

The U.S. Death Penalty as Torture

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Abstract:

Though of course the U.S. Supreme Court has never declared this to be true, many elements of the U.S. death-penalty system constitute torture. The threat of death is real; it is slow; it is often repeated, sometimes removed, sometimes reinstated; it is imposed randomly and capriciously; conditions of confinement induce trauma; and the executions themselves are often botched. We first review definitions of torture, then we review various factual elements of the modern death penalty system (e.g., that in place since the monumental *Furman* decision eliminated all existing death sentences in 1972) that arguably constitute torture. There is nothing isolated about the torture elements of the U.S. death-penalty system. There is perhaps no method to avoid elements of psychological torture, given the slow, premeditated, ritualized, and bureaucratic nature of any state machinery of death. The U.S. death-penalty system systematically subjects thousands of individuals to psychological torment in a number of ways that we document here. Because the U.S. is a representative democracy, all Americans share responsibility for these outcomes, though almost none are aware of what we describe.

INTRODUCTION

OVER 9,000 INDIVIDUALS have been sentenced to death in the U.S. since the momentous *Furman v. Georgia* decision (1972) invalidated all existing death sentencing statutes. Under the “new, improved” system that the justices validated in *Gregg v. Georgia* and *Jurek v. Texas* (1976), safeguards were to ensure that the death penalty would be carried out humanely, proportionately (focusing only on the most deserving criminals who had committed the most horrific acts), and in a way that avoided the unacceptable practices of the past, including caprice and racial bias. Now, with 50 years of experience with the new system, history shows

that this has been a fool's errand. The modern death penalty incorporates numerous characteristics that are tantamount to torture, and some of them may be designed to achieve this outcome. In this essay, we document elements of torture inherent in the modern U.S. capital-punishment system.

Let us start briefly with some definitions. C. Fitzhugh Brundage has written the most complete history of the use of torture in the U.S., and he writes:

The history of American torture reminds us of Montaigne's wisdom that "each man calls barbarism is whatever is not his own practice." Torture, like other forms of cruelty, lies in the eye of the beholder. There is no unambiguous threshold that separates cruelty from torture. In common usage, cruelty includes the wanton, unnecessary, outrageous, and inhumane infliction of suffering on the body or mind.... Torture, in common understanding, is purposeful and entails the infliction of suffering as punishment or a means of interrogation. The ambiguous boundary that separates cruelty and torture has been the battleground where defenders and opponents of torture have repeatedly clashed (Brundage, 2018, 5).¹

The United Nations defines torture in this way:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.²

Amnesty International (2024) writes: "Torture is when somebody in an official capacity inflicts severe mental or physical pain or suffering on somebody else for a specific purpose."³ Finally, the U.S. Department of Justice defines torture as something that involves the specific purpose of inflicting severe suffering, including the "threat of imminent death."⁴

One common element of psychological torture is the repeated threat of imminent death or pain, causing the victim to anticipate the punishment to come. Individuals subject to this type of anticipation and anxiety may come to seek out the pain so that they need no longer anticipate it. We will see that this is a common part of the death-penalty system.

Sister Helen Prejean describes this scene in her book, *Death of Innocents*, after quoting the Amnesty International definition just given:

I think of Dobie Williams brought to the death chamber once, twice, three times; and once, twice getting a reprieve and returning to his cell to wait for death once again; and then, on the third try, finally being killed.

What blinds us to the reality of torture that state killing entails? Is it the same blindness that allowed our forebears to practice slavery without flinching? How else could they walk through the town square and watch as African slaves were auctioned to the highest bidders and not be horrified [. . .]

It is usually only in hindsight that societies recognize that they have engaged in torture. Until then, torture is normal and justified and even sanctioned by religious beliefs.⁵

Brundage would likely agree with Prejean, that during the periods and in those environments when torture is used, it can be routine and prevalent, even banal. While some instances he notes may be gratuitous cruelty by sadistic individuals, others are widely used practices reflecting institutional traditions. His is a chilling reminder of the banality of torture, particularly in situations of complete powerlessness, such as in military, police, or correctional environments. While it may be common-place, it is anything but “banal” to those on the receiving end of it.

