

THE DEATH PENALTY AS A PUBLIC HEALTH PROBLEM

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Introduction

Capital punishment is intentional homicide. Yet the World Health Organization's 2002 World Report on Violence and Health and the 2014 follow-up report on state implementation of its recommendations do not mention capital punishment.² This is a major oversight, as the efficacy of United Nations violence prevention policies cannot accurately be evaluated without inclusion of data regarding the impact of the state's own employment of violence³ on its citizenry. Abolition of the death penalty should be robustly joined to all public health efforts at stemming violence because the death penalty's anti-therapeutic effects on individuals and systems will not be ameliorated by ignoring that it is a traumatogenic force.⁴

Qualitative studies and narrative accounts show compelling evidence of the anti-therapeutic effects of the death penalty on all classes of

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 - 2 World Health Organization. 2002. *World Report on Violence and Health*. Geneva: World Health Organization. 2014. *Global Status Report on Violence Prevention 2014*. Geneva.
 - 3 The World Health Organization defines "violence" as "the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation." WHO Global Consultation on Violence and Health. 1996. *Violence: a public health priority*. Geneva: World Health Organization. (document WHO/EHA/SPL.POA.2).
 - 4 Sandra L. Bloom and Michael Reichert. 1998. *Bearing Witness: Violence and Collective Responsibility*. New York: Haworth Press. pp.18 ("Traumatogenic forces are those social practices and trends that cause, encourage, or contribute to the generation of traumatic acts."); Alfred L. McAlister. 2006. "Acceptance of killing and homicide rates in nineteen nations." *European Journal of Public Health* 16:pp. 259, 264 (finding that differences in national homicide rates correlate with differences in the "social acceptability of killing" reflected in the presence or absence of the death penalty).

persons involved in capital cases.⁵ It is an understatement to say that the “human mind is not well suited to killing [and that] killing tends to make the mind sick.”⁶

The death penalty has a profoundly negative effect on the individuals who are the direct and indirect objects of the punishment as well as the persons charged with carrying it out. The direct objects of the punishment, of course, are the persons sentenced to death, those the penalty was designed to deter—through the threat of homicide—from committing acts unacceptable to the state. The emotionally dysregulating effect of the death penalty on the condemned themselves is a staple of the experience of their visiting family members, advocates, fellow inmates, and jailers. However, researchers seem to have written little about the effects on the inmates of the sentence itself. One reason, probably, is restrictions imposed by legal appeals. The few studies on the impact of the sentence are drawn from exonerated or released inmates.⁷ The paucity of research on inmates also may reflect resistance to viewing death-sentenced inmates as victims, although the vast majority are. For example, a 2000 study of sample of United States death row inmates found prior

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- 5 Cynthia F. Adcock. 2010. “The collateral anti-therapeutic effects of the death penalty.” *Florida Coastal Law Review* 11:289-320; Marilyn Armour and Mark Umbreit. 2007. “The ultimate penal sanction and ‘closure’ for survivors of homicide victims.” *Marquette Law Review* 91:381; Elizabeth Beck, Sarah Britto, & Arlene Andrews. 2007. *In the Shadow of Death: Restorative Justice and Death Row Families*. Oxford: Oxford University Press; Robert Bohm. 2012. *Capital Punishment’s Collateral Damage*. Durham: Carolina Academic Press; Robert Bohm. 2010. *Ultimate Sanction: Understanding the Death Penalty Through Its Many Voices and Many Sides*. New York: Kaplan Publishing; Lauren M. De Lilly. 2014. “‘Antithetical to human dignity’: Secondary trauma, evolving standards of decency, and the unconstitutional consequences of state-sanctioned executions.” *Southern California Interdisciplinary Law Journal* 23:107-145; Sandra Joy. 2014. *Grief, Loss, and Treatment for Death Row Families* Plymouth, UK: Lexington Books; Rachel King. 2005. *Don’t Kill in Our Name: Family Members of Murder Victims Speak Out Against the Death Penalty*. Piscataway, NJ: Rutgers University Press; Penal Reform International, Briefing Paper. 2015. “Prison Guards and the Death Penalty,” available from: <http://www.penalreform.org/wp-content/uploads/2015/04/PR1-Prison-guards-briefing-paper.pdf>. (accessed 24 August 2016); Michael L. Radelet. 2016. “The incremental retributive impact of a death sentence over life without parole.” *University of Michigan Journal of Law Reform* 49:4:795-815; Susan Sharp. 2005. *Hidden Victims: The Effects of the Death Penalty on Families of the Accused*. Piscataway, NJ: Rutgers University Press; Susannah Sheffer. 2013. *Fighting For Their Lives: Inside the Experience of Capital Defense Attorneys*. Nashville, TN: Vanderbilt University Press; Sandra D. Westervelt and Kimberly J. Cook. 2012. *Life after Death Row: Exonerates’ Search for Community and Identity*. Piscataway, NJ: Rutgers University Press.
- 6 Rachel M. McNair. 2007. “Killing as trauma.” In Elizabeth K. Carll, ed. *Trauma Psychology: Issues in Violence, Disaster, Health, and Illness*. London: Praeger. vol. 1, 147, 147.
- 7 See Westervelt and Cook, *supra* note 4, and Lloyd Vogelman, Sharon Lewis, and Lauren Segal. 1994. “Life after death row: post-traumatic stress and the story of Philip Takedi.” *South African Journal of Psychology* 24:91-99.

victimization by family violence in all 16 cases studied and 14 of 16 with post-traumatic stress disorder.⁸

The death penalty also works emotional dysregulation in its indirect objects: the families, friends, legal advocates, other defenders or sympathizers of the condemned, and many survivors of homicide victims. It similarly negatively affects those charged with levying and carrying out the sentence, including the police, courts, prosecutors, jurors, wardens, guards, chaplains, and executive officers. Finally, serious concern should be raised about the death penalty's transmission of trans-generational trauma, especially within marginalized groups that often are its disproportionate targets⁹—not merely social or racial minorities, but impoverished families that experience criminal history cycles. In nations such as the United States, where the death penalty has been disproportionately applied to racial minorities and has arisen out of a historical context of widespread extrajudicial execution used to marginalize them, it should be examined as a residual tool of that marginalization.¹⁰

