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THE DAY CANADA SAID NO TO THE DEATH PENALTY IN THE UNITED STATES:

INNOCENCE, DIGNITY, AND THE EVOLUTION OF ABOLITIONISM

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INTRODUCTION

When it comes to opposing the death penalty, it is revealing whether a society considers the fundamental question “Could an innocent be executed?” or “Should a government be allowed to kill the guilty?” This article explores the intersection between these distinct approaches through a sociolegal and historical perspective, thereby shedding light on why certain societies or actors gravitate toward innocence or dignity. Its thesis suggests that the way the death-penalty debate is framed has far greater implications than is commonly realized for the evolution of both criminal punishment and liberal democracy.

Innocence and dignity are both constitutive societal questions. First, miscarriages of justice have been defining issues in the history of Western civilization. The death sentences of two innocents—Socrates and Jesus—have influenced its philosophy,

† Associate Professor, USC Gould School of Law. I am grateful to the anonymous peer reviewers for their comments. Daniel C. Richman and David A. Strauss likewise provided thoughtful feedback during the 2021 Culp Colloquium hosted by Duke Law School, Harvard Law School, and the University of Chicago Law School. Similarly, the 2021 Grey Fellows’ Forum at Stanford Law School led to helpful suggestions from Shirin Bakhshay, Andrew Gilden, and Thea Johnson. Last but not least, my colleagues at the McGill Faculty of Law provided valuable comments during our academic workshop.
faith, and culture. Wrongful convictions later played a neglected role in the rise of democracies rooted in the rule of law, such as by inspiring the English Bill of Rights of 1689, ultimately shaping modern constitutional protections in Britain, Canada, the United States, and beyond. Second, the growing recognition of dignity as a fundamental legal principle since the Enlightenment buoyed an anti-death-penalty movement convinced that killing prisoners is inherently inhumane. This normative paradigm shift has extended beyond state-killing by influencing debates over prisoners’ rights as a whole. Nowadays, the abolition of the death penalty and other degrading punishments is increasingly regarded as a benchmark of liberal democracy and human rights.

A tension nonetheless exists between these two constitutive questions. Focusing on innocence as the key reason to abolish capital punishment suggests that, but for the risk of error, it would be legitimate to kill the guilty. Dignity instead aspires to transcend practical considerations like innocence by recognizing the inhumanity of any execution. Accordingly, each approach offers a window into fundamental issues, including how social, historical, legal, and political circumstances shape the acceptable limits on punishment.

Today, the United States stands out not only in conserving the death penalty, but also in refusing to consider it a question of


human rights or dignity. At the outset, American society is an outlier within the Western world, which is generally understood as encompassing the United States, Canada, Australia, New Zealand, and European nations, except Russia and states in its orbit like Belarus. All other Western democracies are in the abolitionist camp. Abolition accelerated in postwar Europe when regional powers took this step, namely West Germany (1949), the United Kingdom (1965), and France (1981). Yet other nations preceded them generations earlier, including Portugal (1867), the Netherlands (1870), Norway (1905), Sweden (1921), and Denmark (1933). This trend is hardly Eurocentric. New Zealand (1961), Australia (1984), and Canada (1976), as we will see in greater detail, have abolished capital punishment. Furthermore, America is increasingly an outlier in the wider world, where over two-thirds of all countries have abolished capital punishment in law or practice. Abolition has encompassed nations on diverse continents, such as Costa Rica (1877), Uruguay (1907), Namibia (1990), Nepal (1990), and South Africa (1995). Alongside the United States, the leading executioners have overwhelmingly been dictatorial regimes,


7 The dates of abolition in this article are primarily for ordinary, non-war crimes. Various nations have experienced discrepancies in dates of abolition for peace and wartime. Amnesty International, “Abolitionist and Retentionist Countries as of July 2018” (23 October 2018), online (pdf): Amnesty International <amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf>.

8 See ibid.
such as China, North Korea, Iran, and Saudi Arabia. Mirroring the global decline, however, international law is progressively barring capital punishment. For decades before the flurry of federal executions during Donald Trump’s final months as president, America’s retention of the death penalty chronically fostered tensions with allies concerned about its disregard for international human rights norms. In sum, the United States is an exception within the modern Western world and a relative exception within the wider world.

The death penalty’s retention is intertwined with additional facets of American exceptionalism, the notion that the United

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11 After a 17-year hiatus in federal executions, the Trump administration conducted 13 executions in its last 6 months. See Lee Kovarsky, “The Trump Executions” (2022) 100 Tex L Rev 620. See also Trevor Gardner, “Law and Order as the Foundational Paradox of the Trump Presidency” (2021) 73 Stan L Rev 141.

12 See generally Zimring, Contradictions, supra note 3 at 42–46.

13 See also Carol S Steiker & Jordan M Steiker, “The Rise, Fall, and Afterlife of the Death Penalty in the United States” (2020) 3 Ann Rev Crim 299 at 313 (“The United States is exceptional in its retention and use of the death penalty, a position that puts it at odds with most of the developed, democratic world”) [Steiker & Steiker, “Rise, Fall, and Afterlife”].

States is an exception by diverse objective measures.\textsuperscript{15} For instance, the United States virtually has the world’s highest incarceration rate following the emergence of mass incarceration in the 1980s.\textsuperscript{16} None of this means that it is a permanent exception.\textsuperscript{17} Every society is malleable and the United States has experienced innumerable social transformations since its founding.\textsuperscript{18} Modern America may actually be in the process of gradually abolishing the death penalty. The practice has markedly declined in the 21st century, reflecting a longstanding social ambivalence about capital punishment.\textsuperscript{19} Twenty-three states have now abolished it. In 2021, the number of executions

\begin{footnotesize}
\begin{enumerate}
\item Nowadays, “American exceptionalism” is often understood as meaning that America is “exceptional” in the sense of “superior,” although historically the concept has mostly referred to America being an “exception.” See generally Seymour Martin Lipset, \textit{American Exceptionalism: A Double-Edged Sword} (New York: Norton, 1997) at 18, 26.
\item Although the United States long had the highest incarceration rate worldwide, a relative decline in imprisonment recently led its rate to fall beneath El Salvador, Rwanda, Turkmenistan, and Cuba. “Highest to Lowest - Prison Population Rate” (last visited 12 November 2022), online: \texttt{World Prison Brief <prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All> [“Prison Population Rate”]; “United States of America” (last visited 12 November 2022), online: \texttt{World Prison Brief <prisonstudies.org/country/united-states-america>.
\item When questioning the concept of American exceptionalism, David Garland rightly cast doubt on the notion that “[t]he death penalty persists in the United States” because it “is different in some deep and continuing sociocultural sense,” as differences in US penalty are “actually much more recent and much more contingent” than may appear. David Garland, “The Concept of American Exceptionalism and the Case of Capital Punishment” in Reitz, \textit{supra} note 14, 103 at 110.
\item Scholars who employ the concept of American exceptionalism typically reject cultural essentialism and consider historical shifts in American society. See e.g. Michael Kammen, \textit{In the Past Lane: Historical Perspectives on American Culture} (New York: Oxford University Press, 1997); Lipset, \textit{supra} note 15; Steiker & Steiker, “Rise, Fall, and Afterlife,” \textit{supra} note 13.
\end{enumerate}
\end{footnotesize}
(11) and death sentences (18) were around their lowest historical levels.\textsuperscript{20} Compared to other countries, the United States may thus be lagging behind in a long-term abolitionist process, rather than bound to remain an exception.\textsuperscript{21} This incremental evolution exists within the United States itself, as certain states were among the earliest jurisdictions worldwide to permanently abolish capital punishment: Michigan (1847), Wisconsin (1853), and Maine (1887).\textsuperscript{22} Given that capital punishment is primarily a Southern phenomenon in a continent-size country, the references to the US death penalty in this article should not be misinterpreted as negating stark regional variations.\textsuperscript{23}

Sociolegal scholarship has still sought to elucidate why the United States has become an outlier on the death penalty.\textsuperscript{24} Besides factors leading to the retention of capital punishment itself, scholars have addressed how American society has debated the issue. In particular, the risk of executing an innocent has assumed a central role in US abolitionism since the late 20th century.


\textsuperscript{22} “State by State” (last visited 15 January 2022), online: Death Penalty Information Center <deathpenaltyinfo.org/state-and-federal-info/state-by-state>.


\textsuperscript{24} See e.g. Garland, Peculiar Institution, supra note 19; Hammel, supra note 6; Jouet, Exceptional America, supra note 14 at 194–232; Steiker & Steiker, Courting Death, supra note 4; James Q Whitman, Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe (New York: Oxford University Press, 2003); Zimring, Contradictions, supra note 3; Franklin E Zimring & Gordon Hawkins, Capital Punishment and the American Agenda (Cambridge, UK: Cambridge University Press, 1986).
century. Epitomizing this trend, Joe Biden’s 2020 presidential campaign platform based its commitment to abolition squarely on innocence:

> Over 160 individuals who’ve been sentenced to death in this country since 1973 have later been exonerated. Because we cannot ensure we get death penalty cases right every time, Biden will work to pass legislation to eliminate the death penalty at the federal level, and incentivize states to follow the federal government’s example.

As Virginia abolished the death penalty in 2021, Scott Surovell, a state senator and the bill’s sponsor, stressed: “The problem with capital punishment is that once it’s inflicted you can’t take it back, it can’t be corrected.” Of course, innocence is not the only dimension of modern American abolitionism. It encompasses other concerns, including racial disparities, the high financial cost of capital trials or appeals, and the death penalty’s ineffectiveness against crime. That being noted, we will see how innocence has gained importance in the US sociolegal debate and has recurrently been framed as the cornerstone of abolitionism.

By contrast, normative objections to state-killing play a greater role in abolitionism in many other parts of the world nowadays. In particular, Europe has gravitated toward a

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26 “The Biden Plan for Strengthening America’s Commitment to Justice” (last visited 17 May 2021), online: Biden Harris <joebiden.com/justice/>.


categorical objection to the death penalty on the ground that any execution violates human rights rooted in dignity.29

Meanwhile, scholarship has largely ignored Canada’s position in this historical evolution, despite the profound insights it has to offer. Canada appears to have taken a middle-road between the United States and Europe. On one hand, its Parliament abolished the death penalty in 1976—the same year as the US Supreme Court reauthorized it in Gregg v Georgia,30 following its temporary abolition in Furman v Georgia four years earlier.31 Canada’s foreign policy has regularly embraced global abolitionism based on human rights.32 On the other hand, Canada’s constitutional jurisprudence has been disinclined toward the human rights rationale against capital punishment, partly because of a plausible US export: an attempt to settle the issue by focusing narrowly on innocence.

The overwhelming focus on America-Europe comparisons in sociolegal scholarship has actually obscured a key, albeit little known and under-studied chapter in death-penalty history. Two decades ago, Canada said “No” to America’s death penalty. In United States v Burns (2001), the Supreme Court of Canada barred the extradition of two men facing capital punishment in Washington State.33 The defendants were Canadian citizens from British Columbia who allegedly fled across the border to their home province after murdering three people. The case offers an extraordinary window into the US death-penalty system through foreign eyes. While Burns has been described as a constitutional milestone under the Canadian Charter of Rights and Freedoms,34

29 See generally Jouet, “Death Penalty Abolitionism,” supra note 2; Steiker & Steiker, Courting Death, supra note 4 at 248; Zimring, Contradictions, supra note 3 at 26–46.
30 Gregg v Georgia, 428 US 153 (1976) (plurality opinion) [Gregg].
31 Furman v Georgia, 408 US 238 (1972) (per curiam) [Furman].
32 See United States v Burns, 2001 SCC 7 at paras 79–89 [Burns].
33 See ibid.
this article offers another perspective on its twentieth anniversary. The Court said "No" to America's death penalty for doubtful reasons, especially a newfound risk of executing the innocent, and did not offer a resounding "Yes" to fundamental principles of liberal democracy—human rights and dignity. This appeared to be because, at least to an extent, a modern conception of abolitionism in the United States found its way into the Supreme Court of Canada’s reasoning, namely the notion that the death penalty is wrong because it may fail to kill only the guilty.

This history risks being lost following the Supreme Court of Canada’s recent landmark decision in *R v Bissonnette*, which prohibited life without parole as an affront to human dignity. Although the *Canadian Criminal Code* did not allow life without parole, the Justices struck a statute enabling *de facto* life without parole through consecutive life sentences. In *Bissonnette*, Canada’s highest court therefore did what it refused to do in *Burns*: address the crux of the issue—the punishment’s substantive cruelty—and hold that human dignity is an inalienable, inviolable principle. *Bissonnette’s* humanistic reasoning built upon a wider evolution in Western civilization, including the European Court of Human Rights’ jurisprudence barring life without parole. Canada’s justices added that “the

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35 See *R v Bissonnette*, 2022 SCC 23 at paras 2–9 [*Bissonnette*].

36 The sentence for first-degree murder under the *Criminal Code* is 25-years-to-life. See *Criminal Code*, RSC 1985 c C-46, s 745(a). In 2011, the *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act* amended section 745.51 of the *Criminal Code* to allow consecutive periods of parole ineligibility for killing multiple victims, such as 75-years-to-life for a triple homicide. See *Bissonnette*, *supra* note 35 at para 3. The defendant, Alexandre Bissonnette, had atrociously murdered six people in a Quebec City mosque. See *ibid* at paras 1, 10–11. See also Julie Desrosiers & Catherine Bernard, “L’emprisonnement à perpétuité sans possibilité de libération conditionnelle : Une peine inconstitutionnelle?” (2021) 25 Can Crim L Rev 275 (discussing the genesis of the 2011 legislative amendment and its unconstitutionality based on Canadian and international sentencing principles).

37 See *Bissonnette*, *supra* note 35 at para 104, citing *Vinter and Others v United Kingdom*, No 66069/09, 130/10, and 3896/10, [2013] ECHR 645 [*Vinter*].
American approach differs from the one that exists under Canadian law, since that country applies the death penalty and has a narrower interpretation of the concept of cruel and unusual punishment. By offering a longer history, this article exposes how the distinction between the American and Canadian approach was not always as clear-cut as it may seem today.

The object of the article is thus not to explain America’s retention of capital punishment or life without parole or Canadian abolitionism writ large, but to critically analyze dignity, innocence, and their deeper implications. The subject is topical as experts believe that, within one or two generations, the US Supreme Court may consider another constitutional challenge to abolish the death penalty. As Canada’s Justices seem to have been significantly influenced by the modern US death-penalty debate, Burns illustrates what a US Supreme Court decision might look like if certain social dynamics encourage judges to try and settle the issue by focusing narrowly on innocence.

Why has innocence increasingly been framed as the death-penalty issue in the United States since the late 20th century? The

On the relative limitations of the landmark Vinter decision abolishing life without parole, see note 287 and accompanying text.