The U.S. Supreme Court has clearly decided that the state executions *per se* are not torture, and it has rarely intervened when particular allegations have been put before it, though it has proscribed the use of the death penalty against those who were minors at the time of the crime (*Roper v. Simmons*, 2005) or who suffered from an intellectual deficit (*Atkins v. Virginia*, 2003). We cannot turn to the U.S. courts for a definition of what is torture; after all the U.S. Constitution bars “cruel and unusual” punishments, but many of those we describe below are not unusual at all. So, we must use our own judgment to identify those elements of the U.S. death-penalty system which qualify as torture under the definitions just given. Here, we count the ways. We can be clear about one thing, however. Brundage discusses the ambiguity of the line that separates mere cruelty from outright torture. We will not be discussing border-line cases here, but some of the extremes.

CAPRICIOUS AND IDENTITY-BASED SELECTION OF THOSE CONDEMNED TO DIE

It would be one thing to be sentenced to the state's most severe punishment because one were found guilty of one of the most heinous crimes ever committed. But what if other factors came into play, or if the system were simply random, arbitrary, or capricious? This is the main argument that caused a majority of the justices to reject the death penalty in *Furman* (1972). But it remains a key characteristic of the modern system as well.

Ray Hinton served more than 28 years on Alabama's death row before being exonerated. He describes this conversation with the police detective explaining the likely outcome of his case: conviction. After explaining that he does not believe that Hinton was guilty, the officer continues: "But it doesn't matter [. . .] I can give you five reasons why they are going to convict you [. . .] Number one, you're black. Number two, a white man gonna say you shot him. Number three, you're gonna have a white district attorney. Number four, you're gonna have a white judge. And number five, you're gonna have an all-white jury."⁶ Individuals with white victims, and white female victims in particular, are significantly more likely to be sentenced to death. And in those rare instances when the victim is white but the offender is black, then these odds are at their highest. Hinton also reminds us of another important factor: social class. He writes: "There was a bad joke that ran up and down the row, with guys repeating it all the time: 'What does capital punishment mean?' 'It means a guy without capital gets punished.'"⁷

While race, gender, and class certainly played a role in Hinton's wrongful imprisonment, randomness is another factor to consider. For example, in 2020, the U.S. saw over 22,000 homicides, of which more than 15,000 were in states with a legally valid death-penalty statute. In that year, 19 death sentences were imposed, and 17 executions were carried out. The highest historic value for death sentences, 315 (in 1998) was still a tiny fraction of the 18,000 homicides in death-penalty states in that year. Were the 19 individuals selected for death in 2020 guilty of the 19 most heinous crimes in the states where death was an option? No.

The best estimates are that 4 percent of those sentenced to death have been innocent, though the 200 death row exonerations from 1972 through 2024 touch only a fraction of this number.⁸ While the courts have not verified it, there are numerous examples of modern executions where evidence suggests that the person executed was factually innocent (see cases such as Cameron Willingham, Carlos de Luna, or judicially veri-

fied historical ones such as George Stinney.)⁹ Of course, the U.S. allows the execution of individuals convicted of “felony murder”—that is, participating in a felony (such as a store robbery) during which a homicide occurs. At least a dozen individuals have been executed where it was not even alleged that they were the actual killer. In some cases, the killer was also executed, but in a greater number, the killer testified against the accomplice and received a lesser sentence in exchange for testimony.¹⁰ So much for the greatest punishment going to the most culpable.

Many atrocious murders lead to a punishment less than death, and many of the nation’s most notorious serial killers were never sentenced to die. This includes Samuel Little, perhaps the most prolific serial killer in U.S history,¹¹ Gary Ridgeway (the “Green River Killer”), who killed over 45 people,¹² and others. They committed crimes in states with the death penalty but avoided death often by testifying about their crimes in exchange for leniency, allowing the police to clear cases that otherwise might not have been solved. Others testify against codefendants, as noted above. The idea that the death penalty is reserved for the worst cases is belied by its common use as a bargaining chip by prosecutors who use it to induce defendants to give up information they need. There is no bargain without a cost, and the cost here is that many of the most culpable killers in modern American history have bargained themselves out of a capital sentence. Of course, some are not such good strategic bargainers, and death awaits those who do not know how to work the system.

