THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS

The Death Penalty's Denial of Fundamental Human Rights details how capital punishment violates universal human rights – to life; to be free from torture and other forms of cruelty; to be treated in a nonarbitrary, nondiscriminatory manner; and to dignity. In tracing the evolution of the world's understanding of torture, which now absolutely prohibits physical and psychological torture, the book argues that an immutable characteristic of capital punishment – already outlawed in many countries and American states – is that it makes use of death threats. Mock executions and other credible death threats, in fact, have long been treated as torturous acts. When crime victims are threatened with death and are helpless to prevent their deaths, for example, courts routinely find such threats inflict psychological torture. With simulated executions and non-lethal corporal punishments already prohibited as torturous acts, death sentences and real executions, the book contends, must be classified as torturous acts, too.

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The frontispiece of the third edition of Cesare Beccaria's treatise, *Dei delitti e delle pene*, published in 1765, illustrating one of the book's objectives: to replace executions with incarceration and hard labor. The frontispiece depicts an idealized figure, Justice, shunning an executioner who is carrying a sword and axe in one hand and trying to hand Justice a cluster of heads with his other outstretched hand. Justice's gaze is transfixed instead on a pile of prisoner's shackles and worker's tools – the instruments symbolizing imprisonment and labor.

The Death Penalty's Denial of Fundamental Human Rights

INTERNATIONAL LAW, STATE PRACTICE, AND THE EMERGING ABOLITIONIST NORM

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In memory of
Roger Hood (1936–2020),
Christof Heyns (1959–2021),
and David Weissbrodt (1944–2021),
and for all abolitionists,
opponents of torture,
and human rights advocates –
past, present, and future –
who led, are leading, or
will lead the way.

If I can demonstrate that the death penalty is neither useful nor necessary, I will have won the cause of humanity.

Cesare Beccaria, *Dei delitti e delle pene* (1764), translated into French as *Traité des délits et des peines* (1766) and English as *An Essay on Crimes and Punishments* (1767)

I consider the death penalty an improper punishment for any crime.

Dr. Benjamin Rush, *An Enquiry into the Effects of Public Punishments upon Criminals and upon Society* (1787)

The death penalty is the special and eternal sign of barbarity.

Victor Hugo, Speech to France's *Assemblée Constituante* (September 15, 1848)

I have come here tonight to see about a thing that fairly shocked me. It shocked me worse than slavery. I've heard that you are going to have hanging again in this state … Where is the man or woman who can sanction such a thing as that? We are the makers of murderers if we do it.

Sojourner Truth, "Lecture on Capital Punishment," Lansing, Michigan (June 3, 1881)

The future may judge us less leniently than we choose to judge ourselves. Perhaps the whole business of the retention of the death penalty will seem to the next generation, as it seems to many even now, an anachronism too discordant to be suffered, mocking with grim reproach all our clamorous professions of the sanctity of life.

Benjamin N. Cardozo, *What Medicine Can Do for Law* (1928)

Capital punishment is abolished.

Article 102, Basic Law of the Federal Republic of Germany (May 23, 1949)

The ultimate weakness of violence is that it is a descending spiral, begetting the very thing it seeks to destroy … Returning violence for violence multiplies violence, adding deeper darkness to a night already devoid of stars.

Reverend Martin Luther King Jr., *Where Do We Go from Here? Chaos or Community* (1967)

I have seen the horror of the death penalty and the violence it propels. It is time for a global ban … I have experienced the horror of being close to an execution. Not only during the apartheid era of South Africa, when the country had one of the highest execution rates in the world, but in other countries as well. And I have witnessed the victims of the death penalty the authorities never speak of – the families of those put to death.

Desmond Tutu, "The Doctrine of Revenge," *The Guardian* (November 12, 2007)

The death penalty has no place in the 21st century.

UN Secretary-General António Guterres, World Day Against the Death Penalty (October 10, 2017)

Contents

Preface

I was exposed to the cruelty and injustice of the death penalty – not directly, but through history's long shadow – at an early age. I grew up in Mankato, Minnesota, just a few blocks away from the site of America's largest mass hanging. On December 26, 1862, in the midst of America's Civil War, thirty-eight Dakota Indians were simultaneously hanged from a large, four-sided scaffold constructed of wooden timbers. More than 300 Dakota Indians had originally been sentenced to die by a military commission in the aftermath of the US–Dakota War of 1862, but President Abraham Lincoln – insisting that the military commission's records be meticulously reviewed – narrowed the number of men to be executed to thirty-eight. Although President Lincoln's three-page order, handwritten on Executive Mansion stationery, listed each man to be executed by name and number (Nos. "2," "4," "5," "6," "10," etc.) according to the military tribunal's records, at least one man, Chaska, was wrongfully executed on that fateful day after Christmas. After the mass execution in Mankato, *Frank Leslie's Illustrated Newspaper* printed a depiction of the execution day scene – an illustration showing a large number of spectators and lines of soldiers on horseback and standing at attention surrounding the gallows to secure the site. Chaska was put to death either because he was mistakenly confused with Chaskaydon, a condemned man with a somewhat similar name, or – more nefariously – because of false rumors that he'd had sexual relations with a white woman, Sarah Wakefield, the thirty-three-year-old wife of a doctor who'd been held captive during the US–Dakota War.

Like so many executions, Mankato's mass execution is tied up with issues of race. General Henry Sibley, the first Governor of Minnesota who'd fought in the US–Dakota War and then created the military tribunal that convicted and sentenced to death the Dakota combatants, privately referred to Chaska as Sarah Wakefield's "dusky paramour." And Chaska was put to death even though he had, in fact, protected Wakefield from harm during the fighting

and hostilities. "If it had not been for Chaska, my bones would now be bleaching on the prairie," Wakefield wrote of her survival in *Six Weeks in the Sioux Tepees* (1864), shocked to learn after the mass hanging that her Native American protector had been hanged. "In regard to the mistake by which Chaska was hanged instead of another, I doubt whether I can satisfactorily explain it," a Christian missionary, Reverend Stephen Riggs, wrote to Sarah Wakefield after Chaska's wrongful execution. "We all regretted the mistake very much," Reverend Riggs lamented, although Wakefield – quite understandably – believed that Chaska's execution "was done intentionally," despite protestations to the contrary. Until the late twentieth century and the dedication of Reconciliation Park in Mankato, only a stark, five-ton granite marker tersely reading, "Here were hanged 38 Sioux Indians Dec. 26th 1862," marked the mass hanging's location. All of the names of the Dakota Indians put to death in 1862 are now listed at the park, directly adjacent to the Mankato branch of the Blue Earth County Library where, as a kid, I checked out books, not knowing the full extent of the tragedy that unfolded there.