38 Bissonnette, supra note 35 at para 107.


41 See Garrett, supra note 23 at 226–32; Steiker & Steiker, Courting Death, supra note 4 at 258; Zimring, Contradictions, supra note 3 at 183–87; Zimring & Hawkins, supra note 24 at 156.
article calls into doubt the main narrative, namely that this shift stems from the mounting number of exonerations that raised awareness of a poorly known problem. Rather, the article describes how sentencing innocents to death had been a chronic issue for centuries. This history may be surprising but it should not be. Capital punishment presents an inherent risk of executing the innocent. Wrongful convictions must have been born with it. They cannot genuinely be a “new” problem or “revelation.” In fact, miscarriages of justice have been a constitutive issue in the history of Western civilization, from the trials of Socrates and Jesus to the emergence of the English Bill of Rights of 1689, the French Revolution of 1789, and the Dreyfus Affair straddling the late nineteenth and early twentieth centuries. In addition to major figures or political events, we shall see that numerous instances of ordinary innocents sentenced to death are documented in the seventeenth, eighteenth, nineteenth, and twentieth centuries, from Britain to France, Canada, and the United States.

If generations of abolitionists had been aware of miscarriages of justice, innocence became a popular cause in late 20th century America. This partly reflected the strategic decision of certain abolitionists to raise opposition to capital punishment by emphasizing the predicament of innocents whose execution could not be justified. The shift also reflected substantial media coverage of wrongful convictions. We will see below how, by contrast, innocence played a minimal role in the prominent death-penalty cases of the 1970s, namely Furman v Georgia (1972) and Gregg v Georgia (1976), when the US Supreme Court respectively abolished and reauthorized capital punishment. The abolitionists who litigated these cases could have made innocence the central issue but did not even seem to

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44 Furman, supra note 31; Gregg, supra note 30.
45 See infra note 197 and accompanying text.
It is tempting to explain the subsequent rise of the US innocence movement by a wave of exonerations. The modern debate over wrongful convictions in other countries, such as Canada, France, the Netherlands or Australia would seem to comfort this conclusion. In reality, it would be a partial explanation at best. Even though the nature and scale of the innocence phenomenon is now better understood due to the efforts of legal experts and investigative reporters, we shall see that past generations recurrently grappled with this problem.

This article theorizes why innocence has assumed a dominant role in modern American abolitionism, in turn influencing the Supreme Court of Canada’s attempt to settle a decisive case by focusing on innocence. It notably identifies a nexus between the rise of the innocence movement and the “tough-on-crime” movement in the United States. The heavy emphasis on innocence is an outgrowth of an ultra-punitive phase that emerged in the mid-1970s to early 1980s. America then affirmed itself as the sole Western democracy to retain the death penalty. The rise of mass incarceration simultaneously led it to reach the highest incarceration rate worldwide. Remarkably, its incarceration rate is over seven times higher than Germany and

46 See ibid.


48 See e.g. Burns, supra note 32 at paras 96–103; Kathryn M Campbell, Miscarriages of Justice in Canada: Causes, Responses, Remedies (Toronto: University of Toronto Press, 2018).

49 See Denis Salas, “L’affaire d’Outreau ou le miroir d’une époque” (2007) 143:1 Le Débat 30 (discussing France’s national debate following a prominent miscarriage of justice about alleged pedophilia).


52 See Campbell, supra note 48; Garrett, supra note 23; Holvast, Nan & Lestrade, supra note 50; Marshall, supra note 42; Sangha & Moles, supra note 51.
Sweden, six times higher than Canada, nearly four times higher than Britain, and three times higher than Australia and New Zealand.53 Harsh penal practices exist in all Western nations,54 yet the magnitude of punitiveness in American society is extraordinary. Whereas past generations of Americans had spearheaded humanistic and rehabilitative principles of punishment, these came to be perceived as foreign values.55 “The collapse of American criminal justice,” to borrow the title of William Stuntz’s magisterial book,56 reveals why the risk of innocence appeared as one of the few viable ways of advocating social change. As empathy or compassion toward the guilty became illegitimate in modern America, reformers gravitated toward the most sympathetic prisoners: the innocent.

In this social environment, certain American abolitionists sought to do what Canada’s Justices did in Burns: resolve the death-penalty debate by circumventing the issue of whether killing prisoners is itself inhumane. However, these normative questions are inescapable. The death penalty ultimately rests on a moral judgment about who deserves to be killed.57

Canada is concerned by all of these issues, which are not solely relevant to the United States. Even though Canada abolished capital punishment in 1976, an attempt to reintroduce it in 1987 failed in Parliament by a 148-127 vote—a small margin.58 Canada

53 “Prison Population Rate,” supra note 16. Regarding the relative decline of the US incarceration rate in recent years, see also note 16.


58 See Kindler v Canada (Minister of Justice), [1991] 2 SCR 779 at 832, 84 DLR (4th) 438 [Kindler].
may someday face another potent movement to bring back executions. According to a 2020 poll, 51 percent of Canadians actually support capital punishment.\(^5^9\) Notwithstanding their limited success, various Canadian politicians, including former Prime Minister Stephen Harper (2006–15), have also resorted to penal populism by appealing to fear of crime and harsher prison terms.\(^6^0\) While he did not push for reintroducing the death penalty, Harper stated that he morally supported capital punishment.\(^6^1\) And Harper reversed a national policy of systematically seeking clemency, commutation or extradition for Canadians facing the death penalty in foreign countries, including the United States.\(^6^2\) A Canadian federal judge found this policy shift arbitrary and unlawful in a case concerning the withdrawal of diplomatic efforts to save a Canadian citizen on death row in Montana.\(^6^3\) All of these developments stirred debate among Canadian legislators and civil society.\(^6^4\)


\(^6^0\) See generally Doob & Webster, supra note 54; Desrosiers & Bernard, supra note 36 at 277–83.


\(^6^3\) See Smith v Canada (Attorney General), 2009 FC 228.

By exploring the relationship between the death penalty and prisoners’ rights as a whole, the article identifies how abolitionist nations can remain conflicted about protecting prisoners’ human dignity. Ending state-killing in Canada has indeed not been synonymous with ending degrading treatment for prisoners.\(^6^5\) The Supreme Court of Canada’s unwillingness to develop the principle of dignity in *Burns* echoed a wider ambivalence toward prisoners’ rights. *Burns* should not be analyzed in a social and historical vacuum, just as the Court’s narrow reasoning should not be interpreted merely as a reflection of the comity and diplomatic concerns surrounding extradition decisions.\(^6^6\)

The article therefore speaks to diverse audiences in Canada, the United States, and worldwide. At the outset, it tackles fascinating questions relevant to multiple fields, particularly law, history, sociology, criminology, and philosophy. For scholars of Canadian law, it provides another lens into a groundbreaking case whose wider implications may not be immediately apparent. Similarly, for scholars of American law, the article sheds light on events, narratives, and issues that have been neglected in US debates. As “[t]hose who know only one country know no country,”\(^6^7\) comparative scholarship has the potential to offer new perspectives. If American jurists and scholars have paid little attention to Canadian law, the same cannot be said about their Canadian counterparts. Various Supreme Court of Canada decisions discuss US law in relative depth,\(^6^8\) and

\(^{65}\) While Canadian sentences are much shorter than in the United States, conditions of incarceration in Canada often evoke the violence and harshness associated with US prisons. See Rose Ricciardelli, *Surviving Incarceration: Inside Canadian Prisons* (Waterloo: Wilfrid Laurier University Press, 2014).


\(^{67}\) See Lipset, *supra* note 15 at 1.

\(^{68}\) Aside from *Burns* and *Kindler*, see generally *R v Smith* (Edward Dewey), [1987] 1 SCR 1045, 40 DLR (4th) 435 [*Smith*] (interpreting “cruel and unusual” punishment) and *R v Sinclair*, 2010 SCC 35 (declining to adopt the *Miranda* rules for Canadian police interrogations).
Canadian legislators wary of imprisonment have historically used the punitiveness of American society as a foil. Still, the issues discussed in this article have received insufficient attention. By exploring under-studied sources and chapters of history, the article proposes a fresh look at longstanding questions surrounding dignity, innocence, and liberal democracy.

The article is organized as follows. First, it offers context regarding the Supreme Court of Canada’s seminal Burns decision on the US death penalty, which presented wrongful convictions as a largely newfound problem, thereby echoing the narrative of many American abolitionists since the late 20th century. Second, the article describes how miscarriages of justice have actually been a recurrent issue in Western history, from antiquity to modernity, shedding doubt on the notion that innocence became a sudden crisis a few decades ago. Historical evidence also suggests that social actors may be tempted to present innocence as a mostly new question to try and settle the death-penalty issue. The Supreme Court of Canada exemplified this approach when it circumvented wider issues regarding the death penalty’s legitimacy by emulating a strategy characteristic of modern American abolitionism. This heavy emphasis on innocence has insidious roots, especially the erosion of empathy toward guilty prisoners in the age of America’s “tough-on-crime” movement. Third, the article examines why a narrow focus on innocence may negate the value of dignity as a legal principle, thereby revealing a social environment where concern for prisoners’ wellbeing is deemed illegitimate. This approach is at odds with the growing recognition of dignity as a pillar of liberal democracy.

The article finally suggests that recognizing the death penalty as a violation of human dignity is not a purely symbolic measure or futile philosophical debate. This normative evolution has been instrumental in cementing abolition in Europe, where the development of dignity spurred the end of executions and life

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without parole.\textsuperscript{71} Europe still remains ambivalent about dignity, whose development appears indispensable to abandon persistently degrading practices.\textsuperscript{72} Developing dignity as a principle in Canadian law could likewise foster critical reforms, from reconsidering lengthy or ruthless imprisonment\textsuperscript{73} to abolishing solitary confinement\textsuperscript{74} and tackling the massive imprisonment of Indigenous peoples in Canada that is sometimes compared to US mass incarceration.\textsuperscript{75} The recent prohibition of life without parole in \textit{Bissonnette} speaks to dignity’s promise in Canadian law, as this norm was at the heart of the historic decision.\textsuperscript{76} Last but not least, the development of dignity is all the more critical in an America society that has built the “harshest” penal system “in the history of democratic government.”\textsuperscript{77} Even if the United States abolished capital punishment, rejecting dignity may help normalize ruthless prison terms and mass incarceration. Innocence is a hard question in criminal justice. Yet the hardest question is how to treat the guilty.

\textsuperscript{71} See Vinter, \textit{supra} note 37. On the relative limitations of the landmark \textit{Vinter} decision abolishing life without parole, see note 287 and accompanying text.


\textsuperscript{73} See generally Ricciardelli, \textit{supra} note 65.

\textsuperscript{74} See generally Jane B Sprott & Anthony N Doob, “Solitary Confinement, Torture, and Canada’s Structured Intervention Units” (23 February 2021), online (pdf): Centre for Criminology & Sociolegal Studies <crimsl.utoronto.ca/sites/www.crimsl.utoronto.ca/files/Torture%20Solitary%20SIUs%2028_Sprott%20Doob%2023%20Feb%202021%29.pdf> [Sprott & Doob, “Solitary Confinement”].


\textsuperscript{76} See \textit{Bissonnette, supra} note 35 at paras 2–9.

\textsuperscript{77} See Stuntz, \textit{supra} note 56 at 3.
I. THE TWENTIETH ANNIVERSARY OF A KEY CHAPTER IN DEATH-PENALTY HISTORY

In 1994, a triple homicide in Bellevue, a suburb of Seattle, would eventually precipitate diplomatic tensions between the United States and Canada, a landmark decision by the Supreme Court of Canada opposing the US death penalty, and media coverage in both nations.\(^{78}\) Washington State had demanded the extradition of two suspects who had left for neighboring British Columbia following the homicides. The charge was capital murder. After lengthy police investigations and legal proceedings, the Justices unanimously ruled in 2001 that the suspects could not be extradited without assurances that they would not be executed.\(^{79}\)

“I think Canada has absolutely no right to do this,” a neighbor of the victims declared. “We want the ability to punish our own,” concurred Pam Roach, a Washington state senator. “Canada should not place restrictions on the administration of justice in the United States.”\(^{80}\) “[I]mperial arrogance” is not often associated with the image of Canada in the United States, but this was the language on display, including among some Canadians.\(^{81}\) Supporters of Canada’s own “tough-on-crime” movement were incensed.\(^{82}\) Others differed. “Canada just sent an unequivocal message to the United States. It was: In this country, we don’t sanction killing people in the name of the law—and we don’t look kindly on countries that do,” wrote Rosa Harris-Adler, a journalist.\(^{83}\) Kent Roach, one of Canada’s most distinguished

\(^{78}\) See Alphonso, supra note 78; Ko, supra note 78; Roach, supra note 34 at 923–24.

\(^{79}\) Burns, supra note 32.

\(^{80}\) Alphonso, supra note 78 at A4.


\(^{82}\) See Burns, supra note 32. Burns garnered the criticism of the Canadian Alliance, a political party known for supporting harsher punishments. See also Roach, supra note 34 at 924; Anthony N Doob & Carla Cesaroni, “The Political Attractiveness of Mandatory Minimum Sentences” (2001) 39 Osgoode Hall LJ 287 at 297 (discussing the party’s hardline stances).

\(^{83}\) Rosa Harris-Adler, “In This Country We Don’t Kill,” Ottawa Citizen (18 February 2001).
scholars, concluded that the Court “performed its anti-majoritarian role admirably by examining the fundamental principles of Canadian and international law to reach these conclusions.”

On the twentieth anniversary of the Supreme Court of Canada’s Burns decision regarding the US death penalty, this section offers another perspective. Burns was a victory for the anti-death-penalty movement in barring the extradition of two men who may have been executed in America, yet its reasoning mattered as much as its conclusion. The Court declined to address whether the death penalty itself is “cruel and unusual” under Section 12 of the Canadian Charter. Canada thus diverged from the European approach and the wider international trend toward recognizing the death penalty as an inherent violation of human rights rooted in dignity. Rather, the Supreme Court of Canada converged with modern American abolitionism in focusing on the risk of innocence as a central reason to oppose an execution. It depicted wrongful convictions as an essentially new problem that arose in the late 20th century, to boot one that was mostly unknown merely ten years earlier when its own Kindler decision had approved an extradition for a prospective execution in Pennsylvania.

84 Roach, supra note 34 at 923.

85 With regard to prison terms, the Supreme Court of Canada has also historically leaned toward a relatively narrow interpretation of Section 12. See Julie Desrosiers, “L’article 12 de la Charte canadienne des droits et libertés: Le critère de la disproportion exagérée revisité” (2016) 21 Can Crim L Rev 153 at 155–60.

86 In addition to Europe, Latin American nations were among the world’s first jurisdictions to insist upon no extradition without assurances. This principle was later enshrined in Article 9 of the Inter-American Convention on Extradition (1981). South Africa subsequently adopted a similar position, underlining that executions are inherent human rights violations that cannot be facilitated by extradition. See Bharat Malkani, “Extradition and Non-Refoulement” in Steiker & Steiker, Comparative Capital Punishment, supra note 3 at 76, 78, 83.
A. AN INAUSPICIOUS PRELUDE

By the late 20th century, the international community increasingly recognized any execution as a human rights violation, but the United States was among the top executioners worldwide alongside authoritarian regimes.\textsuperscript{87} It further stood out as the only Western democracy to retain capital punishment, which Canada had abolished in 1976 after conducting its last execution in 1962. The United States equally was the world’s sole superpower, following the Soviet Union’s collapse and before China’s rise. It enjoyed a peculiar status as standard bearer for democracy and recurrent adversary of international human rights standards.\textsuperscript{88} While Americans had historically been among the trailblazers in the anti-death-penalty movement born of Enlightenment ideas,\textsuperscript{89} US abolitionists had faced crushing defeats in prior decades.\textsuperscript{90} And executions in America had recently reached their highest number since the 1960s.\textsuperscript{91} Canada’s high court was now asked to facilitate this process by handing over people for execution. It complied.