Two simple facts might clarify the random and capricious nature of the death penalty. We noted above that 1998 showed the highest number of death sentences, with 315. The period from the mid-1980s through the end of the 1990s regularly saw approximately 3 percent of homicides in death states leading to a death sentence. That rate has been below 1 percent in every year since 2014, and below one-half of 1 percent in several of those years. It seems unlikely that homicides today are less heinous, on average, than those a generation ago. Similar variation occurs from town to town, even within the same state. Philadelphia v. Pittsburgh; Los Angeles v. Oakland; Houston v. Austin; Baltimore’s suburbs v. the central city; St. Louis’s suburbs v. the central city; all of these comparisons show differences of more than twice the odds of a death sentence, not based on the facts of the crime or the suffering of the victim, but on decisions by local prosecutors acting independently.¹³ In sum, the seriousness of the crime is far from the only determinant, or even sometimes an important determinant, of being sentenced to death. The process is largely random, but also affected by the identity characteristics of the victims and accused, plea-bargaining, by time, and by location. One element of torture

is being subjected to a capricious process, and anyone involved in the U.S. capital-punishment process understands how capricious it all can be.

MULTIPLE CYCLES OF DEATH SENTENCING AND REVERSING ON APPEAL

One important element of torture is its recurring nature. Being subjected to multiple imminent threats of death or pain has a cumulative effect, with victims sometimes seeking out the punishment as a means of putting an end to the agony of waiting under uncertainty. Since the 1972 *Furman* decision forced the states to re-write their capital-punishment statutes and through the end of 2024, various states and jurisdictions have imposed 9,034 death sentences, carried out 1,607 executions, and currently house 2,111 individuals on various death rows across the country. What about the others? Some have passed away or committed suicide (see below), but the single largest number have had their sentence reversed. In fact, over 4,444 death sentences have been definitively reversed, commuted, or otherwise eliminated (192 of these have been full exonerations). With 2,111 individuals on death row, but 4,444 death sentences reversed, it is obvious that reversal is the most common outcome of a death sentence; indeed, about half of all death sentences so far imposed throughout the modern period have been reversed.

This high rate of reversal understates the rate at which individual death sentences are reversed on appeal because many of them are reversed, then reimposed at a second trial, or a third one, and the number above refers only to final outcomes for a given individual. Just like Sister Helen's example of Dobie Williams's three dates with the executioner, many individuals have been sentenced to die, seen their appeal of that death sentence be successful, then have faced a second (or third) penalty phase trial at which a death sentence was imposed again. Curtis Flowers, now exonerated from a Mississippi death sentence, was tried six times for the crime and sentenced to death on four separate occasions (two trials ended with mistrials).¹⁴ The on-again-off-again nature of the death penalty has been widely understood by experts, particularly after Columbia Law professor James Liebman documented a 68 percent reversal rate in a large study published in 2000 and updated with similar results in 2002.¹⁵ But it has not been a substantial part of the public conversation about the death penalty. The rickety and unreliable nature of the system suggests its inherent lack of accuracy. But it also suggests a true nightmare for those subjected to it. It is not uncommon for a solemnly declared sentence of

death to be imposed, then reversed, then reimposed, in a cycle that can last for years, sometimes decades.

North Carolina condemned Randy Joe Payne to death in July 1987 for a 1985 crime. The state includes this information on its public website concerning “inmates removed from death row”: “New Trial Ordered 07/27/87; Rec’d Death 02/11/88; Re-Sent Ordered 04/23/91; Rec’d Death 09/28/92; Suicide 08/28/98.”¹⁶ That is, he was sentenced to death in 1987, but this was reversed later that year; he was resentenced again in 1988 but that was reversed in 1991; he was resentenced to death again in 1992; and he committed suicide while on death row six years later.

Such examples are by no means rare. Others include Rolando Ruiz, sentenced to death in 1995 in Texas and spent 20 years on death row in solitary confinement. Ruiz had four execution dates set, and two eleventh-hour stays of execution. Ruiz argued that his execution violated the Eighth Amendment because of the amount of time he spent incarcerated in “traumatic conditions,” namely his “permanent solitary confinement” (*Ruiz v. Texas*, 2017). These arguments failed to move the Court and Ruiz was executed in 2017.