After carefully studying the death penalty and its arbitrary, discriminatory, and torturous administration, *The Death Penalty's Denial of Fundamental Human Rights* represents the apogee of my thinking about capital punishment. It's been a long, arduous journey with lots of dreadful, often hideous, material to digest about crime and punishment, although I've seen material progress toward global abolition of capital punishment since I've been writing about the issue. Since embarking on my exploration of the death penalty more than thirty years ago, a number of countries and American states have abolished capital punishment. The Council of Europe – through Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as the European Convention on Human Rights) – also chose to outlaw the death penalty's use even in wartime. In 2021, at the University of Trento in Italy, I took note of the early anti-death penalty advocacy of Milan native Cesare Beccaria (1738–94) and of an early twentieth-century execution in Trento – of Cesare Battisti. An Italian journalist who fought against the Austro-Hungarian Army, Battisti was charged with high treason, and following his conviction was strangled to death on July 12, 1916, at age forty-one, at Trento's Castello del Bounconsiglio. Because of Protocol No. 13 to the European Convention, I pointed out, it was an execution that could not, by law, take place today in that Italian locale.

All journeys of any length have stops and sights to see along the way, with many mile markers and guideposts – and quite often, a few unexpected detours – en route to one's final destination. My journey is no different. Before getting my law degree in 1991 at the Indiana University School of

Law in Bloomington, I took a death penalty seminar from Professor Joseph Hoffmann, a former law clerk for US Supreme Court Associate Justice (and later Chief Justice) William Rehnquist. After learning in that class about rampant ineffective assistance of counsel in capital cases, and how, at the time, American juvenile offenders could still be sentenced to death, I initially got involved after graduation in doing *pro bono* work on capital habeas corpus matters as a young lawyer at Faegre & Benson in Minneapolis. That legal work drew my attention to the death penalty's ad hoc and racially discriminatory administration, and to the extraordinary complexity of capital litigation (replete with procedural bars and defaults, "retroactivity"/"nonretroactivity" jurisprudence, and an exhaustion of remedies doctrine in postconviction proceedings). I also learned that so-called "private prosecutors" (i.e. lawyers hired by murder victims' families to assist in conducting criminal prosecutions) were still appearing in capital cases in places such as Texas (as they frequently did in eighteenth- and nineteenth-century America, a topic I've written about in *Private Prosecution in America: Its Origins, History, and Unconstitutionality in the Twenty-First Century* (2022)). That *pro bono* work also led me to start thinking harder and writing more systematically about capital punishment and its immutably cruel and torturous characteristics, with a view toward its complete abolition.

The death penalty is about vengeance-seeking, even if the effort to avenge a killing is dressed up as "retribution." As a result of my initial exposure as a lawyer to capital punishment, I wrote an article in 1994 for the *Arkansas Law Review* arguing that the use of private prosecutors for interested parties should be considered unethical and unconstitutional. In 1996, I also published a law review article about the history of executions in Minnesota, with the botched hanging of William Williams in 1906 ultimately leading to abolition of the punishment of death in my home state in 1911. After the sheriff miscalculated the length of the rope, Williams – the condemned man – hit the floor once the scaffold's trap door swung open at 12.31am, with three deputies holding up Williams's body for an excruciating fourteen and a half minutes until the coroner pronounced him dead from strangulation. A twenty-eight-year-old immigrant steamfitter from Cornwall, England, Williams had been convicted of murdering a teenager, Johnny Keller, with whom he had fallen in love. In spite of a dissent arguing that Williams should have been granted a new trial because of the jury's exposure to "certain prejudicial newspaper articles" and "irregularity in the proceedings and misconduct of the jury," the Minnesota Supreme Court had affirmed his conviction and death sentence, noting Williams had "a strong and strange attachment" to the murdered boy. Williams's last words were: "Gentlemen, you are witnessing an illegal

hanging. I am accused of killing Johnny Keller. He was the best friend I ever had and I hope to meet him in the other world. I never had improper relations with him. I am resigned to my fate. Goodbye."

As is so often the case for authors, one writing project leads to another. After writing about Minnesota's history of state-sanctioned killing, I then researched and wrote my first book, *Death in the Dark: Midnight Executions in America* (1997), documenting America's gradual, decades-long transition from public, daytime executions to privately conducted, nighttime executions. Minnesota, like other American states, once required executions to be carried out "before the hour of sunrise" and in private – either within prisons or adjacent enclosures. Through my research, I discovered that, because of the passage of a series of laws that led to a rise in nighttime executions, between 1977 and 1995 more than 80 percent of the 313 executions that took place in the United States occurred between 11.00pm and 7.00am, with more than 50 percent occurring between midnight and 1.00am. Centuries ago, execution attendees had been drawn to the anti-death penalty movement by the barbarity of the executions, but as hangings moved from public squares into prisons – and, in some locales, into the middle of the night – once open-air spectacles descended into the shadows. It was in 1998, shortly after *Death in the Dark*'s publication, that I started teaching a death penalty seminar myself as an adjunct professor at the University of Minnesota Law School, also known as Walter F. Mondale Hall in honor of the late US vice-president.