The Death Penalty is a Trauma-Organized System

The purpose of the death penalty is to inspire dread through the threat and performance of state homicide¹¹ and it is effective at instilling long-term dread in the persons within its realm of immediate influence. In many jurisdictions, once an arrest is made and the state has made its decision to pursue death, the state's prospective

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- 8 David Freedman and David Hemenway. 2000. "Precursors of lethal violence: a death row sample." *Social Science and Medicine* 50:1757-1770: see also David Lisak and Sara Beszterczey. 2007. "The cycle of violence: the life histories of 43 death row inmates." *Psychology of Men and Masculinity* 8(2):pp. 118, 125 (finding a "vast majority" had suffered "multiple forms of abuse and neglect" and "strong majorities experienced extreme levels of terror" in their lives prior to the crime that sent them to death row).
- 9 William E. Cross, Jr. 1998. "Black psychological functioning and the legacy of slavery." In Yael Danieli, ed., *International Handbook of Multigenerational Legacies of Trauma*. New York: Plenum Press; Joy DeGruy. 2005. *Post Traumatic Slave Syndrome*. Uptone Press. (coining "Post Traumatic Slave Syndrome" as "multigenerational trauma [resulting from centuries of slavery] together with continued oppression and absence of opportunity to access the benefits available in the society").
- 10 Equal Justice Initiative. *Report, Lynching in America: Confronting the legacy of racial terror*. Available from <http://www.eji.org/lynchinginamerica>. (accessed 24 August 2016); Jennifer Schweizer. 2013. "Racial disparity in capital punishment and its impact on family members of capital defendants." *Journal of Evidence-Based Social Work* 10:91-99.
- 11 *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.").

act of violence becomes the overriding issue and all persons within that realm of influence become fixated on the penalty. In the present administration of capital punishment, lives are taken over by the drama surrounding the prospective execution of the defendant—not infrequently for decades in those states that otherwise are concerned with fair judicial process. The death penalty, thus, has been described as a “sustained catastrophe during which the danger and threats to life and self extend over a period of time . . . [continuing] day after day, year after year with no discernible end.”¹²

Social science has preoccupied itself with the question whether the death penalty is a better general deterrent to murder than other sentences.¹³ This statistical inquiry into the effect of the lethal threat on unknown, potential, individual criminals tends to overshadow the actual stories of harm resulting from state homicide on the aforementioned groups of persons within the direct influence of the punishment system. Fundamentally, this analysis that prioritizes and isolates cause and effect on individuals' behaviour fails to comprehend the breadth and profundity of human interconnectedness. It is at least as myopic as studies that also isolate rates of violent crime or suicide without looking at systemic interactions and asking how “our collective actions contribute to human violence.”¹⁴ A punishment carried out against an individual always will have a communal and inter-generational impact, not merely an impact on isolated prospective criminals. The more violent the punishment, the more wide, deep, and deleterious the impact on the given system of human relations.

Humans are neurobiologically communal creatures, not isolated sets of individuals. Trauma studies are opening new understandings of what it is to be human, helping us to be mindful that the Cartesian individualism that underlies our theories of retributive punishment is

12 *Westervelt and Cook, supra* note 4, at 131.

13 National Research Council of the National Academies, Committee on Deterrence and the Death Penalty. 2012. *Deterrence and the Death Penalty*. Washington, D.C.: The National Academies Press, 2 (concluding that “research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates”); see also Keith Humphreys and Peter Piot. 2012. “Scientific evidence alone is not sufficient basis for health policy.” *British Medical Journal* (online) at *BMJ*2012;344:e1316 doi: 10.1136/bmj.e1316 (proof that the death penalty has a deterrent effect “can never tell us whether the taking of a helpless individual's life by the state is morally acceptable”).

14 Bandy X. Lee, Phillip L. Marotta, Morkeh Blay-Tofey, Winnie Wang, and Shalila de Bourmont. 2014. “Economic correlates of violent death rates in forty countries, 1962-2008: a cross-typological analysis.” *Aggression and Violent Behavior* 19: pp. 729, 736.

a “socially constructed illusion”¹⁵ that theorizes and, thus, to an extent manufactures the person as an autonomous entity who chooses to initiate relationships with others in moral or immoral ways.¹⁶ Neuroscience suggests the opposite, that “from relationships, the very possibility of independent persons emerges.”¹⁷ Our individual neural systems are intertwined with those of others.¹⁸ In fact, we are dependent on the inner lives of others for our construction of our identities and very survival. If, for example, a human baby is fed and clothed but deprived of emotional contact, he or she will start to fail and can die.¹⁹ We share with other mammals a limbic region in our brains that not only evolved to give us a better means to process experiences that appear threatening, but also to provide us with attachment to caring others through “limbic resonance.” “The mammalian nervous system depends for its neurophysiologic stability on a system of interactive coordination, wherein steadiness comes from synchronization with nearby attachment figures.”²⁰

Limbic states leap between human minds without restriction and, thus, we constantly engage in “emotional contagion,” the “tendency to automatically mimic and synchronize facial expressions, vocalizations, postures, and movements with those of another person and consequentially to converge emotionally.”²¹ We are not unmoved observers of others’ emotional states. Prior to our engagement of our higher cortical processes, evaluating our experience, we already have participated in those states. Between individuals, verbal arguments may accelerate, for example, when we imitate and ingest on the nonverbal, sub-cognitive level, another’s agitated (or emotionally dysregulated) inner state and then react. Whole communities may become emotionally dysregulated almost in an instant by experiences of violence and the quick spread of emotional contagion. On a large scale, the coordinated assault

15 Sandra L. Bloom. 1995. “When good people do bad things: meditations on the ‘backlash.’” *Journal of Psychohistory* 22(2):273-304.

16 Thomas Szasz. May 2000. “Mind, brain, and the problem of responsibility.” *Society* 37:pp. 34, 35 (“When we use the word ‘mind’ in law or psychiatry, it stands for a reified-hypothesized ‘organ’ that we treat as if it were the seat of responsibility.”).