Lacey Mark Sivak was originally sentenced to death in Idaho in 1981. He was resentenced to death again in 1983, 1988, and 1992. His death sentence was again reversed in 2011 and prosecutors decided not to seek the death penalty for the fifth time. Phillip Tomlin was originally sentenced to death in Alabama in 1978. He was then resentenced to death in 1990, 1994, and 1999, before he was finally resentenced to life in prison in 2004. Curtis Flowers was sentenced to death in Mississippi in 1997. He was resentenced to death in 1999, 2004, and 2010, before he was exonerated in 2020. Flowers spent nearly 24 years on death row for a crime he did not commit. Jerry Jerome Smith was sentenced to death in Alabama in 1998. He was resentenced to death in 2005, 2012, 2014, and 2018. He is still on death row in Alabama. Harold Lucas was sentenced to death in Florida in 1977. He has since been resentenced to death four times, in 1980, 1985, 1987, and, most recently, in 1991. He was still on death row, as of December 31, 2024.

DEATH WARRANTS ARE GENERALLY NOT CARRIED OUT, BUT SOMETIMES THEY ARE

A death warrant typically comes in the form of a letter from the Governor, the Director of Corrections, or the prison warden to a condemned individual giving a date of their scheduled execution, generally 60 days

or more in advance. Individuals are told they must make arrangements with next of kin to dispose of their body, and what will occur if they do not. In the last few days before the execution, they are typically removed from other prisoners, told to liquidate their few possessions, and put in an isolation cell near the death chamber, generally under 24-hour suicide watch.

The typical death warrant is cancelled, not carried out. In the five years from 2020 through 2024, states and jurisdictions issued 270 death warrants but carried out only 95 executions. That means that 175 warrants, or 65 percent, went unfulfilled.¹⁷ Sister Helen Prejean described the case of Dobie Williams, who was executed on his third date with the execution chamber. In the case of Troy Davis, for whom there was substantial evidence of innocence in the case of the killing an off-duty officer in Savannah Georgia, he was eventually executed, but only on the fourth attempt. Two warrants were cancelled after timely legal appeals. One, however, saw him strapped to the gurney, having already made his goodbyes to his family members, before the Supreme Court cancelled the warrant. In the fourth attempt, uncertainty about whether it would be carried out continued for hours, with appeals going to the Supreme Court and the Governor's office right until the last second, and hundreds of protesters gathered at the prison.¹⁸

A 1995 Pennsylvania act mandated that the Governor of that state "shall" issue a death warrant, a pardon, or a commutation within 90 days of the state supreme court's review and approval of a death sentence; if not the Director of Corrections shall issue a warrant. But under federal law, those who have completed direct state review of their initial death sentence are entitled to federal review, and this often takes several years. These warrants are therefore legally premature and are routinely quashed. Still, the condemned receives a letter instructing him of his (false) death date. Pennsylvania has issued over 400 of these warrants and carried out only three of them, all to individuals who instructed their attorneys not to fight the process.¹⁹

One Idaho case was so galling that a federal court intervened. Gerald Pizzuto has been condemned to die in Idaho since 1986. In May 2001, the Attorney General scheduled his execution but it was not carried out because the Commission on Pardons and Parole recommended his commutation, which the governor rejected (Pizzuto was at the time in hospice care because of advanced cancer of the bladder).²⁰ In November 2022, a second date was set, also cancelled because the state had no lethal injection drugs. In February 2023, a third date was set, with the Attorney General recognizing that the state still had no means of carry-

ing it out, and the condemned appealed on the basis of violation of his constitutional rights to be free from cruel and unusual punishment. U.S. District Judge B. Lynn Winmill ruled that

repeated rescheduling of his execution is like dry firing in a mock execution or a game of Russian roulette. With each new death warrant comes another spin of the revolver's cylinder, restarting the thirty-day countdown until the trigger pulls. Not knowing whether a round is chambered, Pizzuto must re-live his last days in a delirium of uncertainty until the click sounds and the cylinder spins again (*Pizzuto v. Tewalt* 2023).

Winmill continued that the

alleged practice of keeping Pizzuto in a state of perpetual terror by scheduling and re-scheduling his execution, despite knowing that the lethal injection almost certainly will not be performed, plausibly constitutes cruel and unusual punishment. None of Defendants' arguments to the contrary are persuasive" (*Ibid*).