In \textit{Kindler v Canada} (1991), the Supreme Court of Canada decided the case of a US citizen who had been sentenced to death in Pennsylvania before escaping to Canada. After his arrest in Quebec, Joseph Kindler argued that it would be unconstitutional for Canada to extradite him without assurances from Pennsylvania authorities that they would not inflict capital punishment.\textsuperscript{92} By a 4-3 majority, the Supreme Court of Canada laid waste to all his claims.

Chief Justice Beverley McLachlin’s opinion in \textit{Kindler} was particularly adamant that extraditions leading to an execution

\textsuperscript{87} See \textit{Burns}, supra note 32 at para 91.
\textsuperscript{88} See generally Ignatieff, supra note 14.
\textsuperscript{89} See Banner, \textit{supra} note 43 at ch 4-5; Jouet, “Death Penalty Abolitionism,” \textit{supra} note 2.
\textsuperscript{90} See e.g. \textit{ Gregg}, supra note 30 (reauthorizing the death penalty in 1976 following its temporary abolition in \textit{Furman v Georgia} (1972)); \textit{McCleskey v Kemp}, 481 US 279 (1987) [McCleskey] (rejecting relevance of statistical data establishing systemic racial discrimination in capital punishment).
\textsuperscript{91} See Banner, \textit{supra} note 43 at ch 10.
\textsuperscript{92} See \textit{Kindler}, \textit{supra} note 58 at 794–96, 840–41.
did not violate the Canadian Charter of Rights and Freedoms. The opinion accepted the Canadian Minister of Justice’s blanket denials about capital punishment’s unfair application in America.\footnote{See \textit{ibid} at 841–42.} Besides, Canada supposedly was not responsible for facilitating the execution process in handing over people to be killed by US authorities. Because Canada would not be the executioner, the effect of its actions would be “too remote” to raise constitutional concerns.\footnote{\textit{Ibid} at 846–47.}

Even though the extradition treaty between both nations explicitly allowed Canada to request assurances that capital punishment would not be imposed before granting an extradition, the Court found it would be too onerous to expect the Minister of Justice to do so. This is a troubling aspect of \textit{Kindler}, whose reasoning comprised multiple strawmen: “The simple fact is that if we were to insist on strict conformity with our own system, there would be virtually no state in the world with which we could reciprocate;”\footnote{\textit{Ibid} at 844–45.} “[we must consider whether] it is better that a fugitive not face justice at all rather than face the death penalty;”\footnote{\textit{Ibid} at 851.} “if such assurances were mandatory, Canada might become a safe haven for criminals in the United States seeking to avoid the death penalty.”\footnote{\textit{Ibid} at 853.}

In reality, the issue was solely the death penalty—not “strict conformity” with Canada’s penal system. The notion that American justice could not operate without capital punishment was misleading. Only a minute fraction of murders in the United States lead to an execution, partly because prosecutors routinely pursue other punishments.\footnote{In the run-up to \textit{Kindler}, roughly 0.2 percent of homicides in America resulted in an execution. See Zimring & Hawkins, \textit{supra} note 24 at 70.} The Court’s alleged dilemma between no extradition or no punishment was equally baseless. Extraditions with assurances of no death penalty are straightforward, as illustrated by the outcome of \textit{Burns} a decade
later: both defendants were extradited to America and later received life without parole.\textsuperscript{99} Moreover, the claim that Canada risked becoming a safe haven for fugitives seeking to avoid execution was unsubstantiated fearmongering, as Justice Cory’s dissent emphasized.\textsuperscript{100}

A reticence to act was likewise manifest in Justice Gérard La Forest’s separate majority opinion. On one hand, he suggested that reinstituting executions in Canada would be unconstitutional, noting “strong ground” to believe that “the death penalty cannot, except in exceptional circumstances, be justified in this country,” given “the limited extent to which the death penalty advances any valid penological objectives and the serious invasion of human dignity it engenders.”\textsuperscript{101} On the other hand, he asserted that this was “not the issue” in \textit{Kindler} because America would be the executioner, before reiterating that Canada should not “become a haven for criminals.”\textsuperscript{102}

Justice La Forest’s opinion epitomized Canada’s unwillingness to delve into the US death-penalty system, as he wrote that “the United States Supreme Court is well aware of the arbitrariness issue and has shown a willingness to act to prevent it,” citing \textit{Furman v Georgia} (1972).\textsuperscript{103} We saw that \textit{Furman} was the groundbreaking decision that temporarily abolished capital punishment,\textsuperscript{104} although the US Supreme Court reauthorized it soon afterwards in \textit{Gregg v Georgia} (1976) after purportedly curing its defects.\textsuperscript{105} By 1991, the year \textit{Kindler} was decided,

\textsuperscript{99} See \textit{Rafay v Obenland}, 2020 WL 5982000 (WD Wash Dist Ct) [\textit{Rafay}].
\textsuperscript{100} See \textit{Kindler}, supra note 58 at 825. The \textit{Kindler} majority was unpersuaded by the European Court of Human Rights’ landmark decision in \textit{Soering v United Kingdom}, No 14038/88, [1989] ECHR. \textit{Soering} had barred an extradition to America given the “death-row phenomenon,” namely the trauma caused by years of delays waiting for one’s execution. \textit{Soering} found this to be mental torture. The Canadian Minister of Justice saw no merit in this claim. See also \textit{Kindler}, supra note 58 at 841–42. Nor did most Justices.
\textsuperscript{101} \textit{Kindler}, supra note 58 at 833.
\textsuperscript{102} \textit{Ibid} at paras 833–35.
\textsuperscript{103} \textit{Ibid} at para 75, citing \textit{Furman}, supra note 31.
\textsuperscript{104} \textit{Furman}, supra note 31.
\textsuperscript{105} \textit{Gregg}, supra note 30.
prominent experts had documented how capital punishment’s application remained deeply arbitrary\(^\text{106}\) and how the US Supreme Court had mostly abdicated its oversight.\(^\text{107}\) *McCleskey v Kemp* (1987), a controversial 5-4 decision, even held that significant statistical evidence of systemic racial discrimination was essentially irrelevant.\(^\text{108}\) Disregarding these developments, Justice La Forest characterized the American death penalty appeals process as “generous” in allowing multiple rounds of review.\(^\text{109}\) Hence, Canada’s Supreme Court appeared to seal the fate of future extraditees facing execution.\(^\text{110}\)

A volte-face would occur only ten years later. Three of the four Justices in the 4-3 *Kindler* majority changed positions in *Burns*—a unanimous decision.\(^\text{111}\) The quick shift in jurisprudence helps explain why *Burns* is framed around the doubtful claim that innocence had become a significant problem between 1991 and 2001.

**B. FRAMING INNOCENCE AS THE DECISIVE ISSUE**

*Burns* arose from a gruesome, triple homicide in Bellevue, Washington, in 1994. The victims were the father, mother, and sister of Atif Ahmad Rafay. The police suspected Rafay and his friend Glen Sebastian Burns, two Canadian citizens who had left Washington State for their home province of British Columbia in the murder’s aftermath. Rafay and Burns admitted that they were at the Rafay family home in Bellevue on the night of the murders


\(^{107}\) See generally Weisberg, *supra* note 57.

\(^{108}\) *McCleskey*, *supra* note 90.

\(^{109}\) *Kindler*, *supra* note 58 at 838.


\(^{111}\) These were Justices McLachlin, L’Heureux-Dubé, and Gonthier. Justice La Forest—the remaining member of the *Kindler* majority—retired in 1997.
but contended that the victims were killed after their departure. Bellevue police lacked sufficient evidence to charge them. After the suspects returned to Canada, however, the Bellevue police cooperated with the Royal Canadian Mounted Police (RCMP) to elicit a confession through a “Mr. Big” operation in British Columbia.\textsuperscript{112} Canadian police then frequently used these peculiar schemes that enmeshed suspects in fictitious mafias in hope that they would eventually let down their guard and admit to a past crime.\textsuperscript{113} In 2014, the Court would find “Mr. Big” ploys presumptively unconstitutional given their capacity to induce unreliable confessions.\textsuperscript{114} To catch the Burns suspects over a decade earlier, an RCMP officer had posed as a mafia member trying to recruit the suspects, who subsequently bragged about committing the Bellevue murders in order to share Rafay’s inheritance and life insurance. This led Washington State to demand their extradition. The Canadian Minister of Justice, Allan Rock, approved the request without requiring assurances against capital punishment.\textsuperscript{115}

Yet the Supreme Court of Canada held that it would be unconstitutional to extradite the suspects if they could be executed. Why did it decline to follow its own ruling in \textit{Kindler} a

\begin{itemize}
\item \textsuperscript{112} See \textit{Burns}, supra note 32 at paras 9–12.
\item \textsuperscript{113} See \textit{R v Hart}, [2014] 2 SCR 544 at para 56 (noting that “[t]he Mr. Big technique is a Canadian invention” employed “on more than 350 occasions as of 2008”).
\item \textsuperscript{114} \textit{Ibid} at para 191. See also Adelina Iftene & Vanessa L Kinnear, “Mr. Big and the New Common Law Confessions Rule: Five Years in Review” (2020) 43:3 Man LJ 295.
\item \textsuperscript{115} The British Columbia Court of Appeal initially ordered the Minister to request these assurances in a succinct decision that mostly focused on the defendants’ Canadian citizenship. The BC judges were mindful of the precedent in \textit{Kindler} approving an extradition to face capital punishment in the United States. Justice Ian T Donald particularly sought to distinguish that precedent by emphasizing that Joseph Kindler was an American, whereas the Burns defendants were Canadian citizens who would be denied their right to return to their country if executed abroad. See \textit{United States v Burns}, [1997] 94 BCAC 59 at paras 27–31, 116 CCC (3d) 524. The Supreme Court of Canada would “agree with the result, though not the reasons, reached by a majority of the judges of the British Columbia Court of Appeal,” as it did not focus on the issue of citizenship. \textit{Burns}, supra note 32 at para 8.
\end{itemize}
decade earlier? “Legal systems have to live with the possibility of error. The unique feature of capital punishment is that it puts beyond recall the possibility of correction.”\(^{116}\) These opening lines embodied the judgment’s rationale. In this regard, the unanimous Canadian Justices were far ahead of the polarized US Supreme Court, which memorably could not find consensus in *Herrera v Collins* (1993) on whether executing an innocent would be unconstitutional.\(^{117}\) American constitutional law has not settled that issue since then.\(^{118}\) By framing the issue in this manner, however, the Supreme Court of Canada echoed media coverage and public discourse suggesting that “revelations of wrongful convictions” were largely a new issue in the late 20th century.\(^{119}\) *Burns*’s initial paragraph further marshaled the narrative of a modern crisis brought to light: “In recent years, aided by the advances in the forensic sciences, including DNA testing, the courts and governments in this country and elsewhere have come to acknowledge a number of instances of wrongful convictions for murder despite all of the careful safeguards put in place for the protection of the innocent.”\(^{120}\) The Court underscored that this problem is not limited to the United States: “The instances in Canada are few, but if capital punishment had been carried out, the result could have been the killing by the government of innocent individuals.”\(^{121}\) In reality, miscarriages of justice had been a constitutive issue throughout the history of Western civilization, as we will see in the next section.

Paradoxically, the *Burns* defendants claimed their own innocence and that their confession was “play-acting,” just like the undercover officer. The Supreme Court sidestepped their claims, noting that a Washington jury could decide the matter.\(^{122}\)

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116 *Burns, supra* note 32 at para 1.
118 See Steiker & Steiker, *Courting Death, supra* note 4 at 273.
119 *Burns, supra* note 32 at para 1 [emphasis added].
120 *Ibid*.
121 *Ibid*.
122 See *ibid* at paras 9–12.
Instead, Burns addressed the risk of executing the innocent in principle.\textsuperscript{123} Burns briefly acknowledges the global abolitionist movement’s focus on human rights,\textsuperscript{124} but insists that the most important issue with the death penalty is that a government might fail to kill a guilty criminal and instead strike a hapless innocent.\textsuperscript{125} Centering on innocence reflected a utilitarian cost-benefit analysis implying that the death penalty may be a legitimate punishment, although the risk of a miscarriage of justice outweighs its value. Ten years earlier, Justice Peter Cory had offered a distinct perspective in his Kindler dissent, underlining the international community’s growing recognition that, in any circumstance, capital punishment is incompatible with human rights and dignity.\textsuperscript{126} The Burns court was therefore aware that the death penalty was increasingly recognized as a categorical human rights violation. This is what counsel argued on appeal, alongside other claims like the risk of wrongful execution.\textsuperscript{127} The Justices indeed noted that, as of 2001, 108 countries had abolished capital punishment, up from only eight

\textsuperscript{123} After receiving life without parole in Washington following their extradition, Burns and Rafay filed unsuccessful appeals before US courts regarding their alleged innocence. See Rafay, supra note 99.

\textsuperscript{124} See Burns, supra note 32 at para 89 (“This evidence does not establish an international law norm against the death penalty, or against extradition to face the death penalty. It does show, however, significant movement towards acceptance internationally of a principle of fundamental justice that Canada has already adopted internally, namely the abolition of capital punishment”). See also ibid at para 84 (“When . . . combined with other examples of Canada’s international advocacy of the abolition of the death penalty itself, . . . it is difficult to avoid the conclusion that in the Canadian view of fundamental justice, capital punishment is unjust and it should be stopped”).

\textsuperscript{125} See e.g. ibid at para 127 (“[Capital punishment] strikes at the very ability of the criminal justice system to obtain a uniformly correct result even where death hangs in the balance”; ibid at para 102 (“[W]here capital punishment is sought, the state’s execution of even one innocent person is one too many”).

\textsuperscript{126} See Kindler, supra note 58 at 793–828.

\textsuperscript{127} See United States v Burns, 2001 SCC 7, Factum of the Respondents Glen Sebastian Burns and Atif Ahmad Rafay, 11 April 2000 at 46–55.
in 1948. Executions were largely the province of authoritarian regimes.\textsuperscript{128} Canada had played a role in this trend. Its last execution and abolition had respectively occurred in 1962 and 1976.\textsuperscript{129} Canada subsequently advocated for abolition on the international stage, such as by backing resolutions of the UN Commission on Human Rights urging an end to capital punishment.\textsuperscript{130} In 1997, Canada’s representative to the Commission even referred to executions as violating “the right to life,”\textsuperscript{131} foreshadowing the adoption of this principle under European law.\textsuperscript{132}

Nevertheless, Canada took a duplicitous stance on the death penalty. While its foreign policy urged abolition worldwide, Canada reportedly was “the only country in the world” that had “abolished the death penalty at home but continue[d] to extradite without assurance to face the death penalty abroad.”\textsuperscript{133} The Minister of Justice thus allowed Burns and Rafay to be extradited despite a prospective death sentence, prompting their appeal.

