatment causing very serious and cruel suffering.”<sup>31</sup> Under U.S. regulations implementing the U.N. Convention Against Torture, which was ratified by the U.S. Senate in 1994,<sup>32</sup> “[t]orture” is similarly described as “an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.”<sup>33</sup> Thus, under the U.N., European and U.S. approaches, torture is an *aggravated* or *extreme* form of cruel, inhuman or degrading treatment or punishment.

While the U.N. Convention Against Torture explicitly covers state actors, the torturous conduct of non-state actors is regularly punished by countries' domestic criminal laws. A *state actor* — according to the U.S. Supreme Court and other jurists — is someone whose conduct is “fairly attributable to the state.”<sup>34</sup> While *torture-murder* describes a particular species of homicides accompanied by torturous conduct by *non-state* actors,<sup>35</sup> *judicially imposed* death sentences and *state-sanctioned* executions are not currently classified as acts of torture under the law.<sup>36</sup> That is true even though the U.N. Convention Against Torture makes the prohibition on torture absolute and requires governments to *prevent* and *criminalize* acts of torture.<sup>37</sup> And this is the present legal regime even though the U.N. Human Rights Committee, the U.N. Special Rapporteur on Torture,<sup>38</sup> and jurists, psychologists and others<sup>39</sup> readily agree that simulated, or “mock,” executions — as well as a wide array of *non-lethal* acts — *are* considered to be torturous in nature. A “mock execution,” as one source puts it, is “a stratagem in which a victim is deliberately but falsely made to feel that his execution or that of another person is

imminent or is taking place.” “It may be staged for an audience or a subject who is made to believe that he is being led to his own execution,” that source reports.<sup>40</sup>

*Torture* — as a general matter — has long been strictly prohibited by law in international conventions and covenants,<sup>41</sup> as well as by individual countries and regional human rights systems, including in Africa, Europe, the Americas and elsewhere.<sup>42</sup> Article 5 of the Universal Declaration of Human Rights, adopted by the U.N. General Assembly in 1948, provides: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, dating to the 1950s, states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Article 5 of the American Convention on Human Rights, which entered into force in 1978, likewise provides in a slightly longer provision: “No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.” And Article 5 of the African Charter on Human and Peoples’ Rights, which became effective in 1986, reads: “All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”<sup>43</sup>

Torture is thus universally forbidden throughout the civilized world, with prohibitions found in a wide array of international conventions and domestic legal codes. International humanitarian law, also known as the law of war, specifically prohibits torture.<sup>44</sup> And it is also prohibited by the U.S. Code of Federal Regulations,<sup>45</sup> various foreign<sup>46</sup> and state constitutions,<sup>47</sup> federal and state statutes in the United States,<sup>48</sup> as well as by the U.S. Supreme Court and other judicial systems.<sup>49</sup> In 2001, the European Court of Human Rights emphasized of the European Convention for the Protection of Human Rights that “it has long been recognised that the right under Article 3 not to be subjected to torture or to inhuman or degrading treatment or punishment enshrines one of the fundamental values of democratic society.” “It is an absolute right, permitting of no exception in any circumstances,” that court declared.<sup>50</sup> In 1998, the International Criminal Tribunal for the Former Yugoslavia — a tribunal set up by the United Nations — likewise observed: “It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency.” “This prohibition,” the court ruled, “is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.”<sup>51</sup>

American law is made up of a complex blend of constitutional law, binding treaties, federal and state legal codes, regulations and case law. The U.S. Constitution — drafted in the 1780s — does not explicitly forbid torture *by name*.<sup>52</sup> But the Ninth Amendment of the U.S. Bill of Rights clearly states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>53</sup> Legal commentators and high-profile political leaders such as President Franklin D. Roosevelt have described the right to be free from torture as an “unenumerated” or “natural” right.<sup>54</sup> And the Supreme Court of Ireland has specifically recognized that among the “non-exhaustive,” “unspecified personal rights” recognized by the Constitution of Ireland is “the right to freedom from torture or inhuman or degrading treatment.”<sup>55</sup> Indeed, despite the omission of the *torture* term from the U.S. Constitution, the U.S. Supreme Court has long read the Eighth Amendment’s Cruel and Unusual Punishments Clause



to forbid torture. Ratified in 1791, the Eighth Amendment — on its face — prohibits “excessive” bail and fines and explicitly forbids “cruel and unusual punishments.”<sup>56</sup> But the Supreme Court’s case law as to torture is adamant and clear. In its 2010 decision in *Graham v. Florida*, the U.S. Supreme Court, citing an earlier precedent, forcefully declared: “The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances. ‘[P]unishments of torture,’ for example, ‘are forbidden.’”<sup>57</sup>

The U.S. Supreme Court’s recognition of the prohibition against torture actually dates back more than a century. The Supreme Court’s precedents, however, illustrate how torture and capital punishment have been treated in the past as separate legal concepts, with one not tied or associated to the other. In 1890, in *In re Kemmler*, the Supreme Court upheld the use of the electric chair as a method of execution yet simultaneously declared in its judicial opinion: “Punishments are cruel when they involve torture or a lingering death . . .”<sup>58</sup> And in *Wilkerson v. Utah*, the Supreme Court — in 1878 — determined that Utah’s use of a firing squad to punish a premeditated murderer was constitutional, though it ruled at the same time: “Difficulty would attend the effort to define with exactness the extent of the constitutional prohibition which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden . . .”<sup>59</sup> In other words, *torturous* punishments violate the U.S. Constitution, though executions — traditionally seen by American jurists as lawful and, at least in certain circumstances, as legally permissible — were not, at least at that time, treated as torturous acts.<sup>60</sup>

*Torture* is a commonly used English word. But under the Convention Against Torture and existing U.S. law, “lawful sanctions” — as a general category of official actions — are generically *excluded* from the word’s definition. The Convention Against Torture does not define “lawful sanctions,” leaving it up to courts, by necessity, to decide what governmental acts fall into that category.<sup>61</sup> So far, American courts, the U.S. Congress and federal regulators have concluded that the “lawful sanctions” exclusion in the Convention Against Torture *exempts* the death penalty, a punishment authorized by a number of federal and state laws.<sup>62</sup> The “lawful sanctions” exclusion, in fact, is reflected in a U.S. implementing regulation which provides that lawful sanctions “includes judicially imposed sanctions and other enforcement actions authorized by law, provided that such sanctions or actions were not adopted in order to defeat the object and purpose of the Convention to prohibit torture.”<sup>63</sup> In two other regulations, titled “Implementation of the Convention Against Torture,” U.S. law similarly — and even more explicitly — reads: “Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.”<sup>64</sup> In its understandings attached to the Convention Against Torture, the U.S. Senate — the legislative body tasked with “Advice and Consent” as regards U.S. treaties<sup>65</sup> — provided: “[T]he United States understands that ‘sanctions’ includes judicially imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.”<sup>66</sup> The “lawful sanctions” concept — seen by American lawmakers as a carve-out to torture and to cruel or inhuman treatment — is also found in sections of the U.S. Code.<sup>67</sup>

Up to now, the U.S. Supreme Court has focused principally on whether executions inflict excruciating pain *at the very moment* that a death row inmate is put to death.<sup>68</sup> It is now clear from common English usage and various legal prohibitions against torture, however, that one can be either physically or psychologically tortured.<sup>69</sup> *Webster's Third New International Dictionary* defines "torture" as "the infliction of intense pain (as from burning, crushing, wounding) to punish or coerce someone." But that dictionary's definition of torture also lists "anguish of body or mind," "excruciating agony," "extremity of suffering," "to cause intense suffering to," "inflict anguish on" and "subject to severe pain: TORMENT."<sup>70</sup> Indeed, both extrajudicial killings and state-sanctioned executions have been described in popular culture as "torturous" — or at least potentially so — due to the method of killing or mode of execution at issue or because of the risk of a bungled, or "botched," execution.<sup>71</sup> In *Dead Man Walking*, the Nobel Peace Prize-nominated activist Sister Helen Prejean — speaking more broadly — equated torture with capital punishment, writing: "An execution is ugly because the premeditated killing of a human being is ugly. Torture is ugly." As she wrote: "[I]f we are to have a society which protects its citizens from torture and murder, then torture and murder must be off-limits to *everyone*. No one, for any reason, may be permitted to torture and kill — and that includes government."<sup>72</sup>

Although the world's laws are far from uniform, some jurists and tribunals currently classify executions as human rights violations or — more specifically — as *cruel, inhuman or degrading* acts. In 1990, the Hungarian Constitutional Court held that capital punishment conflicted with the right to life and the right to human dignity.<sup>73</sup> Five years later, in 1995, the Constitutional Court of South Africa also struck down that country's death penalty as unconstitutional. In that landmark case, *State v Makwanyane*, the South African court found that the death penalty contravened that country's prohibition of "cruel, inhuman or degrading treatment or punishment."<sup>74</sup> On the same continent, by contrast, the Supreme Court of Uganda — in 2009 — specifically rejected the contention of that country's then 418 death row inmates that the death penalty was *per se* unconstitutional as a cruel, inhuman or degrading punishment. In that case, the Ugandan court did decide that *mandatory* death sentences were unconstitutional and that it would be unconstitutional to execute prisoners who had been on death row for three years or more because of the "inordinate delay."<sup>75</sup>

Globally, just as there is a divide as to the death penalty's legality, there is a division of legal authority as regards the legal effect, if any, of prolonged stays on death row.<sup>76</sup> In *Soering v. United Kingdom*, for example, the European Court of Human Rights barred the extradition of a German teenager, Jens Soering, to face murder charges in Virginia in the absence of assurances that the death penalty would not be sought. The Commonwealth of Virginia had charged Soering with murdering his girlfriend's parents, but the European Court of Human Rights, in 1989, found that it would violate Article 3 of the European Convention on Human Rights to extradite him. Why? Because of the likelihood that Soering, if convicted, would experience the "death row phenomenon" — a concept associated with a death row inmate's suffering while awaiting execution.<sup>77</sup> The Zimbabwe Supreme Court — like the Uganda court — has also embraced that approach, taking note of the inhumanity of prolonged stays on death row.<sup>78</sup>

While the U.S. courts have consistently refused to recognize the "death row phenomenon," the Supreme Court of Canada — in interpreting the Canadian Charter of Rights and Freedoms — specifically ruled in 2001 that extraditing offenders to the U.S. would not be permitted absent assurances that the death penalty would not be sought.

Canada — America’s neighbor to the north — no longer permits executions, with the Supreme Court of Canada ruling: “The Canadian government would not itself inflict capital punishment, although its decision to extradite without assurances would be a necessary link in the chain of causation to that potential result.” Emphasizing that, “in Canada, the death penalty has been rejected as an acceptable element of criminal justice,” Canada’s high court determined: “Capital punishment engages the underlying values of the prohibition against cruel and unusual punishment. It is final and irreversible. Its imposition has been described as arbitrary and its deterrent value has been doubted.” “Canada’s support of international initiatives opposing extradition without assurances, combined with its international advocacy of the abolition of the death penalty,” the court ruled, “leads to the conclusion that in the Canadian view of fundamental justice, capital punishment is unjust and should be stopped.” One of the specific concerns raised in that case — and factored in by the Canadian court — was the “psychological trauma to death row inhabitants” associated with the “death row phenomenon.”<sup>79</sup>

Both executions and inmates’ protracted stays on death row have been described as cruel, inhuman or even torturous in nature by some countries, jurists and legal commentators.<sup>80</sup> But the death penalty is — at the moment — not prohibited under all circumstances under international law or U.S. law. “While the evidence does not establish an international law norm against the death penalty, or against extradition to face the death penalty,” the Supreme Court of Canada held in 2001, “it does show significant movement towards acceptance internationally of a principle of fundamental justice Canada has already adopted internally — namely, the abolition of capital punishment.” That court pointed out that “[t]he recent and continuing disclosures of wrongful convictions for murder in Canada and the United States provide tragic testimony to the fallibility of the legal system, despite its elaborate safeguards for the protection of the innocent.” “This history,” it ruled, “weighs powerfully in the balance against extradition without assurances when fugitives are sought to be tried for murder by a retentionist state, however similar in other respects to our own legal system.”<sup>81</sup>

Although the U.S. Constitution’s Eighth Amendment has been read to bar the execution of certain *categories* of offenders, the U.S. Supreme Court has upheld the death penalty’s constitutionality as a general matter and allowed many executions to proceed. In the Supreme Court’s 2013 Term, for example, thirty-two applications for stays of execution were denied and only one application was granted.<sup>82</sup> In 2015, in *Glossip v. Gross*, the Court — in a five-to-four decision and despite the ever-present risk of botched executions<sup>83</sup> — decided to uphold the constitutionality of Oklahoma’s lethal injection protocol, with the four dissenters worrying aloud about death row inmates being subjected to “torturous” deaths. That protocol called for the administration of one drug, midazolam, to sedate the inmate before the administration of two other drugs, rocuronium bromide and potassium chloride, the former to paralyze him and the latter to induce a heart attack. There were serious questions in that case about the efficacy of midazolam in keeping the condemned inmate unconscious, thus risking an excruciatingly painful death.<sup>84</sup>

The U.S. Supreme Court has, to date, thus rejected the notion that the death penalty is — in the language of the Eighth Amendment — a *cruel and unusual* punishment.<sup>85</sup> Indeed, despite the fact that only a small percentage of countries outside the U.S. still actively use executions,<sup>86</sup> and despite the decision of the European Court of Human Rights in *Soering*, the U.S. Supreme Court has persistently refused to even accept for review an Eighth Amendment case on the subject of the “death row phenomenon.”<sup>87</sup> The concept

is the one legal commentators and mental health professionals now regularly use to describe the severe mental (and accompanying physical) deterioration of death row inmates during the long periods of time — sometimes decades — they spend in prison between the imposition of their death sentences and their actual executions.<sup>88</sup> “The phenomenon,” the United Nations has observed, “refers to a combination of circumstances that produces severe mental trauma and physical suffering among prisoners serving death sentences, including uncertainty and anxiety created by the threat of death and other circumstances surrounding execution . . . .”<sup>89</sup> “In some cases,” law professor William Schabas explains, “this may involve not only the delay as such but also what are often appalling conditions of detention imposed upon those for whom all hope has been abandoned, the ‘walking dead.’”<sup>90</sup> Having decided that America’s death penalty is not *cruel and unusual*, the U.S. Supreme Court has — by implication — clearly rejected the idea that death sentences or executions constitute *torture*, the aggravated form of cruel, inhuman or degrading treatment (“CIDT”) that is, along with torture itself, prohibited by international law.<sup>91</sup>