Many aspects of the death penalty are cruel: sentencing randomly; sentencing based on arbitrary factors such as time period or geography; sentencing in a biased manner based on the race or gender of the victim; excluding blacks from juries thereby precluding a trial by one's peers; and so on. But there is something particularly cruel about asking an individual to give away their belongings, to move to an isolation unit to await execution, and to make plans for the disposal of their own body all while knowing that it is a charade. When Sister Helen writes about what makes people think that something they see around them is not torture, the Idaho Attorney General's office may be what she has in mind.

DECADES ON DEATH ROW WITH THE REMOTE LIKELIHOOD OF EXECUTION

Arriving on death row exacerbates the psychological trauma inflicted by the state in pursuit of the defendant's death.²¹ At the end of a capital murder trial, after the prosecution has done its best to erase the defendant's identification with society then stripped them of humanity with labels like "monster," "murderer," and "killer," the judge makes a final pronouncement: "May God have mercy on your soul." The State would not. The jury did not. Only divine intervention could spare the defen-

dant from what has been deemed “righteous” justice. The impact of this pronouncement on the defendant’s psyche is far-reaching and brings the psychological decay of everyone on death row.

Whether the death row is a 23-hour-a-day solitary confinement setting such as the Polanski Unit in Texas or a congregate confinement such as North Carolina’s Unit 3, the isolation from society and subsequent abandonment by family or friends is the most sure thing about a death sentence other than the result of executions, which are the same no matter the type of confinement or method of death.

The pervasive threat of death, combined with the arbitrariness of who lives and who is executed before a room full of witnesses in a grotesque spectacle of punishment, creates a steady source of debilitating anxiety and uncertainty. “Who will be next?” is a question closely followed by: “When will it be me?” Living in that constant state of indefiniteness, along with the often false hope of appellate relief or clemency, news report of executions in other states, rhetoric by fear-mongering conservative politicians seeking the expanded use of capital torture, and erosion of the Eight Amendment’s prohibition against cruel and unusual punishment by a conservative U.S. Supreme Court—together, these elements destroy any sense of safety or well-being under a sentence of death and induce various forms of mental illness.

It does not require imminent execution to experience a constant psychological torment carried out over decades of confinement on death row. Discussions of torture are frequently limited in both frequency and time, attached to specific events such as the repeated water-boarding of Guantanamo Bay detainees, or the physical crippling of detainees at CIA black sites. In these examples, the government acknowledged wrongdoing until the act of water-boarding “enemy combatants” in detention was signed into policy. Likewise, the long-term confinement under the threat of execution is acknowledged by most democratic nations as a form of torture and subsequently banned because it causes the “death-row phenomenon.” U.S. courts do not acknowledge death-row phenomenon because it would invalidate capital punishment. Death-row phenomenon conceptualizes life under the threat of state-sanctioned homicide while in prolonged confinement on death row, and the resulting psychological trauma. Introduced by the European Court of Human Rights in *Soering v. United Kingdom*, the Court denied an extradition order from the United States because of the likelihood that the man sought would experience “death row phenomenon” in prolonged and uncertain wait for his execution while in confinement. Because death-row phenomenon and the associated psychological trauma breach international prohibitions against

torture, capital punishment is banned in the European Union and all democratic nations except two: Japan and America.

Of course, just because the death penalty has been enacted by half of the state legislatures and upheld by the U.S. Supreme Court as constitutional does not mean that it is less torturous nor does it signal moral acceptability any more than the justifications used to water-board suspects of terrorism. The reality of capital torture is that those sentenced to death are unfortunate winners of a macabre lottery governed by petty politicians in a handful of counties, subjected to increasingly inhumane conditions and methods of execution. It would be enough to drive anyone mad given enough time.

SUICIDE BY GOVERNMENT

Of the 1,607 state executions in the modern period through December 31, 2024, 166 of those executed, over ten percent, have been termed “volunteers.”²² The term “volunteer” is most likely inappropriate. Many individuals on death row suffer from extreme mental illness, and it is not clear that their decisions to drop appeals and effectively commit suicide by government are truly voluntary. In any case, these individuals are in a unique position in that if they instruct their attorneys to stop fighting on their behalf, death by the state may follow.