The Supreme Court of Canada’s unwillingness to address whether capital punishment is fundamentally inhumane was apparent in its refusal to decide the case based on Section 12 of

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\textsuperscript{128} See Burns, supra note 32 at para 91.

\textsuperscript{129} See ibid at paras 3, 76. The death penalty remained lawful for a few military offenses until 1998, although no one was executed in Canada since the key abolition date of 1976. Ibid.

\textsuperscript{130} See ibid at paras 79–89.

\textsuperscript{131} Ibid at para 85.


\textsuperscript{133} Burns, supra note 32 at para 83.
the nation’s *Charter of Rights and Freedoms*. This Section prohibits “cruel and unusual treatment or punishment” in language nearly identical to the Eighth Amendment of the US Constitution. This convergence reflects both nations’ British heritage, as the English Bill of Rights (1689) barred “cruel and unusual punishments.” But Canada’s Justices declined to decide *Burns* under Section 12 given that Canada would not be the executioner. The Justices instead ruled under Section 7 of the *Charter*, which provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” The distinction with Section 12 appeared meaningless: “Section 7 is concerned not only with the act of extraditing, but also the potential consequences of the act of extradition.” The consequence would be the detainees’ prospective killing, which would seem to raise an issue of “cruel and unusual treatment or punishment.”

Given that Section 7 recognizes a “right to life,” the language that has helped cement the death penalty’s abolition in European law, the Justices could have used Section 7 to address whether an execution is inherently inhumane. They instead specified that the only determinative questions surrounding capital punishment were practical, administrative, and procedural.

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134 Smith, *supra* note 68 at 22. See also Anthony F Granucci, “‘Nor Cruel and Unusual Punishments Inflicted’: The Original Meaning” (1969) 57:4 Cal L Rev 839.

135 See *Burns, supra* note 32 at para 57.


137 *Ibid* at para 60 [emphasis in original].

138 *Ibid* at para 78.

139 See e.g. *Protocol 13 to European Convention on Human Rights, supra* note 132 at preamble; *Al-Saadoon, supra* note 132 at paras 115–22; *Joint Declaration EU & COE, supra* note 132 at para 1.

140 See *Burns, supra* note 32 at para 71. Beside innocence, *Burns’s* reasoning rested on another practical issue: the aforementioned “death-row phenomenon.” The Canadian Justices indicated that, in *Soering v United Kingdom* No 14038/88, [1989] ECHR, the European Court of Human Rights had adopted the same reasoning as a basis to bar an extradition. Since
The Justices’ disinclination to address whether killing prisoners is fundamentally inhumane was again manifest in their unwillingness to rely upon the South African Constitutional Court’s seminal *Makwanyane* decision abolishing capital punishment.\(^{141}\) While *Burns* briefly referred to this historic, post-apartheid decision on a separate point,\(^{142}\) it elided how the South African judges emphasized principles of human rights and dignity when outlawing executions.\(^{143}\)

Naturally, one could analyze *Burns* from other angles, such as the comity and foreign relations implications of an extradition. The Canadian Justices would plausibly have been more comfortable finding capital punishment unconstitutional if applied in Canada. Some may feel uneasy telling foreign officials that their practices violate human dignity. But an analogous argument could be made about the Court basing its decision on a potential miscarriage of justice, which implies that American officials cannot be trusted to keep innocents from being executed. Critics in both Canada and the United States denounced *Burns* on this ground, insisting that Canada should have simply handed over the suspected murderers to Washington State without demanding assurances against capital punishment.\(^{144}\) Norm Maleng, the King County Prosecutor, was adamant: “I am personally troubled by the idea that a foreign government can restrict the application of our state law for a crime that occurred within our borders.”\(^{145}\) Temporary diplomatic tensions were

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\(^{141}\) See *State v Makwanyane*, [1995] ZACC 3 [*Makwanyane*].

\(^{142}\) See *Burns*, supra note 32 at para 67.

\(^{143}\) See *Makwanyane*, supra note 141.

\(^{144}\) See Alphonso, supra note 78; Ko, supra note 78; Roach, supra note 34 at 923–24; Seeman, supra note 81.

\(^{145}\) Ko, supra note 78 at B1.
inevitable, irrespective of whether Burns approached the death penalty in terms of innocence or dignity.

Accordingly, it is striking that the Supreme Court of Canada converged with modern American abolitionism in sidestepping whether executions inherently violate dignity and trying to settle the issue by focusing on innocence. This approach exemplifies broader trends in the United States, where reformers center narrowly on practical, administrative, and procedural problems with capital punishment.146 Conversely, abolitionism in modern Europe has gravitated toward the recognition that any execution is an intrinsic violation of human rights rooted in dignity, regardless of innocence and other practical problems.147

Ironically, a heavy emphasis on innocence may reflect the erosion of compassion toward prisoners in American society. Carol Steiker and Jordan Steiker, two leading US death-penalty scholars, have expressed “worry that the real attraction of the innocence critique of the death penalty” may stem from a “lamentable psychological dynamic: the harm of punishing innocents resonates with the public precisely because most Americans can empathize with the harms that they fear could happen to themselves, rather than those that happen only to ‘bad people.’ Lurking behind innocence’s appeal,” the Steikers stress, “might be indifference if not hostility to other types of injustice.”148 They document how wrongful convictions can overshadow other troubling problems, such as inequality, racism, and police or prosecutorial overreach in cases where defendants are guilty. In closing, the Steikers briefly note that overemphasizing innocence raises a “tension with the deepest normative arguments against capital punishment” resting on “the human dignity even of those who are entirely guilty of

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146 See e.g. Steiker & Steiker, Courting Death, supra note 4; Zimring, Contradictions, supra note 3 at 45–48.
heinous offenses.” A narrow focus on innocence may indeed suggest that executing the guilty would be legitimate.

Social actors may nonetheless be tempted to circumvent these wider normative issues by framing the death-penalty debate on innocence. This appears to be what the Supreme Court of Canada chose. Its unanimous *Burns* decision may have been an effort to find common ground by centering on innocence, especially following the Canadian Justices’ divide in *Kindler* ten years earlier. In doing so, it reinforced the doubtful narrative that wrongful convictions emerged as a critical issue in the late 20th century.

II. A HISTORY OF WRONGFUL CONVICTIONS AND THEIR UNDERSIDE

The risk of executing the innocent was born with the death penalty. It must have always existed. Ever since human beings have condemned wrongdoers to die, the possibility of an erroneous judgment has been plausible. This section thus calls into question the notion that innocence is a modern crisis. That misconception partly stems from media coverage and public debate in late 20th century America. At the time of writing, at least 190 people had been exonerated from death row in the United States since 1973. The 1990s and 2000s featured the most exonerations. The Supreme Court of Canada decided *Burns* in 2001, following extensive US and international news reports of exonerations. Understandably, such scandals commanded significant attention, including from scholars, policymakers, and litigators. These circumstances helped promote the impression that past generations had not meaningfully grappled with innocence.

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150 See “Innocence” (last visited 12 November 2022), online: *Death Penalty Information Center* <deathpenaltyinfo.org/policy-issues/innocence>.

151 *Burns, supra* note 32 at paras 105–11.
To the contrary, innocence has been a constitutive issue in the evolution of the West. Wrongful convictions surround key figures in early Western civilization, especially Socrates and Jesus, whose fates greatly influenced philosophy, faith, and culture. By the 17th century, wrongful convictions were pivotal in the development of criminal justice systems protecting due process of law. As liberal democracy emerged in diverse societies, miscarriages of justice became a persistent concern.

A. The Constitutive Nature of Miscarriages of Justice in Western Civilization

This subsection demonstrates how miscarriages of justice have influenced Western history, from antiquity to modernity. While a comprehensive survey of the distant past is beyond this article’s scope, the evidence reveals the recurrence of innocence.

Alfred North Whitehead famously wrote that “[t]he safest general characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato.”152 The Apology is therefore a fitting place to begin. According to Plato, Socrates was sentenced to death after being convicted of denying the Gods’ existence, introducing new Gods, and corrupting Athenian youth. The Apology suggests that these allegations were specious and that Socrates was innocent. Experts have offered various perspectives on the historicity of Plato’s account, although Socrates was indeed convicted of such offenses in 399 BCE.153

Plato’s Socrates could have chosen to remain silent at trial. He instead exerted agency in turning it into a philosophical stage. The structure of Socrates’s trial was remotely analogous to the bifurcated nature of death penalty trials in modern America. Both comprised a guilt phase after which jurors voted on culpability, followed by a sentencing phase with another jury vote. Socrates’s disdain for public opinion may have precipitated his fate. After the jury’s guilty verdict, Socrates had an

opportunity to recommend his own sentence. For purportedly false teachings—that were the truth—Socrates proposed that he be fed at public expense at the Prytaneum like an Olympic victor.\textsuperscript{154} The jurors took offense. While roughly 280 of 501 had voted for conviction, a higher number, approximately 340, voted for his execution.\textsuperscript{155} Hence, some jurors deemed Socrates innocent of the charges but deserving of death.

In a subsequent dialogue, \textit{Crito}, Socrates serenely declined to escape and avoid execution because this would have been neither true to the law nor himself. As R. E. Allen observed, this choice raised a fundamental question: “Can it conceivably be true that a man ought to abide by his own death sentence, given that the sentence was rendered according to law and that he is not guilty?”\textsuperscript{156} In \textit{Phaedo}, Socrates thereafter drank his poison with equanimity. Those by his side wept. Socrates reminded them not to fear death.\textsuperscript{157} The execution of an innocent is at the heart of these foundational texts in Western philosophy pondering the meaning of wisdom, being, and nothingness.

Another defining story in Western civilization likewise involved innocence and the death penalty, namely Jesus Christ’s trial and execution by the Romans. One difficulty is that the various gospels offer contradictory accounts of Jesus’s trial and execution, as with much of his life and teachings.\textsuperscript{158} Nevertheless, 


\textsuperscript{155} See Cartledge, \textit{supra} note 153 at 89–90.

\textsuperscript{156} See Plato, “Crito” in \textit{The Dialogues of Plato, supra} note 154 at 107.


\textsuperscript{158} See Bart D Ehrman, \textit{Jesus, Interrupted: Revealing the Hidden Contradictions in the Bible (and Why We Don’t Know About Them)} (New York: HarperCollins, 2010). Ehrman, an expert on early Christianity, instructively explains that “historical considerations played a secondary role at best” in how the gospel of John recounted Jesus’s trial; “the staging of the trial, the roles of the main characters, the discussions of the judge with plaintiffs and defendant, the temporal and spatial setting—all are set forth not for the sake of establishing what happened at the trial but for elucidating what the
the thrust of the story is that the execution of an innocent has become a symbol of Western civilization. This was not lost on Victor Hugo, a leading abolitionist in the 19th century. The Frenchman was more than a reputable author. He was a legislator. When his son Charles was prosecuted in 1851 for comparing an execution to a state murder, Victor Hugo defended him by testifying at trial. Pointing to a crucifix adorning the chamber, Hugo exhorted the audience to realize that Jesus was “a victim of the death penalty.”

Several years beforehand, one of Hugo’s countrymen lamented the execution of innocents during another key event in Western civilization—the French Revolution. The Marquis de Lafayette was among its leading figures until the Terror precipitated his escape to Austria, where he was detained for five years. After his release, Lafayette deplored that the Revolution’s initially promising abolitionist movement failed to eliminate capital punishment, which he now looked upon in horror. The guillotine embodies how the death penalty has historically served as a political weapon against the innocent.

Across the Channel, miscarriages of justices in the run-up to Britain’s Revolution of 1688–89 factored into the emergence of what would become the criminal procedure of common-law nations. From 1678 to the outbreak of the revolution, a series of prominent treason trials followed the Popish Plot (1678), the Rye House Plot (1683), and Monmouth’s Rebellion (1685). John Langbein describes how “the perception became widespread that innocent persons of the politically significant classes had been convicted and suffered traitors’ deaths for want of the ability to defend effectively against baseless prosecutions.” These events “provoked a movement for enhanced defensive safeguards,” resulting in the Bill of Rights of 1689. From this

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161 Langbein, supra note 1 at 69.

angle, innocence could hardly be a new issue in common law nations since it was a root factor in the emergence of their legal system centuries ago.

Leaving major historical figures or political events aside, ordinary people were wrongfully executed in pre-modern Britain. Bruce P. Smith has documented how, between 1640 and 1790, “notorious instances of wrongful execution—including, most glaringly, several executions of innocent persons for crimes that had never even occurred—generated widespread anxiety among Anglo-American legal commentators from the seventeenth through the early nineteenth centuries.”163 Some scandals involved people who had gone missing and were suspected of having been killed. They later returned but, in the meantime, hapless suspects had been hanged for purportedly murdering them.164 Other 18th century British innocence cases, capital or not, involved root causes now familiar to experts on wrongful convictions: dubious circumstantial evidence, witness perjury, and coerced or induced confessions.165 This encouraged reform, as “influential treatise writers and public officials such as Matthew Hale, William Blackstone, and Samuel March Phillipps urged that courts adopt stricter evidentiary safeguards” to preclude miscarriages of justice.166

Just as in the United Kingdom, miscarriages of justice played a key role in the emergence of modern French government. A century after the French Revolution degenerated into the Terror, the Dreyfus Affair symbolized France’s continuing polarization under the Third Republic. This bitter crisis stemmed from an anti-Semitic conspiracy that saw Alfred Dreyfus, a Jewish military officer, falsely convicted of treason in 1894. The affair sparked fierce political debates over freedom, justice, and human

164 See ibid at 1190–94.
166 See Smith, supra note 163 at 1188–89.
Émile Zola’s editorial, *J’accuse* (1898)—an open letter to the President from a prominent author—captured how a wrongful conviction became a defining historical moment:

It is a crime to lead public opinion astray . . . to poison the minds of the humble, ordinary people, to whip reactionary and intolerant passions into a frenzy while sheltering behind the odious bastion of anti-Semitism . . . I accuse General Billot of having had in his hands undeniable proof that Dreyfus was innocent and of having suppressed it, of having committed this crime against justice and against humanity for political purposes . . .  

Even though Dreyfus was not sentenced to death, he received a degrading punishment with life imprisonment at Devil’s Island, a remote Guyanese penal colony. He was fully cleared in 1906. The Dreyfus Affair corroborates the thesis that wrongful convictions have been constitutive questions in the history of liberal democracy.

This subsection has focused on examples from pre-modern or undemocratic societies. In *Burns*, by contrast, the Supreme Court of Canada tackled wrongful convictions in modern America—a democracy—and depicted “revelations of wrongful convictions” that were mostly unknown or unfathomable hitherto. Echoing media coverage surrounding the innocence movement’s rise in the late 20th century, Canada’s justices described the “growing awareness” that a democracy could regularly sentence innocents to death. In reality, early generations of Americans had already grappled with the issue of innocence to a greater extent than is usually realized.

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169 *Ibid* at 197.

170 *Burns*, supra note 32 at para 1.