And so my journey continued – and the more I looked, the more I learned and became appalled. After writing two more books, *Legacy of Violence: Lynch Mobs and Executions in Minnesota* and *Kiss of Death: America's Love Affair with the Death Penalty*, both published in 2003, I started teaching law full-time in 2007 following my wife Amy's election to the US Senate. Looking back, I've now been writing about – and speaking out against – capital punishment for more than three decades, although criminal justice reform clearly must be much broader – and much deeper – than just doing away with the death penalty. It's my firmly held belief that the criminal law has long been overly punitive and vengeful in character, and that the death penalty should never be permitted because of its inherently cruel and torturous nature. My 2012 book, *Cruel and Unusual: The American Death Penalty and the Founders' Eighth Amendment*, documented the centuries-old English roots of the US Constitution's Cruel and Unusual Punishments Clause, arguing that America's highest court should declare capital punishment unconstitutional under the auspices of that clause. That's precisely what Justices William Brennan and Thurgood Marshall so forcefully called for when they served on the US Supreme Court. In more than 2,000 capital cases, they reiterated their

ardently held conviction that the death penalty is, per se, a cruel and unusual punishment. In a more recent essay I wrote for the *St. Louis University Law Journal*, "What I Think about When I Think about the Death Penalty," I laid out my own personal views on the subject and set forth a legal framework and blueprint for the death penalty's complete abolition.

Judges *judge*, and I believe that jurists around the globe should, through their adjudications, outlaw the death penalty once and for all. As with other jurists throughout the world, individual members of the US Supreme Court have been questioning the death penalty's legitimacy for decades. In 1950, Justice Felix Frankfurter told the British Royal Commission on Capital Punishment: "I myself would abolish it." And in 1963, Justice Arthur Goldberg – in reviewing a list of capital cases, and seeing an opportunity for the Supreme Court to explicitly address the issue – circulated a memorandum to his colleagues about whether the death penalty violated the US Constitution's Eighth Amendment, part of the Bill of Rights made applicable to the states by virtue of the Fourteenth Amendment. Just a few years later, in 1970, Arthur Goldberg – by then a former justice who'd left the Court to serve as the US Ambassador to the United Nations – co-authored a *Harvard Law Review* article, "Declaring the Death Penalty Unconstitutional," with his former law clerk, Alan Dershowitz. Not long after, in *Furman* v. *Georgia* (1972), the US Supreme Court itself held that capital punishment, as then applied, violated the Eighth and Fourteenth Amendments. While the Eighth Amendment prohibits "cruel and unusual punishments," the Fourteenth Amendment guarantees due process and equal protection of the laws. University of Chicago criminologist Norval Morris, in a foreword to a 1973 English-language biography of Cesare Beccaria, said *Furman* represented the "final vindication" of "the quality of Beccaria's perceptive vision."

Sadly, although America's death penalty might have ended there, setting an example for other nations, the US Supreme Court later reversed course. In *Gregg* v. *Georgia* (1976) and two companion cases, *Jurek* v. *Texas* (1976) and *Proffitt* v. *Florida* (1976), it upheld the constitutionality of death penalty laws in Georgia, Texas, and Florida, while simultaneously refusing to uphold mandatory death penalty schemes – the position it still takes to this day. Although the Court explicitly held more than a century ago, in *Wilkerson* v. *Utah* (1878) and *In re Kemmler* (1890), that the US Constitution's Cruel and Unusual Punishments Clause forbids *torture*, those rulings ironically came in cases upholding the constitutionality of executions by public shooting and electrocution. At a time when the concept of torture was under-conceptualized and the death penalty was still in widespread use, neither of those judicial decisions grappled in any serious way with whether the punishment of death

should be classified *as* torture. For example, in *Wilkerson*, the Supreme Court – in dicta – wrote only that "it is safe to affirm that punishments of torture," such as drawing and quartering, burning, or disemboweling while alive, "and all others in the same line of unnecessary cruelty," are "forbidden" by the Eighth Amendment's Cruel and Unusual Punishments Clause.

To get a chance to shape the law's trajectory is both a blessing and a heavy burden for any jurist, especially those sitting in elevated positions of power. Justice Ruth Bader Ginsburg – like few others in history, and as only the second woman to serve on the US Supreme Court – had a unique opportunity to shape the law for the better and in accordance with her own perceptive vision. Much of Justice Ginsburg's professional life as a lawyer – as the biopic, *On the Basis of Sex* (2018), makes clear – was focused on securing equal rights for women. But through her legendary work ethic and judicial opinions, she touched countless aspects of the law, including with respect to the death penalty and what the US Supreme Court, in its Eighth Amendment jurisprudence, has termed the "evolving standards of decency that mark the progress of a maturing society." At an October 2021 presentation, "World Day Against the Death Penalty: Justice Ruth Bader Ginsburg's Legacy," Amy Bergquist – a former law clerk to Justice Ginsburg – pointed out that Justice Ginsburg would refer to reviewing legal papers pertaining to impending executions as "a dreadful part" of the Supreme Court's docket. The review of capital cases thus weighed heavily on Justice Ginsburg. That was especially so in light of her knowledge that, as she so disturbingly put it in 2001, "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial." "People who are well represented at trial," Justice Ginsburg observed, "do not get the death penalty."

Before she died on September 18, 2020 after her battle with pancreatic cancer, Justice Ginsburg – like Justice Breyer and his predecessors and former colleagues, Justices Frankfurter, Goldberg, Blackmun, Brennan, Stevens, and Marshall among them – had personally witnessed major flaws in the death penalty's administration. In truth, Justice Ginsburg's exposure to – and reservations about – the death penalty dated back many decades. As a lawyer for the American Civil Liberties Union in the 1970s, she had participated in the drafting of a US Supreme Court amicus brief – filed in *Coker* v. *Georgia* (1977) – arguing that imposing the death penalty for nonhomicidal rape violated the US Constitution's Eighth Amendment. In fact, during her Senate confirmation hearing after being nominated to the nation's highest court, she'd been asked a series of questions about that legal work, but – at the time – had declined to assert her personal views on capital punishment.

"I did not write on the general question of the constitutionality of the death penalty," she told Republican Senator Chuck Grassley of Iowa during her hearing, adding of her ACLU volunteer work while she was a Rutgers Law School professor: "The *Coker* v. *Georgia* (1977) brief said the death penalty for rape – where there was no death or serious permanent injury, apart from the obvious psychological injury – was disproportionate for this reason: The death penalty for rape historically was a facet of the view that woman belonged to man." Then-nominee Ginsburg cogently explained the legal history of how women were once treated and marginalized by the law, using this language: "First, she was her father's possession. If she suffered rape before marriage, she became damaged goods. The rapist was a thief. He stole something that belonged first to the father, then, when the woman married, to her husband." The ACLU amicus brief, law professors Carol Steiker and Jordan Steiker later recounted in the *University of Chicago Law Review*, taking note of how Black men, throughout history, were frequently executed for nonhomicidal rape, especially of white women, "powerfully exposed the ways in which the death penalty for rape fundamentally rested on both sexist and racist beliefs."