Gary Gilmore, the first individual executed (by a Utah firing squad) in the modern period, was executed in January 1977 for a crime that occurred less than six months before. His desire to die, like that of Timothy McVeigh, was immediate. Whereas McVeigh seemingly wanted to be a martyr in his personal war against the US government,²³ Gilmore sought fame and celebrity.²⁴ In both cases, state authorities cooperated with their wishes, carrying out the executions just as they wished. Others choosing suicide by government have come to their decisions only after many years on death row. Figure 1 provides a graphical illustration of these trends. It shows each of the 1,607 modern executions by the date of execution and the years elapsed since the person’s death sentence; dark circles refer to the “volunteers” and smaller grey ones refer to others. Gary Gilmore is represented by the dark circle at the bottom-left of the graph; his 1977 execution was just three months after his death sentence.

Figure 1 shows two shocking things. First, the general trends are stark in that modern executions typically take place now decades after the death sentence. Second, those who drop their appeals do not always do so immediately on arrival on death row. While some do (and they are

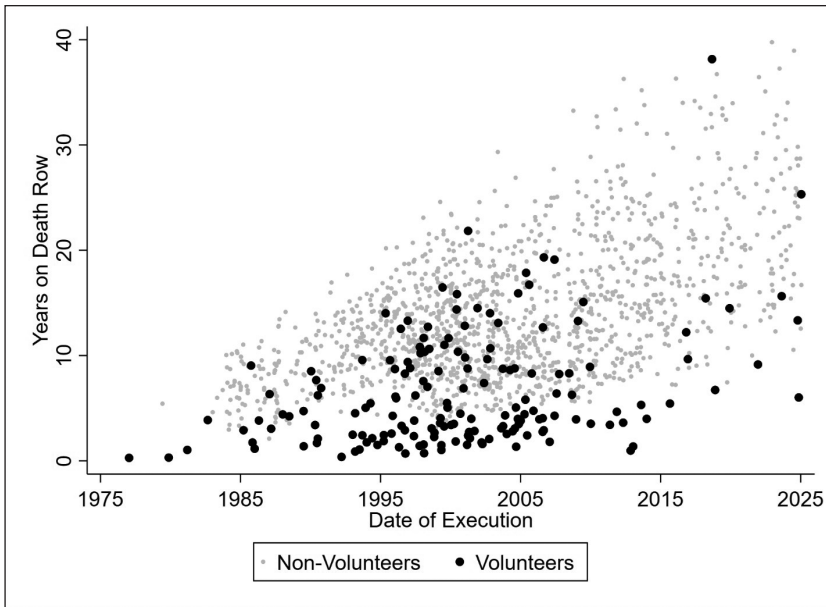


Figure 1. Time Elapsed from Death Sentence to Execution, by Date of Execution.

represented by the dark circles near the bottom of the graph, those who were on death row for only a matter of months before their executions), many others “volunteer” for death only after legally fighting it for twenty years or longer; they just give up. No one executed since 2015 spent less than five years on death row, including volunteers. Corey Dean Moore was executed in Nebraska in 2018 for a 1980 crime; he eventually gave up appeals.

Suicide by government is not as simple as dropping appeals. Defense attorneys may argue that the client is mentally ill and not capable of making decisions in their own best interest. States may not have the required drugs or a legally valid execution method in place. Scott Dozier was sentenced to death in Nevada in 2007 and committed suicide in January of 2019. In October 2016, Dozier gave up his legal appeals and asked to be executed. In an interview with *The Marshall Project*, he stated “I don’t want to die [. . .] I just would rather be dead than do this.”²⁵ The case gained national attention over the lethal injection protocol that would be used to execute him—the state of Nevada had not executed an inmate since 2006 and the new fentanyl-based drug combination had not been tested.²⁶ Dozier had two stays of execution in 2017 after a trial judge found the new drug combination would potentially cause Dozier to “suf-

focus to death.”²⁷ In 2018, the Nevada Supreme Court vacated the lower court’s ruling, and a death warrant was again issued for Dozier. Eight days before his scheduled execution in June of 2018, Nevada changed its lethal injection formula again, which caused the drug manufacturer, Alvogen, to file a lawsuit against the state.²⁸ A District Judge then halted Dozier’s execution and barred Nevada from using any Alvogen drugs in the lethal injection protocol. Roughly six months later, Dozier committed suicide in his prison cell. State prosecutors had yet to appeal the District Judge’s ruling on the drugs used for lethal injection at the time. Nevada has not executed someone since 2006.