171 *Ibid* at para 94.
B. THE DEBATE OVER WRONGFUL CONVICTIONS IN EARLY AMERICA

The British wrongful convictions discussed above spurred reform proposals in the newly founded United States. They could also be met with blanket denials of their applicability to the United States, reflecting a belief in an American immunity to miscarriages of justice. Insofar as such denials recurred over generations, they may help explain why many Americans assumed wrongful convictions were not a genuine problem before modern times, although this point should not be overstated. Wrongful convictions were debated in early America.

According to the historian Stuart Banner, 19th-century American abolitionists “got a lot of mileage” out of innocence cases, including spectacular ones:

Charles Boyington was hanged in Alabama in 1835, protesting his innocence all the while, for murdering a man in a tavern. A few months later the tavernkeeper confessed to the crime on his deathbed. Even more spectacularly, the Boorn brothers of Vermont were about to be executed in 1819 for murdering Russell Colvin, when Colvin himself (or someone who looked very much like him) turned up at the hanging.

Certain American states were among the world’s first abolitionist jurisdictions. Alongside normative objections to executions, the danger of killing innocents was one of the practical problems that motivated reform. In 1847, Michigan abolished capital punishment, except for treason, after a legislative committee identified various concerns, including the potential for irreversible error. Interestingly, a Canadian wrongful execution plausibly impacted public opinion in Michigan. Patrick Fitzpatrick, an Irishman, was executed in 1837 in what is now Windsor. The crime was carnal knowledge of a child under ten. Another person later admitted being the culprit. As the events

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172 Smith, supra note 163 at 1205.
173 Banner, supra note 43 at 122.
occurred in a Canadian city adjacent to Michigan, they apparently bolstered the state’s abolitionist movement.\textsuperscript{175}

Michigan’s abolition and other international developments even drew attention among abolitionists in 19th-century Australia. Aside from concerns about capital punishment’s inhumanity and ineffectiveness, early Australian reformers discussed suspected wrongful executions in their society.\textsuperscript{176} This again demonstrates that the death penalty predictably raised concerns about innocence in societies where it existed and where critical social debate was generally permitted.

This pattern continued in the United States. Prior to Maine’s abolition of capital punishment in 1887, two cases involving claims of innocence encouraged reform. Clifton Harris, an African American, was hanged in 1869 before additional evidence indicated another man was guilty.\textsuperscript{177} Louis F.H. Wagner was executed six years later in what became a cause célèbre—even the warden of the prison where he was executed reportedly suspected his innocence.\textsuperscript{178} Wrongful executions remained a serious concern after Maine’s abolition, hindering efforts to reestablish capital punishment.\textsuperscript{179}

Nevertheless, the American Prison Congress proclaimed in 1912 that no wrongful executions had probably ever occurred in US history.\textsuperscript{180} To the contrary, scholarship in the early 20th century\textsuperscript{181} was already documenting miscarriages of justice involving factors like “erroneous eyewitness testimony, false


\textsuperscript{177} See Galliher et al, supra note 174 at 54–55.

\textsuperscript{178} Ibid at 55.

\textsuperscript{179} Ibid at 55, 60–61, 74–75.

\textsuperscript{180} See Smith, supra note 163 at 1215.

confessions, faulty circumstantial evidence, and prosecutorial excesses.\textsuperscript{182} By the 1950s, wrongful convictions remained a matter of debate, from capital to rank-and-file cases.\textsuperscript{183} Thorsten Sellin, the renowned criminologist, wrote about "the many instances in which innocent persons have been saved from the extreme penalty either by the last minute discovery of new evidence or by a commutation."\textsuperscript{184} In this period Alfred Hitchcock also released a successful film, \textit{The Wrong Man} (1956), featuring Henry Fonda. It recounted the true story of Manny Balestrero—a star-crossed musician who was exonerated after being misidentified as a robber in New York City.\textsuperscript{185} In 1975, Bob Dylan launched his famous song \textit{Hurricane} about Rubin Carter, a Black boxer who was convicted of murder in New Jersey and later exonerated with the help of Canadian volunteers.\textsuperscript{186}

Innocence was intertwined with another key issue in American history—the lynching of Black people. These grisly extrajudicial executions were common in the South.\textsuperscript{187} They could particularly disgust liberal Northerners aware that mobs lynched innocents based on flimsy evidence.\textsuperscript{188} Even when no execution or lynching ensued, countless African Americans were wrongfully punished like the Scottsboro Boys in the 1930s.\textsuperscript{189}

\textsuperscript{182} Smith, \textit{supra} note 163 at 1216.


\textsuperscript{187} See Zimring, \textit{Contradictions, supra} note 3 at ch 5.

\textsuperscript{188} Galliher et al, \textit{supra} note 174 at 83.

\textsuperscript{189} Huff, Rattner & Sagarin, \textit{supra} note 167 at 27–29.
The historical parallels between lynchings and intense use of capital punishment against African Americans in the South have led some to characterize the US death penalty as a “legal lynching.” One of Martin Luther King’s condemnations of capital punishment involved such a case. In 1958, Alabama executed Jeremiah Reeves for allegedly raping a white woman when he was sixteen. Many believed that Reeves, a respected Black high-school student, was innocent and that police had coerced his confession. Before the execution, King led a march where he acknowledged that Reeves might be innocent, although he insisted that “[e]ven if he were guilty, it is the severity and inequality of the penalty that constitutes the injustice.”

As Section III shall describe, it is critical that King equally sought to transcend the issue of innocence or unfair administration of the death penalty with a categorical objection to its inhumanity. “This is not a political issue: it is ultimately a moral issue. It is a question of the dignity of man,” King declared. His position illustrates how past generations of American abolitionists were more inclined to blend humanistic and practical objections to capital punishment, whereas practical concerns like innocence now dominate abolitionist discourse in the United States.

C. THE RISE OF THE MODERN US INNOCENCE MOVEMENT

While Americans have long debated wrongful convictions, abolitionists did not always consider the risk of innocence a central question. Innocence was barely discussed in the cases

191 See e.g. Phillip Hoose, Claudette Colvin: Twice Toward Justice (New York: Farrar, Straus & Giroux, 2009) at 23.
193 Ibid.
that reshaped the US death penalty in the 1970s, namely *Furman v Georgia* (1972)\(^{195}\) and *Gregg v Georgia* (1976),\(^{196}\) which respectively abolished and reinstated capital punishment. Anthony Amsterdam, the foremost abolitionist of his generation, litigated both challenges. Neither his briefs nor oral arguments addressed innocence.\(^{197}\) The justices’ nine separate judicial opinions essentially did not either, except for a lucid Thurgood Marshall: “Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death.”\(^{198}\) Contemporary reviews of this scholarship suggest that it was a subject of academic debate. Ashbel Gulliver, a professor and former dean at Yale Law School, even foreshadowed the modern literature on wrongful convictions when surveying research on their root causes.\(^{199}\)

Innocence eventually gained broader attention in late 20th century America, sparking legal and social debate.\(^{200}\) Echoing heightened media coverage, innocence was front and center in Hollywood films starring prominent actors like *True Crime* (1999), featuring Clint Eastwood and directed by him, and *The Life of David Gale* (2003) with Kevin Spacey and Kate Winslet. Innocence was again the focus of an episode on *The Simpsons*, the popular TV show, titled “The Frying Game” (2002). The advent of modern forensics, such as DNA evidence, had enabled more exonerations. Still, most modern exonerations do not stem from

\(^{195}\) *Furman*, *supra* note 31.

\(^{196}\) *Gregg*, *supra* note 30.


DNA but from problems like coerced confessions, perjury from prosecution witnesses, mistaken eyewitness identifications, misleading forensics, and official misconduct. Overall, experts have developed more systematic ways of documenting these practices and the pervasiveness of wrongful convictions.\(^\text{201}\)

Yet a neglected factor helps explain why innocence became a central social concern in this period: the nexus between the innocence and “tough-on-crime” movements. The latter influenced both the rise of mass incarceration in America on virtually world-record levels since the 1980s and its reassertion of capital punishment in defiance of abolition elsewhere in the West.\(^\text{202}\) Various US Supreme Court decisions then signaled that most justices were unreceptive to abolitionist claims rooted in “evolving standards of decency,” procedural injustice or systemic discrimination.\(^\text{203}\) By the late 20th century, legislators and public opinion in the United States likewise tended to readily find the death penalty legitimate and desirable.\(^\text{204}\) These constraints, not to forget the abolitionists’ devastating setbacks in prior decades,\(^\text{205}\) favored a reform strategy emphasizing innocence. Because much of American society was unconcerned about mercy or due process for the guilty, the path to reform would have to stress the predicament of sympathetic innocents ensnared in the penal system. This approach ultimately made its way across the border, as the Supreme Court of Canada chose to focus on innocence to resolve the vexing, recurring question of extraditions that could lead to the death penalty stateside.

D. The Supreme Court of Canada Echoes the US Innocence Movement

\(^{201}\) See Campbell, supra note 48; Garrett, supra note 23; Marshall, supra note 42.


\(^{203}\) See e.g. Gregg, supra note 30; McCleskey, supra note 90; Weisberg, supra note 57.

\(^{204}\) See e.g. Banner, supra note 43 at ch 10.

\(^{205}\) See generally supra note 90 and accompanying text.
The Supreme Court of Canada's historic *Burns* decision of 2001 was largely an outgrowth of the modern American innocence movement and a reflection of the United States' capacity to influence debates abroad. As discussed in Section I, *Burns* hardly focused on the death penalty as a fundamental human rights issue. In doing so, the Supreme Court of Canada converged with the United States while diverging from Europe and much of the international community. Emulating the modern US innocence movement, its unanimous opinion framed innocence as an endemic problem finally laid bare by forces of progress. Despite briefly acknowledging that “[t]he possibility of miscarriages of justice in murder cases has long been recognized as a legitimate objection to the death penalty,” the justices emphasized that “our state of knowledge of the scope of this potential problem has grown to unanticipated and unprecedented proportions in the years since *Kindler*,” merely a decade earlier.\(^{206}\) The Court proceeded to describe diverse exonerations in Canada, the United States, and United Kingdom, including by DNA evidence.\(^{207}\)

In fact, earlier cases in Canadian history again cautioned against the idea of a mostly newfound problem. Besides the aforementioned wrongful execution in Windsor back in 1837, consider how Thomas D'Arcy McGee, a founding father of the Confederation of Canada, was murdered in 1868. Some believe that an innocent was swiftly convicted and hanged for the crime. McGee’s case encapsulates longstanding risk factors of wrongful convictions, such as circumstantial evidence and pressure on the authorities to resolve a high-profile crime.\(^{208}\) From the 19th century onward, wrongful convictions were recurrently suspected to have occurred in Canada.\(^{209}\) However, as the nation was in the midst of debating abolition in the 1970s, reformers “struggled to find clear-cut cases of judicial error.”\(^{210}\) Canadian

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\(^{206}\) *Burns*, supra note 32 at para 95.

\(^{207}\) See *ibid* at paras 96–117.

\(^{208}\) See Campbell, supra note 48 at 3.


\(^{210}\) Strange, supra note 40 at 613.
abolitionists still invoked “the irrevocability of error” in inflicting death.\textsuperscript{211} Prominent scandals would materialize post-abolition with the exoneration of several prisoners, including Donald Marshall, Jr. and David Milgaard, who respectively spent approximately eleven and twenty-three years locked up after convictions in the 1970s.\textsuperscript{212}

Although the justices insisted on “revelations” of innocence in the late 20th century,\textsuperscript{213} they seemed aware that such problems existed much earlier. For instance, Burns described wrongful executions in the United Kingdom in 1952 and 1953, respectively, in the cases of Mahmoud Mattan and Derek Bentley.\textsuperscript{214} Oddly, Burns omitted an arguably more prominent innocence case that was widely debated in the run-up to Britain’s abolition of capital punishment in 1965. Timothy Evans, “a slow-witted Welsh miner,”\textsuperscript{215} was hanged in 1950 in a case where the main witness against him was a serial killer thereafter suspected as the real culprit. The scandal led to the movie 10 Rillington Place (1971) featuring famous British actors.\textsuperscript{216} Tellingly, France faced an analogous debate over a possible wrongful execution in the run-up to its own abolition of 1981—the case of Christian Ranucci—that likewise led to a movie adaptation with Le pull-over rouge (1979).\textsuperscript{217} The recurrence of wrongful convictions and at-times eerily similar debates bolsters the centuries-long evidence that wrongful convictions are not a modern crisis.

E. More Than Innocent Mistakes

The seemingly endless list of scandals and exonerations in the United States may lead to the wrong idea. American constitutional law has scarcely acknowledged the risk of fatal error. The law lags far behind the vigorous social debate

\textsuperscript{211} Jayewardene, supra note 40 at 87.
\textsuperscript{212} See Burns, supra note 32 at paras 97–98.
\textsuperscript{213} Ibid at para 1.
\textsuperscript{214} Ibid at paras 114–16.
\textsuperscript{215} Hammel, supra note 6.
\textsuperscript{216} See ibid at 103–05.
\textsuperscript{217} See Jouet, “Death Penalty Abolitionism,” supra note 2 at 41.
surrounding the innocence movement. In *Burns*, the Supreme Court of Canada actually devoted much more meaningful attention to the innocence problem *in the United States* than the US Supreme Court ever has. Why? Among other reasons, wrongful convictions are intertwined with broader processes of dehumanization in a modern US penal system that has grown exceptionally repressive. If the death penalty is “only” applied in a few counties within a few states,\(^{218}\) it is the tip of the iceberg in a nation that has practically the highest incarceration rate worldwide.\(^{219}\) This subsection will therefore describe how this context is a key reason why, to certain modern-day American reformers, innocence has often appeared the most viable strategy to abolish the death penalty. This may be a pragmatic strategy, but it mirrors a social shift away from prisoners’ rights in particular and human rights in general. A closer look at this social context reveals why the Supreme Court of Canada should have been wary of echoing an approach framing innocence as the crucial death-penalty question.

To a greater extent than their counterparts in other Western democracies, American jurists have struggled to find consensus on basic prisoners’ rights. In 1993, the US Supreme Court’s seminal *Herrera* decision revealed an emblematic absence of consensus among the Justices about whether executing an innocent would be unconstitutional.\(^{220}\) *Herrera* embodied the intensifying polarization of the American legal debate, as well as growing indifference or animosity toward death-row prisoners.

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\(^{219}\) While some American states are more repressive than others, even those with the lowest incarceration rates tend to have far higher ones than Canada and other Western democracies. See Franklin E Zimring, “The Complications of Penal Federalism” in Reitz, *supra* note 14 at 181; Emily Widra & Tianna Herring, “States of Incarceration: The Global Context 2021” (September 2021), online: *Prison Policy Initiative* <prisonpolicy.org/global/2021.html>.

\(^{220}\) See generally *Herrera, supra* note 117. See also Zimring, *Contradictions, supra* note 3 at 151–54.
This period was simultaneously characterized by the merciless “procedural defaults” at the heart of Clinton-era legislation whose title sought to legitimize capital punishment by lumping it with terrorism, namely the *Antiterrorism and Effective Death Penalty Act of 1996*. Procedural defaults are among a host of technical rules imposing stringent deadlines or constraints to file a claim, thereby hindering or barring appeals by people facing execution. As Franklin Zimring underlined, “procedural defaults do not discriminate between weak and strong cases; they punish defendants with less skilled lawyers.” Legislative and judicial tolerance for the abysmally low quality of court-appointed counsel in capital cases has reinforced this outcome.