Throughout her life, Justice Ginsburg had a clear vision for the law's path forward and was receptive to considering international law as part of her judicial philosophy, one described by one of her former law clerks, Alexandra A. E. Shapiro, as "gradualist," but highly pragmatic and with a "commitment to preserving the rights of the accused." As Justice Ginsburg's vision is recalled, it should not be forgotten that her own struggle with capital cases – one that began after she became a US Supreme Court justice – ended with her joining Justice Breyer's clear-eyed and cogent dissent in *Glossip* v. *Gross* (2015), calling on the Supreme Court to forthrightly take up the question of whether the death penalty is unconstitutional. It was a position that Justice Ginsburg, like Justice Breyer, did not come to lightly. At her 1993 Senate confirmation hearing, then-DC Circuit Judge Ginsburg had accurately observed that "no judge on the Court currently takes the position that the death penalty is unconstitutional under any and all circumstances." By then, Thurgood Marshall (1908–93) and William Brennan (1906–97) were no longer on the nation's highest court. "Brennan, Marshall Doggedly Fight Death Penalty," a 1983 headline in the *Washington Post* had declared during their Court tenure, with Justices Brennan and Marshall frequently reciting in dissents that the death penalty is in all circumstances a cruel and unusual punishment. "I'll never give up," Marshall, then in his 70s, said in a brief interview. "On something like that, you can't give up and you can't compromise."

Justice Ginsburg's real-world struggle with capital cases – one that started as a case-by-case review, but that ended with her call to comprehensively review

the death penalty's constitutionality – frames the arguments (and the long arc of the law) presented in *The Death Penalty's Denial of Fundamental Human Rights*. Justice Ginsburg cast numerous votes in capital cases, deciding, among other things, to exempt those with intellectual disabilities and juvenile offenders from capital punishment in two landmark cases, *Atkins* v. *Virginia* (2002) and *Roper* v. *Simmons* (2005). In 2008, in extending the Supreme Court's landmark *Coker* v. *Georgia* decision barring the death penalty's use for rape, she also joined Justice Anthony Kennedy's majority opinion in *Kennedy* v. *Louisiana*, a 5-4 decision outlawing death sentences for nonhomicidal child rape. The judicial opinions that Justice Ginsburg authored or joined, including Justice Breyer's dissent in *Glossip*, help frame whether the law – whether international or domestic – should continue to tolerate the use of death sentences. Justice Ginsburg, certainly, understood the power of a good dissent. As she once said: "Dissents speak to a future age. It's not simply to say, 'My colleagues are wrong and I would do it this way.' But the greatest dissents do become court opinions and gradually over time their views become the dominant views." Justice Ginsburg is no longer with us and Justice Breyer is now retired, replaced by Justice Ketanji Brown Jackson. But could Justice Breyer and Justice Ginsburg's dissent in *Glossip* and dissents in other death penalty cases ultimately become the law of the land? Might international law one day outlaw all executions? As TV and radio broadcasters frequently remind us: "Stay tuned."

Over the decades, I myself have read reams of studies, news stories, and articles about the cruelty, arbitrariness, and discriminatory nature of death sentences and executions – the very topics that Justices Breyer and Ginsburg raised in their *Glossip* dissent. The more I've examined the death penalty, in fact, the more I've observed its arbitrary, discriminatory, and plainly torturous nature – and the more I've become interested in the long arc and repercussions of the world's anti-death penalty and anti-torture movements on what I now see as the death penalty's inevitable abolition. As a consequence, with much help and encouragement over the years, I've explored the impact of the Enlightenment on the law, writing a trilogy of books about the life and ideas of Cesare Beccaria (1738–94), the young Italian aristocrat who, in 1764 in a slender treatise, *Dei delitti e delle pene* (*On Crimes and Punishments*), renounced torture and announced his opposition to capital punishment. That trilogy – *The Birth of American Law: An Italian Philosopher and the American Revolution* (2014), *The Celebrated Marquis: An Italian Noble and the Making of the Modern World* (2018), and *The Baron and the Marquis: Liberty, Tyranny, and the Enlightenment Maxim that Can Remake American Criminal Justice* (2019) – makes clear that the prospect of the death penalty's

abolition was actually considered and debated centuries ago. Beccaria's writings led to calls for the death penalty's abolition by leading figures in Europe and the Americas, with abolition or restrictions on capital punishment following in certain locales, whether by a monarch's edict or a legislature's vote. In a letter written in 1797, Abigail Adams – the wife of American president John Adams – herself wondered what might happen in the United States "if the states go on to abolish capital punishment."

My recent scholarship – *The Death Penalty as Torture: From the Dark Ages to Abolition* (2017), a series of book chapters and law review articles, and now this book – contends that capital punishment, because of its inherent characteristics, should be reclassified as a form of torture. When one considers various acts, including nonlethal acts, that are already considered to be torturous in nature, it's crystal clear to me that the death penalty should be so classified. *The Death Penalty's Denial of Fundamental Human Rights* specifically shows why international law and domestic legal systems should immediately determine that capital prosecutions, death sentences, and executions inflict impermissible torture. Jurists around the globe should declare that capital punishment violates the all-important concept of human dignity, the very foundation of the world's framework for international human rights law. They should also conclude that the law's long-standing prohibitions of arbitrary and discriminatory punishments should bar the use of capital prosecutions and death sentences. As Ban Ki-moon, the former UN Secretary-General, wrote in his own preface to the UN publication, *Death Penalty and the Victims* (2016): "The right to life is the foundation of all human rights. The taking of life is irreversible, and goes against our fundamental belief in the dignity and worth of every human being." In his public appeal, he concluded: "I call on all world leaders, legislators and justice officials to stop executions now. There is no place for the death penalty in the 21st century."