Because international law does not universally bar it, the death penalty thus persists in America and elsewhere, though the punishment’s centuries-old history is one of successive restrictions on its use.<sup>92</sup> The U.S. Supreme Court, tinkering around the edges but letting most executions proceed,<sup>93</sup> has only declared *some* death penalty procedures or uses of capital punishment to be unconstitutional. In particular, the Court has only outlawed the execution of certain *types* of offenders deemed less culpable for their actions and declared *particular* death penalty schemes (*e.g.*, mandatory ones) to be unconstitutional. For example, in *Hurst v. Florida*, the Supreme Court held in 2016 that Florida’s capital sentencing process — under which a judge, not the jury, made the life-or-death decision — violated the defendant’s Sixth Amendment right to a trial by jury.<sup>94</sup> Likewise, it is now illegal under U.S. Supreme Court precedent to execute the insane,<sup>95</sup> the intellectually disabled,<sup>96</sup> those under age eighteen at the time of their crimes,<sup>97</sup> non-homicidal rapists<sup>98</sup> and kidnappers,<sup>99</sup> and — within articulated parameters — those who neither kill nor intend to kill.<sup>100</sup> The *mandatory* death penalty is now unconstitutional in the United States and many other countries, but *discretionary* death penalty laws are still in use in the U.S. and other retentionist states.<sup>101</sup>

With at least some executions already seen as *unlawful*, important questions must be considered: In the twenty-first century, should the “lawful sanctions” carve-out to the definition of *torture* — the one found in the Convention Against Torture, in U.S. law, and elsewhere — still be read to allow death sentences and executions? Does it make any sense for the law to bar the execution of certain types of offenders while allowing the execution of others? Other weighty questions come to mind, too. Is the way in which death sentences are imposed and executions are carried out too cruel and too arbitrary and discriminatory to allow for the death penalty’s use? And should universal human rights — the rights to life and human dignity and the rights to be free from torture, cruelty and discrimination — cause jurists to declare capital punishment unconstitutional or torturous in nature? The death penalty’s disparate treatment in different parts of the world warrants answers to these pressing questions.

The death penalty is now under siege around the globe as never before. Although people are still being brutally beheaded in Saudi Arabia for apostasy and banditry and stoned to death in Afghanistan for adultery,<sup>102</sup> the number of countries actively using executions has fallen dramatically in recent years.<sup>103</sup> Of particular interest to jurists in the U.S., where the unusualness of a punishment is a standard part of the Eighth Amend-

ment calculus, the number of American death sentences and executions has substantially fallen off in the last two decades.<sup>104</sup> At this point, only a small fraction of the world's countries actively use executions,<sup>105</sup> with just *two percent* of U.S. counties accounting for a *majority* of all American executions.<sup>106</sup> China — the country known for its repression of the pro-democracy protests in Tiananmen Square — still executes thousands of offenders each year.<sup>107</sup> But while Amnesty International doesn't even try to count Chinese executions as they are considered a state secret, that organization's statistics show that the death penalty, broadly speaking, is on the decline, with retentionist states increasingly on the defensive in attempting to justify their use of executions.<sup>108</sup>

Over the last several decades, jurists worldwide have evaluated the constitutionality of capital punishment. In 1963, U.S. Supreme Court Justice Arthur Goldberg — as part of his efforts — circulated a lengthy memorandum to his colleagues in an attempt to convince them that the death penalty constituted a cruel and unusual punishment.<sup>109</sup> More recently, the Lithuanian Constitutional Court — as just another example — ruled in 1998 that the death penalty provisions of that country's criminal code were unconstitutional.<sup>110</sup> The Lithuanian parliament, by an overwhelming majority, thereafter voted to abolish the death penalty, replacing it with life imprisonment. "The parliament," as London-based Amnesty International later reported of Lithuania, "commuted to life imprisonment the sentences of the nine prisoners then under sentence of death."<sup>111</sup> While the Constitutional Court of South Africa declared capital punishment unconstitutional *more than twenty years ago*,<sup>112</sup> the Connecticut Supreme Court did so in 2015 under the auspices of that state's constitution. The declaration of the punishment's unconstitutionality in that case, *State v. Santiago*, came after Connecticut's legislature voted to abolish the death penalty on a prospective-only basis. The state supreme court's split, four-to-three decision — its act of judicial review — was necessitated because the state legislature's abolition measure was not retroactive, leaving eleven men lingering on Connecticut's death row even after the passage of the state legislature's abolition bill, one signed into law by Governor Dan Malloy.<sup>113</sup>

The future is impossible to predict, but one thing is clear: the past has never alone dictated how the law will evolve. In the post-*Furman* era, the U.S. Supreme Court has taken a timid, mostly hands off approach to capital cases, tinkering around the edges but not thoroughly examining the central questions pertaining to the death penalty: Is it so cruel — and is it so freakishly imposed — that it should no longer be allowed? And does it qualify as a form a torture? Applying its long-standing "evolving standards of decency" test to evaluate Cruel and Unusual Punishments Clause claims,<sup>114</sup> the U.S. Supreme Court has upheld the death penalty's constitutionality (except for certain classes of offenders for which it has found the death penalty to be disproportionate and unjust), choosing to focus narrowly on whether there is an unacceptable risk of *physical* pain when the inmate is actually strapped to a gurney and put to death.<sup>115</sup> In *Baze v. Rees* and *Glossip v. Gross*, the Supreme Court approved Kentucky and Oklahoma's lethal injection protocols, though those 2008 and 2015 decisions drew vigorous dissents. *Glossip*, decided just months before Justice Antonin Scalia's death, was a five-to-four decision, with Justice Scalia siding with the majority in that case.<sup>116</sup> And the Court's rulings came in spite of serious and continuing concerns over the death penalty's arbitrary and discriminatory application and a spate of exonerations and miscarriages of justice. In 2009, the prestigious American Law Institute actually withdrew the death penalty provisions of the Model Penal Code "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment."<sup>117</sup>



The U.S. Supreme Court's rulings in *Baze* and *Glossip* disregarded the ever-present risk of physically painful deaths for inmates.<sup>118</sup> For instance, by all accounts, the State of Oklahoma's 2014 execution of convicted killer Clayton Lockett inflicted excruciating physical pain. Lockett died 43 minutes after the first drug, midazolam, was administered at 6:23 p.m. on April 29, 2014. He was initially declared unconscious, but roughly three minutes later, witnesses said that he began to groan, gasp, and writhe on the gurney. Blood squirted onto his clothing after a doctor inserted an intravenous line, or IV, in his groin area that hit one of Lockett's arteries. Lockett died at 7:06 p.m., with Oklahoma officials — disturbed by what had happened — temporarily putting executions on hold after Lockett's horrific death. "What happened in Oklahoma is deeply troubling," President Barack Obama weighed in on the botched execution. "It looked like torture," one witness later bluntly told reporters.<sup>119</sup> In upholding state lethal injection protocols, in the case of *Glossip* by the narrowest of margins, the U.S. Supreme Court chose to follow in the footsteps of now antiquated cases, *from the late nineteenth century*, holding that death by firing squad and electrocution are not cruel and unusual punishments.<sup>120</sup>

*The Death Penalty as Torture* argues that, in the twenty-first century, death sentences and executions should be legally classified as forms of torture — and that the law, evolving as it always does, should move toward a universal, *jus cogens* norm universally prohibiting the death penalty's use. The Vienna Convention on the Law of Treaties describes *jus cogens* — the Latin term meaning "compelling law" — as "a peremptory norm of general international law,"<sup>121</sup> with prohibitions on slavery,<sup>122</sup> maritime piracy<sup>123</sup> and torture,<sup>124</sup> among other practices,<sup>125</sup> already considered existing *jus cogens* norms.<sup>126</sup> The Vienna Convention, signed or ratified by more than 100 countries,<sup>127</sup> itself contemplates the emergence of new peremptory norms of general international law,<sup>128</sup> and death sentences and executions should be added to that list under the *torture* rubric. While legal battles in the past have been fought over whether capital punishment is a *cruel* practice, this book contends that death sentences and executions should be classified as *torturous*. The prohibition against torture in the Convention Against Torture is absolute and has achieved a *jus cogens* status, meaning that — at this point in time — no country can derogate from that prohibition for any reason.<sup>129</sup>

International law already prohibits extrajudicial, summary and arbitrary executions,<sup>130</sup> and death threats<sup>131</sup> and "simulated" executions<sup>132</sup> are barred, too, classed as serious human rights abuses that can amount to torture.<sup>133</sup> If *lynchings*, *death threats* and *mock executions* are, quite appropriately, considered to be acts of torture,<sup>134</sup> then *death sentences* and *actual executions* should qualify as well. Because *capital charges* — or *threats* to bring capital charges — are also powerful threats to kill, they too should be classified as acts of torture in a world in which there is a *jus cogens* norm prohibiting the death penalty's use. Just as lynchings are no longer tolerated by civilized societies, state-sanctioned executions — long associated with racial prejudice, the suppression of political dissent and religious minorities, and the deprivation of human dignity — should no longer be tolerated either. Stephen Bright — the president of the Southern Center for Human Rights, and an experienced capital litigator<sup>135</sup> — has aptly called the death penalty "a direct descendant of lynching and other forms of racial violence and racial oppression in America" and "one of America's most prominent vestiges of slavery."<sup>136</sup>

The global decline of the death penalty is accelerating, and with that evolution, it is time for lawmakers and jurists — and the civilized countries of the world — to unite and view death sentences and executions for what they are: acts of torture. In 2007, the United Nations General Assembly first adopted a resolution calling for a moratorium on the

death penalty — a resolution supported by 104 nations and later reaffirmed by even more countries.<sup>137</sup> When a similar resolution passed in 2012, the number of countries supporting it had grown to 110, and in 2014 — the fifth time the death penalty moratorium resolution came before the U.N. General Assembly, 117 nations voted in favor, with only 38 countries voting against it and only 34 nations abstaining.<sup>138</sup> With the U.N. now actively pushing for the complete abolition of capital punishment, a serious examination of the death penalty's relationship to the law of torture is warranted, if not long overdue. "The death penalty has no place in the 21st century," U.N. Secretary-General Ban Ki-moon has declared without equivocation, calling upon "[l]eaders across the globe" to end — in his words — "this cruel and inhumane practice."<sup>139</sup> Already, Rome's Coliseum is lit up every time a country or state abolishes the death penalty, with such celebrations becoming regular affairs as more and more sovereign states have turned away from the use of executions.<sup>140</sup> The question this book seeks to answer: are executions the *ultimate* form of cruelty, *acts of torture*?

The use of torture was common in the Dark Ages, and it is still closely associated with the Inquisition and the medieval period. *The Death Penalty as Torture* first describes that history along with the death penalty's own sordid past. The book then recounts the centuries-old efforts to end such practices — efforts that began in earnest during the Enlightenment and that bore some initial fruit even in the eighteenth century as sovereigns and states began to outlaw or curtail their use.<sup>141</sup> The book then lays out the details of the death penalty's administration, the state's deliberate, calculated and persistent efforts to take a human life. It describes the arc of capital cases, from charging decisions to trials and appeals to death warrants and post-conviction and clemency proceedings. And it discusses how capital defendants and death row inmates — in the U.S. and elsewhere — are regularly treated before, at, and after their sentencing proceedings, all the way down to their last meals. Whereas those convicted of capital crimes in the U.S. are sentenced to death in open court, the process can be far more secretive in totalitarian or authoritarian regimes.<sup>142</sup> While only a handful of countries still treat the death penalty's use as a state secret, repressive regimes — run by Chinese Communist Party officials or North Korean dictators — still regularly execute people as a form of state control.<sup>143</sup>

As noted earlier, the "death row phenomenon" — of increasing prominence in international human rights discourse — is associated with *prolonged stays* on death row and relates to the mental decline of (and harmful psychological and physical effects on) death row prisoners.<sup>144</sup> Although a few U.S. Supreme Court Justices have futilely called upon their colleagues to take up the question of whether prolonged stays on death row constitute "cruel and unusual punishments,"<sup>145</sup> that subject has been explored extensively elsewhere, including in thoughtful dissents by, or joined by, Justices Stephen Breyer, Ruth Bader Ginsburg, and John Paul Stevens.<sup>146</sup> In his 1996 book, *The Death Penalty as Cruel Treatment and Torture*, law professor William Schabas devoted a whole chapter to the death row phenomenon, putting it this way: "The length of detention on death row is one of its more egregious and contested features. As Albert Camus wrote, a man is destroyed by the wait for death long before he really dies."<sup>147</sup>

Instead of rehashing that line of argument, important as it is, this book argues that death sentences and executions are ripe for classification as *acts of torture* for two reasons no matter how death row inmates are treated within prisons, and no matter how long they reside on death row, be it days, months, years or decades. First, death sentences — whether threatened, imposed, or actually carried out — are *torturous threats of death* akin to the kind of threats to kill made by *non-state* actors that are already classified as

acts of torture.<sup>148</sup> Second, executions are *more severe* than many *non-lethal* acts already classified as illicit acts of torture. Harsh conditions of confinement for death row inmates certainly amplify the death penalty's torturous nature, as do long stays on death row. But capital punishment is torturous notwithstanding what particular conditions exist in specific locales or how much time an inmate actually spends on death row.