The US Supreme Court, legislators, and other actors have thus created major hurdles for prisoners to present evidence of innocence. According to Zimring, largely hollow legal protections suggest that numerous judges aspire to “create a costless constitutional comfort” to keep a clean conscience and that those who subscribe to this approach “are fooling themselves that the process they administer reserves its arbitrary results for the actually guilty.”

How could the law defend such a contrived understanding of due process? Dehumanization is a plausible explanation. Criminals are routinely reduced to their worst act and perceived as monsters, predators, and parasites. Modern American law tends to assume that people can effectively forfeit their humanity by committing murder and other grave crimes. Strikingly, a Pennsylvania prisoner who spent crushing spells in solitary

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221 Pub L No 104-132, s 440, 110 Stat 1214 at 1276–77 (codified as amended at 8 USC s 1101 (2014)).
224 Zimring, *Contradictions*, supra note 3 at 154.
226 See Kleinfeld, *supra* note 57 at 942, 991–96; Webster & Doob, *supra* note 14 at 34, 49.
confinement declared: “Nobody deserves to be treated like this. They might as well have killed me.” 227 Institutionalized discrimination on the basis of race, ethnicity, and social class significantly contributes to the dehumanization of Black, Latino, and poor white prisoners. Those on death row are typically the most vilified, as much of society cannot identify with them at a human level 228—unless they are innocent.

Research tends to disregard how wrongful convictions are more than innocent mistakes. They too are part of the tip of the iceberg in a penal system that routinely denies human dignity. Indeed, recurrent wrongful convictions reflect social acceptance of pervasive due process violations surrounding both the death penalty and mass incarceration in modern America, such as the merciless “procedural default” rules eliminating opportunities for appeal, namely for prisoners lacking competent lawyers 229.

But dehumanization is not only a key reason why the US death-penalty system construes fairness and due process so narrowly. The very practice of killing incapacitated prisoners rests on their dehumanization. These are among the reasons why the Supreme Court of Canada elided the most fundamental question by suggesting that the risk of executing the innocent was the decisive death-penalty issue.

This hardly means that other Western democracies are paragons of humanity. In-depth studies of Canadian and French prisons, for instance, reveal troubling patterns of abuse, callousness, and discrimination. 230 Canada notably faces an ongoing debate about limiting or abolishing solitary confinement. In 2019, the Courts of Appeal for British Columbia and Ontario found protracted solitary confinement declared: “Nobody deserves to be treated like this. They might as well have killed me.” 227 Institutionalized discrimination on the basis of race, ethnicity, and social class significantly contributes to the dehumanization of Black, Latino, and poor white prisoners. Those on death row are typically the most vilified, as much of society cannot identify with them at a human level 228—unless they are innocent.

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229 See Zimring, Contradictions, supra note 3 at 147–54, 174.
230 See e.g. Ricciardelli, supra note 65; Council of Europe, supra note 72.
unconstitutional,\textsuperscript{231} which spurred Parliament to pass legislation setting new standards.\textsuperscript{232} Distinguished experts who subsequently investigated the reform’s implementation have deplored Correctional Service Canada’s immobilism and unresponsiveness to demands for data. At present, lengthy solitary confinement appears to persist in Canada.\textsuperscript{233}

Even so, the harshness of American justice is of a far greater magnitude. Among other factors, a normative evolution in American society since approximately the 1970s has fostered the notion that criminals forfeit their right to live and should be cast away from society forever or for as long as possible.\textsuperscript{234} These attitudes are not as commonplace elsewhere in the West, where “tough-on-crime” movements are less radical.\textsuperscript{235} On top of draconian sentences, solitary confinement is routinely used for exceptionally long periods in America,\textsuperscript{236} where the UN Special Rapporteur on Torture denounced the predicament of two men held in solitary for over forty years.\textsuperscript{237}

If nations vary in their degree of punitiveness, the protection of human dignity may always be more an aspiration than a reality.

\textsuperscript{231} See \textit{British Columbia Civil Liberties Association v Canada (Attorney General)}, 2019 BCCA 228; \textit{Canadian Civil Liberties Association v Canada (Attorney General)}, 2019 ONCA 243.

\textsuperscript{232} See \textbf{Bill C-83}, \textit{An Act to Amend the Corrections and Conditional Release Act and Another Act}, 1st Sess, 42nd Parl (21 June 2019).

\textsuperscript{233} See e.g. Sprott & Doob, “Solitary Confinement,” \textit{supra} note 74.

\textsuperscript{234} See e.g. Webster & Doob, \textit{supra} note 14 at 34, 49.

\textsuperscript{235} See generally Doob & Webster, \textit{supra} note 54; Whitman, \textit{supra} note 24.

\textsuperscript{236} As terms of solitary confinement vary wildly and are not systematically documented in the United States, an average length in solitary is hard to measure. Yet for documented cases approximately 3,000 persons were in solitary for over three years as of 2020. See Correctional Leaders Association & Liman Center at Yale Law School, “Time-in-Cell 2019: A Snapshot of Restrictive Housing” (September 2020) at 5, online (pdf): \textit{Yale Law School} <law.yale.edu/sites/default/files/area/center/liman/document/time-in-cell_2019.pdf>.

anywhere. Dignity is nonetheless making progress as a legal norm in Canada, America, Europe, and much of the world, although scholarship would benefit from a broader historical and comparative perspective. In the next section we will particularly see how a normative evolution has contributed to the gradual abolition of ruthless punishments in liberal democracies. Focusing excessively on innocence may hinder this evolution by eclipsing the human dignity of all prisoners.

This is not to deny the accomplishments of the modern innocence movement in exposing pervasive injustice, incompetence, corruption, abuse, and discrimination. The movement’s successes extend beyond capital cases, as they encompass systemic reforms to enhance procedural safeguards and preclude government overreach, such as video-recorded interrogations, blind lineups, open-file discovery, and refined forensics. So far, the innocence movement’s most impressive achievement may have been persuading George Ryan, the Republican Governor of Illinois, to empty death row and commute 167 death sentences shortly before leaving office in 2003. Illinois subsequently abolished capital punishment in 2011. Figures like Lawrence Marshall—an exceptional litigator and law professor who led efforts to secure the massive number of commutations in Illinois—have known greater victories than most abolitionists in history, whose struggle has often ended in bitter defeat. What is more, the modern innocence movement has broadened the appeal of abolitionism in American society, perhaps especially among those who may have readily supported executions. At the same time, the decline of capital punishment

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238 See e.g. the numerous sources cited in supra notes 246, 265, 276–279.
239 See Campbell, supra note 48; Garrett, supra note 23 at ch 2; Marshall, supra note 42.
240 See generally Marshall, supra note 42; Steiker & Steiker, Courting Death, supra note 4 at 209–10, 301.
241 See generally Garrett, supra note 23 at 91; Steiker & Steiker, Courting Death, supra note 4 at 300–01.
in America is not simply due to innocence, whose effect on social reform can be overstated.\footnote{Consider the observations of leading experts: “I was surprised to learn, when looking at the data on exonerations, that there is not any association between death row exonerations and any change, over the years that followed such exonerations, in the number of death sentences in a state.” Garrett, supra note 23 at 101. “Although it is often speculated that concerns about wrongful conviction contributed strongly to the decline in popular support, the phenomenon of exonerations gained visibility in the late 1990s and yet the steep decline in public support did not fully register until fairly recently.” Steiker & Steiker, “The Rise, Fall, and Afterlife” supra note 13 at 309.}

Because the modern American death-penalty debate plausibly influenced the Canadian Justices’ reasoning, Burns offers a window into how the US Supreme Court might approach a challenge to capital punishment’s constitutionality in the future. In many ways, Canada’s Justices did what US abolitionists have been demanding from their own justices for decades: find the death penalty unlawful. The underside of this historic ruling deserves greater scrutiny, as it exemplified how certain social actors may be inclined to circumvent wider questions of dignity by casting innocence as the critical death-penalty issue, which may inhibit the development of dignity as a legal norm.

In sum, insofar as modern American abolitionism has influenced the debate abroad, one should be mindful of the reasons why innocence has become a central issue in the United States. Historical and contextual evidence points to a harsher social climate that led rehabilitation and humanistic principles of punishment to fall out of favor. Because mercilessness toward the guilty became the norm, the debate over social change gravitated toward innocence. The guilty would benefit from abolishing capital punishment and other reforms, yet it would be merely as a collateral benefit of helping the innocent. We will now consider how this approach diverges from legal systems founded on inalienable human rights.

III. GROUNDING PRISONERS’ RIGHTS IN DIGNITY

If miscarriages of justice have been a constitutive issue in the history of Western civilization, human dignity is among its
highest aspirations. If a practice violates human dignity, the fundamental issue is not whether it is meted out to the guilty or innocent. No one should face it. In Burns, the Supreme Court of Canada said “No” to America’s death penalty for a doubtful reason, a largely newfound risk of executing the innocent, without saying “Yes” to the protection of human rights rooted in dignity—a bedrock of liberal democracy.

“To declare oneself against the death penalty makes no sense when it is an innocent defendant,” as Albert Camus observed. “In that case, everyone is against it, obviously. An adversary of this punishment must justify his point of view precisely in the case where the defendant is guilty.” Camus was writing to an American journalist to defend his endorsement of the Oscar-winning abolitionist film I Want to Live! (1958) about Barbara Graham, a woman whom California executed. In a post-scriptum, Camus added “my declarations constitute absolutely no judgment on American justice but simply the judgment of a question of civilization that is common to many countries, including yours and mine.”

Abolition has now prevailed in all Western democracies—except the United States. France accomplished this step in 1981, five years after Canada. This is neither a solely European nor Western phenomenon. Over two-thirds of all countries worldwide have abolished capital punishment in law or practice.

The roots of both abolitionism and human dignity have sparked a spirited scholarly debate involving jurists, sociologists,
historians, philosophers, and beyond. While this article does not purport to resolve that debate, several considerations are relevant. Within Western civilization, humanistic objections to the death penalty and other harsh punishments gained traction during the Enlightenment, if not before during the Renaissance. By the late eighteenth and nineteenth centuries, the abolitionist movement also made headway in the United States.247 Abolitionists on both sides of the Atlantic then commonly employed a polyvalent discourse encompassing both humanistic and practical objections to executions.248 This brief genealogy of dignity’s emergence as a sentencing principle does not mean that the modern conception of dignity was self-evidently born ex nihilo during the European Enlightenment and that it never existed earlier or elsewhere.249 Scholars have offered diverse perspectives on dignity’s origins, including whether it is an ancient, evolving or modern concept.250

Nor has abolitionism’s evolution been purely linear. For instance, eight American states abolished the death penalty between 1897 and 1917, but reinstated it within a few years or decades.251 New Zealand voted abolition in 1941, reauthorized capital punishment in 1950, and finally abolished it in 1961.252

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249 Relatedly, the history of abolitionism has neglected facets, such as reforms in diverse Latin American nations that preceded change in parts of Europe. See e.g. Patrick Timmons, “Seed of Abolition: Experience and Culture in the Desire to End Capital Punishment in Mexico 1841-1857” in Austin Sarat & Christian Boulanger, eds, The Cultural Lives of Capital Punishment (Stanford: Stanford University Press, 2005) 69 at 69–73.

250 See generally supra note 246.


252 See Amnesty International, supra note 7 at 7; Zimring & Hawkins, supra note 24 at 6.
Rather than an inevitable march toward progress, contingency has shaped a process that could have evolved in countless ways.\textsuperscript{253} Through it all, the abolitionist camp has grown considerably to encompass most countries.\textsuperscript{254} Its relative success is measurable by empirical elements like the number of executions, death-eligible crimes or abolitionist jurisdictions.\textsuperscript{255}

Abolitionism has now become a defining question in the evolution of liberal democracy.\textsuperscript{256} In the words of the criminologists Franklin Zimring and Gordon Hawkins, it “provides countries throughout the world with an index of the degree of recognition accorded to human rights.”\textsuperscript{257}

If abolition is a benchmark of humanity, the reasons why one opposes capital punishment become critical. Saying “No” and “Yes,” the Camusian ethical concept evoked in this article’s title, is encapsulated in the following quotation: “What is a man in revolt? A man who says no. But if he refuses, he does not renounce: it is also a man who says yes, from his first step.”\textsuperscript{258} In Camusian philosophy, the “revolt” refers to an ethical choice comprising the rejection of inhumanity and affirmation of humanity. Camus thus explained why he would not countenance callous killing in the name of some greater good: “We will know nothing so long as we know if we have the right to kill this other standing in front of us or agree to him being killed.”\textsuperscript{259} Camus depicted how abstract ideologies reducing people to their worst

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\textsuperscript{253} See e.g. Steiker, “Capital Punishment and Contingency,” supra note 39.
\textsuperscript{255} See \textit{ibid}; Garland, “Capital Punishment and American Culture,” supra note 21 at 355 (discussing incremental steps toward abolition).
\textsuperscript{257} Zimring & Hawkins, supra note 24 at 165.
\textsuperscript{258} Albert Camus, \textit{L‘homme révolté} (Paris: Gallimard, 1951) at 25 [translated by author]. Camus’s book \textit{L’homme révolté} was officially translated as \textit{The Rebel}, although this title is not altogether satisfactory. \textit{Man in Revolt} or \textit{The Human in Revolt} would have been more accurate. The French translations are therefore my own from the original edition.
\textsuperscript{259} \textit{Ibid} at 14.
\end{flushleft}
acts or traits can rationalize murder. While this text focused on political violence during the Cold War, not the death penalty, Camus was a leading abolitionist. *Reflections on the Guillotine* (1957), his subsequent denunciation of the death penalty's inhumanity and inutility, played a more meaningful role in the US death-penalty debate than is widely assumed. Indeed, Anthony Amsterdam, then the leading American abolitionist, emphatically cited Camus in the briefs of *Furman v Georgia* (1972), the landmark decision where the US Supreme Court temporarily abolished the death penalty.

Camus’s perspective illustrates a wider societal evolution. Many historical figures have likewise argued that executions negate “dignity”—a principle increasingly recognized in positive law.

A. FROM DEMOCRACY TO DIGNITY

What is human dignity? This legal norm is rooted in the inherent worth of all human beings. For much of history, the concept of

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264 Camus, *Reflections on the Guillotine, supra* note 261 at 204.

265 See generally Xavier Biyo, “Le concept de dignité” in *La dignité saisie par les juges en Europe* 13, *supra* note 246 at 24–33; Luís Roberto Barroso, “Here,
*dignitas* had a distinct meaning that evoked social worth based on merit or title, such as belonging to the nobility. Notwithstanding its stark contradictions in the age of colonialism and slavery, the Enlightenment eventually contributed to the development of an egalitarian and universal conception of human worth. In modern liberal democracies, human dignity has gradually acquired a universal and inalienable character. The evolution of this norm has profound ramifications for criminal punishment: it is impossible to forfeit one’s inherent and inalienable human dignity by committing a crime. Once the law recognizes that the death penalty or any other punishment denies human dignity, the remedy becomes its categorical abolition.