Acknowledgments

Not long after graduating from law school in 1991, I got the opportunity as a young lawyer at Faegre & Benson in Minneapolis to work on death penalty cases. One of the extraordinary capital litigators I met was Sandra Babcock, then a supervising attorney with the Texas Capital Resource Center handling state and federal habeas corpus proceedings. Among other cases, she was representing death-row inmates in matters in which murder victims' families had been allowed to hire private lawyers – so-called "private prosecutors" – to assist in the capital prosecutions. I ended up writing a law review article on that topic after doing extensive legal research into the practice, and I later watched as Sandra skillfully put the law, including international law, to use in her cases. For example, she effectively represented the interests of Mexican nationals on American death rows before the International Court of Justice in *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, asserting violations of the Vienna Convention on Consular Relations (1963) after foreign nationals in the United States were not informed of their rights to consular notification and access. She's now a clinical professor at Cornell Law School and the faculty director of the Cornell Center on the Death Penalty Worldwide, and in 2021 received the American Bar Association's John Paul Stevens Guiding Hand of Counsel Award. She's also spearheaded the creation of a valuable resource for capital litigators, *Representing Individuals Facing the Death Penalty: A Best Practices Manual* (2013), with her own skillful advocacy saving more than 100 prisoners in Malawi previously sentenced to death.

Throughout my career, in fact, I've been influenced by the ideas and perspectives of so many people who've fought for justice, human rights, and the abolition of capital punishment – whether in individual cases or on a more systemic basis. Many years ago, for instance, I got the chance to meet Bryan Stevenson, the founder and executive directive of the Alabama-based Equal

Justice Initiative, as well as Sister Helen Prejean – the Roman Catholic nun and dynamic author of *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States* (1993). Bryan Stevenson's *New York Times* bestselling memoir, *Just Mercy: A Story of Justice and Redemption* (2014), has inspired countless people to work for criminal justice reform. In *Just Mercy*, Stevenson wrote movingly about the case of Walter McMillian, an African-American man wrongfully convicted of murder who'd spent six years on Alabama's death row before his exoneration in 1993. "They tortured me with the promise of execution for six years," McMillian once said of the pain and suffering he endured while in prison, adding haltingly, "I lost my job. I lost my wife. I lost my reputation. I lost my – I lost my dignity." "I lost everything," McMillian concluded of his years-long death-row ordeal, with the Alabama Court of Criminal Appeals rejecting four of his appeals before he finally gained his freedom.

I first met Sister Helen Prejean when she came to Minneapolis to speak out against the death penalty and to talk about her own bestselling book. She suggested the publisher for my first book, *Death in the Dark: Midnight Executions in America* (1997), later writing two more books of her own, *The Death of Innocents: An Eyewitness Account of Wrongful Executions* (2004) and *River of Fire: My Spiritual Journey* (2019). I've had the privilege to hear Sister Helen evangelize about the need for the death penalty's abolition, and she's been a leading advocate for a global moratorium on executions. In December 2000, she – along with representatives of Amnesty International and a Rome-based interfaith group, the Sant'Egidio Community – delivered to then-UN Secretary-General Kofi Annan a petition signed by 3.2 million people seeking to end state-sanctioned killing. To hear Sister Helen speak passionately about her work with both death row inmates and murder victims' families is always incredibly moving, and her work as a spiritual advisor to the condemned has given her a unique, up-close perspective on capital punishment. As she ultimately concluded in *Dead Man Walking*, the book that inspired the film of the same name: "[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."

In truth, the cruelty and torturous nature of capital punishment could not be clearer. The state's ultimate sanction involves lawmakers authorizing the punishment of death, prosecutors bringing capital charges, juries imposing death sentences, and government officials crafting detailed execution protocols addressing everything from an inmate's burial arrangements, final hours, and last meal. Violent crimes can be especially aggravated or torturous in

nature, but executions are inherently so. One Alabama death row inmate, Doyle Lee Hamm, was left with more than a dozen puncture marks in his groin and legs by an "execution team" before the nearly three-hour-long February 22, 2018 lethal injection attempt on his life was finally aborted. In the hours before the scheduled execution, Justice Stephen Breyer – dissenting from the US Supreme Court's denial of Hamm's stay request – wrote that he "would reconsider the constitutionality of the death penalty itself." Justices Ruth Bader Ginsburg and Sonia Sotomayor also dissented from the denial of the stay application, emphasizing that the planned method of execution "has, by all accounts before us, never been tried before in Alabama." In the aftermath of the not-so-hastily aborted execution attempt, Hamm's attorney Bernard Harcourt – a Columbia Law School professor I've gotten to know through academic conferences, and who had explicitly warned state officials that Hamm's lymphatic cancer and compromised veins would make it extremely difficult to carry out the execution – aptly observed: "This was clearly a botched execution that can only be accurately described as torture." After Hamm and the State of Alabama reached a confidential settlement not long after that ended the state's efforts to set another execution date, Hamm died of cancer in 2021 – more than thirty years after the commission of his crime.

The Death Penalty's Denial of Fundamental Human Rights is rooted in such disturbing events, forthrightly arguing that capital punishment *is* torture and constitutes the ultimate violation of human dignity and the right to life. The law, which has tolerated the death penalty's use for far too long, is often slow to change, in part because it's extremely difficult to convince people to abandon old habits and practices and to change the law, whether by ratifying new treaties or passing new legislation. Judges steeped in legal tradition – who've studied the law as it is – also frequently defer to longstanding legal precedents and executive and legislative actions, even in the face of torturous official acts that make them queasy or that they find personally revolting. In interpreting the law, jurists only decide the cases and controversies brought before them, so the law, at times, evolves only incrementally from case to case as trials take place and appeals are heard. Landmark judicial rulings can suddenly change everything – as with the Constitutional Court of South Africa's decision in *State* v. *Makwanyane* (1995), declaring that country's death penalty unconstitutional. But the Anglo-American doctrine of *stare decisis* – Latin for "to stand by things decided" – exerts a strong pull on the law to maintain its relative constancy. Horrendous US Supreme Court decisions like *Dred Scott* v. *Sandford* (1857), *Plessy* v. *Ferguson* (1896), and *Louisiana ex rel. Francis* v. *Resweber* (1947) – denying African Americans citizenship, allowing racial

segregation, and permitting a Black juvenile offender, Willie Francis, to be executed at the age of 18 after the first execution attempt in the electric chair failed to kill him – remind us that judicial decisions can, themselves, be grave injustices.

