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*From Lynch Mobs to the Killing State:
Race and the Death Penalty in America*

Edited by Charles J. Ogletree, Jr., and Austin Sarat

When Law Fails: Making Sense of Miscarriages of Justice

Edited by Charles J. Ogletree, Jr., and Austin Sarat

The Road to Abolition?

The Future of Capital Punishment in the United States

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NEW YORK UNIVERSITY PRESS

NEW YORK AND LONDON

NEW YORK UNIVERSITY PRESS
New York and London
www.nyupress.org
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Library of Congress Cataloging-in-Publication Data

The road to abolition? :
the future of capital punishment in the United States /
edited by Charles J. Ogletree, Jr., and Austin Sarat.
p. cm. —

(The Charles Hamilton Houston Institute series on race and justice)

Includes bibliographical references and index.

ISBN-13: 978-0-8147-6217-2 (cl : alk. paper)

ISBN-10: 0-8147-6217-4 (cl : alk. paper)

ISBN-13: 978-0-8147-6218-9 (pb : alk. paper)

ISBN-10: 0-8147-6218-2 (pb : alk. paper)

1. Capital punishment—United States.

I. Ogletree, Charles J. II. Sarat, Austin.

KF9227.C2R63 2009

364.660973—dc22 2009020633

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Manufactured in the United States of America

c 10 9 8 7 6 5 4 3 2 1

p 10 9 8 7 6 5 4 3 2 1

To my son, Ben (A. S.)

To my son, Chuck,
my daughter, Rashida,
and my wife, Pamela,
who have stood firmly with
me in their opposition to the
death penalty. (C. O.)

120. *At the Death House Door* is a recent documentary chronicling Texas Warden Carroll Pickett's concerns about the possible execution of an innocent man. See <http://www.ifc.com/atthedeathhousedoor>.
121. "UN Votes for Death Penalty Freeze," *BBC News*, Dec. 18, 2007, available at http://news.bbc.co.uk/2/hi/in_depth/7151031.stm.
122. Associated Press, "Rome to Light Coliseum When New Jersey Bans Death Penalty," *New Jersey Real-Time News*, Dec. 14, 2007, available at http://www.nj.com/news/index.ssf/2007/12/rome_to_light_up_colosseum_in.html.
123. Daniel Givelber, "Innocence Abroad: The Extradition Cases and the Future of Capital Litigation," *Oregon Law Review* 81 (2002): 161–82.
124. Samuel R. Gross and Phoebe C. Ellsworth, "Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century," in *Beyond Repair? America's Death Penalty* (Stephen P. Garvey, ed.), 7–57. Durham, N.C.: Duke University Press, 2003.
125. See, e.g., Jennifer McMenamin, "In Maryland, Most Want Option of Execution," *Baltimore Sun*, June 2, 2008 (majority ceases to favor death penalty when LWOP offered as option); Frank Newport, "Sixty-Nine Percent of Americans Support Death Penalty," Oct. 12, 2007, available at <http://www.gallup.com/poll/101863/Sixty-nine-Percent-Americans-Support-Death-Penalty.aspx> (support for death penalty typically fall to the 47–54 percent range when LWOP is offered as an option).
126. Carol S. Steiker and Jordan M. Steiker, "Abolition in Our Time," *Ohio State Journal of Criminal Law* 1 (2003): 323–43.
127. Steiker and Steiker, "Tale of Two Nations."
128. Peter Whoriskey and Sonia Geis, "Lethal Injection Is on Hold in Two States," *Washington Post*, Dec. 16, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/15/AR2006121501499.html> (describing reforms, moratoria, and delays in a variety of states long before the Supreme Court granted review).
129. Charles Lane, "Supreme Court Puzzles Some with Mixed Answers on Lethal Injection," *Washington Post*, Feb. 10, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/02/09/AR2006020901954_pf.html (quoting Joshua Marquis, a prosecutor and vice president of the National District Attorneys Association, who urged executions to continue during the Supreme Court's consideration of the lethal injection case, describing the constitutional challenge as "sort of a legal 'Hail Mary' pass").
130. LeBlanc, "Death Penalty Bill Facing Stiff Opposition."
131. Most recently, in *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), the Court rejected states' efforts to revive the death penalty for the nonhomicidal offense of child rape. The court's expansive decision prohibits the imposition of capital punishment for any ordinary crimes not resulting in death.

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Rocked but Still Rolling

The Enduring Institution of Capital Punishment in Historical and Comparative Perspective

Michael McCann and David T. Johnson

The death penalty in the U.S. is a wreck, but it's our wreck—a collage of American attitudes, virtues, and values.

—David Von Drehle, 2008¹

With all cylinders working as in Texas [the death penalty] produces a lot of executions.

—Richard Dieter, 2007²

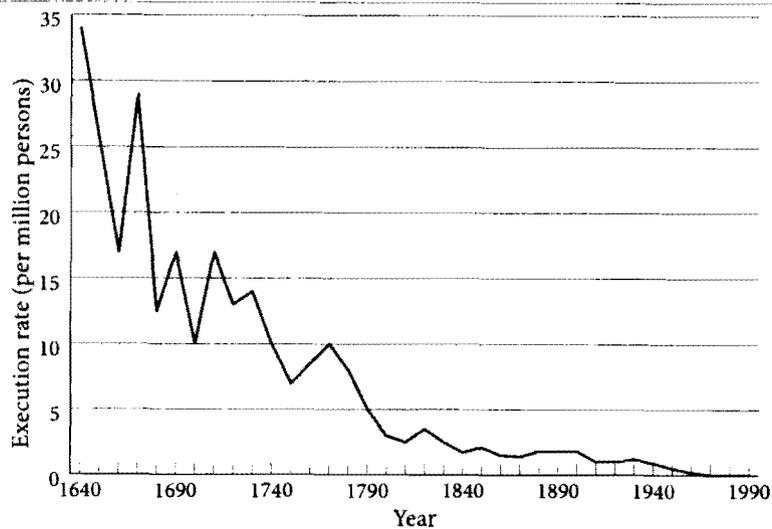
[T]o the extent *Baze* was supposed to be a sort of test drive for doing away with capital punishment altogether. . . . [I]t seems to have been driven off a cliff.