17 Kenneth Gergen. 2009. *Relational Being*. Oxford: Oxford University Press. pp. 38.

18 Thomas Lewis, Fari Amini, Richard Lannon. 2000. *A General Theory of Love*. New York: Vintage. pp. 85.

19 *Ibid.*

20 *Ibid.* at 84.

21 Elaine Hatfield, John T. Cacioppo, and Richard L. Rapson. 1993. *Emotional Contagion*. Cambridge: Cambridge University Press. pp. 5.

on America on 11 September, 2001, dysregulated a nation through emotional contagion.²² Gang violence dysregulates communities.²³ Individual homicides dysregulate families and communities. With regard to the dysregulating effect on persons under the sway of a homicide, there is little basis to distinguish the death penalty from murder.²⁴

The ways in which we utilize our higher brains to make meaning of our experience after dysregulating acts of violence contribute to our individual and communal emotional regulation.²⁵ On individual and communal levels, constructive stories responding to perceived or accomplished threats generally cool our individual and social systems. There may be no better example of that than the South African Truth and Reconciliation Commission process for the cooling of a society through constructive stories.²⁶ Destructive stories — in contrast — perpetuate or enhance a sense of threat, spreading emotional contagion, at times triggering “traumatic re-enactment” (repetition of the triggering event) between individuals and within social systems.²⁷ Neuropsychiatrists refer to individuals or communities in the thrall of destructive stories as “trauma-organized systems.”²⁸

There are two elements in a trauma-organized system. First, a victimizer-victim relationship. The essential actors in the system include a victimizer who “traumatizes” and a victim who is “traumatized.” In

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- 22 Sandra L. Bloom. 2006. “Neither liberty nor safety: the impact of fear on individuals, institutions, and societies, part IV.” *Psychotherapy and Politics International* 4(1):4-23.
- 23 John A. Rich. 2009. *Wrong Place, Wrong Time: Trauma and Violence in the Lives of Young Black Men*. Baltimore: Johns Hopkins University Press.
- 24 Kate King. 2004. “It hurts so bad: comparing grieving patterns of the families of murder victims with those of families of death row inmates.” *Criminal Justice Policy Review* 15(2):pp.193, 209 (finding the distorted grieving patterns so similar between murder victim and defendant family members as to describe them as “mirror images on either side of the homicide, both being thrown into a situation of horror and hopelessness”).
- 25 Marilyn Armour. 2003. “Meaning making in the aftermath of homicide.” *Death Studies* 27(6):519-40; Lawrence Miller. 2009. “Family survivors of homicide: II. Practical therapeutic strategies.” *The American Journal of Family Therapy* 37:85-98.
- 26 Antjie Krog. 1998. *Country of My Skull: Guilt, Sorrow, and the Limits of Forgiveness in the New South Africa*. New York: Times Books.
- 27 Sandra L. Bloom. 2008. “By the crowd they have been broken, by the crowd they shall be healed: the social transformation of trauma.” In Richard G. Tedeschi, Chrystal L. Park, and Lawrence G. Calhoun, eds., *Posttraumatic Growth: Positive Changes in the Aftermath of Crisis*. New York: Psychology Press. pp.179, 208 (In re-enactment, the traumatized individual “adapts to a hostile environment and then proceeds to recreate a similar environment in order to make the best use of these adaptations. If groups — communities and even nations — respond in a similar way, then we’re dealing with a dangerous and volatile situation”).
- 28 Bloom and Reichert, *supra* note 3, at 14; Sandra L. Bloom. 2001. “Conclusion: a public health approach to violence.” In Sandra L. Bloom, ed., *Violence: A Public Health Menace and a Public Health Approach*. London: Karnac Books. p.84.

this context, “there is an absence of a protector, or the potential protectors are neutralized.”²⁹ Second, the system is not self-aware, is amnesiac, and re-enacts toxic, traumatic events. Within the system, individuals and communities “create ‘stories’ by which they live their lives, make relationships, initiate actions, and respond to actions, and maintain and develop them.”³⁰ In the words of Arnon Bentovim, a British psychiatrist, “abusive traumatic events have an exceptionally powerful effect in creating self-perpetuating ‘stories’ which in turn create ‘trauma-organized systems’ where ‘abusive’ events are re-enacted and re-enforced.”³¹

The death penalty appears to be one such trauma-organized system. Through its own act of traumatic re-enactment, the state becomes an overwhelmingly powerful, almost irresistible victimizer. The state’s judicial system spins self-perpetuating stories justifying its violence against an individual on the basis of that person’s mental state at the time of an offence, which is itself constructed by the state from testamentary and circumstantial evidence.³² In the process, the state creates a “solitarist identity”³³ for the criminal ignoring that (1) individuals are composed of multiple identities formed in multiple relationships and cannot authentically be reduced to an entity to be punished in an absolute way³⁴ and (2) that every individual is a product of that web of interrelationships and forces that make personal responsibility relative, not absolute. In doing this, the state, perhaps most importantly, ignores its own failures in relation to the co-creation of the person who committed the offence.³⁵

29 Arnon Bentovim. 1992. *Trauma Organized Systems*. London: Karnac Books, at xx-xxi, quoted in Bloom, “Conclusion: a public health approach to violence.” In *Violence: A Public Health Menace and Public Health Approach*, *supra* note 27, at 83-84.

30 *Ibid.*

31 *Ibid.*

32 Robert Cover. 1985-1986. “Violence and the word.” *Yale Law Journal* 95:pp. 1601, 1608 (“Beginning with broad interpretative categories such as ‘blame’ or ‘punishment,’ meaning is created for the event which justifies the judge to herself and to others with respect to her role in the acts of violence.”).

33 Amartya Sen. 2008. “Violence, identity and poverty.” *Journal of Peace Research* 45(1):pp. 5, 14 (referring to the “violence of solitarist identity”).

34 *Ibid.* at 10 (“In the recognition of plural human identities, the increased concentration on class and other sources of economic disparity has made it very hard to excite communal passions and violence in Kolkata along the lines of a religious divide—a previously cultivated device that has increasingly looked strangely primitive and raw.”).