Conversely, degradation is the antithesis of dignity. According to James Whitman, the concept of degradation is historically tied to European feudal practices and signifies “to reduce another in status” or treat them as “inferior.” The label of *Untermenschen* (subhuman) would ultimately exemplify degradation, as it served to rationalize the persecution of Jewish people under the Third Reich. The cruelties of slavery likewise rested on the dehumanization of those held in bondage. Analogously, certain criminal punishments may deny the dignity of prisoners, such as by degrading them as subhuman parasites or monsters, a process often intertwined with race and class prejudice.

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267 Whitman, *supra* note 24 at 8.

Within the West, the gradual development of humanistic sensibilities since the Renaissance and Enlightenment inspired reformers seeking to limit or abolish capital punishment and other cruel practices. These transformations initially occurred at the national level and were later crystallized in postwar international treaties. Illustratively, Protocol No. 13 to the European Convention on Human Rights (2002) categorically prohibits the death penalty and stresses that it violates “the inherent dignity of all human beings.” The trend has extended beyond Europe and the West. For example, the Second Optional Protocol to the United Nations’ International Covenant on Civil and Political Rights (1989) comparably states that abolishing capital punishment “contributes to [the] enhancement of human dignity.”

Whereas modern America recurrently disregards international human rights standards, dignity played a more influential role in its penal system and reform movements from the late 18th century to approximately the 1970s. Past generations of American abolitionists actually placed substantial weight on humanistic objections to state-killing, as illustrated by the rhetoric of prominent figures like Frederick Douglass, Sojourner Truth, Elizabeth Cady Stanton, Walt Whitman, Clarence Darrow, and Martin Luther King. In 1958, the US

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270 Protocol 13 to European Convention on Human Rights, supra note 132 at preamble.


273 These American historical figures were involved in diverse reform movements besides opposing the death penalty. Frederick Douglass (1818–95) and Sojourner Truth (c 1797–1883) were prominent 19th century African-American leaders, who notably advocated the abolition of slavery and women’s rights. Elizabeth Cady Stanton (1815–1902) was a leading suffragist. Walt Whitman (1819–92) was an influential literary figure. Clarence Darrow (1857–1938) was perhaps the most influential litigator of his generation. Martin Luther King (1929–68) needs no introduction. See Jouet, “Death Penalty Abolitionism,” supra note 2.
Supreme Court would proclaim that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.” While the dramatic harshening of American justice subsequently called this language into question, dignity is now slowly making progress as a principle in US constitutional law.

Canada offers an insightful point of comparison given its relative ambivalence toward dignity, which sometimes places it halfway between the United States and Europe. In 1960, the Canadian Bill of Rights proclaimed “the dignity and worth of the human person.” Following the adoption of the Canadian Charter of Rights and Freedoms in 1982, the Supreme Court reaffirmed this principle, because “the administration of justice... is founded upon the belief in the dignity and worth of the human person and the rule of law.” Dignity has gained importance in Canadian constitutional law, arising in debates over criminal justice, abortion, assisted suicide, LGBTQ rights, and other issues. The Supreme Court of Canada notably recognized that depriving prisoners of the right to vote “runs counter to our constitutional commitment to the inherent worth

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274 Trop v Dulles, 356 US 86 at 100 (1958) (plurality opinion) [Trop].


276 Preamble to the Canadian Bill of Rights, RSC 1970, App III.


278 Ibid at para 63.

279 See e.g. R v Oakes, [1986] 1 SCR 103 at para 64 (where Dickson C] stressed that “[t]he Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person”); Smith, supra note 68 at para 45, citing Walter S Tarnopolsky, “Just Deserts or Cruel and Unusual Treatment or Punishment? Where Do We Look for Guidance?” (1978) 10 Ottawa L Rev 1 at 33 (listing criteria for assessing the constitutionality of a sentence, including whether it is “unusually severe and hence degrading to human dignity and worth”); R v Morgentaler, [1988] 1 SCR 30 at 164 (where Wilson J stated “[t]he Charter and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity”).

280 See Barroso, supra note 265 at 340.
and dignity of every individual." Canada thereby converged with Europe and diverged with America, whose states commonly deny voting rights to current and former prisoners—an exceptional practice in the democratic world. On sentencing, Canada is again far closer to Europe. It neither has the death penalty nor US-style mass incarceration, as Canada does not regularly inflict draconian prison terms. Life without parole as such does not exist in the Canadian Criminal Code, and the Supreme Court of Canada recently found unconstitutional a statute allowing de facto life without parole. If the tide may be shifting, ambivalence has long characterized Canada’s approach toward dignity.

Europe has placed more weight on dignity as a sentencing principle. This norm has contributed to its abolition of the death penalty and life without parole as an analogous punishment condemning people to hopelessly die in prison—irrespective of their remorse, rehabilitation or concrete danger to society. Ambivalence remains palpable. After the European Court of Human Rights (ECHR) seemingly abolished life without parole in its historic Vinter (2013) decision, it apparently backtracked in a subsequent case, Hutchinson (2017), upholding a life without parole scheme in the United Kingdom. But rather than a case about prisoners’ rights, Hutchinson could be interpreted as a concession to the animosity toward the ECHR among British

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281 Sauvé v Canada (Chief Electoral Officer), 2002 SCC 68 at para 35.


283 See generally Doob & Webster, supra note 54.

284 See Bissonnette, supra note 35 at paras 2–9. See also supra note 36 and accompanying paragraph.

285 Besides our comprehensive discussion of Kindler and Burns, consider how the Quebec Court of Appeal recently observed that dignity “has not yet been established as a principle of fundamental justice” in Canada. Bissonnette v R, 2020 QCCA 1585 at para 151.

286 Supra note 37.

287 Hutchinson v United Kingdom [GC], No 57592/08, [2017] ECHR 65.
citizens who wish to leave the Court.  

This situation evokes “Brexit,” Britain’s withdrawal from the European Union, even though the ECtHR operates under the Council of Europe, a distinct entity. In any event, life without parole was unlawful or rare throughout Europe even before Vinter, which may have a wider impact in the long term.

Revisiting Burns especially revealed how, compared to Europe, Canada has placed less weight on dignity. Besides European law writ large, dignity has influenced ECtHR decisions barring extraditions that may lead to execution or life without parole, as Al-Saadoon (2010) and Trabelsi (2015) respectively held. In fact, Trabelsi concerned an alleged terrorist whom Belgium unlawfully extradited to the United States to potentially face life without parole. Demonstrating how this trend is not limited to Europe, South Africa and Latin American nations have adopted similar positions on extraditions involving capital punishment. The development of human dignity as a sentencing principle is nonetheless within reach in Canada, as we saw that it has largely converged with Europe overall.

Such an evolution may seem inconceivable in the United States, where life without parole and similarly merciless prison terms have become normalized in the age of mass incarceration. It would be a mistake to attribute this divergence to inherent traits of European or Canadian culture supposedly foreign to American society, as the United States historically was a pioneer in instituting rehabilitation policies.

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289 See generally Hutchinson, supra note 287 at para 38, Pinto de Albuquerque J, dissenting.

290 Supra note 37 paras 68–72.

291 Al-Saadoon, supra note 132; Trabelsi v Belgium, No 140/10, [2014] V ECHR 259.

292 See Malkani, supra note 86 at 78, 83.

293 See generally Banner, supra note 43 at ch 4; Mugambi Jouet, “Revolutionary Criminal Punishments: Treason, Mercy, and the American Revolution” (2021) 61 Am J Leg Hist 139; Tonry, supra note 272.
Proponents of draconian punishments suggest that dignity is an illegitimate norm instituted by elites who disregard the public’s wish that criminals receive their just deserts.\textsuperscript{294} This perspective is particularly influential in contemporary America, where politicians, judges, and prosecutors regularly justify merciless penalties by claiming to respond to the public. In reality, public opinion tends to be ill-informed and disproportionately shaped by the views of American elites and public officials themselves. They have embraced penal populism to a far greater degree than their counterparts elsewhere in the West, fomenting public support for executions and draconian prison terms through fearmongering, disinformation, and “tough-on-crime” rhetoric.\textsuperscript{295} Hence, if American leaders are less inclined than their counterparts in other Western democracies to go against public opinion,\textsuperscript{296} it is not merely because they are unwilling to override the average voter, as these choices commonly reflect their own support for harsh justice.

The rise of illiberal democracies in the early 21st century invites us to further consider how liberal democracy is not simply majority rule.\textsuperscript{297} It is majority rule with a host of features, from individual human rights to the separations of powers, the rule of law, a free press, and more. Even though human rights are indispensable components of liberal democracy, countries may differ in their understanding of these protections, as demonstrated by our comparative analysis of prisoners’ rights. Conceptual differences are also relevant in the case of the United States, which generally stands out among Western democracies in declining to use the concept of “human rights” in the domestic

\textsuperscript{294} See e.g. Ernest Van Den Haag, “The Death Penalty Once More” in Hugo Adam Bedau, ed, \textit{The Death Penalty in America}, supra note 200 at 454 (asserting that “capital punishment has separated the voters as a whole from a small, but influential, abolitionist elite”).


\textsuperscript{296} See generally Hammel, supra note 6; Garland, “Capital Punishment and American Culture,” supra note 21 at 362–63.

context. But the takeaway for our purposes is that, whether termed “human rights” or otherwise, protecting the dignity of vulnerable or unpopular individuals can legitimately entail going against public opinion.

In addition to its counter-majoritarian dimension, we saw that the development of dignity as a principle in positive law rests on the notion that no one should be dehumanized or degraded. This is not merely a theoretical or philosophical consideration, as recognizing the dignity of all persons has concrete implications. Slavery epitomizes how a society should not reject inhumane practices solely on the ground that they are ineffective. Even as historians and economists have engaged in an instructive debate about whether slavery fostered or hindered economic growth in the Americas, this scholarship should not overshadow how dehumanization and racism helped legitimate the institution. It is doubtful whether any society may truly disavow and transcend its history of slavery unless it recognizes this reality. Torture offers a more recent example of the stakes

298 See Mugambi Jouet, “The Exceptional Absence of Human Rights as a Principle in American Law” (2014) 34:2 Pace L Rev 688 [Jouet, “The Exceptional Absence of Human Rights”]. In the United States, “human rights” often mean “international human rights,” such as matters falling under international treaties. Similarly, “human rights” rarely evoke issues arising domestically but mostly problems in foreign dictatorships, say, Cuba or Iran. The disinclination to use the concept of “human rights” in the domestic context is paradoxical given that Americans like Franklin Delano Roosevelt, Eleanor Roosevelt, and Martin Luther King were among the catalysts of the postwar human rights movement. See ibid.

299 See generally Hammel, supra note 6, (discussing the role of elites in European abolitionism).


301 Incidentally, nineteenth-century American reformers juxtaposed the inhumanity of slavery and capital punishment. See generally John Cyril Barton, Literary Executions: Capital Punishment and American Culture, 1820–1925 (Baltimore: John Hopkins University Press, 2014) at 14–17, 182. For a modern analogy, see also Alper, supra note 149 (“Future generations will look back on the institution of capital punishment as we do the institutions of slavery, lynching, and Jim Crow. We condemn slavery not only because African men and women who had committed no crime were its
involved in framing an issue. The relatively limited weight of human rights and dignity in modern American society helps explain why, during George W Bush’s “War on Terror,” the United States officially reintroduced torture into Western civilization. Much of the ensuing debate revolved around whether torture is ineffective because a suspect will say anything while experiencing agony, or whether it is counterproductive in tarnishing America’s global reputation.302 These may be reasonable arguments, although the prohibition against torture becomes nonessential if its opponents can only muster the claim that torture “does not work” and either do not believe or dare say that it is inhumane.303 Authorities have a responsibility to say a resounding “No” to torture, not simply because it may prove ineffective, but because they should unequivocally say “Yes” to human dignity.304

Circumventing arduous moral questions in favor of narrow practical solutions may prove effective in the short run, as reform may require compromise. Yet lasting change probably requires a normative evolution. No democracy can fully renounce the legacy of slavery or practice of torture if its main concerns with these matters are narrowly practical. And no society may perhaps hope to definitively turn its back on draconian punishments, whatever their nature, unless it recognizes their inhumanity.

While this article suggests that the fundamental question regarding the death penalty is how a society decides to treat the guilty, some may argue that the execution of an innocent would itself raise concerns about human dignity. But if this claim rests

victims, but because it is morally abhorrent for human beings to buy, sell, and own one another: So it is with the death penalty”).


303 Opposing a purely utilitarian debate, certain Americans invoked “human rights” when condemning torture, in the image of Senator John McCain, who insisted it was a normative issue above all. Ibid at 719, n 196.

304 While the Bush administration’s use of torture faced strong pushback from much of the global community, various dictatorships used America’s actions to legitimize their own reliance on torture. See Averell Schmidt & Kathryn Sikkink, “Breaking the Ban? The Heterogeneous Impact of US Contestation of the Torture Norm” (2019) 4:1 J Global Security Stud 105 at 109–12, 115.
on the idea that an execution violates human dignity because the prisoner is innocent, it suggests a non-universal conception of human dignity implying that the concern would be lessened or absent if the prisoner were guilty. Assuming an execution is a violation of universal human rights, no one deserves to be executed and focusing on guilt or innocence is misplaced. Comparably, if torture inherently violates human dignity, one should not approach the debate in terms of whether torturing a terrorist would be less of a violation than torturing an innocent.

One must still recall that jurists, historians, and philosophers have offered multiple competing perspectives on dignity. Some argue that dignity is a vague, meaningless catchall. Then again, the same could be said about innumerable legal concepts, including equality, justice, fairness, and due process of law. This article does not purport to resolve the genealogical or philosophical debate over dignity once and for all. The bottom line is that human dignity is a definable norm that has come to play a meaningful role in positive law. This would remain the case even if, for the sake of argument, framing the abolition of capital punishment in terms of human rights and dignity reflected a recent shift around the 1970s or 1980s in Western Europe, as opposed to a long-term evolution in diverse regions of the world. A society can ultimately choose if it wishes to respond to crime with practices like the death penalty, merciless prison terms, and crushing periods of solitary confinement. The historical dimensions of dignity may provide a window into the

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305 Meghan Ryan has thoughtfully described how stringent legal rules to establish claims of innocence in the United States denigrate human dignity because they have a narrow procedural logic, such as prioritizing the finality of convictions. See Ryan, supra note 265 at 2167–73. But she adds that dignity remains a relevant principle to punish the guilty. See ibid at 2134. Overall, she proposes that “purely utilitarian punishment is unconstitutional” by “neglect[ing] the importance of the individual offender.” Ibid at 2133 [emphasis in original].

306 See generally supra note 246.

307 See e.g. Van Den Haag, supra note 294 at 452.

308 See Zimring, Contradictions, supra note 3 at 16–41.

past, yet they do not spell what present or future generations should do.