—Dahlia Lithwick, 2008³

Complexities of "Abolition"

The abolition of capital punishment is a much discussed but complicated concept, and the standards for measuring where the United States is on the road to abolition are far from obvious. For one thing, a de facto halt in executions could (and often does) occur without a de jure prohibition of the death penalty. As of the end of 2007, some 33 nation-states had gone at least 10 years without a judicial execution, and many others had so greatly

FIGURE 5.1
Execution rate in the United States, 1640–1999



From Payne 2004, p. 130.

narrowed the category of crimes eligible for capital punishment and so limited prosecution of those crimes that they were essentially abolitionist in practice.⁴ Yet halts in execution do not always mean that abolition is near. In Asia, for example, Brunei Darussalam, the Maldives, and Papua New Guinea have not conducted any executions for more than half a century but still have not legally eliminated the institution of capital punishment, while in the United States the retentionist states of Kansas and New Hampshire have gone more than 10 years without executing anyone.

The bifurcation between “abolitionist” and “retentionist” also obscures huge differences between nations and large changes within nations over time. This, too, is relevant for assessing where the United States is on the road to abolition. As figure 5.1 illustrates, executions per capita in the United States dropped dramatically between 1640 and 1990, from roughly 35 executions per million persons to nearly 0.⁵

In comparative perspective, the total volume of state killing⁶ in the United States over the past 350 years is about one recent year’s total for the People’s Republic of China, making us wonder what is missed by placing these two countries in the same retentionist category. By some historical and comparative standards, the United States appears to be far along the road to abolition.

But the issues are even more complex. Leaders in China and Russia have conceded that capital punishment should eventually be abolished even if their countries are not yet “ready” to do so. Similar concessions about formal *de jure* abolition are rarely heard among elected leaders in the United States, where normative retentionists seem to far outnumber abolitionists—or at least the former are more vocal and better positioned to block the agendas of the latter. Clearly, changes in death penalty policy are often impermanent. Among American states, for example, there have been almost as many reversals from abolitionist to retentionist as there have been sustained abolitions.⁷ Reversals have followed abolition elsewhere in the world as well—as in Nepal and the Philippines—albeit usually with few executions following reinstatement.

Our Skeptical Standpoint

In this chapter, we focus on the prospects for complete, sustained, *de jure* abolition in the United States, and some of the complexities identified here will surface at various points along the way. We write in full awareness that many experts not only seek abolition in the United States but also expect it to be achieved sometime soon. Some authors in this volume approach the latter position. Our argument, by contrast, proceeds with skepticism at two levels. On the one hand, we are wary of prediction itself, for important changes in public policy often turn on unpredictable triggering events or the convergence of factors that are difficult to discern confidently in advance. Social scientists are simply not very good at predicting policy change.⁸ On the other hand, while we reserve judgment about the distant future, we find many reasons to believe that capital punishment will be difficult to terminate in the present historical context. Progress has been made in reducing executions, and the United States might be moving slowly down the long road to *de jure* abolition, but the end is not presently in sight and the forces that have prevailed for the last quarter of the twentieth century seem unlikely to dissipate anytime soon. In short, the death penalty will probably remain in American law even as it continues to be hobbled and slowed in practice. In this essay, we explain why state executions will be difficult to abolish completely, though we do envision potential developments that could hasten an end we both hope for.

Analytical Framework.

The general framework of our analysis is comparative, historical, and institutionalist. This approach recognizes that cultural values and meanings matter. Deeply rooted ideological traditions linking the freedom of rights-bearing citizens, anxiety over the fragility of disciplinary institutions (family, church, school, work), and the utility of harsh punishment for securing order and banishing the undeserving figure prominently in this account. But we view the meanings of such norms as historically contingent, contested, and variable rather than singular, static, and determinative. Explaining variations in death penalty policy requires linking subtle divergences in public discourse, especially regarding the rights of citizens, to broader changes in historically contingent politics and distinctive institutional structures.⁹

We assess the contemporary "American condition"¹⁰ relative to two other historical contexts that witnessed changes in death penalty policy: the abolition of the death penalty in post-World War II Europe, and the often-claimed (wrongly, we will argue) "near miss" moment of abolition during the late civil rights era of the 1960s and 1970s in the United States. These comparisons of political and institutional factors provide the key to explaining why the United States diverged from the European pattern and why it will remain exceptional in its commitment to capital punishment.

Rather than viewing these two historical contexts as separate developments, we connect them in a single narrative by treating the post-*Furman* period as a moment in postwar American political history that differs from the general postwar patterns in Europe. The emergence of the United States as a preeminent military and economic world power, the escalation of the cold war, and the rise of the Southern civil rights movement which drew energy from these international developments set in motion political dynamics that proved decidedly mixed for American capital punishment. These forces initially put the death penalty on the defensive but ultimately helped to reinvigorate its practice and symbolic significance amid the Southern-inspired, highly racialized backlash that grew into the nationwide "culture wars." At the same time, the unique institutional features of American politics that facilitated the politicization of punishment policy during this period also protected harsh justice from the kinds of centralized elite interventions that occurred in Europe.

One result of America's fragmented institutional politics has been a chaotic, uncoordinated, ad hoc tampering that in recent years has weakened

and slowed the death penalty in practice. But these developments have not undercut—and, perhaps, have even fortified—the endurance of capital punishment as a symbolic institution. The death penalty in the United States is in many ways broken, slowed, and barely functioning, but most American citizens and leaders retain faith in it, and those who oppose it lack the institutional means to end it.

Comparing Historical Legacies

We begin by taking a long-term historical perspective toward American capital punishment.¹¹ As a number of scholars have shown, American practices of state execution were until recent years remarkably similar to those in Europe and other parts of the world.¹² From early modern times, capital punishment was used for many kinds of wrongdoings and wrongdoers, and it was justified by a wide variety of secular and religious logics.¹³ Executions were prominent instruments of order from the late aristocratic era through the transition to a more bourgeois society, when conceptions of property were changing in diverse ways. Indeed, capitalist development proceeded in tandem with reliance on capital punishment. A free republic wary of government requires individual rights-bearing citizens who are self-governing to help accumulate wealth and to exchange and use it in orderly ways. The very qualification for citizenship was the demonstration of self-discipline by individuals in everyday civil practice—the capacity to tame passions, to discipline one's body, to govern oneself in pursuit of material security and comfort, and to work hard and delay gratification. These qualities of citizenship were essential for a society organized around individual rights. As Tocqueville posed it, the grand question for democratic societies was how to organize and sustain the institutional mechanisms for instilling such disciplined self-governance into the masses (of white male citizens) amid the dynamic, disintegrative forces of an exchange-based, commodified society.

