
The Death Penalty as Torture: From the Dark Ages to Abolition, was published in February 2017 by Carolina Academic Press. It won a Bronze Medal in the World History category of the Independent Publisher Book Awards. The title of this essay is inspired by Raymond Carver's short story, "What We Talk About When We Talk About Love," first published in 1981 as part of a collection with the same title, and the title of a 1999 book review in *The Journal of Criminal Law and Criminology*.
RAYMOND CARVER, WHAT W

University of Baltimore School of Law, and Rutgers School of Law.

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ILIAN CHENWI, TOWARDS THE ABOLITION OF THE DEATH PENALTY IN AFRICA: A HUMAN RIGHTS PERSPECTIVE 17 (2007); *see also* NIGEL CAWTHORNE, PUBLIC EXECUTIONS: FROM ANCIENT ROME TO THE PRESENT DAY 6 (2012).

2. *See, e.g.*, DANIEL FENNING & JOSEPH C

PRESS, 1540–1605, at 57–60, 139, 208 (1977); HENRY KAMEN, THE SPANISH INQUISITION: A HISTORICAL REVISION 276–277 (4th ed. 2014); RICHARD WARD, *Introduction*, in A GLOBAL HISTORY OF EXECUTION AND THE CRIMINAL CORPSE 1 (Richard Ward ed., 2015); FRANCES LARSON, SEVERED: A HISTORY OF HEADS LOST AND HEADS FOUND 84–85 (2014).

3. IÑIGO FERNÁNDEZ, HISTORY OF MEXICO: A JOURNEY FROM PREHISTORIC T

sometimes *showing up alive* after the condemned individual's execution.⁸ The New York-based Innocence Project, founded in 1992 by Barry Scheck and Peter Neufeld, has shined considerable new light over the past twenty-five years on the causes and frequency of innocent people being unjustly imprisoned and sentenced to death.⁹ However, the phenomenon of wrongful convictions is not new; it spans centuries and societies around the world.¹⁰ "To date," the Innocence Project's website reports, "350 people in the United States have been exonerated by DNA testing, including 20 who served time on death row."¹¹ "These people," that website points out, "served an average of 14 years in prison before exoneration and release."¹² American death row inmates now spend an average of *more than fifteen years* between sentencing and execution,¹³ but it is, ironically, only because of such prolonged delays that, through newly discovered evidence, some exonerations are produced.¹⁴ Had executions been carried out more expeditiously after sentencing, scores of innocent people would have been put to death as a result of faulty eyewitness testimony, perjury by jailhouse snitches, false confessions, or for other reasons.¹⁵

8. ROBERT J. NORRIS, *EXONERATED: A HISTORY OF THE INNOCENCE MOVEMENT* 16 (2017); BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* xiii-iv, 222 (2000); ROB WARDEN, *WILKIE COLLINS'S THE DEAD ALIVE: THE NOVEL, THE CASE, AND WRONGFUL CONVICTIONS* 152-64 (2005) (discussing eleven wrongfully convicted defendants in "dead alive" cases known to have occurred in the United States, including that of William Marion and Charles Hudspeth, executed in Arkansas on December 30, 1892, before his supposed victim, George Watkins, was located alive and well in Kansas in June 1893); R. MICHAEL WILSON, *LEGAL EXECUTIONS IN NEBRASKA*,

Men and women are wrongfully convicted everywhere, from the United States and Canada in North America to China and Japan in Asia,¹⁶ and there are plenty of examples of miscarriages of justice in death penalty cases, including in modern times.¹⁷ All one has to do is peruse the Internet—and look at websites for the Innocence Project,¹⁸ the Death Penalty Information Center,¹⁹ the National Registry of Exonerations,²⁰ and the Death Penalty Worldwide²¹—to read about all the horrifying circumstances that led jurors in particular cases to wrongfully convict men or women, convictions that show that justice systems regularly make mistakes and are hardly infallible.²² One recent headline, “Scalia Once Pushed Death Penalty for Now-Exonerated Inmate Henry Lee McCollum,” speaks volumes about the risk of executing those who were not, in fact, responsible for the crimes at issue.²³

Examples of miscarriages of justice are, in reality, incredibly easy to find—and they can often be found close to home. In Mankato, Minnesota, the place