35 The vast majority of death row inmates in the United States have addiction and mental health issues that also reflect prior institutional failures. In 15 of 16 cases in the study of California death row inmates, institutions including schools, juvenile detention facilities, prisons, foster homes, medical and psychiatric facilities had failed to recognize and remediate needs prior to commission of their violent offence. Freedman and Hemenway, *supra* note 7, at 1763.

The Death Penalty is Extreme Violence

The death penalty is an abusive social construction and poses a serious threat to public health in at least three ways distinct from other criminal punishments: (1) the death penalty is state-regulated extreme violence; (2) in most states, the death penalty is future-oriented—a dogged pursuit of future state violence; and (3) the death penalty emphasizes shaming.

1. The death penalty is uniquely state-regulated extreme violence.

The first way the death penalty differs from other punishments and is detrimental to health is that, rather than erecting a bar to violence, it regulates violence. In most (arguably in all) other contexts, law's function is to find peaceful means to transform potential or actual physical disputes into words and to help parties find repose, aided by nonlethal government coercion. That includes even the law of war, which by nature is designed to mitigate, not channel, physical conflict. In criminal law, punishments other than the death penalty certainly are maintained through coercive state power, but they are motivated by concerns about accountability, incapacitation, safety, and rehabilitation. In contrast to all other areas of law, death penalty law, if it is to be considered "law,"³⁶ is designed to effectuate fair killing without excuse. It is uniquely a legal "application that prescribes the killing of another person" and requires judges to "set in motion the acts of others which will in the normal course of events end with someone else killing the convicted defendant."³⁷ As it is constituted of the state's threat of homicide, absent the exception that swallows the rule ("pain and suffering arising only from . . . lawful sanctions"),

36 Finn Kjaerulf and Rodrigo Barahona. 2010. "Preventing violence and reinforcing human security: a rights-based framework for top-down and bottom-up action." *Revista Panamericana de Salud Publica* 27(5):382, 382 (observing that violence discourages the rule of law and is a threat to essential liberties and human rights, "in particular, the right to life without fear").

37 Robert Cover. "Violence and the word," *supra* note 31, at 1622.

the death penalty meets the United Nations definition of torture,³⁸ and “is arguably the most extreme form of torture.”³⁹

The extreme violence of the death penalty (in other words, the threat of homicide and homicide itself carried out by government) places it squarely in the category of events described by the Diagnostic and Statistical Manual⁴⁰ and International Classification of Diseases⁴¹ as precipitating psychological trauma and post-traumatic stress disorder.

2. *The death penalty is uniquely future-oriented extreme punishment.*

Second, in most places the death penalty is future oriented—the government only secures at trial a conditional right to pursue execution of the defendant at an often much later date. In states that allow substantial appeals of the death sentence—lasting for many years in democracies like the United States and Japan—repeated exposure to the facts of the crime occurs. For a “long duration”, actors within the capital punishment system, including the defendant and prison personnel, advocates on both sides, and the survivors of the victim and defendant’s family, are trapped in a seemingly endlessly present, claustrophobic moment between the past terrible murder and the government’s future killing. This requires the government to remain in an emotionally up-regulated fight mode against the defendant for years until it eliminates

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- 38 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113 (defining torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he . . . has committed . . . when such pain or suffering is inflicted by or at the instigation of . . . a public official”) (emphasis added).
- 39 Christina M. Cerna. 1997. “Universality of human rights: The case of the death penalty.” *ILSA Journal of International and Comparative Law* 3:465, 468, 475 (“The imposition of the death penalty itself is the most extreme form of torture imaginable, but is excluded from the definition of torture by means of a legal fiction.”); see also *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989) (finding the “very long period of time spent on death row . . . with the ever present and mounting anguish of awaiting execution” likely to violate Article 3 of the European Convention on Human Rights, which prohibits “inhuman or degrading treatment or punishment”); *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (Stephen Breyer & Ruth Ginsberg, dissenting) (comprehensive list of jurisdictions recognizing “death row phenomenon”, that lengthy delay in execution is cruel).
- 40 DSM-5, Section 309.81 (Post-traumatic Stress Disorder) (“Exposure to actual or threatened death . . . in one (or more) of the following ways: 1. Directly experiencing the traumatic event(s); 2. Witnessing, in person, the event(s) as it occurred to others; 3. Learning that the traumatic event(s) occurred to a close family member or close friend. In cases of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental; 4. Experiencing repeated or extreme exposure to aversive details of the traumatic event(s).”). The DSM refers to first responders’ and police officers’ experiences as examples of No. 4.
- 41 ICD, Section F43.1 (Post-traumatic Stress Disorder) (“Arises as a delayed or protracted response to a stressful event or situation (of either brief or long duration) of an exceptionally threatening or catastrophic nature, which is likely to cause pervasive distress in almost anyone.”).

him. For prosecutors, repeatedly reiterating the death threat might be as emotionally dysregulating as it is for defence counsel on the other side, anticipating and fighting against the eventual execution.⁴²

The future orientation leaves family members and other survivors of the murder victim in limbo, often unable to properly go through the steps of grieving as they are stirred throughout appellate events to recall the sharp grief and trauma of their loss. Survivors describe being brought back to “square one” every time something happens in a case over the years, sometimes decades, that appeals last.⁴³ As they may find themselves unable to process grief, being repeatedly interrupted and thrown back to square one, their anger tends to be re-aroused at the defendant, at the defendant’s advocates, at the prosecutors, and at the system.⁴⁴

The future-orientation also uniquely damages the defendant’s family and friends and, sometimes, the defendant’s advocates,⁴⁵ who all undergo a “chronic dread” related to anticipatory grief, a constant threat of loss intimately tied to serially traumatizing events (appellate losses, stayed execution dates).⁴⁶ Anyone who cares about the defendant may be affected by this, including prison personnel. Recognizing this, the state of Texas has utilized execution-day chaplains to work with the condemned during the execution process who are otherwise employed in places other than death row in the prison system. This shields the chaplains actually working on death row from the likely detrimental emotional and psychological consequences that would attend to their participation in the killing of persons they had come to know and care about.⁴⁷

3. *The death penalty is uniquely shaming.*

Lastly, precisely because the death penalty is intentional homicide, it is profoundly shaming in a way that no other punishment (or action short

42 See Sheffer, *supra* note 4.

43 Armour and Umbreit, *supra* note 4, at 408–409.

44 Jennifer Connolly and Ronit Gordon. 2015. “Co-victims of homicide: a systematic review of the literature.” *Trauma, Violence, and Abuse* 16(4):494–505.