Traditionally, families, religion, and work provided the primary sources of socialization and normalizing discipline, but elaborate educational institutions, civic groups, unions, and associations of all sorts eventually developed to expand the disciplinary, norm-enforcing webs of social organization. These modes of social control required support from systems of criminal justice that backed up disciplinary sacrifice with threats of punishment for those undeserving individuals who failed to follow the norms

and codes of law. The harshness of punishment varied by offense, but theft of property in addition to acts of violence commonly justified execution. British and other European colonists transplanted these interrelated institutions of property, social discipline, and criminal punishment—including capital punishment—to the new world of America, where they grew in diverse but strikingly parallel ways even after independence.¹⁴

On both sides of the Atlantic, capital punishment was subjected to a sustained process of scrutiny, reform, and restraint starting in the late-seventeenth century. The range of capital offenses and eligible offenders was narrowed, technologies of death were shed of their more barbaric trappings, critics of capital punishment multiplied, public opinion became more divided and complex, death penalty procedures were formalized and reformed, and the number of those sentenced to death and of those executed steadily declined during the nineteenth and twentieth centuries. Abolitionist voices became more prominent, too, spurred by Cesare Beccaria's influential *Essay on Crimes and Punishments*, published in 1764. As Franklin Zimring has summarized, "By late in the eighteenth century, a variety of reform proposals directed at reducing death sentences had been introduced in the United States and Europe," and half a century later a number of American states, most in the Midwest, led campaigns for abolition.¹⁵ In 1867, Portugal became the first western European nation to abolish the penalty for ordinary crimes; by century's end, three nations had formally abolished and two others had stopped executing. Executions in both the United States and Europe declined throughout the nineteenth century, dropping to almost none in the two decades after World War II. In this way, judicial killing became an increasingly "exceptional punishment."¹⁶ More broadly, David Garland is quite right to note that the histories of capital punishment in the United States and Europe were remarkably parallel until the 1970s.¹⁷ Only then did the dramatic divergence occur. While Europe almost completed its abolitionist transformation by that decade—the last execution in western Europe occurred in France in 1977—executions in the United States escalated and the death penalty took on much greater symbolic significance in public and political life.

The divergence between the United States and Europe raises two key questions for this essay. First, what political and institutional factors account for the different death penalty trajectories? In our view, the political factors were mostly specific to the contemporary context, while the institutional features reflect great differences in the organization and administration of criminal policy and of politics more generally that stretch far

back in time. Second and more centrally, what does this analysis suggest about the future of capital punishment in the United States and Europe?

Abolition in Postwar Europe

We begin with the European experience, drawing heavily on Franklin Zimring's insightful account. The key point is that European nations emerged from World War II humbled and ravaged, wary of the potential for murderous elite political demagoguery, and committed to constitutional and legal reforms that would make fascist rule difficult to repeat and world war less likely.¹⁸ State execution almost became synonymous with totalitarianism. The Soviet Union executed more persons each year in the 1930s than all the nonfascist states of western Europe would over the entire twentieth century,¹⁹ and Nazi Germany added millions more casualties to the execution toll. After defeat, the formerly fascist nations of Europe led the way to abolition, with Italy abolishing in 1944 and West Germany in 1949. By 1950, Austria, the Netherlands, and Belgium would cease resorting to capital punishment. The key U.S. allies in victory during the war, France and England, retained *de jure* capital punishment but abandoned it in practice over the following decades.

The specter of the bloody totalitarian past and of postwar foreign occupation generated strong pressures to abolish at this historical juncture, even if they were not openly acknowledged. Indeed, abolition efforts were decidedly bureaucratic, formal, legalistic, and parochial, led largely by coalitions of elites acting somewhat independently, typically defying public opinion that still favored capital punishment by margins of 2 or 3 to 1—though the intensity of such support was probably not great.²⁰ The fact that authority over criminal justice matters was centralized at the national parliamentary level and that elections emphasized national over local issues contributed in important if underappreciated ways to the capacity for elite-driven change. And commissioned studies, elite debates, and specific policy proposals for abolition developed in largely insular, nation-by-nation fashion, with each country looking to its own tradition for support and guidance. Whatever political tensions and divisions existed in the European nations during this postwar period, elite consensus about the need to limit state power along with centralizing institutional features insulated abolitionism from partisan politicization in individual polities. In these ways, capital punishment was dismantled methodically and, for the most

part, quietly amid the much larger effort to rebuild Europe along more stable, democratic, and market-oriented lines.

Commitments to citizen rights surely played a role in motivating and justifying the initial wave of abolition during the era of demilitarization and constitutional change in postwar Europe, but discourses of rights reflected the diversity of parochial national traditions and owed little to any transnational authority or universal principles. Once institutionalized, however, abolition took on new meanings as the European-led human rights movement gained momentum during the 1980s. The “human rights” frame became salient only after all the critical battles in the local death penalty wars were done.²¹ There have been many key moments in this process of transition, including the reversal of the exemption for state death penalties by Protocol No. 6 of the 1983 European Convention on Human Rights.

The institutionalization of a new human rights regime had at least two important consequences for capital punishment. First, a transnational discourse recognizing the rights of all persons and grounded in respect for the right to life itself began to subsume the variable traditions of national and local discourse in Europe. Second, new transnational authorities were authorized to define and enforce specific rights throughout Europe. Thus, abolition of the death penalty in Europe led to an elaborate new repertoire of moral and legal justifications for eliminating the ultimate punishment in other countries, as well as administrative mechanisms for achieving that end. At the same time, a vibrant social movement of abolitionist “missionaries” emerged in Europe to excoriate the immoral retentionist policies of the United States. We now turn to an analysis of that divergent legacy.

Dramatic Divergence: Postwar Politics in the United States

America’s postwar death penalty policy and practice initially appeared to converge toward the abolitionist pattern of Europe, but by the late 1980s the United States was again sentencing large numbers of persons to death and executing more often than it had in a quarter century. The resurrection of capital punishment was widely supported by elites and the general public. In this section, we outline the main contours of the historically specific *political* developments that reversed America’s abolitionist trend in the late twentieth century; in the next section, we consider some of the enduring *institutional* features that facilitated this politics and that seem likely to sustain retention for some time to come.