After describing how death sentences are sought, imposed and carried out, *The Death Penalty as Torture* describes the evolution of the law's treatment of cruelty and torture. The book sets forth current definitions and understandings of torture, both in law and in common parlance, before describing how — and why — various non-lethal acts are already properly classified as unlawful acts of torture. While *torture* is a concept long associated with the intentional infliction of severe pain or suffering, whether mental or physical in nature,<sup>149</sup> the Convention Against Torture<sup>150</sup> and similar laws and regulations<sup>151</sup> — as noted before — generically exclude “lawful sanctions” from the word's definition. In some instances, the death penalty itself is explicitly excluded from the meaning of torture and described on paper in the Code of Federal Regulations as a “lawful sanction.” Two U.S. federal regulations — 8 C.F.R. § 208.18(a)(3) and 8 C.F.R. § 1208.18(a)(3), to use the precise legal citations — thus read: “Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, *including the death penalty . . .*”<sup>152</sup> In exposing the anomaly of capital punishment, *The Death Penalty as Torture* shows how American and foreign courts handle *non-lethal* acts and assorted *corporal* punishments, both of which jurists routinely describe as either cruel or torturous in nature because of the pain or suffering they inflict.<sup>153</sup> The book thus exposes the law's inconsistency — indeed, the law's Kafkaesque and unprincipled hypocrisy — in treating acts *short of death* as torture while exempting death sentences and executions from that legal designation.

The last portion of the book then argues that, in light of the death penalty's inherent characteristics, the law should rapidly move toward the adoption of a *jus cogens* norm prohibiting death sentences and executions.<sup>154</sup> The imposition of death sentences — the judicial acts leading to executions — bear a striking resemblance to other non-lethal acts (*i.e.*, threats to kill and mock executions)<sup>155</sup> already classified by courts and government officials as torturous in nature.<sup>156</sup> And because they take (and do not just injure) life, executions themselves would have to be logically placed at the top of the torture-cruelty scale, what might be thought of as the torture-cruelty continuum. In fact, U.N. officials and courts around the world now categorize countless acts far less severe than death as unlawful acts of torture.<sup>157</sup> “The U.N. Special Rapporteur on Torture,” one scholar notes, “has listed several acts determined to be torture, including beating; extraction of nails or teeth; burns; electric shocks; suspension; suffocation; exposure to excessive light or noise; sexual aggression; prolonged denial of rest or sleep, food, sufficient hygiene, or medical assistance; total isolation and sensory deprivation; and simulated executions.”<sup>158</sup> It is simply bizarre, incongruous and Orwellian for the law to allow death sentences and executions when *non-lethal* acts such as pulling out one's fingernails are routinely classified as torture.<sup>159</sup> With a worldwide movement calling for the death penalty's total abolition underway,<sup>160</sup> the book shows how international law experts, jurists and ordinary citizens alike are beginning to describe capital punishment using the rubric of torture. As death sentences and executions become increasingly rare, it is only a matter of time before they are universally found to violate fundamental human rights and international law.



*The Death Penalty as Torture* asserts that due to their immutable characteristics, both death sentences and executions deserve to be stigmatized as acts of *torture* — the word used to characterize the worst kind of cruelty and inhuman brutality.<sup>161</sup> Right now, the death penalty is outlawed in some places but simply regulated or restricted in others, a patchwork treatment that runs afoul of the universality of human rights. The book also explains why the already embedded “lawful sanctions” carve-outs to the definitions of *torture* should not inhibit a future declaration that capital punishment violates the existing *jus cogens* norm against torture from which no country may derogate.<sup>162</sup> Just as the interpretation of “cruel and unusual punishments” in American law has evolved over time, and will, inevitably, continue to do so,<sup>163</sup> what qualifies as *torture* will naturally change from one generation to the next.<sup>164</sup> In the twenty-first century, capital punishment should no longer be permitted and should be seen as an egregious violation of basic human rights, including the right to life, the right to human dignity, the right to be free from discrimination, and the right not to be tortured or cruelly treated.<sup>165</sup> The book concludes that, in the future, capital charges, death sentences and executions should be universally forbidden under the law, and that the existing *jus cogens* norm against torture should be read to prohibit the penalty of death.

## Notes

1. Brent E. Newton, *Justice Kennedy, The Purposes of Capital Punishment, and the Future of Lackey Claims*, 62 *Buff. L. Rev.* 979, 982–83 (2014) (“By 1995, several foreign courts had recognized, as a basis for prohibiting capital punishment, that lengthy stays on death row were cruel and inhumane. Particularly notable was the British Privy Council’s 1994 decision in *Pratt & Morgan v. Attorney Gen. for Jamaica*, in which the highest court in Britain observed that lengthy delays in carrying out death sentences would never have been tolerated at any point in the past in England when capital punishment was practiced.”) (citations omitted).

2. Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 *Geo. L.J.* 487, 517 n.133 (2005) (noting that the Supreme Court of Nigeria upheld the death penalty’s constitutionality in *Kalu v. State*, [1988] 12 S.C.N.J. 1 (Nig.), but that the South African and Hungarian Constitutional Courts struck down the death penalty as a violation of the right to life); *ibid.* (noting that courts in Tanzania and India have also upheld the death penalty’s constitutionality) (*citing* *Mbushuu v. Republic*, [1995] T.L.R. 97 (Tanz.); *Bachan Singh v. Punjab*, [1980] 1 S.C.R. 654 (India)); *The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 *Harv. L. Rev.* 2049, 2057 (2001) (“Although the South African court found that the death penalty did not violate public international law per se, it noted that the United Nations Committee on Human Rights, the Hungarian Constitutional Court, and three justices of the Canadian Supreme Court had declared the death sentence to be a cruel and unusual punishment.”) (*citing* *State v. Makwanyane*, 1995 (3) SALR 391, 423, 432, 451 (CC) (S. Afr.); *Kindler v. Canada*, [1991] 2 S.C.R. 779, 851, 856 (Can.)); Vlad F. Perju, *The Puzzling Parameters of the Foreign Law Debate*, 2007 *Utah L. Rev.* 167, 183 & n.94 (2007) (“In the world today there is an emerging consensus against the death penalty. Foreign courts have addressed the issue of the compatibility of death penalty with the values of a modern democratic state in a number of occasions and have produced elaborate decisions, oftentimes by engaging the arguments of their American counterparts.”) (*citing* *State v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.); Decision No. 23/1990 (X. 31) Alkotmánybíróság [AB] [Constitutional Court], Oct.24, 1990, *Magyar Közlöny* [MK.] 1990/107 (Hung.), *translated in* 1 *E. Eur. Case Rep. Const. L.* 177 (1994)).

3. This is a common size of a death row cell in the United States. Roger Hood & Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 5th ed. 2015), p. 208; Marie Mulvey-Roberts, ed., *Writing for Their Lives: Death Row USA* (Urbana: University of Illinois Press, 2007), p. 208.

4. *Compare* In re J-E-, 23 I. & N. Dec. 291, 2002 WL 4881156 (BIA 2002) (“torture covers intentional *governmental acts*, not negligent acts or acts by private individuals not acting on behalf of the government”) (emphasis added) *with* Gregg v. Georgia, 428 U.S. 153, 202 (1976) (referencing “a horrifying *torture-murder*” committed by a criminal) (emphasis added); Godfrey v. Georgia, 446 U.S. 420, 422 (1980) (“Under Georgia law, a person convicted of murder may be sentenced to death if it is found beyond a reasonable doubt that the offense ‘was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.’”) (citing Ga. Code § 27–2534.1(b)(7) (1978)) and Rose v. Clark, 478 U.S. 570, 582 n.10 (1986) (referencing “an execution-style killing or a violent torture-murder”).

5. *E.g.*, Rukmini Callimachi, “The Horror Before the Beheadings: ISIS Hostages Endured Torture and Dashed Hopes, Freed Cellmates Say,” *New York Times*, Oct. 25, 2014; *see also* Adam Withnall, “ISIS Executes Palmyra Antiquities Chief and Hangs Him from Ruins He Spent a Lifetime Restoring,” *Independent*, Aug. 19, 2015; Jim Miklaszewski, Andrea Mitchell & Alastair Jamieson, “Jordon F16s Strike ISIS Targets, Honor Dead Pilot’s Family,” NBC News, Feb. 5, 2015.

6. *E.g.*, *People v. Odom*, 244 Cal. App.4<sup>th</sup> 237, 240–45 (Cal. Ct. App. 2016); *Thompson v. State*, 389 So.2d 197, 198 (1980).

7. Ronald M. Holmes & Stephen T. Holmes, *Contemporary Perspectives on Serial Murder* (Thousand Oaks, CA: Sage Publications, 1998), p. 149.

8. Amanda C. Pustilnik, *Pain as Fact and Heuristic: How Pain Neuroimaging Illuminates Moral Dimensions of Law*, 97 Cornell L. Rev. 801, 805 (2012) (“Torture-murder, a capital offense, is defined as a death that results from or in the course of the defendant’s infliction of ‘severe pain’ or ‘excess’ pain upon the victim, regardless of the defendant’s intent to kill.”). An entire A.L.R. annotation is devoted to this topic. John C. Williams, “What Constitutes Murder by Torture,” 83 A.L.R.3d 1222 (1978), §2[a] (“Murder perpetrated by means of torture is one of the most brutal kinds of homicide which is punishable under the criminal laws. The court decisions involving murder by torture reflect that in almost all cases the crime exists as a separate enumerated type of first-degree murder.”).

9. *Hussein v. Attorney General*, 273 Fed. Appx. 147, 155 (3d Cir. 2008) (citing In re J-E-, 23 I. & N. Dec. 291, 299 (BIA 2002); *Silva-Rengifo v. U.S. Attorney General*, 473 F.3d 58, 69 (3d Cir. 2007)); *see also* Dana Carver Boehm, *Waterboarding, Counter-Resistance, and the Law of Torture: Articulating the Legal Underpinnings of U.S. Interrogation Policy*, 41 U. Tol. L. Rev. 1, 39 (2009) (“To qualify as torture, interrogation intended to cause severe physical or mental harm must be conducted ‘under the color of law.’”).

10. *E.g.*, Amy Maguire, “Time to Halt Death Penalty,” *Newcastle Herald*, May 1, 2015, <http://www.theherald.com.au/story/3050303/opinion-time-to-halt-death-penalty/> (“[T]he death penalty is torturous. Not only does capital punishment inflict pain and suffering at the time of execution, but it imposes years of mental anguish on death row inmates. Capital punishment also inflicts terrible suffering on the families and loved ones of those sentenced to death.”).

11. *Habtemicael v. Ashcroft*, 370 F.3d 774, 779 (8th Cir. 2004).

12. Bernard Schwartz, *The Unpublished Opinions of the Warren Court* (Oxford: Oxford University Press, 1985), p. 395.

13. *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting; joined by Douglas & Brennan, JJ.).

14. *Furman v. Georgia*, 408 U.S. 238, 260, 263, 270–73, 281, 286 (1972) (Brennan, J., concurring).

15. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

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

17. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); Richard C. Dieter, “Struck by Lightning: The Continuing Arbitrariness of the Death Penalty Thirty-Five Years After Its Re-instatement in 1976,” Death Penalty Information Center (July 2011).

18. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

19. *Baze*, 553 U.S. at 35; *Glossip*, 135 S. Ct. at 2726.

20. *See generally* Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 Geo. L.J. 1331 (2014); *see also* Robin Miller, *Substantive Challenges to Propriety of Execution by Lethal Injection in State*

*Capital Proceedings*, 21 A.L.R.6th 1 (2007) (collecting and analyzing federal and state cases discussing substantive challenges to the propriety of execution by lethal injection); Adam J. Kolber, *The Experiential Future of the Law*, 60 Emory L.J. 585, 641 (2011) (“Debate continues to swirl around lethal injection as death row inmates argue in court that lethal injection protocols risk causing them excruciating pain.”).

21. “Causes of Wrongful Convictions,” Death Penalty Information Center, <http://www.deathpenaltyinfo.org/causes-wrongful-convictions>; Ben Crair, “2014 Is Already the Worst Year in the History of Lethal Injection: Another Day, Another Problematic Execution,” *New Republic*, July 24, 2014, <http://www.newrepublic.com/article/118833/2014-botched-executions-worst-year-lethal-injection-history>.

22. See *Glossip*, 135 S. Ct. at 2755 (2015) (Breyer, J., dissenting; joined by Justice Ginsburg).

23. Luke Walker, “EU Bans Export of Lethal Injection Drugs to US,” *The Fix*, Dec. 13, 2011, <https://www.thefix.com/content/eu-ban-lethal-injection-drugs-9323>.

24. E.g., “Lethal Injection Drug Shortage,” The Council of State Governments, E-Newsletter, Nov./Dec. 2015, [http://www.csg.org/pubs/capitolideas/enews/issue65\\_4.aspx](http://www.csg.org/pubs/capitolideas/enews/issue65_4.aspx) (“A nationwide shortage of sodium thiopental, an anesthetic that is part of the three-drug cocktail used in lethal injections, has thrown capital punishment in the United States into disarray, delaying executions and forcing the change of execution protocols in several states.”).

25. *Baze*, 553 U.S. at 35; *Glossip*, 135 S. Ct. at 2726. Certain states’ death penalty schemes have, from time to time, been declared unconstitutional or unlawful as a matter of state law. For example, New York’s highest court declared that state’s death penalty statute unconstitutional in 2004. *People v. LaValle*, 3 N.Y.3d 88, 131 (2004). Before Maryland’s legislature voted to abolish capital punishment, an administrative law case in Maryland also determined that Maryland’s legal injection procedure was not properly adopted and thus had to be enjoined. *Evans v. State*, 914 A.2d 25, 80 (Md. Ct. App. 2006); Arnold Rochvarg, *How Administrative Law Halted the Death Penalty in Maryland*, 37 U. Balt. L.F. 119 (2007).

26. Austin Sarat & Jürgen Martschukat, eds., *Is the Death Penalty Dying? European and American Perspectives* (Cambridge: Cambridge University Press, 2011), pp. 8–9.