45 Sheffer, *supra* note 4.

46 Joy, *supra* note 4, at 9.

47 Walter C. Long. 2015. “The constitutionality and ethics of execution-day prison chaplaincy.” *Texas Journal on Civil Liberties and Civil Rights* 21(1):1,3.

of murder) is. United States Supreme Court Justice William Brennan described as the death penalty's "fatal constitutional infirmity" its direct assault on "human dignity", treating "members of the human race as nonhumans, as objects to be toyed with and discarded."⁴⁸ In 1993, three Canadian Supreme Court justices assessed the assault on dignity more colourfully: "[The death penalty] is the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. [It is] the ultimate desecration of human dignity."⁴⁹ The death penalty is an exercise of extraordinarily extreme shaming. If in some abstract sense it is about "incapacitating an offender", in real operation it is about decapitating the offender. It is overkill. It mirrors the action taken by an individual who has suffered a "narcissistic wound."⁵⁰ In this instance, a government or society reacts—in a trauma-organized way—perceiving its own cohesion to be under threat.

Survivors of murder victims often experience stigmatization.⁵¹ Some survivors, particularly those of already marginalized groups, undergo "disenfranchised grief,"⁵² which "occurs when a loss cannot be openly acknowledged, publicly mourned, or socially supported."⁵³ Even in cultures disposed to assist victims of violent crime, survivors nevertheless feel isolated because they experience other people as avoiding contact with them.⁵⁴ The death penalty may exacerbate problems survivors face. Perhaps already feeling misunderstood and isolated, survivors find themselves obligated—usually within their own family systems as they respond to the state—to take positions on the death penalty. Discord over the death penalty creates rifts within survivor family systems, further isolating some family members who may be shamed for favouring or opposing the sentence, depleting the best available resources for recovering from trauma within family systems.⁵⁵

48 *Gregg v. Georgia*, 428 U.S. 153, 230 (1976) (Brennan, J., dissenting).

49 *Kindler v. Canada*, 6 CRR (2d) 193, 241 (SC) (Cory, J.).

50 James Gilligan. 2000. "Violence in public health and preventative medicine." *The Lancet* 355:1802 (referring to "narcissistic wound" as one of "40 synonyms" for "shame").

51 King, *supra* note 23, at 195-196.

52 Lawrence Miller. 2009. "Family survivors of homicide: I. Symptoms, syndromes, and reaction patterns." *The American Journal of Family Therapy* 37:pp. 67, 68.

53 Joy, *supra* note 4, at 11.

54 King, *supra* note 23, at 196.

55 Gabriela Lopez-Zeron and Adrian J. Blow. 2015. "The role of relationships and families in healing from trauma." *Journal of Family Therapy*, DOI: 10.1111/1467-6427.12089. (early version online before inclusion in print publication) (reviewing relational evidence-based trauma treatment protocols).

Family members of the defendant also undergo disenfranchised grief, at times feeling stigmatized as though they themselves are blamed for the defendant's behaviour.⁵⁶ In the United States, the role of trial and habeas attorneys to develop mitigation evidence enhances their shame, as it tends to validate their self-condemning feelings. US prosecutors also make disparaging comments about them in court. Referred to sometimes as the death penalty's "other victims", they sense that they are the objects of pity and ostracization within their communities and even their own extended families. Meanwhile, they go through what has been described as a BADD cycle—Bargaining, Activity, Disillusionment, and Desperation—akin to the experience of family members of someone with a terminal illness, in which they bargain with God or the criminal justice system, hoping for a positive outcome, engage in frantic activity on behalf of their family member, experience disillusionment with the system, and become desperate when an execution date is set.⁵⁷ In some lengthy appeals processes, this sequence may repeat itself. It becomes exhausting, as reflected in shame felt by the brother of a Texas inmate subjected to multiple dates when the thoughts ran through his head—what was his brother being saved for? more maltreatment?—and he concluded to his shock, "Go ahead and kill him."⁵⁸

Inmates' family members perceive the annihilating theme of "nobodiness"⁵⁹ being projected upon the defendant as also being about them. This is particularly dangerous, as a matter of public health, when the defendant's family already is marginalized (as it actually is in most cases). There is a virtual public health consensus that the "experience of overwhelming shame and humiliation" is the "pathogen that seems to be a necessary but not sufficient cause of violent behaviour."⁶⁰ Through emotional contagion, the message of nobodiness not only can spread its damage horizontally through the trauma-organized system, shaming family, friends, and

56 King, *supra* note 23, 197.

57 Sharp, *supra* note 4, at 64-79.

58 Walter C. Long, 2011. "Trauma therapy for death row families." *Journal of Trauma and Dissociation* 12:pp. 482, 489.

59 Martin Luther King, Jr. 1986. "Letter from Birmingham Jail." In James M. Washington, ed., *The Essential Writings and Speeches of Martin Luther King, Jr.* New York: Harper Collins, p. 293 (describing the "degenerating sense of 'nobodiness'" projected on African Americans by racial discrimination arising from slavery).