16. NA JIANG, *WRONGFUL CONVICTIONS IN CHINA: COMPARATIVE AND EMPIRICAL PERSPECTIVES* 5 (2016); HÉLÈNE KATZ, *JUSTICE MISCARRIED: INSIDE WRONGFUL CONVICTIONS IN CANADA* 9 (2011); DANIEL S. MEDWED, *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT* 4 (2017); David T. Johnson, *An Innocent Man: Hakamada Iwao and the Problem of Wrongful Convictions in Japan*, 13 *THE ASIA-PACIFIC J.* 1, 1–26 (2015). *See generally* HE JIAHONG, *BACK FROM THE DEAD: WRONGFUL CONVICTIONS AND CRIMINAL JUSTICE IN CHINA* (2016) (outlining high-profile wrongful convictions in China); Kimberly A. Clow & Rose Ricciardelli, *Wrongly Convicted and Wrongly Incarcerated: Exoneree Experiences and Public Perceptions*, in *EXPERIENCING IMPRISONMENT: RESEARCH ON THE EXPERIENCE*

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where I grew up, thirty-eight Dakota Indians were hanged simultaneously on
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codes explicitly called for more severe punishments for blacks than for whites.³¹ As a recent report of Bryan Stevenson's Alabama-based Equal Justice Initiative observes: "During the period between the Civil War and World War II, thousands of African Americans were lynched in the United States. Lynchings were violent and public acts of torture that traumatized black people throughout the country and were largely tolerated by state and federal officials."³² The Equal Justice Initiative documented 4,084 racial terror lynchings in twelve Southern states between 1877 and 1950.³³

The adoption of the U.S. Constitution's Fourteenth Amendment guaranteed "equal protection of the laws" and, as American courts subsequently determined, applied the guarantees of the Eighth Amendment against the states.³⁴ But that didn't stop Ku Klux Klan lynchings and other extra-judicial killings throughout American states, including in northern locales.³⁵ One eminent scholar, David Garland, has defined *public torture lynchings* as "lynchings that were highly publicized, took place before a large crowd, were staged with a degree of ritual, and involved elements of torture, mutilation, or unusual cruelty."³⁶ For example, in 1893, one black man, Henry Smith, was tortured and burned alive in Paris, Texas, in front of a crowd of 15,000, following the rape and murder of a white, three-year-old child.³⁷ And in my home state of Minnesota, three African-American circus workers were lynched in 1920, with the three young men—Elias Clayton, Elmer Jackson, and Isaac McGhie—pulled out of Duluth's jail and lynched from a lamp post by a 5,000 to 10,000-member lynch mob.³⁸ Just as public executions still take place in Asia and many Islamic countries,

31. JOSEPH A. RANNEY, *IN THE WAKE OF SLAVERY: CIVIL WAR, CIVIL RIGHTS, AND THE RECONSTRUCTION OF SOUTHERN LAW* 51 (2006).

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lynchings still occur in nations such as India and Pakistan.³⁹ In September

2015—as one news reporter noted—“In India, lynchings are still a common occurrence.”⁴⁰

capital trials, and the process results in conviction-prone and death sentence-prone juries.⁴⁶ Not only that, it skews the Supreme Court's own evaluation of the "evolving standards of decency" because jury verdicts are one of the "objective" criteria for gauging those standards.⁴⁷ Jury verdicts cannot possibly be representative of societal views if death penalty opponents are routinely stripped from jury panels.⁴⁸

The death penalty is, at bottom, rooted in revenge. Although extra-judicial lynchings take place without any provision of due process whatsoever, both lynchings and state-sanctioned executions channel society's

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Although the U.S. Constitution's Fourteenth Amendment was designed by its drafters to ensure "like punishment" for blacks and whites, as the Civil Rights Act of 1866 had explicitly done,⁷³ and although numerous international and regional human rights instruments, as well as domestic laws, call for equality of treatment under the law,⁷⁴ racial minorities still experience invidious discrimination in criminal justice systems around the world, including in the United States.⁷⁵ In fact, in American states that retain capital punishment, those who kill whites are much more likely to get the death penalty—and to be executed—than those who kill blacks.⁷⁶ The long-standing injustice and arbitrariness of who is selected to die, and who is actually executed, is only compounded by the fact that death sentences and executions have become increasingly sporadic and rare.⁷⁷ Very few American counties and local prosecutors actively utilize capital punishment, making death sentences more a function of geography—where the particular crime was committed—than anything else.⁷⁸ The title of Shirley Jackson's famous *New Yorker* short story, "The Lottery," provides an apt metaphor for America's death penalty and, for that matter, the capital punishment schemes of other countries around the world.⁷⁹