27. Wesley Kendall & Joseph M. Siracusa, *The Death Penalty and U.S. Diplomacy: How Foreign Nations and International Organizations Influence U.S. Policy* (Lanham, MD: Rowman & Littlefield, 2013), p. 169; Melissa A. Waters, *The Future of Transnational Judicial Dialogue*, 104 Am. Soc’y Int’l L. Proc. 465, 465–66 (Mar. 24–27, 2010).

28. See Richard P. Shafter, *Construction and Application of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment*, 184 A.L.R. Fed. 385, § 4.5 (2003) (“For purposes of claim seeking relief under Convention Against Torture (CAT), torture covers intentional governmental acts, not negligent acts or acts by private individuals not acting on behalf of the government.”) (*citing* 8 C.F.R. § 1208.18(a)(2); *Valdiviezo-Galdamez v. Attorney General of U.S.*, 663 F.3d 582 (3d Cir. 2011)).

29. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. G.A. Res. 3452 (Dec. 9, 1975), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975).

30. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter “Convention Against Torture” or “CAT”], *opened for signature* Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85, *entered into force* June 26, 1987, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984); Guy B. Adams & Danny L. Balfour, *Unmasking Administrative Evil* (Armonk, NY: M.E. Sharpe, 3d ed. 2009), p. 138 (“The United Nations Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment was instituted in 1984, signed by the United States in 1988, and ratified with reservations by the U.S. Senate in 1994.”).

31. Case of *Al-Adsani v. The United Kingdom* (Application no. 35763/97), Eur. Ct. Hum. Rts., Judgment of Grand Chamber (Nov. 21, 2001) ¶ 59.

32. Katharine E. Tate, *Torture: Does the Convention Against Torture Work to Actually Prevent Torture in Practice by States Party to the Convention?*, 21 Willamette J. Int’l L. & Disp. Resol. 194, 209 (2013) (“The United States ratified the CAT on October 21, 1994, and the Convention entered

into force in the United States on November 20, 1994.”); compare Penny M. Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 Ala. L. Rev. 97, 123 (2011) (“The United States also enacted implementing legislation for the Convention Against Torture (CAT), but in a piecemeal package that has watered down the treaty. Like other human rights treaties ratified by the United States, the CAT was ratified in 1994 with multiple RUDs, including a non-self-executing reservation covering Articles 1–16. Those RUDs nullify the treaty’s obligations and language.”). In submitting the Convention Against Torture, President Ronald Reagan proposed a package of reservations, understandings, and declarations (“RUDs”). Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399, 415 n.85 (2000). “The Reagan Administration’s proposed RUDs to the Torture Convention were criticized by some senators and human rights groups as being too restrictive. In light of this criticism, as well as a special request from the Senate Foreign Relations Committee, the Bush Administration submitted a revised and less restrictive set of RUDs.” Ibid., p. 416 n.87 (citing Senate Comm. on Foreign Relations, Report on the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. Exec. Rep. No. 101-30, at 4 (2d Sess. 1990); S. Exec. Rep. No. 101-30 app. A (2d Sess. 1990) (letter from Janet G. Mullins, Assistant Secretary, Legislative Affairs, Department of State, to Senator Claiborne Pell, transmitting Bush Administration Reservations, Understandings and Declarations)). The RUDs attached to the Convention Against Torture by the United States have been the subject of much controversy. See, e.g., David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 Geo. L.J. 823 (2012).

33. 8 C.F.R. § 1208.18(a)(2) (description in U.S. regulations on “Implementation of the Convention Against Torture”).

34. *Filarsky v. Delia*, 132 S. Ct. 1657, 1661 (2012) (“Anyone whose conduct is ‘fairly attributable to the state’ can be sued as a state actor under § 1983.”). Compare *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 n.6 (1982) (“The Court has concluded that the acts of a private party are fairly attributable to the state on certain occasions when the private party acted in concert with state actors.”).

35. As a result of regional human rights treaties and international law covenants, governments have an affirmative obligation to punish and prevent acts of torture. See, e.g., *Sadiq Elmi v. Australia*, Comm. No. 120/1998, U.N. Comm. Against Torture, 22d Sess., ¶ 5.2, U.N. Doc. CAT/C/22/D/120/1998 (May 25, 1999) (a “[s]tate would normally be expected to take action, in accordance with its criminal law, against private persons having committed acts of torture against other persons”).

36. E.g., 8 C.F.R. § 208.18(a)(3).

37. CAT, Art. 2(1) (“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”); CAT, Art. 4(1) (“Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.”); see also Rebecca J. Cook, *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994), p. 141 (“The UN Convention is more specific about state responsibility. Compromising between those who wanted to include privately inflicted torture and those who felt that domestic law enforcement should take care of those cases, the drafters of the Convention included private acts of torture and ill-treatment when carried out with the ‘consent or acquiescence of a public official.’”); Rita Abrahamsen & Anna Leander, eds., *Routledge Handbook of Private Security Studies* (New York: Routledge, 2016), p. 232 (“states have a positive obligation to prevent torture and ill-treatment by private officials and privately-run prisons, and detention centres must be monitored by the state to ensure compliance with the CAT”).

38. Michael P. Scharf, *Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?*, 65 Wash. & Lee L. Rev. 129, 143 (2008) (“The U.N. Human Rights Committee has found similar acts or conduct to constitute torture, including ‘electric shocks, and mock executions, forcing prisoners to remain standing for extremely long periods of time, and holding persons incommunicado for more than three months while keeping that person blindfolded with hands tied together, resulting in limb paralysis, leg injuries, substantial weight loss, and eye infection.’”).

39. *Kilburn v. Islamic Republic of Iran*, 699 F. Supp.2d 136, 152 (D. D.C. 2010) (“mock executions” qualify as torture); Mark Benjamin, *Will Psychologists Still Abet Torture?*, Salon, Aug. 21, 2007,

<http://www.salon.com/news/feature/2007/08/21/psychologists/> (discussing the American Psychological Association's resolution condemning certain interrogation practices, including mock executions, as torture), cited in Michael W. Lewis, *A Dark Descent into Reality: Making the Case for an Objective Definition of Torture*, 67 Wash. & Lee L. Rev. 77, 124 n.226 (2010).

40. "Mock Execution," Project Gutenberg, [http://www.self.gutenberg.org/articles/mock\\_execution](http://www.self.gutenberg.org/articles/mock_execution).

41. Universal Declaration of Human Rights, Art. 5; International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter "ICCPR"], Art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); CAT, Art. 2; see also Johan D. van der Vyver, *Torture as a Crime under International Law*, 67 Alb. L. Rev. 427, 430 (2003) ("Almost all of the major international instruments for the promotion and protection of human rights and those that codified international humanitarian law condemn torture."); William Paul Simmons, *Liability of Secondary Actors Under the Alien Tort Statute: Aiding and Abetting and Acquiescence to Torture in the Context of the Femicides of Ciudad Juárez*, 10 Yale Hum. Rts. & Dev. L.J. 88, 123 (2007) (noting that the Convention Against Torture's "definition of torture has been labeled 'customary international law'").

42. 18 U.S.C. § 2340A; see also Katharine E. Tate, *Torture: Does the Convention Against Torture Work to Actually Prevent Torture in Practice by States Party to the Convention?*, 21 Willamette J. Int'l L. & Disp. Resol. 194, 209–10 (2013) ("There are several areas in the United States Code where torture is prohibited or defined, some of which were enacted before the United States became a party to the CAT."); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Nov. 27, 1987; entered into force, 1989), European Treaty Series—No. 126. Article 1 of the European Convention established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. See also Joachim Herrmann, *Implementing the Prohibition of Torture on Three Levels: The United Nations, the Council of Europe, and Germany*, 31 Hast. Int'l & Comp. L. Rev. 437, 445 (2008) ("To strengthen the protection against torture, the European Convention established an Anti-Torture Committee with powers similar to the ones Costa Rica had in 1980 proposed to the United Nations. . . . [D]elegations of the European Anti-Torture Committee carry out periodic visits to member states of the Council of Europe.").

43. African [Banjul] Charter on Human and Peoples' Rights (adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986), Art. 5; American Convention on Human Rights (adopted Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 1, OEA/Ser. L./V/II.23 doc. Rev. 2, entered into force July 18, 1978), Art. 5(2); European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S., entered into force Sept. 3, 1953, Art. 3. The Arab Charter on Human Rights, entered into force in 2008, also provides: "No one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman punishment." League of Arab States, Arab Charter on Human Rights, May 22, 2004, Art. 8(1), reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force Mar. 15, 2008, available at University of Minnesota, Human Rights Library, <http://www1.umn.edu/humanrts/instree/loas2005.html>.

44. Dr. U C Jha, *International Humanitarian Law: The Laws of War* (New Delhi, India: Vij Multimedia, 2011), pp. 107–8 ("Torturing captured soldiers or civilians to obtain information, to punish, or to humiliate them is absolutely prohibited. It is a war crime in both international and non-international armed conflicts. States are required to bring offenders to justice. The prohibition applies to all levels of conflict: international, non-international, UN missions and situations of internal violence and disturbances (internal security operations). The argument of military necessity can never be used to justify torture.").

45. Title 22, Part 95 ("Implementation of Torture Convention in Extradition Cases"). Section 95.2(b) of Title 22 of the Code of Federal Regulations provides: "Pursuant to sections 3184 and 3186 of Title 18 of the United States Criminal Code, the Secretary [of State] is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country by means of extradition. In order to implement the obligation assumed by the United States pursuant to Article 3 of the Convention [Against Torture], the Department considers the question of whether a person facing extradition from the U.S. 'is more likely than not' to be tortured in the State requesting extradition when appropriate in making this determination."); see also 8 C.F.R. § 1208.18(a) ("The



definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.”).

46. *Cole v. Holder*, 659 F.3d 762, 768 (9th Cir. 2011) (“the Honduran constitution prohibits torture”); *Kamara v. Attorney General of the United States*, 420 F.3d 202, 218 (3d Cir. 2005) (“the Sierra Leone Constitution prohibits torture”); *Lanza v. Ashcroft*, 389 F.3d 917, 923 (9th Cir. 2004) (noting that Argentina’s constitution prohibits torture); *Zoarab v. Mukasey*, 524 F.3d 777, 778 (6th Cir. 2008) (“[t]he U.A.E.’s constitution prohibits torture”); *Constitución De La Republica De Nicaragua* (Mar. 22, 1939), art. 76 (“Every act of cruelty or torture against convicts is prohibited.”); Adam Chilton & Mila Versteeg, “The Failure of Constitutional Torture Prohibitions,” *Washington Post*, Apr. 25, 2015, <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/04/25/the-failure-of-constitutional-torture-prohibitions/> (“Today, about 84 percent of the world’s constitutions prohibit torture.”).

47. Constitution of the State of Louisiana of 1974, § 20 (“No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment.”); *State v. Schofield*, No. 06-0301, 736 N.W.2d 267, 2007 WL 1689673 \*6 (Iowa Ct. App., June 13, 2007) (“Both the United States and Iowa constitutions prohibit punishments that inflict torture . . .”).

48. *E.g.*, West’s Ann. Cal. Penal Code § 206 (added by Initiative Measure (Prop. 115), approved June 5, 1990, eff. June 6, 1990).

49. *Baze*, 553 U.S. at 48 (plurality opinion) (“the *Wilkerson* Court simply noted that ‘it is safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden’ by the Eighth Amendment”) (citing *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878)); Daniel R. Coquillette, *Ideology and Incorporation III: Reason Regulated — the Post-Restoration English Civilians 1653–1735*, 67 B.U. L. Rev. 289, 310 n.84 (1987) (“Lord Denning claims that the ‘last instance of torture in England’ was that of Edmund Peacham in 1614 in the presence of Francis Bacon, then Attorney General. Torture was not ultimately prohibited in England until 1707, and was probably practiced — despite Lord Denning’s assertions — by order of the Council until about 1640.”) (citations omitted).

50. *Case of Al-Adsani v. The United Kingdom* (2001) (Judgment of Nov. 21, 2001), ¶ 59 (Grand Chamber decision).

51. *Prosecutor v. Furundzija* (10 Dec. 1998, Case No. IT-95-17/I-T, (1999) 38 International Legal Materials 317), ¶ 144.

52. John D. Bessler, *Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement*, 4 Nw. J. L. & Soc. Pol’y 195 (2009) (containing citations in footnote 107).

53. U.S. Const., amend. IX; see also Akhil Reed Amar, *America’s Unwritten Constitution: The Precedents and Principles We Live By* (New York: Basic Books, 2012), p. 136 (“Some scholars have suggested that a new unenumerated right should not be recognized unless it is endorsed by three-fourths of the states — the high bar set by Article V for constitutional amendments. But in recognizing new rights, judges are not *amending* the document. Rather, they are *applying* it, construing directives in the Ninth and Fourteenth Amendments that call for protection of fundamental but nonspecified rights — directives that *already* cleared Article V hurdles when these amendments were duly enacted.”) (italics in original).

54. Sarah Frazier, *Liberty of Expression in Ireland and the Need for a Constitutional Law of Defamation*, 32 Vand. J. Transnat’l L. 391, 422 n.216 (1999) (“Finlay notes that since *Ryan*, several unenumerated personal rights have been acknowledged, including freedom from torture”); Ewa Bagińska, ed., *Damages for Violations of Human Rights: A Comparative Study of Domestic Legal Systems* (Cham, Switzerland: Springer, 2016), p. 178 (noting that the Irish constitution is the source of “certain latent or unenumerated rights arising out of the wording of Article 40.3 which states,” among other things, “that ‘[t]he State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen’”); John S. Gibson, *Dictionary of International Human Rights Law* (Lanham, MD: The Scarecrow Press, 1996), p. 130 (“The widespread use of ‘cruel and unusual punishment’ and torture by Nazi Germany prompted President Franklin D. Roosevelt to add another human freedom to his list of ‘Four Freedoms’ of January 1941.