Triumphant America, Divided Americans

The United States emerged from World War II not simply triumphant but as the preeminent economic, political, and military power in the world. Despite a past of imperial expansion that cost countless lives of Native Americans, violent subjugation of African Americans in the still-segregated South, support for corporate thuggery against workers, and the recent internment of 100,000 Japanese Americans, domestic political elites could justifiably distance themselves from the murderous fascism and imperial militarism of totalitarian European states defeated in World War II. Even more than in Britain and France, leaders in the United States found little reason to increase legal limits on state power or to refrain from exercising violence against persons who wantonly broke the law.

In this context, a new conflict arose: the clash with communism that was perceived to be spreading rapidly around the world. The primary effect of this clash was to increase American anxiety about a new, more pervasive, and potentially more dangerous European adversary, one armed with nuclear weapons whose devastating effects America had demonstrated in the bombings of Japan. American leaders found justification for transforming this international crisis into a routinized steady-state protocol. As the military was equipped with an unprecedented capacity to impose violence, American disciplinary institutions—higher education, civic associations, churches, civil defense networks, and the Hollywood TV and movie industries—geared up to make America tough, vigilant, and unified for the struggle. Regular breakouts of hot conflict—from the Korean War to the long conflict in Vietnam—maintained pressures to prepare to use force against foreign and domestic adversaries alike.

In this anxious environment, concern about excessive state violence was remote, thus weakening the push for abolition of capital punishment that was experienced in Europe. For example, the execution of Julius and Ethel Rosenberg in 1953 was controversial, but approval for the execution of “subversives” was high among elites and the general public alike. Opinion polls reveal a jump in support for capital punishment, from 61 percent in 1936 to 70 percent in the year the Rosenbergs were electrocuted.²² Associate Justice William O. Douglas even faced impeachment charges in 1952 after granting a stay of execution to this famous and notorious couple.

The campaign against the communist threat unified American elites in the 1950s, thereby generating strong pressures for conformity and elite

rule around agendas that were notably different from those in Europe. But American politics also divided along other lines. The most important rupture emerged from growing challenges to the racist legacy of Jim Crow segregation, especially in the South. As a host of studies has documented, many black soldiers who fought in World War II returned home to find their rights denied, poor job prospects, segregated public facilities, widespread police violence, and lynchings.²³ Some black veterans spoke openly about the hypocrisy of the principles for which they had risked and sacrificed much, and many black leaders found in the changing world context resources to amplify these and related claims. Most important, the continuing racial hierarchy and violence in the South constituted a major embarrassment that dramatically undermined the efforts of the American government to win the "hearts and minds" of people around the world, especially those struggling to "decolonize" in Asia, Africa, and Latin America. Some black leaders appealed directly to nations around the world and to the new institutional authority of the United Nations to condemn American apartheid. In 1947, the NAACP, with W. E. B. DuBois as principal author, petitioned the United Nations, denouncing racism in the United States as "not only indefensible but barbaric." "It is not Russia that threatens the U.S. so much as Mississippi," said DuBois; "not Stalin and Molotov but Bilbo and Rankin; internal injustice done to one's brothers is far more dangerous than the aggression of strangers from abroad."²⁴ Black leaders also embraced the language of "international human rights" to mobilize world support for challenging the narrower, less-egalitarian, and more-hypocritical traditions of rights practice in the United States.²⁵

Beginning in the Truman administration, these struggles on the international stage pressured U.S. officials and social leaders to formulate strategies for dismantling the most symbolically salient features of segregation in the South.²⁶ Since support for the Democratic Party was already slipping in the traditional stronghold of the white South, elected officials were too vulnerable to lead the charge, and hence a strategy was designed to reshape the Supreme Court with moderate justices, led by California Republican Earl Warren, who would use constitutional review to overturn the legal basis of segregation established in *Plessy*. At the same time, the NAACP and other groups supplemented the already well established litigation campaign with grassroots activism that grew into what we now know as the Southern civil rights movement.

Civil Rights Legacy: Moratorium, Backlash, and Death Reinstated

More than any other factor, the legacy of civil rights activism during the cold war shaped the future of capital punishment in the United States in contradictory ways. On the one hand, the civil rights movement paved the way and provided momentum for the famous halt in executions from 1967 to 1977. Activist lawyers built on the legal successes they were achieving through the courts in other spheres and escalated legal challenges against capital punishment. Their campaign was led by the NAACP Legal Defense Fund and the ACLU, and their strategy was legalistic and litigation centered, although educational and lobbying efforts were pursued as well.²⁷ The ultimate goal for most activists was abolition, grounded in claims about how execution conflicts with "evolving standards of decency" and therefore represents "unnecessarily cruel punishment." Repeatedly warned about the likelihood of massive resistance on and beyond the Supreme Court, the activists chose to attack capital punishment indirectly, by focusing on procedural inadequacies and racial discrimination at the sentencing phase of trials. The key strategy was to create a nationwide logjam of appeals by death-sentenced prisoners. As a result, the number of inmates awaiting execution rose significantly, and an unofficial moratorium on executions started in 1967.

The lawyer-led coalition managed to land a number of cases contesting procedural issues before the Supreme Court, but achievements were mixed and limited until the surprising *Furman* ruling of 1972. While only two Justices (William Brennan and Thurgood Marshall) went as far as to hold that capital punishment violated the Constitution, three others (William O. Douglas, Potter Stewart, and Byron White) joined them to invalidate state death penalty practices on procedural grounds, focusing on the lack of standards to guide discretion in the determination of capital sentencing. Four Justices—Warren Burger, William Rehnquist, Harry Blackmun, and Lewis Powell—refused to find constitutional violations in existing procedures or practices. The rest of the story is well known. After many states revised their sentencing guidelines and related procedures, seven Justices on the Court ruled in 1976 that the constitutional requirements of due process and equal protection were satisfied by the new legal regimes. The doors to the death chambers were thrust open, and the machinery of death soon began grinding again. Equally important, this period laid a narrow legal track for channeling challenges into

procedural and technical grooves—what Blackmun later called “tinkering with the machinery of death”—and away from disputing the core practice itself.²⁸ These grooves still shape and contain the main currents of abolitionist challenges in the United States today.