73. John D. Bessler, *The Inequality of America's Death Penalty: A Crossroads for Capital Punishments at the Intersection of the Eighth and Fourteenth Amendments*, 73 WASH. & LEE L. REV. ONLINE 487, 515–16 (2016).

74. See e.g., WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 197 (3d ed. 2002) (discussing the International Convention on the Elimination of All Forms of Racial Discrimination).

75. Stephen B. Bright, *Discrimination, Death and Denial*, in *MACHINERY OF DEATH: THE REALITY OF AMERICA'S DEATH PENALTY REGIME* 45, 69–70 (David R. Dow & Mark Dow eds., 2002); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, in *FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA* 211, 241 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006); David P. Keys & R. J. Maratea, *McCleskey v. Kemp and the Reaffirmation of Separate v. Equal*, in *RACE AND THE DEATH PENALTY: THE LEGACY OF MCCLESKEY V KEMP* 7, 7–20 (David P. Keys & R. J. Maratea eds., 2015). See generally Charles V. Hamilton, *Not Yet "E Plu*

VI. ALL THE TYRANNY, AUTHORITARIANISM, AND TOTALITARIANISM

Death sentences were once justified on the basis of the “divine right of kings,” and iron-fisted monarchs made frequent use of executions to quash uprisings or rebellions.⁸⁰ Dictators such as Stalin, Hitler, and Pol Pot all made use of arbitrary killings, death sentences, and executions,⁸¹ and the death penalty is still employed by a number of totalitarian, autocratic, or one-party regimes. The People’s Republic of China—the country that ruthlessly squelched pro-democracy demonstrators in Tiananmen Square—is the world’s top user of executions,⁸² but other countries that make regular use of executions constitute a rogues’ gallery of human rights violators. Among the countries that top Amnesty International’s list of most frequent users of executions are Iran, Saudi Arabia, Iraq, and Pakistan.⁸³ “Often,” scholar Franklin Zimring writes in *The Contradictions of American Capital Punishment*, tracing the movement of Western representative democracies away from executions, “state killings in totalitarian regimes did not involve even the pretense of judicial process.”⁸⁴

The death penalty is an outlier, especially for modern-day Western democracies. When I was a kid, I used to go to a dental office in Mankato, Minnesota, that had copies of

by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness,” was a milestone in the annals of human rights.⁹⁰ It is time for the United States to outlaw the death penalty throughout the country—and to reclaim its leadership position in the world. Steven Pinker, writing of the U.S. Supreme Court and capital punishment in *Enlightenment Now: The Case for Reason, Science, Humanism,*

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death-eligible offenses—more than two hundred at one time under England’s notorious “Bloody Code”—have shrunk dramatically throughout the civilized world.⁹⁷ In many places, death sentences and executions are no longer used at all.⁹⁸ In Kenya, the country’s president recently commuted the death sentences of more than 2,700 inmates, thereby completely clearing that nation’s death row.⁹⁹

The death penalty has gone from being a *lawful* punishment to being an *unlawful* one throughout the continent of Europe, as well as in a number of non-European countries and states.¹⁰⁰ As Oxford criminologist Roger Hood—a prominent scholar on the use of capital punishment throughout the world—has recently written:

Although the death penalty has yet to be declared unlawful throughout the world, concern for protecting human rights has become a powerful dynamic over the past quarter of a century since the Berlin Wall came down and the UN added Protocol Number 2 to the ICCPR, which banned the death penalty and committed ratifying states not to reintroduce it.¹⁰¹

The Second Optional Protocol to the International Covenant on Civil and Political Rights provides in Article 1(1) and Article 1(2), respectively: “No one

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within the jurisdiction of a State Party to the present Protocol shall be executed”¹⁰² and “

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Rights,¹¹⁶ have recognized the “death row phenomenon,”¹¹⁷ a concept which is associated with prolonged delays between sentencing and execution coupled with harsh conditions of confinement on death row.