B. AN INDISPENSABLE NORMATIVE EVOLUTION

The abolition of degrading criminal punishments has increasingly become a cornerstone of liberal democracy. The anti-death-penalty movement has been the tip of the iceberg in this wider conception of prisoners’ rights, as Franklin Zimring and Gordon Hawkins described:

The symbolic value of abolition in Western society is the message of forbearance in modern governments, armed with an abundance of lethal technology, deliberately choosing not to kill in the face of criminal provocation. It is a statement about the limits of governmental power, a conception of the nature of democratic government with implications far beyond the field of criminal justice.\footnote{Zimring & Hawkins, supra note 24 at 164.}

To these prominent criminologists, abolition or retention “has never been determined by the evidence but on beliefs and sentiments little influenced by evidence about utilitarian effects.”\footnote{Ibid at 150.} A “mass conversion” of death-penalty supporters will not occur in the United States, they cautioned, as it has seldom occurred elsewhere. Yet Zimring and Hawkins suggested that a normative evolution will be indispensable to American abolition.\footnote{Ibid.} Zimring subsequently reaffirmed that “morally centered objections to execution and morally committed activism will be needed to create an atmosphere where change can be facilitated” in American society.\footnote{Zimring, Contradictions, supra note 3 at 307.} Such paradigm shifts have facilitated the abolition of the death penalty in Europe, Canada, and other parts of the world, where the development of human rights and dignity has favored abolitionism both by bolstering opposition and mollifying support for executions.\footnote{See e.g. ibid at 181–82, 196–97.}
The development of dignity as a universal principle can likewise reshape all prisoners’ rights by mollifying calls for ruthless sentences and fostering a paradigm shift. As Jonathan Simon has explained, dignity is a principle that “can motivate and mobilize citizens” by establishing the value of prisoners’ lives and stressing that its protection is imperative.315 These issues concern any society, including abolitionist nations like Canada that have continued to inflict degrading prison terms reflecting persistent ambivalence toward the notion that criminals can have inalienable human rights.316

What is more, the abolition of capital punishment cannot be assumed to be permanent. An attempt to resurrect the death penalty in Canada failed by merely a dozen legislative votes in 1987 and, nowadays, half of Canadians still express support for capital punishment.317 Someday Canada and fellow abolitionist democracies might face stronger attempts to reintroduce executions. These are among the reasons why scholars, jurists, and other social actors must devote closer attention to how prisoners’ rights are framed and debated. In particular, a narrow conception of prisoners’ human rights is inferable in the belief that the main reason to oppose capital punishment is that someone put to death might be innocent, namely that they might not be the intended target: a guilty prisoner.

But isn’t the strength of the innocence movement precisely its capacity to sidestep divisive debates about the morality of executing the guilty? It is, indeed. Among other factors, wrongful convictions appear to have undermined capital punishment’s popularity in America.318 Nevertheless, calls for abolition based on the risk of executing innocents appear to fail against people who strongly support executions. The considerable media coverage of exoneration scandals, besides endemic due process violations, has not translated into a widespread rejection of the

315 Simon, supra note 3 at 276.
316 On degrading conditions of incarceration in Canada and parts of Europe, see generally note 229 and accompanying paragraph.
317 See supra notes 58, 59 and accompanying paragraph.
318 See Garrett, supra note 23 at 91; Steiker & Steiker, Courting Death, supra note 4 at 300–01.
death penalty. As of 2018, 49 percent of Americans still believed that it was applied “fairly.”

Both its supporters and opponents can estimate the proportion of innocents convicted at similar rates, although supporters find this downside tolerable given capital punishment’s desirability. A recent empirical study found that most Americans actually believe that falsely convicting an innocent is just as bad as falsely acquitting a guilty person. The study did not focus on capital punishment but evokes how the risk of a wrongful execution does not automatically translate into support for abolition among the punitive-minded. In the constitutional arena, the US Supreme Court’s striking divide in Herrera (1993) revealed that the risk of executing innocents does not assuredly spell abolition. As the Steikers have underlined, “the lack of precedent supporting the argument likely undermines its use as the sole ground for a constitutional attack on the death penalty.” Back in 1986, Zimring and Hawkins had already expressed doubts about innocence’s capacity to unilaterally achieve abolition: “it is improbable that abandonment of the death penalty will result from some singular event or political act such as a dramatic miscarriage of justice, for example, the execution of an innocent person . . . .” Rather, “[s]pecific events may slightly accelerate or retard the movement, but only general and profound social change can alter long-term results.”

319 “Death Penalty” (last modified 2021), online: Gallup <news.gallup.com/poll/1606/Death-Penalty.aspx> (2018 poll on fairness).
320 See Banner, supra note 43 at 304–05.
322 See also Garrett, supra note 23 at 101 (finding no association between death-row exonerations and death sentences). On the influence of the innocence movement and capital punishment, see also supra note 240 and accompanying paragraph.
323 See Herrera, supra note 117.
324 Steiker & Steiker, Courting Death, supra note 4 at 273.
325 Zimring & Hawkins, supra note 24 at 151.
326 Ibid.
A normative evolution may be indispensable not only to realizing abolition, but also to securing it from predictable attempts to bring back capital punishment. Such attempts revived the death penalty in America\(^{327}\) after *Furman* had appeared to secure abolition in 1972.\(^{328}\) Meanwhile, abolition has prevailed in dozens of democracies, notwithstanding relative continuing support for executions.\(^{329}\) Yet equating abolitionism with elite override of public opinion\(^{330}\) would eclipse key considerations. Polls in Canada\(^{331}\) or Europe,\(^{332}\) for example, may suggest relative support for capital punishment though abstract data can shroud intensity of support.\(^{333}\) This intensity depends on the social and historical context. Saying “Yes” to the death penalty in Texas does not mean the same thing as in Canada.\(^{334}\) And saying “Yes” in Texas in 2020 would not carry the same meaning as in 1850 or 1950. On average, the range of cases leading to calls for an execution would plausibly be narrower for a modern Canadian than a modern Texan, and for a modern Texan than a Texan of yesteryear. That is because public opinion is tied to a wider normative evolution, including the broadening scope of human rights and dignity since the Enlightenment.

The battle over innocence might actually be a “proxy war” about the death penalty’s normative desirability.\(^{335}\) Many abolitionists who oppose it on this basis probably also do categorically on moral grounds. To some, stressing the risk of error might be primarily a strategic argument. Still, this framing

\(\text{\footnotesize \(327\) See generally Gregg, supra note 30.} \)

\(\text{\footnotesize \(328\) Furman, supra note 31.} \)

\(\text{\footnotesize \(329\) See generally Hammel, supra note 6 at 26–28 (discussing public opinion polls).} \)

\(\text{\footnotesize \(330\) See Van Den Haag, supra note 294.} \)

\(\text{\footnotesize \(331\) Recall that a 2020 poll found 51 percent support for capital punishment among Canadians. See Yoshida-Butryn, supra note 59.} \)

\(\text{\footnotesize \(332\) See e.g. Hammel, supra note 6 at 26–28.} \)

\(\text{\footnotesize \(333\) See Zimring, *Contradictions*, supra note 3 at 11, 196–97.} \)

\(\text{\footnotesize \(334\) See also Jouet, *Exceptional America*, supra note 14 at 225 (comparing Texas and Sweden).} \)

\(\text{\footnotesize \(335\) Zimring, *Contradictions*, supra note 3 at 158.} \)
mirrors the wider societal ambivalence or unwillingness toward recognizing the dignity of all prisoners.

C. A Blueprint for the Future

In Burns, the Supreme Court of Canada was tempted by innocence. A blueprint for another approach was available in Justice Peter Cory’s dissent in Kindler ten years earlier. He insisted that Canada should not extradite prisoners to face the death penalty because it is an inherently “cruel and unusual” punishment based on the evolution of Canadian and international standards. “The death penalty not only deprives the prisoner of all vestiges of human dignity, it is the ultimate desecration of the individual as a human being,” Justice Cory stressed. He found that extraditing Joseph Kindler to face possible execution in Pennsylvania ran afoul of “Canadian values” and Canadian commitments under international human rights law by “applying one standard to the United States and another to other nations.” The majority’s rationale that Canada would not be the executioner represented “an indefensible abdication of moral responsibility” evoking the “ceremonial washing of his hands by Pontius Pilate.” Antonio Lamer, then the Chief Justice, joined Cory’s dissent. In another dissent, Justice John Sopinka concluded on separate grounds that capital punishment is unconstitutional in Canada and that detainees consequently cannot be extradited for execution. Accordingly, all dissenters in Kindler, a 4-3 decision, found the death penalty unconstitutional per se in Canada.

Moreover, Justice Cory offered a learned historical account of the death penalty’s evolution in the West, from medieval times to the Enlightenment and Cesare Beccaria’s impactful abolitionist treatise On Crimes and Punishment (1764), onto the gradual decline of executions. “Except for the United States,” he found,

336 Kindler, supra note 58 at 785, 817.
337 Ibid at 827.
338 Ibid at 824.
339 See ibid at 789–93.
340 See ibid at 799–819.
“the western world has reinforced this commitment to human dignity, both internationally and nationally, through the express abolition of the death penalty.”

Abolitionism was also making headway beyond the West. The South African Constitutional Court cited Justice Cory’s dissent in its groundbreaking decision abolishing the death penalty following apartheid. Incidentally, the South African judges delved deeply into the United States’ experience with capital punishment when weighing its inhumanity, uselessness, and arbitrariness.

Justice Cory wrote his dissent in 1991, during a phase when capital punishment had resurfaced in the United States, although it has sharply declined since the 21st century. Death sentences and executions have plummeted. The number of abolitionist states has risen to 23 plus the District of Columbia. While Justice Cory identified the United States as an outlier in the international trend toward abolition, we saw that it may instead be slowly heading in the same direction.

Justice Cory’s dissent is relevant to the US debate, where scholars have considered how a Supreme Court decision abolishing capital punishment in America might be framed. Whereas Canada and numerous other nations abolished capital punishment by legislative vote, a Supreme Court decision is the only viable path for nationwide abolition in the United States. Distinctive conceptions of federalism and constitutionalism have long made it harder to achieve national reforms of any kind in America compared to other democracies. Congress might lack the authority to pass legislation abolishing capital punishment in

341 Ibid at 809.
342 See Makwanyane, supra note 141 at para 60, opinion of Chaskalson PJ. See also ibid at paras 330, 335, opinion of O'Regan J. While the decision was unanimous, each judge published a separate opinion. All converged on the importance of human rights.
345 See generally Ginsburg and Huq, supra note 297 at 139, 205–06.
the states, assuming a political majority could be found.\footnote{See Steiker & Steiker, Courting Death, supra note 4 at 256–57.} Criminal law in the United States is extremely decentralized and primarily handled at the state level. An abolitionist constitutional amendment would resolve this hurdle yet is inconceivable. The US Constitution is exceptionally difficult to revise due to supermajority amendment procedures. This leaves a constitutional ruling by the US Supreme Court. But any abolitionist decision—whether framed on humanistic or procedural grounds or both—is unlikely in the immediate future given the United States’ current sociopolitical climate and the makeup of its Supreme Court.\footnote{See generally Steiker & Steiker, “The Rise, Fall, and Afterlife,” supra note 13 at 306, 311.}

Even so, a normative evolution conducive to nationwide abolition cannot be excluded. Future social shifts could facilitate a US Supreme Court decision recognizing capital punishment as inherently “cruel and unusual punishment” based on “evolving standards of decency.”\footnote{See Trop, supra note 274 at 99–101.} American society has previously experienced remarkable historical reversals. Modern principles of rehabilitative and humane punishment notably emerged in eighteenth and nineteenth America, inspiring reform in Canada and Europe.\footnote{Ashley T Rubin, “Prison History” in Oxford Research Encyclopedia of Criminology (Oxford: Oxford University Press, 2018) 1 at 5–9.} If in recent decades the United States became an outlier among Western democracies by repudiating these principles, it paradoxically was among the nations that spearheaded their development.

Absent a normative evolution, the United States’ societal dynamics are likelier to lead its Justices toward a ruling akin to the Supreme Court of Canada’s \textit{Burns} decision centering on the risk of innocence and other procedural problems. If America abolished capital punishment solely on this rationale, it may preempt the development of dignity as a legal norm. This may in turn help normalize mass incarceration, solitary confinement, and other degrading practices. If a society deems killing prisoners legitimate, almost anything can be done to them. Thus
far a legacy of the anti-death-penalty movement in modern America is that it may have contributed to the proliferation of life without parole by touting it as an alternative to death. By treating human dignity as if it were irrelevant to criminal punishment, a society may create a dehumanizing system where dignity is irrelevant to criminal punishment.

CONCLUSION

This article has explored the nexus between two constitutive societal questions: innocence and dignity. They have been at the heart of the death-penalty debate for centuries, although they raise wider issues regarding the evolution of criminal punishment and liberal democracy. The more reticent or ambivalent certain societies or social actors may be toward recognizing the dignity of all prisoners, the more they may gravitate toward the innocent. A nexus exists between the rise of America’s “tough-on-crime” movement and its innocence movement in the late 20th century. In an extraordinarily harsh environment where treating criminals humanely appeared illegitimate, reformers increasingly invoked the plight of sympathetic innocents trapped behind bars.

Given America’s capacity to influence the social discourse abroad, the Supreme Court of Canada emulated the evolution of modern US abolitionism in its landmark *Burns* decision barring extraditions based on the risk of innocence. *Burns* exemplifies how social actors may be tempted to settle the death-penalty issue by focusing on innocence—an approach that some American abolitionists have encouraged the US Supreme Court to adopt. This approach has often rested on the notion that wrongful convictions materialized into a decisive issue in the late 20th century. But we saw how miscarriages of justice have been constitutive in the history of Western civilization. They have

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350 Empirical research suggests that promoting life without parole (LWOP) as an alternative had a limited impact in the decline of capital punishment in modern America. Instead, “[t]ens of thousands of people who never could or never would have been sentenced to death now get the ’other death penalty’” Garrett, *supra* note 23 at 167. Some prosecutors “are far more aggressive than ever before in seeking and obtaining LWOP.” *Ibid* at 171.
surrounded crucial events from antiquity to the emergence of modern democracy, including the trials of Socrates and Jesus, the birth of the English Bill of Rights, the French Revolution, and the Dreyfus Affair. They were chronic issues in the debates over capital punishment in the eighteenth, nineteenth, and twentieth centuries in diverse nations. If generations of abolitionists have tackled miscarriages of justice, it is revealing that they have been increasingly redefined as the cornerstone of American abolitionism in recent decades.

These findings do not signify that emphasizing human dignity is the only viable strategy or legitimate cause for reformers or abolitionists, wherever they may be. Rather, the article exposed the underside of a debate framing innocence as the death-penalty issue, uncovering social attitudes about the worth of all prisoners’ lives. Eclipsing humanistic concerns from abolitionism has cut against a long-term normative evolution in liberal democracies. The lasting abolition of executions may serve as a stepping stone to challenge merciless prison terms and all degrading punishments in the United States, Canada, Europe, and beyond. This broader transformation may partly depend on pursuing the development of human dignity as a fundamental legal principle. If modern societies say “No” to killing or mistreating prisoners, they should also say “Yes” to the highest aspirations that have influenced this historical evolution.