During the moratorium years that preceded the 1976 holding in *Gregg*, many officials and activists recognized there was little support for total abolition on or beyond the Court. Some elites, including Justices Earl Warren and Hugo Black, even worried that a ruling that abolished capital punishment on constitutional grounds would undermine the Court’s already shaky legitimacy and perhaps produce a major backlash.²⁹ In this regard, there is little reason to consider the moratorium period as a “near miss” for abolition. Indeed, a forceful backlash against civil rights advances and inclusionary goals was under way well before the *Furman* and *Gregg* decisions.

The backlash began in the South, where opponents of desegregation advanced legal arguments about judicial overreaching and disregard of federalism, as well as moral arguments about the breakdown of social values and discipline that would result from too much change.³⁰ More particularly, Southern leaders started to stress the dangers of civil rights activism, communist subversion, and increasing street crime as interrelated pathologies that undermined civic values and social order. These appeals rang true for many Americans in the South and elsewhere, as civil rights protests increased, white youth defiantly listened to commercial R&B when not singing “The Times They Are a Changing,” and cold war anxieties mounted. The alarmist rhetoric spread into national politics, too, most notably in the voice of Barry Goldwater,³¹ and then, amid escalating protests that joined civil rights concerns to antiwar chants, by Richard Nixon in 1968. When Nixon made restoration of “Law and Order” a central campaign theme, he struck a resonant chord with the “silent majority” about the closely linked dangers then threatening civil society.³² As Garry Wills put it in his brilliant *Nixon Agonistes*, “Law and order was not merely a code phrase for racism. It was the last clause left from our old moral creed . . . the ideal of self-government, of the self-disciplined, self-made man,” the bearer of rights. This ethos, Wills emphasizes, made people “see chaos come again when the young, or the blacks”—or communist sympathizers—“refuse to honor self-restraint.”³³ By 1970, nearly four out of five Americans believed that “law and order had broken down” and that the cause was “Negroes who start riots” and “communists,” along with burgeoning crime in the streets.³⁴

This turbulent period marked the start of increased federal involvement in criminal justice policy and of the ratcheting up of punitive penal policies. The campaign began as a largely symbolic electoral appeal, but policy changes with material impacts began to multiply in the late 1970s.³⁵ These appeals drew on the continued anxieties linking cold war threats of violent war to racialized fears about street violence and political protest among the “underclass.” Ronald Reagan, another long-time cold warrior, pushed the transformation along by putting a smiling paternal face on the punitive campaign for law and order, as well as on welfare rollbacks. But leadership on law and order issues was hardly limited to partisan Republicans. Congressional Democrats quickly followed suit in an effort to demonstrate how tough they could be on street criminals and foreign enemies, adding new punitive crime-fighting policies with each election.³⁶

Tough talk and a demonstrated record of tough action on crime became a necessity for electoral competitiveness at all levels. In 1988, the ravaging of presidential candidate Michael Dukakis, who defended prisoner furlough policies and refused to endorse the execution of his wife’s hypothetical rapist and killer, underscored the imperative to be seen as “tough.” Thereafter, Democrat Bill Clinton won the presidency in part by out-toughing his opponents, as did his successor George W. Bush. That both of these presidents hailed from Southern states—following Jimmy Carter and sunbelt-based Ronald Reagan—is indicative of a larger trend. The promise of the civil rights era was to bring the Jim Crow South into legal conformity with the rest of the nation, and this vision surely represented an advance for social justice. But the civil rights movement also catalyzed forces of racially fueled reaction that grew from its Southern roots into a process that transformed the nation in increasingly conservative, hierarchical, and racially exclusionary directions.

The human costs of this changing politics are well known: incarceration rates quadrupled in 20 years; draconian mandatory minimums were enacted, especially for drug offenses; huge percentages of African American men and other minority males were subjected to incarceration or surveillance;³⁷ and public investments in prisons and policing skyrocketed as expenditures for education, welfare, job training, and other forms of social support were cut. This dramatic transformation in public policy began in an era of increased street crime (including homicide), social unrest, and international conflict with world rivals. But the punitive turn quickly lost touch with real material risks, taking on a momentum of its own in the 1980s. The War on Crime, the War on Drugs, and other dimensions of the

responsibilizing “culture wars” only intensified as the cold war and civil unrest faded away.

The main forces driving these changes are subject to much debate, especially regarding how much causal importance should be credited to the initiative of politicians; to issue entrepreneurs like police, prosecutors, and prison contractors; to interest group and social movement advocates; and to “authentic” anxieties in the general public.³⁸ The role of evangelical and fundamentalist Protestantism, which is far less prominent in Europe, deserves attention, too.³⁹

But the key point for this essay is how the larger context of punitive penalty fueled the resurgence of capital punishment in America since the late 1970s. Richard Nixon strongly supported capital punishment, as has every successful presidential candidate since.⁴⁰ The demise of Michael Dukakis in 1988 clearly illustrates the converse: that insufficient enthusiasm for capital punishment can be a political deathblow. Bill Clinton paid considerable attention to this new reality. While campaigning for president, he returned to Arkansas to see that Ricky Ray Rector, a brain-damaged man with an IQ around 70, would be executed for killing a police officer and civilian. As president, Clinton signed an omnibus crime bill in 1994 that expanded the federal death penalty to some 60 different offenses, as well as the Antiterrorism and Effective Death Penalty Act of 1996. George W. Bush ran as the “death penalty governor.” During his six years as governor of Texas, he presided over 152 executions, more than any other governor in the recent history of the United States, and he also signed a bill limiting death penalty appeals in state courts. Bush boasted that those sentenced to death under his watch were surely guilty and had been granted due process, even though studies showed that legal counsel in Texas were often inadequate and that procedural practices in capital trials were frequently deficient.