He proclaimed on June 20, 1941, that ‘freedom from torture is a natural right.’”); John Witte, Jr. & M. Christian Green, eds., *Religion and Human Rights: An Introduction* (Oxford: Oxford University Press, 2012), p. 45 (“[M]y right not to be tortured for the pleasure of the torturer is a natural right. I have that right whether or not it has been conferred on me by treaty or legislation”); Edward Peters, *Torture* (Philadelphia: University of Pennsylvania Press, 1999), p. 87 (“Seventeenth- and eighteenth-century theories of natural law focused often on torture as violating their most essential tenets, that of the natural dignity of humans and that of the individual natural right of humans to decide upon the means of preservation of their dignity.”); see also Duncan Ivison, *Rights* (New York: Routledge, 2008), p. 39 (“A natural right is a right that all persons have *qua* persons, and independent of any special relationships or voluntary actions. The idea is that natural rights refer to certain moral relations that hold independently of the existence of any legal system, or perhaps any social or political system at all. . . . A right not to be tortured seems to be a basic right in this sense . . .”) (citation omitted); Mario I. Aguilar, *Religion, Torture and the Liberation of God* (New York: Routledge, 2015), pp. 85–86 (noting the views of the Catholic Church that acts of torture violate “natural law”).

55. Dimbo v. Minister for Justice Equality and Law Reform [2008] IESC 26 (May 1, 2008) ¶ 46 (citing *Ryan v. The Attorney General* [1965] IESC 1; [1965] I.R. 294 (July 3, 1965), ¶¶ 22–23, available at <http://www.bailii.org/ie/cases/IESC/1965/> (“[t]o attempt to make a list of all the rights which may properly fall within the category of ‘personal rights’ would be difficult”)); *Oguekwe v. Minister for Justice Equality and Law Reform* [2008] IESC 25 (May 1, 2008) (same); Scott Kent Brown II, *The Coptic Church in Egypt: A Comment on Protecting Religious Minorities from Nonstate Discrimination*, 2000 B.Y.U. L. Rev. 1049, 1094 (2000) (“[T]he Irish courts have found a related ‘unenumerated right’ protected under the Constitution: ‘The right to freedom from torture or inhuman or degrading treatment or punishment.’”) (citing Ronan Keane, “The Role of the Judiciary in the Protection of Human Rights: The Irish Experience,” in *The Role of the Judiciary in the Protection of Human Rights* (Eugene Cotran & Adel Omar Sherif eds., 1997), pp. 219, 222); “A Summary of Your Rights,” Irish Human Rights and Equality Commission, <http://www.ihrec.ie/training/guides/guide/section6.html> (noting that Irish courts “have interpreted the Constitution as including certain human rights,” referred to as “unenumerated rights,” and that these include “freedom from torture, inhuman or degrading treatment or punishment”).

56. U.S. Const., amend. VIII.

57. *Graham v. Florida*, 560 U.S. 48, 59 (2010) (citing *Hope v. Pelzer*, 536 U.S. 730 (2002) & *Wilkerson*, 99 U.S. at 136).

58. *In re Kemmler*, 136 U.S. 436, 447 (1890).

59. *Wilkerson v. Utah*, 99 U.S. 130, 130–36 (1878).

60. In a 2008 concurrence in *Baze v. Rees*, the U.S. Supreme Court case upholding the constitutionality of Kentucky’s three-drug lethal injection protocol, Justices Clarence Thomas and Antonin Scalia — hard-core proponents of “originalism” — themselves voted to uphold the death penalty’s use while simultaneously concluding: “the Eighth Amendment was intended to disable Congress from imposing torturous punishments.” *Baze*, 553 U.S. at 97 (Thomas, J., concurring); *ibid.*, p. 98 (Thomas, J., concurring) (“Early commentators on the Constitution likewise interpreted the Cruel and Unusual Punishments Clause as referring to torturous punishments.”).

61. *Nuru v. Gonzales*, 404 F.3d 1207, 1221 (9th Cir. 2005).

62. E.g., Eric A. Tirschwell & Theodore Hertzberg, *Politics and Prosecution: A Historical Perspective on Shifting Federal Standards for Pursuing the Death Penalty in Non-Death Penalty States*, 12 U. Pa. J. Const. L. 57, 76–77 (2009) (“The Federal Death Penalty Act was a Democratic initiative, introduced by then-Senator, now-Vice President Joseph Biden. FDPA, and the omnibus crime bill of which it was a part, was designed to dispel the belief that Democrats generally (and President Clinton particularly) were soft on crime. On the Senate Floor, Senator John Kerry of Massachusetts boasted that the Democratic crime bill was ‘overwhelmingly tougher’ than past Republican efforts, noting that the bill added ‘60 new death penalties . . . the largest expansion of the Federal death penalty in the history of the U.S. Congress.’ Similarly, during his reelection campaign, President Clinton stated, ‘[m]y 1994 crime bill expanded the death penalty for drug kingpins, murderers of federal law enforcement officers, and nearly 60 additional categories of violent felons.’ On August 25, 1994,

all but two Democratic senators voted in favor of the crime bill, clearing FDPA's path to the White House and breathing new life into the federal death penalty that had been dormant for more than three decades.”).

63. 29 C.F.R. § 95.1(b)(6); *see also* 29 C.F.R. § 95.1(b)(1) (reciting that *torture* “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”); Kristen B. Rosati, *International Human Rights Treaties Can Make a Difference: U.S. Implementation of Article 3 of the United Nations Convention Against Torture*, 28-WTR Hum. Rts. 14, 16 (2001).

64. 8 C.F.R. § 208.18(a)(3); 8 C.F.R. § 1208.18(a)(3).

65. The U.S. Constitution's Treaty Clause is found in Article II, section 2, and it gives the President of the United States the “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” U.S. Const., Art. II, sec. 2, cl. 2.

66. Kristen B. Rosati, *The United Nations Convention Against Torture: A Self-Executing Treaty that Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal*, 26 Denv. J. Int'l L. & Pol'y 533, 539 (1998).

67. 18 U.S.C.A. § 2340(1) (“‘torture’ means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control”); 10 U.S.C.A. § 950t(11) (“Crimes triable by military commission” — “Torture”) (“Any person subject to this chapter who commits an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”); 18 U.S.C.A. § 2441(d)(1)(A) (“Torture”) (“The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.”); 18 U.S.C.A. § 2441(d)(1)(B) (“Cruel or inhuman treatment”) (“The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control.”). In 18 U.S.C. § 2441, which relates to “War crimes,” the U.S. Code states: “Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.” 18 U.S.C.A. § 2441(a). Subsection (d) of that statute relates to “Common Article 3 violations,” and defines a “grave breach of common Article 3” of the Geneva Conventions to include “Torture,” “Cruel or inhuman treatment,” “Performing biological experiments,” “Murder,” “Mutilation or maiming,” “Intentionally causing serious bodily injury,” “Rape,” “Sexual assault or abuse,” and “Taking hostages.” 18 U.S.C.A. § 2441(d)(1)(A)-(I).

68. *E.g.*, *Glossip*, 135 S. Ct. at 2726.

69. *Powell v. St. John Hosp.*, 614 N.W.2d 666, 674 n.10 (Mich. Ct. App. 2000) (*citing Random House Webster's College Dictionary* definition); *Niang v. Gonzales*, 492 F.3d 505, 516 (4th Cir. 2007) (“[D]ictionary definitions of ‘torture’ include anguish ‘of body or mind.’”) (*citing Merriam-Webster's Collegiate Dictionary* (Springfield, MA: Merriam-Webster, Inc., 11th ed. 2004), p. 1320).

70. *Webster's Third New International Dictionary of the English Language Unabridged* (Springfield, MA: Merriam-Webster, Inc., 2002), p. 2414.

71. *E.g.*, Leigh Buchanan Bienen, *Murder and Its Consequences: Essays on Capital Punishment in America* (Evanston, IL: Northwestern University Press, 2010), p. 68 (“[I]t is the inept application of the paralytic agent in the three-drug method which is most likely to make the execution torturous for the condemned, especially when injected incompetently.”); Richard A. Stack, *Grave Injustice: Unearthing Wrongful Executions* (Dulles, VA: Potomac Books, 2013), ch. 6 (“The state’s



execution was torturous and served as the ultimate violation of Tafero's right to be free from cruel and unusual punishment.”).

72. Helen Prejean, *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States* (New York: Random House, 1993), pp. 124, 216.

73. Decision No. 23/1990 (X. 31) Alkotmánybíróság [AB] [Constitutional Court], Oct. 24, 1990, Magyar Közlöny [MK.] 1990/107 (Hung.), translation available at [http://www.mkab.hu/letoltesek/en\\_0023\\_1990.pdf](http://www.mkab.hu/letoltesek/en_0023_1990.pdf).

74. *State v Makwanyane and Another* (CCT3/94) [1995] ZACC 3 (1995); 1995 (6) BCLR 665, 1995 (2) SACR 1 (6 June 1995) (Chaskalson P) ¶ 8.

75. *Attorney General v Susan Kigula & 417 Others*, Constitutional Appeal No. 03 of 2006 [2009] UGSC 6 (Jan. 21, 2009), available at <http://www.ulii.org/node/15313>.

76. Alexander Cogbill, *European Court of Human Rights' Dance with Death*, 29 Conn. J. Int'l L. 151, 159 (2013) (noting that the European Court of Human Rights, in *Soering v. United Kingdom*, recognized the “death row phenomenon” and that India, Zimbabwe and Jamaica adopted the concept); see also *Chambers v. Bowersox*, 157 F.3d 560, 569 (8th Cir. 1998) (“In a 1993 case, the Privy Council recommended to the Crown that the death sentences of two appellants be commuted to life imprisonment, concluding that executing them after almost 14 years on death row would violate the Jamaican Constitution.”) (*citing Pratt v. Attorney General of Jamaica*, [1994] 2 App. Cas. 1, [1993] 4 All E.R. 769 (P.C. 1993).”); *Sher Singh v. State of Punjab*, A.I.R. 1983 S.C. 465, 470–71 (the Supreme Court of India has held that condemned prisoners may ask whether it is “just and fair” to permit execution in cases of “[p]rolonged delay”); Catholic Comm’n for Justice and Peace in Zimbabwe v. Attorney-General, [1993] 1 Zimb. L.R. 239, 240, 269(S) (Aug. 4, 1999), <http://www.law.wits.ac.za/salr/catholic.html> (the Supreme Court of Zimbabwe concluded that delays of five and six years were “inordinate” and constituted “torture or . . . inhuman or degrading punishment or other such treatment.”).

77. Melissa A. Waters, *The Future of Transnational Judicial Dialogue*, 104 Am. Soc’y Int’l L. Proc. 465, 465–66 (Mar. 24–27, 2010).

78. “Death Row Phenomenon,” Death Penalty Worldwide, Cornell Law School, <http://www.deathpenaltyworldwide.org/death-row-phenomenon.cfm> (*citing Minister of Justice v. Burns and Rafay*, 2001 SCC 7 (S.C. Canada, 22 Mar. 2001), ¶ 122); *Kigula and Others v. Attorney Gen.*, 2006 S. Ct. Const. App. No. 03, at 56–57 (Uganda 2009); Catholic Comm’n for Justice & Peace in Zimbabwe v. Attorney General, No. S.C. 73/93 (Zimb. June 24, 1993 (reported in 14 Hum. Rts. L. J. 323 (1993)) (available at [http://www.unhcr.org/refworld/country,,ZWE\\_SC,,ZWE,,3ae6b6c0f,0.html](http://www.unhcr.org/refworld/country,,ZWE_SC,,ZWE,,3ae6b6c0f,0.html))).

79. *Minister of Justice v. Burns and Rafay*, 2001 SCC 7 (S.C. Canada, 22 Mar. 2001).

80. “Death Penalty Increasingly Viewed as Torture, UN Special Rapporteur Finds,” United Nations, Office of the High Commissioner, Oct. 23, 2012, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12685&LangID=E>; Carol S. Steiker, *Can/Should We Purge Evil Through Capital Punishment?*, 9 Crim. L. & Phil. 367, 376–77 & n.17 (2015) (*reviewing Matthew H. Kramer, The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* (Oxford: Oxford University Press, 2011)) (“Once we are on the ground of psychological pain, the lengthy and indeterminate seclusion of condemned inmates on Death Row as they await their executions — the so-called Death Row Phenomenon — could plausibly be deemed a form of torture, as some courts have recognized.”) (*citing Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989)).

81. *Minister of Justice v. Burns and Rafay*, 2001 SCC 7 (S.C. Canada, 22 Mar. 2001).

82. *E.g.*, *The Statistics*, 128 Harv. L. Rev. 401 (2014); “Eighth Amendment Challenge to Oklahoma’s Revised Drug Protocol for Executions by Lethal Injection,” 01-16-215 U.S. Sup. Ct. Actions 7 (“With four justices dissenting, the United States Supreme Court has denied applications for stays of executions filed by four Oklahoma death-row inmates . . .”).

83. Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 357, 382–83 (1997).

84. *Glossip*, 135 S. Ct. at 2780–81 (Sotomayor, J., dissenting) (“The State plans to execute petitioners using three drugs: midazolam, rocuronium bromide, and potassium chloride. The latter two drugs are intended to paralyze the inmate and stop his heart. But they do so in a torturous manner, causing burning, searing pain.”); see also Kim Bellware, “Oklahoma AG Suspends Executions

Indefinitely After Drug Mix-Up,” The Huffington Post, Oct. 1, 2015 (“Oklahoma has a three-drug protocol that uses a cocktail of midazolam to sedate the inmate, pancuronium bromide to paralyze him and potassium chloride to induce a heart attack.”), available at [http://www.huffingtonpost.com/entry/oklahoma-suspends-executions\\_560d83c0e4b0af3706dfec9e](http://www.huffingtonpost.com/entry/oklahoma-suspends-executions_560d83c0e4b0af3706dfec9e).

85. *E.g.*, *Baze*, 553 U.S. at 35.

86. *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (New York: United Nations, 2014), p. 9.