Over three decades in the legal profession, I've gotten to know jurists who've been confronted head-on with capital cases along with seasoned litigators, many recruited by the American Bar Association's Death Penalty Representation Project, who've dedicated years or even decades to working on such cases. At this book's outset, I'd be remiss if I didn't acknowledge the work, views, and personal struggles of those individuals, for it is judges and practicing lawyers, ultimately, who may decide the ultimate fate of capital punishment. In his 1993 *Minnesota Law Review* article, "The Writ of Habeas Corpus: A Complex Procedure for a Simple Process," Judge Donald Lay (1926–2007), then on the US Court of Appeals for the Eighth Circuit, aptly reminded his readers that "capital punishment is unique because it is irrevocable once performed." In truth, the global community of jurists, scholars, and lawyers who regularly wrestle with or write about capital punishment, or who work on death penalty cases, is a relatively small one, although millions of people around the world – many through NGOs like Amnesty International – are diligently working to halt executions and abolish the punishment of death.

In my own advocacy and labors, I've been blessed to get to know some of the top leaders in the field, including William Schabas, a professor of international law at Middlesex University in London and Leiden University, the honorary chairman of the Irish Centre for Human Rights, and the author of more than twenty books, including *The Abolition of the Death Penalty in International Law*, now in its third edition; the late Oxford criminologist Roger Hood (1936–2020) – the author, with Carolyn Hoyle, of *The Death Penalty: A Worldwide Perspective*, and an optimistic man who steadfastly believed that capital punishment would eventually be eliminated; Harvard Law School professor Carol Steiker and her brother, University of Texas at Austin law professor Jordan Steiker, prolific scholars (and both former law clerks to Justice Thurgood Marshall) who've each graciously given me the opportunity to speak about capital punishment at their respective schools; the late David Weissbrodt (1944–2021), a world-renowned international human rights advocate and regents professor who established the University of Minnesota Law School's Human Rights Center, helped found the Advocates for Human Rights and the Center for Victims of Torture, and served as a member of the UN Sub-Commission on the Promotion and Protection of Human Rights; and the late Christof Heyns (1959–2021), the former UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and a University of Pretoria law professor. Christof's father,

Johan, a theologian and minister in the Dutch Reformed Church, called apartheid a sin and was assassinated in his Pretoria home in 1994 – something that surely drove Christof's tireless, day-to-day work in the human rights field.

I first met Roger Hood in Oslo, Norway, at a symposium on capital punishment, although I'd previously become familiar with his influential scholarly writings. And in a master's program at Oxford, I reconnected with David Weissbrodt – a fellow Minnesotan – as I studied pressing human rights issues such as the need to eradicate torture. I had flown all the way from Minnesota to England to study with David, and it was worth every penny to spend time in his learned company. At Oxford, Christof Heyns and I also developed a good friendship, including over tennis matches on the university's grass courts. Because of our mutual interests, we all stayed in touch over the years and made new friendships along the way. Roger, David, and Christof – along with their collective warmth, intelligence, and determined advocacy, and their genuine humanity – will be sorely missed. It was through David and another highly accomplished lawyer, Sam Heins – the former US ambassador to Norway and a former president of the Minnesota Lawyers Committee for International Human Rights – that I got to know Fionnuala Ní Aoláin, David Weissbrodt's successor at the University of Minnesota Law School's Human Rights Center. She's now ably carrying out – and expanding – the Human Rights Center's work.

Six years ago, because of my own decades-long advocacy against capital punishment, I had the privilege to serve as the editor for Justice Stephen Breyer's *Against the Death Penalty* (2016), a Brookings Institution Press title that reprints, annotates, and contextualizes his powerful dissent against capital punishment in *Glossip* v. *Gross* (2015). I've met and had the chance to socialize with Justice Breyer and his wife, Joanna, over the years, and they are delightful people and as smart and thoughtful as they come. Appointed to the US Supreme Court in 1994, Justice Breyer has a notable, longtime friendship with Robert Badinter, the former president of the Constitutional Council in France and the man most responsible for the guillotine's demise in that country. As a lawyer, Badinter represented Roger Bontems, guillotined in Paris in 1972 at Santé Prison along with another man, Claude Buffet. Thereafter, as French President François Mitterrand's minister of justice, a horrified Badinter – nearly two full centuries after the guillotine was first put to use in France in 1792 – was instrumental in France's abolition of capital punishment in 1981. Justice Breyer, who has written of international law's vitality in *The Court and World: American Law and the New Global Realities* (2015), and Badinter, the author of *L'Abolition* (2000), later translated into English as *Abolition: One Man's Battle Against the Death Penalty* (2008), even co-edited

a book, *Judges in Contemporary Democracy: An International Conversation* (2004). To be associated with Justice Breyer's dissent in *Glossip* – and to help bring that dissent to a wider audience – was a genuine professional honor for which I'll forever be grateful.

The majority and dissenting opinions in *Glossip* v. *Gross* illustrate the world's current judicial divide over capital punishment – over how the punishment of death should be treated by the law. In *Glossip*, the US Supreme Court narrowly upheld Oklahoma's three-drug lethal injection protocol by a five-to-four vote. But in his dissent, Justice Breyer – joined by Justice Ruth Bader Ginsburg – wrote that "it is highly likely that the death penalty violates the Eighth Amendment" and its prohibition of "cruel and unusual punishments." "Today's administration of the death penalty," Justice Breyer emphasized, "involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose." "Perhaps as a result," he added, "(4) most places within the United States have abandoned its use." Justice Sonia Sotomayor also filed a dissent in *Glossip*, one joined by Justices Ginsburg, Breyer, and Kagan. It recounted Oklahoma's botched execution of Clayton Lockett in 2014, expressing concern about the "torturous manner" in which lethal-injection drugs operate ("causing burning, searing pain" if maladministered) and pointedly observing: "Nothing compels a State to perform an execution. It does not get a constitutional free pass simply because it desires to deliver the ultimate penalty; its ends do not justify any and all means." Meanwhile, Justice Antonin Scalia wrote a concurrence in *Glossip*, emphasizing: "Time and again, the People have voted to exact the death penalty as punishment for the most serious of crimes."