All in all, the context of the renewed political momentum for capital punishment is clear: electoral politics at the federal and state levels was joined by consistent Court rulings inviting procedural challenges but insulating the core practice of capital punishment from challenge, all justified by reference to public opinion support by margins of 70 percent or more. The divisive, racially charged, punitive politics that transformed U.S. politics created a highly supportive environment for the death penalty, both materially and symbolically, that diverged dramatically from the political context in most of western Europe. At the same time, continuous tinkering with the machinery of judicial killing may well have made

the policy more palatable to elites and the public alike.⁴¹ Extended opportunities for postsentencing review initially provided comfort that a full and fair process would be granted to each person sentenced to death row. And, increasingly, the mass media and dramatic fiction reveled in sensationalizing murder trials, amplifying the focus on victims and their families, as well as rituals of “responsibilization,” while actual executions continued largely out of sight in the middle of the night with few observers and little news attention. Equally important is that electrocution, the gas chamber, and hanging were replaced by sanitized, ostensibly more humane processes of “killing softly” through lethal injection. The result was to portray executions as decent acts, not unlike “putting to sleep” a rabid or dangerous dog. One often-overlooked feature of these innovations is that they developed at the end of the twentieth century, after the completion of western Europe’s abolitionist transformation but squarely amid the resurgence of judicial killing in the United States.

Contemporary Context: Permanent War

The preceding account of historical developments since the late 1970s is crucial to imagining the future of capital punishment in the United States. We see little reason to expect major changes in the larger political context. After all, the Clinton era consolidated neoliberal policy discourse, including assent to the domestic “wars” on crime, drugs, and the underclass, in ways that almost no contemporary politician of any standing in either party has seriously contested. And we already noted that President Bush exceeded his predecessors as an advocate of harsh justice. His public standing plummeted largely due to the debacle in Iraq, but there was little shift in electoral discourse on the domestic issue of penal policy, including capital punishment, or on militaristic force as a key commitment abroad.

Many factors will sustain these dynamics into the future, but the political features of the “war on terror” are probably most important.⁴² As we see it, the “war on terror” has fueled the anxious obsessions with advancing security through hyperpunitive means that was associated with the cold war, but the former has little of the progressive silver lining of the latter. The similarities are not difficult to identify: a rhetoric constructing a dichotomous conflict between a virtuous We and a villainous Them; the high symbolic stakes for the future of “the free world”;⁴³ the increased militarization of political and civic discourse, as well as domestic policing and security practices; the compromising and trampling of civil liberties

at home and abroad; a fixation on willful violence as a problem and a solution; pressure for citizens to prove loyalty and defer to elites; and a relaxation of commitments to legal constraints and principles in order to meet the exigencies of "war."⁴⁴

But the differences in context between the present "war on terror" and the cold war are less well appreciated. Among the most important contrasts is that the cold war was at heart an ideological struggle, whereas the U.S.-led "war on terror" recognizes no ideas or vision worthy of challenge. On this view, terrorism occurs not in the name of a rival worldview that threatens our freedom but, rather (as American leaders have constructed it), in the name of a curious mix of religious rage and primitive barbarism. Moreover, whereas the cold war was almost entirely waged in terms of a competition between secular values, the "war on terror" has been propelled by unmistakably religious rhetoric and fervor, especially the righteous fury that figures so prominently in the Old Testament.⁴⁵ In this sense, the present war is anything but "cold."

These factors have undercut sensitivity to cultural difference and magnified racial antagonism in the United States; in addition, they have reduced the pressure of two ideological forces highlighted by the struggles against communism. First, however empty and misleading it was, communism's egalitarian, inclusionary ideology pressured Americans to act as if those values mattered in our own society, and the emergence of a vision of a Great Society in the hottest moments of the cold war is one indication of that influence. In the contemporary context, by contrast, discourse about social justice, equality, and rights-based inclusion has yielded almost completely to the dichotomy of "freedom and security" versus "terror."⁴⁶ Likewise, whereas the cold war context sharpened U.S. sensitivity to the moral and institutional authority of human rights, the "war on terror" has led U.S. leaders to ignore or distance themselves more from such influences than at any time since the mid-1950s. Hence, cold war pressures linked domestic violations of civil rights and liberties to world concerns, but the international obsession with U.S. torture, rendition, and the like has diverted attention away from similar forms of violent state action that take place every day on American streets, in police stations, and in prisons. In short, the "war on terror" has produced almost none of the ideological pressure that supported internal struggles for civil rights and justice in the United States and Europe during the cold war.

Moreover, the cold war domestic struggles initially built on the foundations of the egalitarian New Deal transformation. The present "war on

terror," by contrast, has developed in a domestic context grounded in reaction against the New Deal social welfare ethos and is committed, instead, to stigmatizing punitive discourse, policies, and practices. Far from providing ideological or political incentives to question racially charged punitiveness, the "war on terror" has built on and compounded such tendencies in our nation. We have no way of knowing how these pressures might play out in the future; they may diminish, but they are unlikely to recede quickly for the material and political sources of the tensions are rooted in enduring relationships around the world. Indeed, our leaders regularly remind us that this war is permanent and that there is no end in sight. When one adds the neoliberalizing pressures of globalization, the anxiously self-righteous punitiveness fed by the "war on terror," and the inertia of steady-state crisis that has dominated America in recent years, there is little reason to suppose that pressures to continue capital punishment will subside anytime soon. Optimistic abolitionists counter that well-grounded challenges to capital punishment have increased during this period, but what impresses us is how little influence these sophisticated assaults have had on elite and public support for retaining the ultimate sanction. As Marie Gottschalk concludes in her insightful study of the politics of mass incarceration, "The institution of capital punishment in the United States has been stubbornly impervious to rational or scientific arguments that have been its undoing elsewhere."⁴⁷ For this reason, too, a "completion" of the abolitionist trend like those evidenced in Europe is unlikely to occur anytime soon in the United States.