But the vast majority of countries have moved away from the death penalty,¹¹⁸ and what was once lawful in many places is no longer so.¹¹⁹ For example, after a number of European countries abandoned the death penalty, the Council of Europe developed a policy opposing it.¹²⁰ Protocol No. 6 to the European Convention on Human Rights, in which member states agreed to abolish the death penalty’s use in peacetime, entered into force in March 1985 when five states had ratified it.¹²¹ And Protocol No. 13 to the European Convention on Human Rights, which extends that bar to times of war, came into force in July 2002 when ten states had ratified that protocol.¹²² According to the latest statistics from Amnesty International, there are 141 countries that are abolitionist in law or practice versus fifty-seven retentionist countries.¹²³ Indeed, *threats* of death (*e.g.*, obtaining confessions by playing Russian roulette) and a host of *non-lethal* bodily punishments (*e.g.*, the thumbscrew or pulling out one’s

116. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (1989).

117. Jordan M. Steiker, *The American Death Penalty: Constitutional Regulation as the Distinctive Feature of American Exceptionalism*, 67 U. MIAMI L. REV. 329, 343 (2013); Mark V. Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 U. BALT. L. REV. 299, 303 (2006).

118. *The Death Penalty in 2016: Facts and Figures*, AMNESTY INT’L (Apr. 11, 2017), <https://www.amnesty.org/en/latest/news/2017/04/death>

state practice—has changed dramatically in the last few decades. “Today,” death penalty expert William Schabas writes, “the death penalty no longer exists within the territory of the Council of Europe.”¹²⁸ The law rarely remains static, and courts should recognize the psychological torture associated with capital punishment.

The conclusion that *threats of death*—and capital prosecutions and death sentences would certainly qualify—should be classified as torturous in nature seems almost self-evident when one examines existing legal principles and modern-day definitions of torture. In *Ex parte Deardorff* and other cases, the Supreme Court of Alabama—in issuing rulings in the *non-state actor* context—has, in fact, already determined that “psychological torture” occurs where a victim of torture “is in intense fear and is aware of, but helpless to prevent, impending death.”¹²⁹ That definition is, not surprisingly, consistent with how others think of psychological torture.¹³⁰ In 1972, the California Supreme Court, in declaring the state’s death penalty unconstitutional (before it was brought back via a constitutional amendment), itself once ruled: “The cruelty of capital

A recent, botched execution attempt in Alabama, that of Doyle Lee Hamm, helps illustrate the point.¹³³ Hamm, a convicted murderer but also a cancer survivor, was slated to be executed in Alabama in February 2018 after spending thirty years on death row. Before the execution, Hamm's lawyer, Bernard Harcourt, had warned that due to Hamm's prior illnesses and his history of drug abuse, it would be extremely problematic to find veins to deliver the lethal injection drugs. That, in fact, is exactly what

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IX. THE UNIVERSALITY OF RIGHTS

The Universal Declaration of Human Rights states: “*No one* shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹³⁶ If nations are forbidden to torture ordinary citizens but are allowed to torture convicted offenders or prisoners, then what the world really has is the *Almost Universal* Declaration of Human Rights not the Universal Declaration of Human Rights. Rulings of courts themselves have confirmed that *no one*—not even heinous offenders—should be subjected to a cruel, or

sentences and executions (*e.g.*, the issuance of multiple death warrants in individual cases).¹⁴¹ Capital charges and death sentences involve definitive and clear-cut *threats of death*, and condemned inmates clearly experience tremendous fear and anxiety and have an awareness of their impending deaths, a critical aspect of declarations of “psychological torture” in the *non-state actor* context (*e.g.*, pertaining to “torture-murder” determinations).¹⁴²

X. THE FUTURE

I think about a world without capital punishment—a world in which human rights are honored and protected, not denigrated and violated. I think about a world in which jurists around the globe would not, as part of their jobs, have to decide whether to put people to death. I think about a world in which the United States no longer resorts to state-sanctioned killing, and in which the United States and other retentionist countries finally decide to reject the use of executions. If the United States and Japan (the other highly industrialized country that still uses executions) would get rid of capital punishment, that would put more concerted pressure on authoritarian and rogue regimes, whether