Life is full of surprises, and in Washington, DC, I had the chance to meet Justice Ruth Bader Ginsburg, one of the dissenters in *Glossip* and a true trailblazer in the law who served on the Supreme Court from 1993 until her death in 2020. I even had a little correspondence with Justice Ginsburg prior to the *Glossip* decision that gave me a glimpse into her views on capital punishment before she signed onto Justice Breyer's forceful dissent. After Northeastern University Press had published *Cruel and Unusual: The American Death Penalty and the Founders' Eighth Amendment* (2012), my history of the US Constitution's Cruel and Unusual Punishments Clause, I'd sent out printed books to various opinion leaders, including then-current and retired Supreme Court justices, hoping to persuade them of the death penalty's unconstitutionality. That book has a chapter on how the Italian philosopher Cesare Beccaria's book, *On Crimes and Punishments*, materially influenced America's founders, and I was pleasantly surprised to get a personal letter from Justice Ginsburg

not long after sending out the book. In her reply, she said she looked forward "to the enlightenment reading it will provide" and confided that Beccaria's 1764 treatise (which espouses anti-death penalty views) "was the first work I read on coming here, believing it might help me persuade my colleagues." "Cheers on the vital undertaking you have completed, and every good wish," she closed.

Justice John Paul Stevens, then retired, also wrote back, though with less optimism about the potential for *Cruel and Unusual* to change Justice Scalia's firmly entrenched views. "I doubt that Justice Scalia will feel the need to read it," Stevens bluntly observed, referring to the Supreme Court's decision in *Harmelin* v. *Michigan* (1991), "because I think he remains persuaded that the position he advocated in *Harmelin* was correct." In *Harmelin*, Justice Scalia – the die-hard originalist – wrote of the prohibitions against "cruel and unusual punishments" in English and American law. The English Bill of Rights (1689) – approved by Parliament following the Glorious Revolution of 1688–89 – prohibited cruel and unusual punishments, although English executions continued unabated. In spite of the American Revolution and the adoption of revolutionary state constitutions barring "cruel and unusual," "cruel or unusual," or "cruel" punishments, as well as the ratification of the US Constitution's Eighth Amendment, American executions continued, too. In attempting to justify modern-day executions, Justice Scalia's opinion in *Harmelin* emphasized that "mandatory death sentences abounded" in the first US penal code and "were also common" in the United States – "both at the time of the founding and throughout the 19th century." The 1790 Crimes Act, to which Justice Scalia referred, also authorized the pillory's use for perjury, and permitted whipping – up to "thirty-nine stripes" – for larceny and corruption of judicial records.

Still hopeful a majority of the US Supreme Court might be persuaded in spite of the cautionary note from Justice Stevens, I continued mailing my scholarship to the Supreme Court justices. In 2013, after sending Justice Ginsburg another piece of my scholarship, she took the time to pen another short note. "I am glad to have your writings on Beccaria to share with all in chambers," she wrote, continuing to show a genuine interest. But by far the most memorable letters I received from Justice Ginsburg came after I'd sent her a copy of a law review article I'd published on the death penalty in 2013 in the *British Journal of American Legal Studies*. "The reprint you sent was ruined by the radiation to which all mail sent to the court is exposed," she wrote on December 23, 2013, adding: "I would appreciate another copy, mailed to my home address …" After promptly sending out another reprint (a lawyer knows a jurist's order when he sees one), Justice Ginsburg sent me

another letter, thanking me for the article, titled "The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century." "[I]t arrived unscathed," she noted, adding once again that she would share it "with all in chambers." The last letter I got from her came after I'd sent her a copy of *The Birth of American Law: An Italian Philosopher and the American Revolution*, my 2014 book documenting Cesare Beccaria's sweeping impact on America's founders and early American constitutions and laws. Imagine my delight to one day find in my in-box at the University of Baltimore a short letter on Supreme Court stationery signed "RBG" that read: "Impressive work! I read *On Crimes and Punishments* some years ago and am glad to have an opportunity to learn more about Beccaria."

I wish Justice Ginsburg was still with us, although her legacy in the law is secure. Indeed, her absence has been felt already. It's clear to me that, from the very beginning of her tenure, Justice Ginsburg was not only no fan of capital punishment, but worked diligently behind the scenes to convince her colleagues on the bench to adopt her views. Very few lawyers and judges I've met have ever heard of the eighteenth-century Italian philosopher Cesare Beccaria, the now relatively obscure Enlightenment figure who once helped kick-start the world's anti-death penalty movement. Impressively, Justice Ginsburg not only knew of Beccaria, but she was anxious to know even more. On the Court, Justice Ginsburg could not avoid death penalty cases. Although she charted her own course, her first vote on a death penalty case was for a stay of execution. As law professors Sidney Harring and Jeffrey Kirchmeier explain in their 2004 *New York City Law Review* article, "Scrupulous in Applying the Law: Justice Ruth Bader Ginsburg and Capital Punishment": "In her first vote on a death penalty case, on September 1, 1993, she voted for a stay of execution in *James* v. *Collins*, along with Justices Stevens and Blackmun." "Most of Justice Ginsburg's writing in death penalty cases," they observed, "has been in dissent, with a focus on procedural fairness and in defense of a broader standard for habeas corpus review of state death penalty cases."

The law's history can be seen as a reflection of the times in which people lived or, in the case of international law, as a recorded conversation between the community of nations as a whole. This book, *The Death Penalty's Denial of Fundamental Human Rights*, is the capstone to more than three decades of thinking long and hard about the death penalty, its inherent characteristics, and its torturous and racially discriminatory administration. I have taught a death penalty seminar at multiple law schools – first at the University of Minnesota Law School from 1998 to 2006, then at the George Washington University Law School, where I was a visiting professor for two years, and later at other law schools, including at Rutgers, thanks to an invitation from my

friend and fellow law teacher, Adam Scales. It's a seminar I continue to teach at the University of Baltimore School of Law and the Georgetown University Law Center. This book would not be the book that it is without my past exposure to my students' thoughtful and creative scholarly contributions to the subject of capital punishment. I am also extremely grateful to Tom Randall, Narmadha Nedounsejiane, Sophie Rosinke, Hannah Weber, Gemma Smith, and others at or associated with Cambridge University Press for guiding this book through the publication process. I had a chance to contribute a book chapter in 2020 to a Cambridge University Press anthology, *The Eighth Amendment and Its Future in a New Age of Punishment*, and it's an honor to publish this book with such a distinguished academic publisher.