BOTCHED EXECUTIONS

Concern about botched executions is well-founded, from the first use of the electric chair to horrific scenes such as that of Jesse Tafero, one of the last victims of Florida’s “Old Sparky” in 1990, whose electrocution was interrupted three times because of flames shooting from his head and body. (Tafero was later shown most likely to be innocent, with his codefendant and partner Sonia Jacobs being released from prison in 1993 after jailhouse testimony was shown to be made under threat of reprisals by the state and was recanted. Most likely, the same evidence used to free Jacobs would have freed Tafero as well, though state prosecutors never agreed to this).²⁹

Kenneth Smith was scheduled to die by lethal injection in Alabama in 2022 but the state failed to find a vein during a process that took hours and ended up with him still alive, but suffering, at the end of the allotted time for the death warrant; a failed execution marked by last-minute uncertainty, efforts to insert a needle into various parts of his body, and finally a failure to achieve the planned outcome.³⁰ Smith later became the first person executed by nitrogen gas suffocation in 2024 when the state brought him to the execution chamber a second time.³¹ It would be reasonable, but wrong to assume that Mr. Smith’s experience with a failed effort at state killing is unique. Idaho gave up on the execution of Thomas Creech after eight failed attempts to insert an IV line in February 2024. Creech, 73, has been on death row since 1981.³² Romell Broom survived a similar failed execution attempt in Ohio in 2009, eventually dying on death row in 2024 from Covid; he had served since 1985.³³

Austin Sarat’s 2014 book, *Gruesome Spectacles*, amply documents the large number of lethal injections that have been mismanaged or otherwise resulted in significant suffering for the individual.³⁴ It is important to

recall that lethal injection itself was invented by the medical examiner of the state of Oklahoma who had seen a number of electrocutions and was motivated to seek a “more humane” manner of carrying out state executions.³⁵ But just like every method before, from hanging to the firing squad to the electric chair to the gas chamber to “nitrogen hypoxia,” our collective experience with lethal injection shows that there is no failsafe way to bring an individual to death without the possibility of pain. Numerous examples show the inability of state corrections officials efficiently to organize a medicalized process, often in the absence of a doctor. It is not a system designed to avoid problems. Rather, it is designed to appear to be something other than what it is, a state killing. But, as this review makes clear, suffering and pain in the process of execution is only one of many forms of torture in the death-penalty system. It starts well before a death warrant is even contemplated.

CONCLUSION

Typically, over the past five decades, the U.S. death penalty has worked in this fashion: a tiny handful from perhaps 20,000 homicide offenders are sentenced to death. These individuals are marked by bad luck (wrong time period, wrong county, wrong state, wrong defense attorney, wrong prosecutor, wrong decision about whether to accept a plea agreement, or simple randomness), by poverty, by their identity (young, minority, male) and that of their victims. They face decades of uncertainty on death row, with a high probability of seeing their sentence overturned, perhaps to be reinstated, perhaps not. Depending on the state, they may simply live out the rest of their lives on death row, though with the possibility of execution always looming. If they face a death warrant, it will likely be cancelled, though another may later be issued and one or another of them has some chance of being carried out. All this time they will live in a position of utter powerlessness as they grow old among the condemned. While they live on death row, they will grow well past the age of likely further homicides and may well end up becoming elderly and infirm. Many of those around them will have been removed from death row, resentenced to a lesser punishment, while others may have been executed, with little rhyme or reason explaining which leave death row for these different outcomes. While they attempt to survive in these conditions, there should be no doubt that what they are experiencing is torture.

In a democratic system of government, all power stems from the people. Through our representatives, we all share responsibility for the

actions of our government. Thus, the elements of torture that we have explored here are not only the actions of evil or distant malevolent actors working for their own reasons. Rather, they are the collective responsibility of all of us.

NOTES

1. W. Fitzhugh Brundage, *Civilizing Torture: An American Tradition* (Cambridge: Harvard University Press, 2018), 5.

2. “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.” *United Nations*, General Assembly Resolution, 10 Dec., 1984, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>.

3. “Torture.” *Amnesty International*, <https://www.amnesty.org/en/what-we-do/torture/>. Accessed 23 Jan., 2025.