60 Gilligan, *supra* note 49, at 1802.

advocates of the defendant, but also vertically, dangerously affecting the next generation and setting the stage for traumatic repetition—victimization or perpetration (or both) in next generations through transgenerational transmission of trauma.⁶¹

Finally, the executioners (and associated wardens, chaplains, and guards) not infrequently suffer trauma symptoms resulting from their mere participation in the act of killing or from having a caring prior relationship with the inmate, and they experience a similar distancing from others that may be an institutional consequence (they are prohibited from speaking to others about their experience) or a personal choice (they withdraw feeling shame associated with homicide, believing that others judge them or cannot comprehend their experience).⁶² PTSD symptoms not only result from their acts of killing but “may be more severe under that circumstance.”⁶³

Trauma experienced by actors carrying out violence for the state has been dubbed “perpetration-induced traumatic stress.”⁶⁴ Recognizing that executions are traumatic, corrections authorities take prophylactic measures to reduce the emotional damage on personnel: they promote “professionalism” in the task while having execution teams focus not on “the meaning of their activity, but on performing the sub-functions proficiently;”⁶⁵ they set up execution teams that do not include guards who have known the condemned inmates; they disperse the sense of moral responsibility by distributing execution tasks among a sizeable number of guards; and they obfuscate for all of the actors who the executioner is (e.g. by loading some guns in a firing squad with blanks). Sometimes the prophylaxes fail. Among a growing number of personal accounts of trauma by executioners made public, one American execution-team

61 Kaethe Weingarten. 2004. “Witnessing the effects of political violence in families: mechanisms of intergenerational transmission and clinical interventions.” *Journal of Marital and Family Therapy* 30(1):45-59.

62 Penal Reform International, Briefing Paper. 2015. “Prison Guards and the Death Penalty.” Available from: <http://www.penalreform.org/wp-content/uploads/2015/04/PRI-Prison-guards-briefing-paper.pdf>. (accessed 24 August 2016).

63 Rachel M. McNair. 2007. “Killing as trauma.” In Elizabeth K. Carll, ed., *Trauma Psychology: Issues in Violence, Disaster, Health, and Illness*. London: Praeger, vol. 1, 147, 160.

64 Rachel M. McNair. 2002. *Perpetration-Induced Traumatic Stress: The Psychological Consequences of Killing*. London: Praeger/Greenwood.

65 Michael J. Osofsky, Albert Bandera, and Philip G. Zimbardo. 2005. “The role of moral disengagement in the execution process.” *Law and Human Behavior* 29(4):pp. 386.

guard described reaching a threshold that broke when he began shaking uncontrollably while seeing the eyes of all the inmates he had executed flashing before him.⁶⁶

Conclusion and Recommendations

As a trauma-organized system, the death penalty reinforces multiple solitudes and enmities rather than promoting cooperative efforts at justice. Where the death penalty is imposed for murder, it obscures who the “victim” is by creating a new “victim” or set of victims. This creates cognitive dissonance and conflict throughout the system. The state’s lethal targeting of the defendant, leading to a vigorous defence of the defendant, is experienced as a new offence by many survivors of murder victims who perceive the defendant as getting unmerited notoriety and attention, and their deceased innocent family member unfairly besmirched by unsupportable comparison with the defendant, as the defendant gets sympathy in light of the state’s violent action. Within both victims’ and defendants’ families, formidable, painful divisions arise over the death sentence itself, disrupting or blocking potential, positive, intra-familial, inter-personal, reciprocal resources for post-violence (murder) and pre-violence (execution) emotional resiliency. Defendants’ families sometimes experience alienation from every other actor in the system, even from the defendant’s attorneys who, when building arguments to mitigate the sentence, often blame the defendant’s family members for things having a bearing on his behaviour. Prosecutors and defence attorneys shame each other for their positions on the death penalty and appellate defence attorneys shame prior defence counsel for errors alleged to have led to the death sentence. The system is one of constant aggression, blame displacement, and avoidance, frustrating by design restorative processes and meaning making in the aftermath of violence.

From a public health perspective, the death penalty is inherently anti-therapeutic on a systemic level and, thus, must be abandoned where society can successfully incapacitate violent persons with non-violent means. Sustainable abolition of capital punishment, however, cannot be accomplished if it is approached as a problem in isolation.

66 Werner Herzog, *Into the Abyss* [documentary film], 2011.

In medicine, the excising of a malignant mole cannot be divorced from exploration and treatment of underlying disease processes without great risk of recurrence or worse. In the same way, the death penalty is as much a symptom as a cause of societal dysregulation and cannot be sustainably eliminated without addressing and treating those systemic processes for which it is only a sign or a correlate. Bearing in mind the placement of the death penalty within larger systems, the following recommendations are made:

1. The U.N. should recognize the death penalty as violence.

Public health requires that the death penalty be redressed as a component of—not merely a governmental response to—societal violence.⁶⁷ Violence as traumatic re-enactment is contagious. So, when the government commits intentional homicide, it is difficult to see how that does not breed contempt for life and invite anarchy.⁶⁸ On the other hand, within a context that recognizes the death penalty as violence, public discussions over the goals of violence restraint or elimination should be consensus building in direct contrast to the present way in which arguments over capital punishment are not. Thus, simple recognition by the U.N. World Health Organization that the death penalty falls within its own definition of violence would constitute a large step towards fostering and supporting that consensus seeking serious violence reduction in retentionist nations.

2. The U.N. should encourage cultural and legal pursuit of human dignity as an antidote to violence.

A public health perspective understands that the prioritizing of human dignity means the advancement of negative rights (protecting the individual from government tyranny) and positive rights (requiring government to perform its duty “to protect individuals from violence and abuse”⁶⁹). Dignity intrinsically is hard to define across cultures, but assuming that, at minimum, it includes a right held by

67 James Welsh. 2000. “The death penalty as a public health issue.” *European Journal of Public Health* 10(1):2, 2 (“Modern thinking on penology rejects the view of society as being a battleground between the state and criminals, each drawing on the tools of violence to assert their will.”).

68 James Gilligan. 2000. “Punishment and violence: is the criminal law based on one huge mistake?” *Social Research* 67(3): pp.745, 754.