87. *Johnson v. Bredeisen*, 558 U.S. 1067, 1069 (2009) (Stevens, J., statement respecting denial of cert.); *Gomez v. Fierro*, 519 U.S. 918 (1996) (Stevens, J., dissenting); *Lackey v. Texas*, 514 U.S. 1045 (1995) (memorandum of Stevens, J., respecting denial of cert.); *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of cert.); *Smith v. Arizona*, 128 S. Ct. 2997 (2007) (Breyer, J., dissenting from denial of cert.); *Foster v. Florida*, 537 U.S. 990, 991 (2002) (same).

88. Kara Sharkey, *Delay in Considering the Constitutionality of Inordinate Delay: The Death Row Phenomenon and the Eighth Amendment*, 161 U. Pa. L. Rev. 861, 874 (2013) (“The mental anguish and psychological torture that takes place while awaiting execution is often referred to as the ‘death row phenomenon’ or ‘death row syndrome.’ This term traces back to *Soering v. United Kingdom*, a case decided by the European Court of Human Rights in 1989.”).

89. “Death Penalty Increasingly Viewed as Torture, UN Special Rapporteur Finds,” United Nations, Office of the High Commissioner, Oct. 23, 2012, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12685&LangID=E>.

90. William A. Schabas, *The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World’s Courts* (Boston: Northeastern University Press, 1996), p. 11.

91. *See, e.g.*, Manfred Nowak & Elizabeth McArthur, “The Distinction Between Torture and Cruel, Inhuman or Degrading Treatment,” *Torture*, Vol. 16, p. 148 (2006) (“The distinction between torture and less serious forms of ill-treatment, all of which are absolutely prohibited under Article 7 CCPR [Covenant for Civil and Political Rights], other international and regional treaty provisions as well as customary international law, was introduced because some of the specific State obligations laid down in CAT [Convention Against Torture] were meant to apply to torture only (above all, the obligation to criminalize acts of torture and to apply the principle of universal jurisdiction in this regard). Other obligations aimed at prevention, in particular by means of education and training, by systematically reviewing interrogation rules and practices, by ensuring a prompt and impartial ex officio investigation, and by ensuring an effective complaints mechanism, as laid down in Articles 10 to 13, must be equally applied to other forms of ill-treatment as well.”). The dividing line between *torture* and *cruel, inhuman or degrading treatment* (“CIDT”) has been the subject of much controversy. *See, e.g.*, Julianne Harper, *Defining Torture: Bridging the Gap Between Rhetoric and Reality*, 49 Santa Clara L. Rev. 893, 903 (2009) (“Due to ambiguity surrounding the severity requirement, establishing a dividing line between torture and CIDT has proven a difficult task.”); Stephen Hoffman, *Is Torture Justified in Terrorism Cases?: Comparing U.S. and European Views*, 33 N. Ill. U. L. Rev. 379, 381–82 (2013) (“UN documents define torture as ‘an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment’ but shed no light on what qualifies as CIDT.”).

92. Alan M. Dershowitz, “The Death Penalty in the Court: How It All Began,” in E. Joshua Rosenkranz & Bernard Schwartz, eds., *Reason and Passion: Justice Brennan’s Enduring Influence* (New York: W. W. Norton & Co., 1997), p. 159.

93. John D. Bessler, *Tinkering Around the Edges: The Supreme Court’s Death Penalty Jurisprudence*, 49 Am. Crim. L. Rev. 1913 (2012).

94. *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016) (“We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury’s mere recommendation is not enough.”).

95. *Ford v. Wainwright*, 477 U.S. 399 (1986).

96. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); *Hall v. Florida*, 134 S. Ct. 1986 (2014).

97. *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

98. *Coker v. Georgia*, 433 U.S. 584 (1977); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

99. *Eberhart v. Georgia*, 433 U.S. 584 (1977).

100. *Compare* *Enmund v. Florida*, 458 U.S. 782 (1982) (the Eighth Amendment prohibits the death penalty for a person involved in a felony but who does not kill, attempt to kill, or intend that a killing take place) *with* *Tison v. Arizona*, 481 U.S. 137 (1987) (holding that the death penalty may be imposed on a felony-murder defendant who was a major participant in the felony and exhibited extreme indifference to human life).

101. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); Andrew Novak, *Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya*, 45 *Suffolk U. L. Rev.* 285, 286 (2012) (“The mandatory death penalty, a relic of nineteenth century Britain, is the most constitutionally vulnerable aspect of African death-penalty regimes, and is facing sustained challenge in a number of countries.”). The mandatory death penalty is still in use in some (but a shrinking number of) countries. Andrew Novak, *The Global Decline of the Mandatory Death Penalty: Constitutional Jurisprudence and Legislative Reform in Africa, Asia, and the Caribbean* (Surrey, England: Ashgate Publishing, 2014), p. 1 (“The death penalty is in rapid and irreversible retreat everywhere in the English-speaking world, even in the most intransigent holdouts like Texas and Singapore. The common law mandatory death sentence, automatic upon conviction for homicide or a small number of other serious felonies, has declined even faster than this, to the point of extinction in the Commonwealth.”); *ibid.*, p. 7 (“Although the mandatory death penalty has been extinguished in most of the Caribbean, it survives in Southeast Asia.”). While the death penalty for murder predominates, drug trafficking and other economic crimes are still punishable by death in a few countries, mostly in Asia and the Middle East. Roger Hood, *Abolition of the Death Penalty: China in World Perspective*, 1 *City U. Hong Kong L. Rev.* 1, 3, 14–15 (2009); “Which Countries Have the Death Penalty for Drug Smuggling?”, *The Economist*, Apr. 28, 2015, <http://www.economist.com/blogs/economist-explains/2015/04/economist-explains-28> (“Thirty-two countries, plus Gaza, impose the death penalty for drug smuggling, according to Harm Reduction International (HRI), a drug-focused NGO. All but four (America, Cuba, Sudan and South Sudan) are in Asia or the Middle East. But in most of these countries executions are extremely rare. Fourteen, including America and Cuba, have the death penalty on the books for drug traffickers but do not apply it in practice. Only in six countries — China, Iran, Saudi Arabia, Vietnam, Malaysia and Singapore — are drug offenders known to be routinely executed, according to HRI’s most recent analysis. (Indonesia will soon join this list, following its recent executions.) In Iraq, Libya, North Korea, Sudan, South Sudan and Syria the data are murky.”).

102. Caroline Hawley, “Saudi Arabia Carrying Out ‘Unprecedented Wave’ of Executions,” *BBC News*, Dec. 4, 2015, <http://www.bbc.com/news/world-middle-east-34982154>; Jethro Mullen & Masoud Popalzai, “Woman Stoned to Death in Afghanistan Over Accusation of Adultery,” *CNN*, Nov. 4, 2015, <http://www.cnn.com/2015/11/04/asia/afghanistan-taliban-woman-stoning/>; Adam Withnall, “Saudi Arabia Executes ‘a Person Every Two Days’ as Rate of Beheadings Soars under King Salman,” *Independent*, Aug. 25, 2015, <http://www.independent.co.uk/news/world/middle-east/saudi-arabia-executions-amnesty-international-beheadings-death-sentences-rate-under-king-salman-10470456.html>.

103. The international trend away from the death penalty is detailed in a new U.N. report. *Moving Away from the Death Penalty*, p. 7 (“Today, more than four out of five countries have either abolished the death penalty or do not practice it. Globally, there is a firm trend towards abolition, with progress in all regions of the world.”).

104. “Facts about the Death Penalty,” *Death Penalty Information Center*, Oct. 15, 2015.

105. See “Death Penalty,” *Amnesty International*, <https://www.amnesty.org/en/what-we-do/death-penalty/> (“We have been working to end executions since 1977, when only 16 countries had abolished the death penalty in law or practice. Today, the number has risen to 140 — nearly two-thirds of countries around the world.”); *id.* (“As of July 2015, 101 countries have abolished the death penalty for all crimes.”).

106. Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All* (Oct. 2013) (a report of the Death Penalty Information Center).

107. Bin Liang & Hong Lu, *The Death Penalty in China: Policy, Practice, and Reform* (New York: Columbia University Press, 2015).

108. “The World Moves Towards Abolition,” Amnesty International <http://www.amnestyusa.org/our-work/issues/death-penalty/international-death-penalty> (“International death penalty trends are unmistakably towards abolition. Use of the death penalty worldwide has continued to shrink, and use of the death penalty has also been increasingly curtailed in international law. Since 1990, an average of three countries each year have abolished the death penalty, and today over two-thirds of the world’s nations have ended capital punishment in law or practice.”).

109. Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2002), pp. 248–51, 264, 363 n.38.

110. *The Death Penalty: Abolition in Europe* (Strasbourg: Council of Europe Publishing, 1999), p. 178.

111. “Total Abolition in Bulgaria, Canada, Lithuania,” Death Penalty News, Amnesty International (Dec. 1998), p. 1.

112. *State v Makwanyane and Another* (CCT3/94) [1995] ZACC 3 (1995); 1995 (6) BCLR 665, 1995 (2) SACR 1 (6 June 1995) (Chaskalson P) ¶ 8; *ibid.*, ¶ 26 (“Death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also an inhuman punishment . . . and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.”); *ibid.*, ¶ 95 (“I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment”); *ibid.*, ¶ 153 (“I place greater emphasis on the inevitably arbitrary nature of the decision involved in the imposition of the death penalty as a form of punishment in supporting the conclusion that it constitutes ‘cruel’, ‘inhuman’ and ‘degrading punishment’ within the meaning of section 11(2) of the Constitution”) (Ackermann J, concurring); *ibid.*, ¶ 179 (“every sentence of death must be stamped, for the purposes of section 11(2) as an intrinsically cruel, inhuman and degrading punishment”) (Didcott, J, concurring); *ibid.*, ¶ 233 (“[T]he death penalty is a violation of the right to life. It is cruel, inhuman and degrading. It is also a severe affront to human dignity.”) (Langa J, concurring); *ibid.*, ¶ 276 (“[T]he death sentence does indeed constitute cruel, inhuman or degrading punishment within the meaning of those expressions in section 11(2).”) (Mahomed J, concurring); *ibid.*, ¶ 344 (“[T]he death penalty is unconstitutional. It is a breach of the rights to life and dignity that are entrenched in sections 9 and 10 of our Constitution, as well as a breach of the prohibition of cruel, inhuman and degrading punishment contained in section 11(2).”) (O’Regan J, concurring).

113. *State v. Santiago*, 122 A.3d 1, 9–12 (Conn. 2015); Mackenzie Weinger, “Connecticut Bans Death Penalty,” *Politico*, Apr. 25, 2012, <http://www.politico.com/story/2012/04/conn-bans-the-death-penalty-075619>; Kevin Barry, “Justices Were Right to Abolish ‘Zombie Death Penalty,’” *The Connecticut Law Tribune*, Jan. 8, 2016, <http://www.ctlawtribune.com/id=1202746700023/Commentary-Justices-Were-Right-to-Abolish-Zombie-Death-Penalty?mcode=0&curindex=0>. After *State v. Santiago* was handed down, the Connecticut Supreme Court — after a change in personnel — agreed to review new arguments in another death penalty case, *State v. Peeler*. Justice Flemming Norcott Jr. — a consistent death penalty opponent — was on that court when it rendered the *Santiago* decision, but after his retirement, Justice Richard Robinson replaced him. *State v. Peeler* was argued while Justice Robinson — the new judge — was on the court. Thomas B. Scheffey, “Public Defender, Prosecutors Continue to Spar over Conn. Death Penalty Rulings,” *The Connecticut Law Tribune*, Nov. 4, 2015, <http://www.ctlawtribune.com/id=1202741640392/Updated-Public-Defender-Prosecutors-Continue-to-Spar-Over-Conn-Death-Penalty-Rulings?mcode=0&curindex=0>; “Allowing Retired Conn. Justices to Vote Creates Unsettling Situation,” *The Connecticut Law Tribune*, Dec. 31, 2015, <http://www.ctlawtribune.com/id=1202746110104/Editorial-Allowing-Retired-Conn-Justices-to-Vote-Creates-Unsettling-Situation?mcode=0&curindex=0>; The Associated Press, “Connecticut High Court Revisits Death Penalty for 11 Inmates,” Jan. 7, 2016, <http://abcnews.go.com/US/wireStory/connecticut-high-court-revisits-death-penalty-11-inmates-36148367>; *see also* “Editorial: Conn. Supreme Court Should Make Quick Decision on Death Penalty,” *The Connecticut Law Tribune*, Feb. 10, 2016, <http://www.ctlawtribune.com/id=1202749442523/Editorial-Conn-Supreme-Court-Should-Make-Quick-Decision-on-Death-Penalty?slreturn=20160121222600> (“On Jan. 7, 2016, oral arguments were heard in regard to the continuing vitality of *Santiago*, a contentious 4-3 decision that effectively converted all remaining death row prisoner sentences to life without the possibility of release. This came about following a

variety of procedural appellate maneuvers, in which the state convinced the court to hear arguments in *State v. Peeler*, another death penalty case, wherein the state would argue that *Santiago* was wrongfully decided. The state sought to convince a differently constituted panel of the Supreme Court to reverse the decision in *Santiago*, which had just been decided on Aug. 25, 2015.”) In a 5–2 ruling, the Connecticut Supreme Court in *State v. Peeler* reaffirmed its ruling in *Santiago*. *State v. Peeler*, 140 A.2d 811 (Conn. 2016).

114. The U.S. Supreme Court has ruled that the Eighth Amendment’s Cruel and Unusual Punishments Clause must “draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958); see also Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 Colum. L. Rev. 628, 692 n.325 (2007) (“foreign courts have relied on the ‘evolving standards of decency’ principle articulated in *Trop v. Dulles*”) (citing *Koroitamana v. Commonwealth* (2006) HCA 28, P 66 (June 14, 2006) (Austl.) (opinion of Kirby, J.), available at [http://www.austlii.edu.au/au/cases/cth/high\\_ct/2006/28.html](http://www.austlii.edu.au/au/cases/cth/high_ct/2006/28.html) (relying on *Trop* to justify turning to international principles of law to interpret Australia’s Constitution); *Reyes v. The Queen* [2002] UKPC 11, P 26, [2002] 2 A.C. 235, 246 (P.C.) (appeal taken from Belize) (U.K.) (citing *Trop* for proposition that a court must consider fundamental rights in the constitution “in the light of evolving standards of decency that mark the progress of a maturing society”)).