4. *Definition of Torture Under 18 U.S.C. §§ 2340–2340A*, U.S. Department of Justice, 30 Dec., 2024, [https://www.justice.gov/file/145681/dl#:~:text=\(D\)%20the%20threat%20that%20another,several%20States%20of%20the%20United](https://www.justice.gov/file/145681/dl#:~:text=(D)%20the%20threat%20that%20another,several%20States%20of%20the%20United).

5. Sister Helen Prejean, *The Death of Innocents: An Eyewitness Account of Wrongful Executions* (Vintage, 2005), 108–109.

6. Anthony Ray Hinton, with Lara Love Hardin, *The Sun Does Shine: How I Found Life and Freedom on Death Row* (New York: St. Martin’s Griffin Edition, 2018), 65.

7. *Ibid.*, 209.

8. Samuel R. Gross, Chen Hu, Edward H. Kennedy, and Barbara O’Brien, “Rate of False Conviction of Criminal Defendants Who are Sentenced to Death.” *Proceedings of the National Academy of Sciences of the United States of America* 71.4 (2014): 1161–89; “Innocence Database,” *Death Penalty Information Center* (DPIC), <https://deathpenaltyinfo.org/database/innocence>. Accessed 23 Jan., 2025.

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11. Neil Vigdor, “Samuel Little, Serial Killer Who Confessed to 93 Murders, Dies at 80,” *New York Times*, 31 Dec., 2020, <https://www.nytimes.com/2020/12/31/us/samuel-little-dead.html>.

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13. Frank R. Baumgartner et al., “Learning to Kill: Why a Small Handful of Counties Generates the Bulk of US Death Sentences,” *PLoS-ONE* 15.10 (2020): 1–15; on the role of hostile racial attitudes by whites toward blacks in explaining these differences, see Baumgartner, Christian Caron, and Scott Duxbury, “Racial Resentment and the Death Penalty,” *Journal of Race, Ethnicity, and Politics* 8.1 (2022): 42–60.

14. See Maurice Possley, “Curtis Flowers,” *National Registry of Exonerations*, 25 Sept. 2020, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5808>. Double-jeopardy is being tried for a crime after having been acquitted of it, and U.S. courts do not allow it. But if a jury is hung, leading to a mistrial, the state may bring charges again before a new jury. If an appeal is successful after conviction, the conviction or the sentence may be ruled invalid because of flaws in the original trial, and again the state may seek a new trial. So, a death-sentence reversal is final only when the individual is acquitted, the state drops charges, or the individual is resentenced to a lesser punishment, such as life in prison. This the most common outcome in death sentence reversals. But a large share of reversals are only temporary; a death sentence is often reimposed in a subsequent judicial process.

15. See James S. Liebman, Jeffrey Fagan, and Valerie West, “Error Rates in Capital Cases, 1973–1995,” Columbia University Law School, 12 June 2000. Available from: https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2220&context=faculty_scholarship; and Liebman et al., “A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It,” Columbia University Law School,” 2002, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=4431&context=faculty_scholarship.

16. See “People removed from Death Row since North Carolina’s death penalty was reinstated in 1977,” North Carolina Department of Adult Corrections (NC DAC), <https://www.dac.nc.gov/divisions-and-sections/institutions/death-penalty/list-removed-death-row>. Accessed 28 Dec., 2024.

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22. See “Execution Volunteers,” *DPIC*, <https://deathpenaltyinfo.org/executions/executions-overview/execution-volunteers>; and “Execution Database,” *DPIC*, <https://deathpenaltyinfo.org/database/executions>. Both accessed 26 Jan. 2025.

23. See Robert M Bohm, *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States*. 4th ed. (Waltham, MA: Anderson Publishing, 2012), 106.

24. See Evan J. Mandery, *A Wild Justice: The Death and Resurrection of Capital Punishment in America* (New York: Norton, 2013), 429.

25. Maurice Chammah, “The Volunteer.” *The Marshall Project*, 6 Jan. 2019. <https://www.themarshallproject.org/2018/01/18/the-volunteer>.

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34. Austin Sarat, *Gruesome Spectacles: Botched Executions and America’s Death Penalty* (Stanford, CA: Stanford University Press, 2014).

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