69 Michael Ignatieff. 2001. *Human Rights as Politics and Idolatry*. Princeton: Princeton University Press. p. 83.

every individual not to be the object of homicide (an intrinsically shaming event in every culture), then it requires states to abstain from homicide that is not excused (as necessary defence of self or third parties) and to engage in primary prevention through provision of the positive rights indisputably proven to reduce homicide: “ensuring that people have access to the means by which they can achieve a feeling of self-worth, such as education and employment, and a level of income, wealth, and power that is equal to that which other people enjoy, by universalizing social and political democracy.”⁷⁰ “Nations with the lowest murder rates . . . have the highest degrees of social and economic equity.”⁷¹

Considering human rights to be culturally particular social constructions—and not of natural, divine, or metaphysical origins—enhances rather than diminishes them. From a public health perspective, the transcultural discussion on the nature of human dignity, even as it exposes cultural and ideological disagreements, is a very good development, as it is a manifestation of our natural interdependence and mutual regulation focused on a positive outcome through dialogue.⁷² Such discussion stresses a search for, reverence for, and co-discovery and co-creation of a quality that, notably, is the antidote to violence. Whatever additional causes, contexts, and conditions there are, besmirched dignity is at the heart of human violence. The cultivation of dignity, thus, is violence’s cure and should be highly prized. It has been argued that progress in understanding “bodily integrity and empathetic selfhood” was integral to the creation of the law of human rights in the Eighteenth Century and led to the rejection of torture in the judicial process.⁷³ In the same way, neurobiological insights into trauma and aggression may be incorporated now into the construction of rights defining and supporting dignity in local communities, expanding into “ever-wider circles”, ultimately into “universal validity, freely embraced.”⁷⁴ Qualitative studies and narrative accounts

70 Gilligan, *supra* note 49, at 1802.

71 *Ibid.*; see also Bandy X. Lee, Bruce E. Wexler, and James Gilligan. 2014. “Political correlates of violent death rates in the U.S., 1900–2010.” *Aggression and Violent Behavior* 19:721–728 (finding violent deaths to rise during Republican administrations and with rising unemployment and a falling GDP).

72 See Benjamin Gregg, 2012. *Human Rights as Social Construction*. Cambridge: Cambridge University Press. (recommending a neurobiologically informed social constructionist approach to rights).

73 Lynn Hunt. 2008. *Inventing Human Rights: A History*. New York: Norton. p. 30.

74 Gregg, *supra* note 71, at 235.

provide the best windows into the human needs articulated in contexts of rights provision or lack thereof, calling for systemic changes that reduce violence and enhance human well-being.⁷⁵

3. *The U.N. should encourage cultural and legal reduction of shame-inducing punishment.*

From a public health perspective, retributive punishment “increases feelings of shame and decreases feelings of guilt”⁷⁶ and, thus, increases the potential for “traumatic re-enactment” in violent acts by those punished. “Increasing punitiveness toward criminals is the most powerful stimulus to violent crime . . . just as increasing rates of violent crime can reinforce the punitiveness of society.”⁷⁷ Punishing violent people by restraining them beyond what is necessary to prevent them from actively physically harming others is likely to engender more violence in them. Additionally, the use of prisons for nonviolent crimes—e.g. for drug offences or property crimes—is the most effective way to turn nonviolent persons into violent ones.⁷⁸

Science tells us that we are neurobiologically interdependent. That does not mean that we are not also individual actors who should be respected and treated as free agents, but we are not “autonomous” in the sense that we are fundamentally separate from others and beholden only to abstract universal religious, natural, or moral rules. As individuals, we vary in our “genetic susceptibilities to arousal, temperament, and reactivity.”⁷⁹ Aggression and arousal are on a continuum and we need some aggression for our “motivated functioning,” which we regulate within interpersonal boundary rules.⁸⁰ We socially construct those rules and violence occurs when those rules are broken. In this sense, violence is “a breach of duty not to

75 E.g., the Texas After Violence Project collects digital video oral history accounts of persons directly affected by death penalty cases in Texas. These are stored online, available for viewing anywhere, at the University of Texas' Human Rights Documentation Initiative. <https://www.lib.utexas.edu/hrdi>; www.texasafterviolence.org. The stories provide the kind of bottom-up information needed to define human needs, rights, and co-create less violent structures that support human security.

76 James Gilligan, *supra* note 49, at 1803.

77 James Gilligan. 2001. “The last mental hospital.” *Psychiatric Quarterly* 72(1): pp. 45, 57.

78 James Gilligan. 2001. *Preventing Violence*. New York: Thames and Hudson. p. 117.

79 Gwen Adshead. 2001. “A kind of necessity? Violence as a public health problem.” In Sandra L. Bloom, ed., *Violence: A Public Health Menace and a Public Health Approach*. London: Karnac Books. pp. 1, 4.

80 *Ibid.* at 5.

harm others and also a breach of a connection between the victim and the offender.”⁸¹

When a “solitarist” framework of human being is replaced with a communitarian social framework focused on the mutual pursuit of dignity, our demonstrable biological “interdependencies” can be given “symbolic significance as attachments which invoke personal obligation to others in a community of concern.”⁸² In this context, shaming can be transformed into a more benign influence. Relieved from the context of “purely deterrent punishment,” less-intense shaming may constructively assist communities or courts to “moralize with the offender to communicate reasons for the evil of her actions.”⁸³ Re-integrative shaming labels the boundary violation morally wrong while it nevertheless refuses to stigmatize an offender as permanently deviant and subsequently makes efforts to fully restore the offender after a finite time into the community of rule-abiding persons. Pursuit of restorative processes within a context of understanding of the neurobiological network of human interdependencies has promise for stopping enemy-aggressor and survivor-victim cycles otherwise generated within trauma-organized systems like that maintained by the death penalty.⁸⁴

4. *The UN should encourage cultural and legal support of victims.*

A victim-centered culture emphasizes primary prevention of violence first: stopping the causes—“namely, shaming and humiliating people by subjecting them to hierarchical social and economic systems characterized by class and caste stratification, relative poverty, and dictatorship.”⁸⁵ Of course, elimination of all violent crime is impossible, even in societies that have achieved a significant diminution of wealth and power disparities in addition to other causes of violence. So there will be victims.