115. *Glossip*, 135 S. Ct. at 2731 (“the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims”); *ibid.* (“the District Court did not commit clear error when it found that the prisoners failed to establish that Oklahoma’s use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain”); see also *Baze*, 553 U.S. at 35 (upholding Kentucky’s lethal injection protocol). The concern about observable *physical* pain at executions (as reflected in the centuries-old quest for more “humane” methods of execution) is nothing new. See, e.g., Annulla Linders, *The Execution Spectacle and State Legitimacy: The Changing Nature of the American Execution Audience, 1833–1937*, 36 Law & Soc’y Rev. 607, 636 (2002) (“What was painful to the public . . . was the encounter with the visible pain experienced by the victims of execution. Reducing the appearance of pain, then, was a way to make the death penalty tolerable.”) In the nineteenth and twentieth centuries, a concerted effort was made to hide executions from public view. For example, American executions were moved out of the public square and into prisons, they were commonly carried out in the middle of the night, attendance at executions was restricted, and state laws often barred the publication of execution details. See generally John D. Bessler, *Death in the Dark: Midnight Executions in America* (Boston: Northeastern University Press, 1997).

116. *Baze*, 553 U.S. at 35; *Glossip*, 135 S. Ct. at 2726.

117. Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 Tex. L. Rev. 353, 354 (2010).

118. Austin Sarat, *Grotesque Spectacles: Botched Executions and America’s Death Penalty* (Stanford, CA: Stanford Law Books, 2014), pp. 5–6 (noting that “in the United States from 1890 to 2010 . . . approximately 3 percent of all executions were botched”; “[o]f approximately nine thousand capital sentences carried out in the United States from 1890 to 2010, we know of 276 that were botched—79 from 1900 to 1919, 70 from 1920 to 1949, 23 from 1950 to 1979, and 104 from 1980 to 2010”); see also Marian J. Berg & Michael L. Radelet, “On Botched Executions,” in Peter Hodgkinson & William A. Schabas, eds., *Capital Punishment: Strategies for Abolition* (Cambridge: Cambridge University Press, 2004), pp. 145–46 (“Given the relative privacy in which executions are carried out and the reluctance of prison personnel to admit and publicise bungles, other cases of botched executions for which no public record exists . . . are quite possible.”).

119. Wills Robinson, “It Was a Bloody Mess: Report Reveals Prison Warden’s Reaction to Botched Oklahoma Execution Last Night as More Grisly Details of His Agonizing Death Are Released,” *Daily Mail*, Dec. 15, 2014; “Oklahoma Botches Execution of Clayton Lockett,” Death Penalty Information Center, [www.deathpenaltyinfo.org/node/5760](http://www.deathpenaltyinfo.org/node/5760); Katie Fretland, “Scene at Botched Oklahoma Execution of Clayton Lockett Was ‘A Bloody Mess,’” *The Guardian*, Dec. 13, 2014, <http://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess>; John D. Bessler, “The Methods to the Madness: The Electric Chair, Lethal Injection and Now



Nitrogen Gas,” Jurist, <http://jurist.org/forum/2015/04/john-bessler-death-penalty.php>; “Obama Says Botched Oklahoma Execution ‘Deeply Troubling,’” CBS News, May 2, 2014, <http://www.cbsnews.com/news/obama-says-botched-oklahoma-execution-deeply-troubling/>; “The Cruel and Unusual Execution of Clayton Lockett: The Untold Story of Oklahoma’s Botched Lethal Injection — and America’s Intensifying Fight over the Death Penalty,” *The Atlantic* (June 2015), <http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/> (describing the botched execution); Paige Williams, “Witnesses to a Botched Execution,” *The New Yorker*, Apr. 30, 2014, <http://www.newyorker.com/news/news-desk/witnesses-to-a-botched-execution>; see also Dahlia Lithwick, “When the Death Penalty Turns into Torture,” *Slate*, Apr. 30, 2014, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/04/clayton\\_lockett\\_s\\_botched\\_execution\\_the\\_grim\\_but\\_predictable\\_result\\_of\\_oklahoma.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/clayton_lockett_s_botched_execution_the_grim_but_predictable_result_of_oklahoma.html).

120. *Wilkerson v. Utah*, 99 U.S. 130 (1879); *In re Kemmler*, 136 U.S. 436 (1890); see also *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (allowing an electrocution to go forward after the first attempt to execute the inmate in the electric chair failed to kill the inmate).

121. Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge: Cambridge University Press, 2015), pp. xiv & 3; Vienna Convention on the Law of Treaties (May 23, 1969, entered into force Jan. 27, 1980, United Nations, *Treaty Series*, vol. 1155, p. 311), Art. 53 (“*Treaties conflicting with a peremptory norm of general international law* (‘*jus cogens*’)”).

122. Weatherall, *Jus Cogens*, pp. 58, 208, 210, 268, 284, 341, 460.

123. *Ibid.*, pp. 205, 210, 268; Mark A. Drumbl, *Child Pirates: Rehabilitation, Reintegration, and Accountability*, 46 Case W. Res. J. Int’l L. 235, 236–37 (2013).

124. Weatherall, *Jus Cogens*, pp. 58, 91, 128, 166, 232–35, 307, 391, 471; see also *Filártiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (“Having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the works of jurists we conclude that official torture is now prohibited by the law of nations.”); see also *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgment, ¶ 111 (July 21, 2000), available at <http://www.unhcr.org/refworld/pdfid/402768fc4.pdf> (“[T]here is now general acceptance of the main elements contained in the definition set out in Article 1 of the Torture Convention, and . . . the definition given in Article 1 reflects customary international law.”).

125. Non-refoulement and the prohibition on genocide, war crimes, crimes against humanity, and wars of aggression are also classified as preemptory norms of international law. David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 Duke J. Comp. & Int’l L. 219, 231–32 (2005) (“Although *jus cogens* is widely acknowledged as a principle of international law, there is no agreement on what constitutes the corpus of *jus cogens* norms. Generally speaking, however, such a list would presumably include genocide, crimes against humanity, war crimes, torture, aggression, piracy, and slavery as accepted preemptory norms.”).

126. Weatherall, *Jus Cogens*, pp. xv, 283.

127. Vienna Convention on the Law of Treaties (May 23, 1969). The Vienna Convention on the Law of Treaties (“Vienna Convention” or “VCLT”) sets forth principles of “customary international law.” *Fujitsu Limited v. Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001). Although the United States Senate has yet to ratify the Vienna Convention, “many lower federal and state courts apply the Convention’s treaty-interpretation provisions routinely as customary international law.” Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 Va. J. Int’l L. 431, 434 (2004); see also Betsy L. Fisher, “*The Operation of Law*” in *Statelessness Determinations Under the 1954 Statelessness Convention*, 33 Wis. Int’l L.J. 254, 263 n.51 (2015) (“Even among countries that have not acceded to the VCLT, there is wide recognition that the VCLT’s principles of treaty interpretation now comprise customary international law. The U.S. Department of State argues that the United States ‘is not legally bound by’ VCLT provisions, but that it nonetheless ‘follows many of the rules in the VCLT in the conduct of its day-to-day work on treaties.’ The Second Circuit explicitly recognizes the VCLT as customary law.”) (citations omitted).

128. Vienna Convention on the Law of Treaties, Art. 64 (“Emergence of a new preemptory norm of general international law (‘*jus cogens*’)”) (“If a new preemptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”).

129. Manfred Nowak & Anne Charbord, “Prohibition of Torture and Inhuman or Degrading Treatment or Punishment,” in Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward, eds., *The EU Charter of Fundamental Rights: A Commentary* (Oxford, UK: Hart Publishing, 2014), p. 92 (“One of the key aspects of the prohibition of torture is its absolute and non-derogable nature under international law. The absolute nature of the prohibition of torture means that it is not superseded by any other right or concern: it must be respected no matter the circumstances, and irrespective of the individual’s behaviour.”); Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances* (Cambridge: Cambridge University Press, 2013), p. 6 (“the prohibition on torture is widely recognised as a peremptory norm of international law or *jus cogens*”).

130. Jeanne E. Bishop, *The Right to Be Arrested: British Government Summary Executions*, 11 N.Y.L. Sch. J. Int’l & Comp. L. 207, 209 (1990) (referring to “the general prohibition against summary executions” in international law); see also 6 John B. Moore, *Digest of International Law* (Washington, DC: Government Printing Office, 1906), p. 740 (noting U.S. payment made to Italian government in connection with 1891 lynching of eleven Italians in New Orleans). The U.N. has a Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, with the mandate established in 1982. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, United Nations Human Rights, Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx>.

131. See *infra* Chapter 8.

132. Dawn J. Miller, *Holding States to Their Convention Obligations: The United Nations Convention Against Torture and the Need for a Broad Interpretation of State Action*, 17 Geo. Immigr. L.J. 299, 320 (2003) (“[P]sychological torture includes mock executions”); Katherine J. Eder, *The Importance of Medical Testimony in Removal Hearings for Torture Victims*, 7 DePaul J. Health Care L. 281, 310 n.195 (2004) (“Physicians for Human Rights published a non-exhaustive list of torture methods: . . . Threats: of death, harm to family, further torture and/or imprisonment, mock executions”).

133. *Mohammadi v. Islamic Republic of Iran*, 947 F. Supp.2d 48, 55–56 (D. D.C. 2013) (“Their torture was also psychological in nature. As Manouchehr testified at the evidentiary hearing, he and Akbar were tortured in front of one another and forced to undergo at least five mock executions and other threats of execution, which were intended ‘to break [them] psychologically down.’”); *Kilburn v. Islamic Republic of Iran*, 699 F. Supp.2d 136, 152 (D. D.C. 2010) (finding that “beatings, unsanitary conditions, inadequate food and medical care, and mock executions” qualified as torture).

134. Early American extrajudicial lynchings were often carried out by *non-state* actors, and they were truly barbaric and horrific acts — what modern-day observers would, in common parlance, consider to be *torturous* ones. Zvi H. Triger, *The Gendered Racial Formation: Foreign Men, “Our” Women, and the Law*, 30 Women’s Rts. L. Rep. 479, 486 (2009) (“Lynching rituals involved public castration, torture, and burning while the victim was still alive.”). While lynchings would easily qualify as *torture-murders* under American state laws, only if *public officials* had conducted or acquiesced in such lynchings would those acts have been classified as *torture* under international law. As Georgetown University law professor Paul Butler writes: “Most of the perpetrators of lynching were private citizens (although sometimes police and other government officials participated). Even if laws against torture had existed at the time, lynching would not have been considered torture, which, under most constructs, requires a *state actor*.” Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 Ohio St. J. Crim. L. 57, 61 (2014) (emphasis added).

135. See, e.g., *Foster v. Chatman*, U.S. Sup. Ct., Case No. 14-8349 (official transcript of November 2, 2015 oral argument), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-8349\\_6537.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-8349_6537.pdf); *Snyder v. Louisiana*, 552 U.S. 472 (2008), Dec. 4, 2007 oral argument, available at oral argument, <https://www.oyez.org/cases/2007/06-10119>.

136. John D. Bessler, *Cruel and Unusual: The American Death Penalty and the Founders’ Eighth Amendment* (Boston: Northeastern University Press, 2012), pp. 2–6, 28–29, 188–89; United Nations Human Rights, Office of the High Commissioner, *Moving Away from the Death Penalty: National Leadership* (U.N. press release on “What they say about the death penalty?”); 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). Executions — once regularly used to quash slave rebellions — carry with them a long and sordid history of overt discrimination, with early American

slave codes setting forth more crimes punishable by death for blacks than early American legal codes applying to whites. Michael J. Pfeifer, *The Roots of Rough Justice: Origins of American Lynching* (Urbana: University of Illinois Press, 2011), p. 35; 2 Gerald D. Jaynes, ed., *Encyclopedia of African American Society* (Thousand Oaks, CA: Sage Publications, 2005), p. 779; David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Cambridge, MA: The Belknap Press of Harvard University Press, 2010), p. 12.

137. *Moving Away from the Death Penalty*, p. 9.

138. *Ibid.*; see also Charles Hector, "Madpet [Malaysians Against Death Penalty and Torture] Shocked that Two Individuals Executed 'In Secret,'" Aliran, Dec. 2, 2015, <http://aliran.com/civil-society-voices/2015-civil-society-voices/madpet-secret-executions/> ("In 2014, the fifth time for an anti-death penalty resolution, 117 nation states voted in favour, 38 against, 34 abstentions with four absentees. Every time it was passed, we see the number of countries in favour of abolition of the death penalty growing.").

139. *Moving Away from the Death Penalty*, p. 7.

140. *E.g.*, Claire Heininger, "Rome's Colosseum Lit Up to Mark NJ Abolishing Death Penalty," NJ.com, Dec. 19, 2007, [http://www.nj.com/news/index.ssf/2007/12/colosseum\\_lit\\_up\\_to\\_mark\\_un\\_nj.html](http://www.nj.com/news/index.ssf/2007/12/colosseum_lit_up_to_mark_un_nj.html).

141. See, *e.g.*, "Instruments of Torture," Museum of Torture, <http://www.torturemuseum.com/instruments-of-torture/>.

142. Janet P. Stamatel, Hung-en Sung & Graeme R. Newman, eds., *Crime and Punishment Around the World* (Santa Barbara, CA: ABC-CLIO, 2010), pp. 37, 171, 238.