I also want to thank the many people – the advocates, lawyers, and academics – who I've discussed death penalty issues with over the years. There are far too many people to mention by name (and I know it's impossible to mention everyone here given space constraints), but in addition to those mentioned earlier and my late friend, former Hennepin County Attorney Tom Johnson (1945–2020), I'd be remiss if I didn't acknowledge the following individuals: Mahmood Amiry-Moghaddam, José Anderson, Tom Banchoff, Corinna Barrett Lain, Bruce Beddow, Florence Bellivier, Will Berry, Greg Braun, Stephen Bright, Alberto Cadoppi, Paolo Carta, Raphaël Chenuil-Hazan, Robert Cottrol, Renny Cushing, Deborah Denno, Dick Dieter, Amy Dillard, Rob Dunham, Roger Fairfax, Michael Fedo, Maya Foa, Tom Fraser, Donald Fyson, David Garland, John Getsinger, Phyllis Goldfarb, Ryan Greenwood, Steve Grossman, Michael Handberg, Mike Higginbotham, Marc Howard, Steve Hunegs, Dave Jaros, Leona Jochnowitz, Steve Kaplan, Susan Karamanian, Bob Lande, Amanda Lyons, Robin Maher, Jean Manas, Julian McMahon, Greg Merz, Michelle Miao, Fionnuala Ní Aoláin, Andrew Novak, Emily Olson-Gault, Mark Osler, Rosalyn Park, Todd Peppers, Susan Perry, Bruce Peterson, Steve Pincus, Michel Porret, Mike Radelet, Tim Rank, Arnie Rochvarg, Charlie Rounds, Diann Rust-Tierney, Meghan Ryan, Brian Saccenti, Lill Scherdin, Tim Sellers, Jonathan Siegel, Jonathan Simon, Cliff Sloan, Colin Starger, John Stinneford, Liz Vartkessian, Pam Wandzel, Rob Warden, Kim Wehle, Ron Weich, Steve Wells, Jon Yorke, Luis Arroyo Zapatero, and Elizabeth Zitrin. From A to Z, each of these individuals – as well as all of the authors, journalists, and scholars whose work I've consulted or read – have shaped, in one way or another, my perspective or thinking on capital punishment and its administration in the United States and around the world.

There are some people you'll always remember in life. The lawyers I've gotten to know who've so ably represented death row inmates and, in some cases,

secured their exoneration or sentences less than death, are true heroes of the legal profession. But the death row exonerees I've met or gotten to hear tell their harrowing stories are, no doubt, the most powerful witnesses of all to the death penalty's injustice and torturous inhumanity. Death row inmates frequently endure years, even decades, of solitary confinement, and their experiences – as well as those of their family members – must not be neglected in the debate over the global fate of capital punishment. In *Slavery and the Death Penalty: A Study in Abolition* (2018), Bharat Malkani – a scholar at Cardiff University in Wales – persuasively compares the power of nineteenth-century slave narratives to the real-life stories of twenty-first-century death row exonerees. In his book, he writes compellingly that anti-death penalty efforts should be rooted "in the idea of dignity," observing that to treat someone without respect "is to 'dehumanize' them, or to degrade them to the status of something other than a member of the human community." After it became an Oscar-winning motion picture, filmgoers became familiar with the events described in the 1853 memoir and slave narrative, *Twelve Years a Slave*, by Solomon Northup. But Malkani showcases the tragic (and sometimes lesser-known) modern-day testimonies of the exonerated. One death row exoneree, Anthony Graves, has described how he endured "12 years of having my meals slid through a small slot in a steel door like an animal." Although the vast majority of death row inmates have committed heinous crimes, some – as history has shown – are factually innocent, with many sent to death row the victims of overt or more subtle forms of racial discrimination. Of course, if the concept of *universal* human rights is to be actualized, even the guilty – those who have done horrible things – must be protected from torturous and other cruel, inhuman, or degrading treatment or punishment.

Not surprisingly, death row exonerees like Anthony Graves and Kirk Bloodsworth, a man I once met at an anti-death penalty conference in Madrid, now work tirelessly for the death penalty's abolition. An innocent man who successfully waged a nearly 30-year battle to abolish capital punishment in Maryland, Bloodsworth is a former Marine who became the first American sentenced to die to be exonerated in a post-conviction proceeding through DNA evidence. Convicted of the brutal rape and murder of a 9-year-old girl, Dawn Hamilton, near her home in Rosedale, Maryland, Bloodsworth was sentenced to die in the state's gas chamber. He was freed from prison after a semen sample preserved from the crime scene was tested years later and proved his innocence. Chillingly, prison guards once tasked Bloodsworth with painting the nine-foot-tall, hexagonal steel vault – the state's now-decommissioned execution chamber – where state officials once planned to kill him using lethal gas. "We want to get it ready for you," one guard said, adding, "Paint

it up." In an interview for a documentary, Bloodsworth later described how his prison cell – just one floor below the gas chamber – was so small that he could literally touch both walls with his fingers simply by extending his arms and swaying slightly back and forth. "They put me in a cell," he recalled with horror, saying that when the heavy door "slammed shut" it sounded "just like the tailgate of a dump truck." In 2003, Dawn Hamilton's actual murderer – a known child sex offender – was located, although not before Bloodsworth had been threatened with an unnatural death and Bloodsworth's parents had gone through hell and mortgaged their home to help pay their son's legal bills. Before his exoneration, Bloodsworth had to endure life on death row and being called a "monster" before his determined lawyer – paying $10,000 out of his own pocket to have the DNA sample tested – was able to conclusively prove his client's innocence.

Last but certainly not least, I want to thank my family – my parents, my brothers, my wife Amy, and our daughter Abigail – for being so supportive of me and my writing life over the years. I'm blessed to have their love and support.