One of criminal law’s “crucial issues” is finding a balance “between the security of the citizen and the rights of the suspect, between

81 Ibid. at 25.

82 John Braithwaite. 1989. *Crime, Shame, and Reintegration*. Cambridge: Cambridge University Press. pp. 100-101.

83 Ibid.

84 Carolyn Yoder. 2005. *The Little Book of Trauma Healing*. Pennsylvania: Good Books.

85 James Gilligan, *supra* note 49, at 1802.

the victim and the offender.”⁸⁶ A strong position for the victim in a criminal prosecution is therapeutically better for the rehabilitation of both victim and offender. “If the trial is going to be a platform for renewal and a new start, is it essential that the victim feels that he or she is a protagonist, not merely a piece of evidence.”⁸⁷ That applies to survivors of murder victims in the case of a homicide. However, in the United States, because of the presence of the potential death sentence, the rights of victim survivors to trial participation have been considered to be at great tension with the concern for fairness.⁸⁸

Where the death penalty does not exist an opportunity is presented for the survivors to be greatly empowered at trial without diminution of the defendant’s rights. In Sweden, for example, every victim of a serious offence gets an attorney, gets to be a party next to the prosecutor in court, can present “charges, claims, evidence and arguments.” Every convicted defendant has to pay a significant contribution to victimology research, and every victim can get damages from the state if the defendant cannot pay and the victim has no insurance that will pay.⁸⁹ The rights of the defendant are not diminished, because the state still bears the burden of proof. But the real parties to an offence are brought into virtual equipoise, giving victims or survivors restored self-esteem and empowerment to move on, at the same time giving defendants an opportunity not to see themselves merely victimized by the state but to directly encounter the victims or survivors and, when guilty, truly contemplate their responsibility and the effects of the act—all of this favouring “regret, remorse and rehabilitation” of the defendant.⁹⁰

A legal system like that of Sweden’s which incorporates all of the provisions in the United Nations’ declaration on victims’ rights⁹¹

86 Christian Diesen. 2012. “Therapeutic jurisprudence and the victim of crime.” In T.I. Oei and Marc Groenhuijsen eds., *Progression in Forensic Psychiatry*. Dordrecht: Kluwer Academic Press. pp. 580, 594.

87 *Ibid.* at 595.

88 *Booth v. Maryland*, 482 U.S. 496 (1987) (holding testimony by survivors about their trauma created an impermissible risk of unfairness); *Payne v. Tennessee*, 501 U.S. 808 (1991) (overruling *Booth* and holding victim impact evidence of survivors admissible because a jury should have all evidence before it of the specific harm caused by the defendant).

89 Diesen, *supra* note 85, at 579.

90 *Ibid.* at 595.

91 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the U.N. General Assembly Nov. 29, 1985, A/RES/40/34.

replaces the kind of shame that accompanies a trauma-organized legal system containing the death penalty—annihilating shame—with the more benign shame intrinsic to human interpersonal relations. It allows the state the power it needs for fair, equitable administration of justice while preventing the state from disempowering victims. Such a system supports remorse in the defendant and solutions that victims need, such as an accounting by the defendant of what happened and why the crime occurred. In contrast, victim-offender encounters in a trauma-organized system are seldom, fraught, and distorted. The post-conviction appeals process, during which defendants fight for their lives sometimes for decades, blocks (except in some extraordinary cases⁹²) the possibility of communication between victim and offender. Most death penalty appeals are about the punishment only. Without a death sentence, many cases would open to the possibility of dialogue and, probably, more survivors would seek it when they did not feel that, by trying to talk to the defendant, they were going against the cultural current supporting the institutionally legitimated homicide.⁹³

Broadly speaking, the United Nations declaration on victims' rights also theoretically legitimizes the family members of death row inmates as potential victims of state abuse. Article 18 defines a "victim of abuse of power" as a person who has suffered harm as the result of "acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights". Article 19 provides that states should provide such victims "restitution and/or compensation, and necessary material, medical, psychological and social assistance and support". In a world in which the declaration were an enforceable treaty binding on the United States, for example, the family of Napoleon Beazley, executed in the United States in 2002, would be remunerated because his execution violated a decision by the Inter-American Commission on Human Rights that he was ineligible for the death penalty as he was a juvenile at the time of his offence. Every year since Beazley's execution, the Commission has asked the United States to provide

92 Leo G. Barrile. 2015. "I forgive you, but you must die: murder victim family members, the death penalty, and restorative justice." *Victims and Offenders* 10:239-269.

93 *Ibid.* at 265.

his surviving family restitution.⁹⁴ Some suggestions have been made under U.S. domestic law to hold the state accountable to death row family members' rights to family unity and association.⁹⁵ But appreciation by the trauma-organized system of the status of such persons as victims is categorically blocked by the state's right to legal homicide.

5. *The U.N. should interrogate the death penalty on its relationship to human security or insecurity.*

The United Nations has committed itself to foster conditions that lead to human security.⁹⁶ That model may be more amenable than other developmental models to the goals of violence prevention and elimination because it emphasizes sustainability (“in terms of peace, physical health, mental health, ecology”), prioritizes rights in the face of challenges, differs significantly from the “human development approach” in viewing persons first as group members rather than individuals, considers persons to have multiple identities that “can be sources of conflict and sources of solace in the face of conflicts, with scope for evolution,” and brings forth a “philosophy of inter-connect- edness” that takes a bottom-up approach to the discovery of sources of threats to security and values threatened by them.⁹⁷ The death penalty should be interrogated by this framework about its contribution to security, or the contrary, and, perhaps more fundamentally, about its relationship to human sustainability. Trauma-organized systems (such as the death penalty, war, slavery, systemic discrimination on the basis of immutable characteristics, and economies built on great disparities in wealth and resources) and the abusive cultural stories that support those systems probably give humanity itself a shortening shelf-life, because of the violent individual and social conflict they generate.

94 Inter-American Commission on Human Rights, Case 12.412, *Napoleon Beazley*, Report No. 101/03 (December 29, 2003), para. 60 (1) (recommending that the U.S. “provide the next-of-kin of Napoleon Beazley with an effective remedy, which includes compensation”). The author was one of Beazley’s attorneys.

95 Rachel King, 2007. “No due process: how the death penalty violates the constitutional rights of the family members of death row prisoners.” *Public Interest Law Journal* 16:195-253.

96 U.N. Commission on Human Security, 2003. *Human Security Now*, 4 (defining “human security” as the protection of “the vital core of all human lives in ways that enhance human freedoms and human fulfillment”).

97 Des Gasper, 2011. “The human and the social: a comparison of the discourses of human development, human security and social quality.” *International Journal of Social Quality* 1(1):pp. 91, 103-104.