143. Xiaobing Li, *Modern China* (Santa Barbara, CA: ABC-CLIO, 2015), p. 98 (estimating that China accounts for more than 70 percent of the world's executions, with some international human rights organizations putting the number of Chinese executions per year between 10,000 and 15,000); Jenny Stanton, "Revealed, North Korea's 20 Crimes Punishable by Execution: Don't Dare 'Disrupt Preparations for War' or Commit an 'Extraordinarily Grave Act of Delinquency,'" DailyMail.com, May 14, 2015, <http://www.dailymail.co.uk/news/article-3079950/Revealed-astonishing-list-20-offences-mean-death-penalty-North-Korea-extremely-grave-crime-selling-jewels-black-market-disrupting-preparations-war.html>.

144. Sarah Joseph, Katie Mitchell, Linda Gyorki & Carin Benninger-Budel, *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* (Geneva, Switzerland: World Organisation Against Torture, 2006), p. 177 ("The 'death row phenomenon' is experienced by inmates who are detained on death row for an extended amount of time; the term describes the 'ever increasing mental anxiety and mounting tension over one's impending death.'"); see also Fred Cohen, *Death Row Conditions: Age and Infirmary*, 50 *Crim. L. Bull.*, Art. 8 (Fall 2014) (footnote 3); Angela April Sun, "Killing Time in the Valley of the Shadow of Death": *Why Systematic Preexecution Delays on Death Row are Cruel and Unusual*, 113 *Colum. L. Rev.* 1585, 1588 (2013). Compare Mark Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 *U. Balt. L. Rev.* 299, 304 n.35 (2006) ("In *Foster v. Florida*, 537 U.S. 990 (2002), in dissenting from a denial of certiorari, Justice Breyer reiterated his concerns about the death row phenomenon, again citing non-U.S. sources. In *Lackey v. Texas*, 514 U.S. 1045 (1995), in a memorandum respecting the denial of certiorari, Justice Stevens observed that 'the highest courts in other countries have found arguments [regarding the death row phenomenon] persuasive.' Justice Stevens also noted an opinion by two English judges asserting that execution after long delay would violate the ban on cruel and unusual punishments contained in the Bill of Rights of 1689, which was, according to Justice Stevens, 'the precursor of our own Eighth Amendment.'").

145. *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., dissenting from denial of cert.); *Johnson v. Bredesen*, 558 U.S. 1067 (2009) (Stevens, J., dissenting from denial of cert.); *Muhammad v. Florida*, 134 S. Ct. 894 (2014) (Breyer, J., dissenting from denial of cert.). In 2015, two U.S. Supreme Court Justices — Stephen Breyer and Ruth Bader Ginsburg — called for the question of the constitutionality of the death penalty itself to be reviewed. *Glossip*, 135 S. Ct. at 2755 (Breyer, J., dissenting) ("[R]ather than try to patch up the death penalty's legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.").



146. The “death row phenomenon” has been discussed in a number of books and law review articles. See, e.g., Simeon C.R. McIntosh, *Fundamental Rights and Democratic Governance: Essays in Caribbean Jurisprudence* (Kingston, Jamaica: The Caribbean Law Publishing Co., 2005), p. 263; Kara Sharkey, *Delay in Considering the Constitutionality of Inordinate Delay: The Death Row Phenomenon and the Eighth Amendment*, 161 U. Pa. L. Rev. 861 (2013); Florencio J. Yuzon, *Conditions and Circumstances of Living on Death Row — Violative of Individual Rights and Fundamental Freedoms?: Divergent Trends of Judicial Review in Evaluating the “Death Row Phenomenon”*, 30 Geo. Wash. J. Int’l L. & Econ. 39 (1996); Renee E. Boxman, *The Road to Soering and Beyond: Will the United States Recognize the “Death Row Phenomenon”?*, 14 Hous. J. Int’l L. 151 (1991).

147. William A. Schabas, *The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World’s Courts* (Boston: Northeastern University Press, 1996), p. 96.

148. Under the Convention Against Torture, governments have an affirmative duty to prevent acts of torture, including by non-state actors. See William Paul Simmons, *Liability of Secondary Actors Under the Alien Tort Statute: Aiding and Abetting and Acquiescence to Torture in the Context of the Femicides of Ciudad Juárez*, 10 Yale Hum. Rts. & Dev. L.J. 88, 126 (2007) (“The Committee [Against Torture] has had three occasions to consider torture by non-state actors. These cases show that a state’s consent or acquiescence to private acts of torture would qualify as torture under the CAT definition.”) (citations omitted).

149. *Territory v. Vialpando*, 42 P. 64, 65 (N.M. 1895) (defining torture as the infliction of “pain” or “anguish”); Pustilnik, *Pain as Fact and Heuristic*, pp. 825–26 (“The common understanding of state torture — that is, state-sanctioned or official torture — finds close ties to pain. Indeed, this sense that torture involves severe pain or the threat of severe pain to the victim or the victim’s loved ones is tracked by definitions drawn from dictionaries, encyclopedias, blogs, and other repositories of cultural meaning and has remained largely consistent over time.”).

150. CAT, Art. 1.

151. 8 C.F.R. § 208.18(a)(3); United Nations, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, U.N. Doc. A/Conf. 183/9 (1998) (adopted July 17, 1988), Art. 7(2)(e).

152. 8 C.F.R. § 208.18(a)(3) (emphasis added).

153. See Law of Asylum in the United States § 7:12 (2015) (“The U.N. Committee Against Torture, established under the Torture Convention, monitors state compliance with the Torture Convention, evaluates the compliance reports of each state party, and, in quasi-judicial proceedings where states parties have agreed to its jurisdiction, hears complaints by states and individuals against states that are allegedly violating the Torture Convention. The Committee Against Torture ‘formulates its “decisions” on individual communications and forwards them to the complainant and the state concerned,’ which is invited to inform the Committee of the action it takes pursuant to the Committee’s determination.”); *ibid.* (“The case law of the Committee Against Torture is nonetheless another useful source of interpretation of torture and the prohibition of return under Article 3.”); Tanusri Prasanna, *Taking Remedies Seriously: The Normative Implications of Risking Torture*, 50 Colum. J. Transnat’l L. 370, 379 (2012) (“The prohibition of torture has developed in particularly rich detail through the provisions of the Convention Against Torture (the Torture Convention) and the interpretation of these provisions by the Committee Against Torture (CAT), as well as the jurisprudence of the European Court of Human Rights (ECtHR) interpreting Article 3 of the European Convention on Human Rights (ECHR).”).

154. The international consensus against torture is clear. *Filártiga v. Peña-Irala*, 630 F.2d 876, 883–84 (2d Cir. 1980).

155. David R. Dow, Jim Marcus, Morris Moon, Jared Tyler & Greg Wiercioch, *The Extraordinary Execution of Billy Vickers, the Banality of Death, and the Demise of Post-Conviction Review*, 13 Wm. & Mary Bill Rts. J. 521, 550 n.150 (2004) (“Mock executions and other threats of imminent death are widely recognized to be a form of unconscionable torture. Legislation passed by the United States Congress on April 30, 1994, implementing the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, identifies ‘the threat of imminent death’ as a form of torture. This provision was designed to bring ‘mock executions’ within the ambit

of the legislation.”) (citing 18 U.S.C. § 2340(2)(C) & David P. Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 Nova L. Rev. 449, 455–56 (1991)).

156. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992); *Hamoui v. Ashcroft*, 389 F.3d 821, 828 n.10 (9th Cir. 2004).

157. *Daliberti v. Republic of Iraq*, 146 F.Supp.2d 19, 22 (D. D.C. 2001) (referencing threats of “physical torture” such as “cutting off his fingers, pulling out his fingernails, or shocking him electrically in his testicles,” and noting that the man “was in constant fear that he would be killed or suffer serious bodily harm”) (citations omitted); Valerie Jenness & Michael Smyth, *The Passage and Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road from Symbolic Law to Instrumental Effects*, 22 Stan. L. & Pol’y Rev. 489, 502–503 (2011) (“U.S. soldiers uncovered Saddam’s torture chambers, outfitted with cattle prods, wooden stocks, manacles, and meat hooks. One victim remembers, ‘They would beat us as we hung there. They did unthinkable things—electrocution, immersion in a bath of chemicals, and ripping off people’s finger and toenails. Many were forced to listen to tape recordings of their wives screaming as they were brutally raped.’”); Raj Dhanasekaran, *When Rotten Apples Return: How the Posse Comitatus Act of 1878 Can Deter Domestic Law Enforcement Authorities from Using Military Interrogation Techniques on Civilians*, 5 Conn. Pub. Int. L.J. 233, 244–45 (2006) (“prisons under the control of the Iraqi Interior Ministry tortured up to 120 inmates”; “torture methods included the braking [sic] of bones, the pulling of fingernails, the stamping of cigarettes into skin, and electrocution”).

158. Scharf, *Tainted Provenance*, p. 143.

159. Randall T. Coyne, *Reply to Noah Feldman: Escaping Victor’s Justice by the Use of Truth and Reconciliation Commissions*, 58 Okla. L. Rev. 11, 13 n.25 (2005) (“In sixteenth century England, larceny was punished by lopping off the perpetrator’s ears. Indeed, in colonial America, authorities imposed a number of corporal punishments that would be considered tantamount to torture by modern standards of decency.”) (citing Randall Coyne & Lyn Entzeroth, *Capital Punishment and the Judicial Process* (Durham, NC: Carolina Academic Press, 2d ed. 2001), pp. 5–6).

160. Caycie D. Bradford, *Waiting to Die, Dying to Live: An Account of the Death Row Phenomenon from a Legal Viewpoint*, 5 Interdisc. J. Hum. Rts. L. 77, 77–78 (2011) (“More than two-thirds of the countries in the world have abolished the death penalty. The laws of 58 countries allow for this form of punishment, but only 25 are actively executing detainees.”); David A. Sadoff, *International Law and the Mortal Precipice: A Legal Policy Critique of the Death Row Phenomenon*, 17 Tul. J. Int’l & Comp. L. 77, 110 (2008) (“capital punishment appears to be slowly, but perceptibly, eroding as a practice”).

161. See *Aydin v. Turkey*, 1997-VI Eur. Ct. H.R. 1866, 1945–46 (referencing “the special stigma of ‘torture’” that attaches “only to deliberate inhuman treatment causing very serious and cruel suffering”).

162. Comm. of Ministers of the Council of Eur., *Guidelines on Human Rights and the Fight Against Terrorism* (2002), pp. 7, 21, available at [http://www.coe.int/T/E/Human\\_rights/h-inf\(2002\)8eng.pdf](http://www.coe.int/T/E/Human_rights/h-inf(2002)8eng.pdf) (stating that the “use of torture or of inhuman or degrading treatment or punishment, is absolutely prohibited”); see also *ibid.*, p. 12 (“States may never . . . derogate . . . from the prohibition against torture or inhuman or degrading treatment or punishment.”); see also *Mthembu v. The State* (379/2007) [2008] ZASCA 51 (10 April 2008), p. 15, ¶ 31 (“The CAT prohibits torture in absolute terms and no derogation from it is permissible, even in the event of a public emergency.”).

163. *Trop v. Dulles*, 356 U.S. 86, 100–101 (1958) (“[T]he words of the Eighth Amendment are not precise, . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

164. Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 Colum. Hum. Rts. L. Rev. 291, 306 (1994) (“Over the centuries torture has evolved in the West from a judicial or quasi-judicial method of eliciting or testing truth into a weapon of terror.”); Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture under International Law: The Office of Legal Counsel Memorandum*, 21 Am. U. Int’l L. Rev. 9, 12 (2005) (“the customary norms regarding torture evolved in the latter part of the nineteenth and early twentieth century”).

165. The right to life and the rights to be free from discrimination and torture are set forth in the Universal Declaration of Human Rights, as is the concept of human dignity. Universal Declara-

tion of Human Rights (GA res. 217A (III), UN Doc A/810 (Dec. 10, 1948) [hereinafter “UDHR”], Art. 3 (“Everyone has the right to life, liberty and security of person.”); id., Art. 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); id., Art. 7 (“All are equal before the law and are entitled without any discrimination to equal protection of the law.”); see also Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 Notre Dame L. Rev. 183, 185 (2011) (“As a fundamental precept of human rights and basic liberties, dignity really took hold after the Universal Declaration of Human Rights stated: ‘All human beings are born free and equal in dignity and rights.’”) (citing UDHR, Art. 1); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 Neb. L. Rev. 740, 743 (2006) (noting that the U.S. Supreme Court “has repeatedly treated human dignity as a value underlying, or giving meaning to, existing constitutional rights and guarantees”); Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. Pa. L. Rev. 169, 172 (2011) (“few concepts dominate modern constitutional jurisprudence more than dignity does without appearing in the Constitution”). At times, public officials have attempted to minimize—or even evade—State obligations under the Convention Against Torture and implementing legislation. After 9/11, for example, the Office of Legal Counsel at the Department of Justice issued its now infamous “torture memos” in the context of considering standards of conduct for interrogations. Andrew Cohen, “The Torture Memos, 10 Years Later,” *The Atlantic*, Feb. 6, 2012. One Bush Administration lawyer, Jay Bybee, opined that the U.S. prohibition on torture in section 2340 of Title 18 of the U.S. Code only “proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical,” with “[p]hysical pain amounting to torture” notoriously needing to be—per that legal memo—“equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” “For purely mental pain or suffering to amount to torture under Section 2340,” Bybee’s now discredited legal memo continued, “it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.” “We conclude,” that memo continued, “that the mental harm also must result from one of the predicate acts listed in the statute, namely: threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individual’s personality; or threatening to do any of these things to a third party.” Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, on Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A, at 1, 6 (Aug. 1, 2002), available at <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf>. The U.N. Committee Against Torture has already held that the U.S. interpretation of the Convention Against Torture is too narrow and that the United States needs to implement and enforce the Convention more fully and rigorously. Conclusions and Recommendations of the Committee Against Torture (United States of America), Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, CAT/C/USA/CO/2 (25 July 2006), p. 3 (“The State Party should ensure that acts of psychological torture, prohibited by the Convention, are not limited to ‘prolonged mental harm’ as set out in the State party’s understandings lodged at the time of ratification of the Convention, but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or its duration.”).