Institutional Promotion and Preservation of the Punitive Turn

Many factors contributed to the divergent political developments in Europe and the United States, but we have called special attention to the ways in which enduring institutional differences have mattered. We highlight, in particular, the fact that criminal justice policy making tends to be centralized in national parliamentary institutions throughout Europe, while authority over policing, corrections, and punishment of crime—including the death penalty—is largely decentralized to the state and local levels in the United States. This federal structure has insulated the American South from national pressure and centralized control. Decentralization has also facilitated the selective diffusion of reactionary punitive policies long identified with the South throughout other regions of the

country, the lower Midwest and the Southwest especially, thus producing a variegated pattern of executing states, symbolic retentionist states that do not execute, and abolitionist states.⁴⁸

At the same time, provisions for the election of national representatives and local sheriffs, attorneys general, and prosecutors, as well as mayors and other local executives responsible for appointing law enforcement leaders, opened the way for the politicized ratcheting up of punishment policy.⁴⁹ Stuart Scheingold has shown how the decentralized locus of criminal authority actually liberates national politicians to take the lead in developing the symbolic rhetoric of “law and order” politics for which they are obligated to deliver little in practice.⁵⁰ By contrast, many commentators emphasize that European nations are “less democratic,” thus freeing elites to defy public opinion in ways that are not possible in the United States.⁵¹ We find that general claim problematic, because harsh punishment has been driven in significant part by political elites,⁵² though we do agree that the dynamics of U.S. institutions are distinctive in important ways. Finally, the role of appellate courts in policing the constitutionality of crime policy and practice has shaped American capital punishment in unique ways, chiefly by framing death penalty issues in ways that have preserved the institution of state killing.⁵³

These institutional features not only encouraged growth of the punitive penal complex, they will sustain the politics of law and order, including capital punishment, for a long time to come. It is in this historical and institutional light that we examine three potential paths to abolition: Congress, the Supreme Court, and diffusion between individual states.

Congress

Congress has clearly helped escalate law and order politics, both symbolically and materially.⁵⁴ Indeed, the dramatic expansion of federal power in crime-control policy, fortified by national security concerns at various points, is one of the key features of the political history of the United States during the last half of the twentieth century. But even if some push toward reversing the punitive turn developed, Congress could abolish capital punishment in only two ways. It could eliminate the federal death penalty, which, in turn, might provide momentum for abolition at the state level. But the federal death penalty seems even less vulnerable to challenge than state penalties are because it is rarely applied in practice and because when it is used, it is usually for high-profile offenders—terrorists

in particular (such as Timothy McVeigh)—which is the type of criminal for which the death penalty is least controversial. Congress could also pass a constitutional amendment to abolish the death penalty, but this requires a supermajority of two-thirds in both houses and ratification by three-quarters of the states—thresholds that would be extremely difficult to meet, primarily because of the strong support that exists for capital punishment in at least 13 of the 50 states.

Supreme Court

We have already seen that constitutional litigation was a key strategy in the 1960s, mobilizing the authority of judicial review that was important to the civil rights legacy and producing what many consider a “near miss” for death penalty abolition. But, again, we find that judgment misleading: only two abolitionists sat on the Court, new Nixon appointees led a large majority in support of capital punishment, and only a bare majority was willing to suspend the practice while procedural adjustments proceeded—and even then only for a short while. Far from stopping just short of abolition, the Court has consistently and almost unqualifiedly supported the death penalty as law, moral symbol, and practice. The Supreme Court not only upholds *de jure* judicial killing as consistent with the Eighth Amendment but also deflects direct challenges by channeling claims in procedural and technical directions. Many of the procedural adjustments have reinforced the institution. Among the most important of these have been restrictions on postsentencing appeals and dismissals of aggregate statistical evidence that demonstrates racial bias in capital sentencing. The Court has insulated capital punishment from such claims and delivered notice that the entire criminal justice system is immune to similar challenges. As Powell wrote in *McCleskey*:

McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Thus, if we accepted *McCleskey's* claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.⁵⁵

This passage is important for many reasons. Most centrally, it asserts that death is not a unique or different state mechanism that requires special

legal limitations; it is, rather, an integral part of the hierarchical, exclusionary system of control in the modern neoliberal state.⁵⁶

Individual justices have become prominent and frequently quoted advocates of capital punishment. The most important may be Antonin Scalia, who has defended executions as crucial for public order, as consistent with the Bible, as appropriate to avenge the death of victims and the pain of their loved ones, and as far more humane than the grisly murders committed by those condemned to death.⁵⁷ Against procedural and technical challenges, he intones, executions need not be painless or perfect in order to be constitutional. Scalia has also expressed scorn for European criticism of U.S. policy and law. By contrast, the few vocal opponents among the Justices—Blackmun in particular—only turned abolitionist in or near their retirement from the Bench, after ruling in support of capital punishment for many years. The present Court knows no vocal abolitionist, though Justice Stevens has turned critical after supporting death for decades, dating back to the 1970s. That five Catholics sit on the Court seems to matter little; a group of young, articulate, conservative males are likely to prevail for a long time to come. In short, the Roberts Court is a long way from the Warren Court, whose liberalism is routinely overestimated and did not extend to the abolition of capital punishment. For these reasons, we “see the posture of the current Supreme Court as a massive and virtually insurmountable obstacle” to abolition in the next few decades.⁵⁸

We also are influenced by the considerable historical research showing that the Supreme Court rarely takes bold actions to challenge or change prevailing policies, intervening only when strong policy coalitions support its action.⁵⁹ Such extrajudicial forces supported both the *Brown v. Board of Education of Topeka* (1954) decision that overruled legal segregation and the Court’s willingness to entertain procedural but not substantive challenges to capital punishment in the 1970s. A strong shift toward presidential and congressional support for abolition or a large increase in the number of abolitionist states would likely have to take place before the Court would impose substantive constitutional prohibitions.

The most recent ruling of the Court seems to confirm this reading. In *Baze v. Rees* (2008), the Court endorsed lethal injection—the same protocol used in all but one of the 38 death penalty states—by a 7–2 margin. It is true that Stevens added intrigue by protesting that execution is a “patently excessive and cruel and unusual punishment violative of the Eighth Amendment,” but this cry of protest was overridden by his curious

deference to precedent and concurrence with the majority ruling. The two dissenters, Souter and Ginsburg, argued blandly that the case should be remanded so that the Kentucky Supreme Court could reassess local protocol according to best practices in other states, while Scalia, Thomas, Alito, and Roberts debated how best to discourage further legal challenges. Dahlia Lithwick, senior editor at *Slate*, summarized the implication in terms that well fit the theme of this volume: “[T]o the extent *Baze* was supposed to be a sort of test drive for doing away with capital punishment altogether . . . it seems to have been driven off a cliff.”⁶⁰

We acknowledge that judicial “tinkering” with the processes of sentencing and the technologies of execution should not be treated as insignificant. Recent rulings that exclude juveniles and the mentally retarded from death sentences⁶¹ and that emphasize the imperative of individualized decision-making are rightly welcomed by opponents of judicial killing. Similarly, the practice of admitting DNA tests has prevented wrongful executions. Although DNA evidence has often been used to confirm guilt and to legitimate harsh sentences imposed on the guilty, the innocence movement surely has softened elite and popular support for capital punishment.⁶² Challenges to lethal injection and other technologies of death have further hobbled the machinery of death. Thus, our point is not that procedural tailoring by the Supreme Court and by legislatures is inconsequential; rather, we agree with Hugo Adam Bedau:

Each of these reforms has entrenched ever deeper what remains of the death penalty, which makes what remains of it more resistant to complete repeal. Reform . . . does this by making those who are sentenced to death under its authority seem more deserving of such a penalty. Every step toward greater fairness in death penalty sentencing makes it that much harder to dismantle what’s left.⁶³

The Court’s procedural rulings have also had the ironic, even tragic, effect of “normalizing” harsh punishments throughout the criminal justice system.⁶⁴ We have no crystal ball, but it is hard to imagine all that would have to happen for a major departure from support for the death penalty by the nation’s highest courts. But this is not to say never. Some observers note that it took 60 years before *Plessy* was reversed by *Brown*; the latter took a long time, but it did eventually happen. Perhaps we will witness the abolition of capital punishment by the Supreme Court 60 or so years after *Gregg*. But we will not hold our breaths.

Diffusion among States

If the federal institutions of the Supreme Court and Congress are unlikely routes to abolition, what are the prospects for the diffusion of abolition among individual states? Ideas and policies sometimes spread “just like viruses do,”⁶⁵ and in many contexts “nothing spurs adoption of new ideas like other actors doing the same.”⁶⁶ Might the United States be near a “tipping point” that could lead to national abolition within a decade or two?

Although there are some reasons for optimism, we believe the majority of states remain “a long, long way from giving up” capital punishment.⁶⁷ Consider the good news first. At the time of this writing (April 2008), 14 states have abolished the death penalty, and legislatures in several others—Maryland, Montana, Nebraska, New Mexico, and South Dakota—“appear to be within one or a few key votes of following suit.” While the death penalty remains on the books but unused for decades in at least four other states, another five states “have each executed only one person during the last 40 years.”⁶⁸ More broadly, there has been a “remarkable increase” in the number of abolitionist jurisdictions worldwide, from 29 percent of all countries in 1988 to 52 percent in 2007.⁶⁹ In fact, more countries abolished capital punishment in the 20 years after 1980 than in the preceding 200.⁷⁰ If American states were to ride this wave, capital punishment could disappear quickly.⁷¹

But that is a big “if.” For one thing, the forces that have promoted abolition elsewhere in the world seem to have little traction in the United States.⁷² For example, there has been little political leadership on death penalty issues in the United States, and without a history of totalitarianism to reject, there is also no incentive for American leaders or publics to distance themselves from the execution excesses of previous regimes, as happened in many nations that have abolished it.⁷³ Indeed, the perils of actively opposing capital punishment can be seen in the electoral misfortunes of former New York Governor Mario Cuomo, whose 1994 reelection loss to a political newcomer was at least partly the result of his annual vetoes of death penalty bills that New York’s state legislature had passed.⁷⁴ Similarly, former Illinois Governor George Ryan’s reservations about capital punishment improved neither his political fortunes nor his standard of living (he is now mopping floors in a federal prison). Further south, Virginia Governor Mark Warner’s courageous decision to permit a new test of DNA from Roger Keith Coleman did not exactly create clear incentives for leaders in other Southern states to adopt unorthodox death penalty positions.⁷⁵

Narrowing the frame of analysis to domestic considerations generates additional doubts about the prospects for state-to-state diffusion. In the years between *Furman* (1972) and the emergence of the innocence movement in the 1990s, America’s own anti-death penalty movement was ineffective for three main reasons: it had little money, it framed death penalty issues in ways that held little appeal for most citizens and that inhibited more directly political opposition to the institution, and it consisted primarily of “eastern-based national organizations with weak state affiliates and few local ones.”⁷⁶ Since the innocence movement started to accelerate in the early 1990s, state-based “Innocence Projects” have proliferated at the local level and anti-death penalty frames have become significantly more “pragmatic,” as some analysts argued they must.⁷⁷ Yet America’s anti-death penalty movement continues to be centered in national organizations such as Amnesty International USA, the ACLU, the NAACP Legal Defense and Educational Fund, the National Coalition to Abolish the Death Penalty, and the American Bar Association. Whatever the substantive merits of their positions—and we believe they are considerable—it must be recognized that the anti-death penalty views of these organizations are frequently greeted with indifference and scorn in death penalty strongholds such as Texas, Virginia, and Oklahoma. We see little reason to suppose those domestic missionaries will receive a more enthusiastic reception anytime soon.

Another reason for pessimism about the possibility of diffusion comes from the history of states that have already abolished the death penalty. There is not a large literature on the history of abolition in individual American states, but what there is suggests a few salient truths. The most comprehensive study indicates that elite views (of political and religious elites especially), the media, and population diversity have often played pivotal roles in death penalty debates at the state level. In particular, newspaper coverage of racial problems in capital punishment and either a high or low proportion of racial minorities in the population tend to correlate with abolition in individual states.⁷⁸ But of all Americans, evangelical Christians hold some of the strongest pro-death penalty views, and they and their organizations are especially influential in that part of the country—the South—where death sentences and executions are most frequent.⁷⁹ Similarly, most Southern states have minority populations that fall between the high and low abolition-prone poles, and their medium share of the population appears to be one reason why they pose a “racial threat” to state governments and publics—a threat that helps explain both

the legal status of capital punishment in various American states and the distribution of death sentences and executions across the country.⁸⁰

The real obstacles to abolition in America are old, durable, and Southern. The institution of slavery caused death penalty events to take very different trajectories in the North and South, so that by the time of the civil war there was already “a wide gulf between the northern and southern states in their use of capital punishment.”⁸¹ That gulf has since widened. Between 1950 and 1964, some 60 percent of all American executions were conducted in the South; during the last two decades of the twentieth century, the Southern share rose to 81 percent. And given a death sentence, the risk of execution in states such as Ohio, Pennsylvania, and California is only about 1/50th the risk in southern states such as Texas, Virginia, and Oklahoma.⁸² In 2007, the most recent year for which figures are available, the United States conducted “only” 42 executions, 26 of them (62 percent) in Texas.⁸³ No other state executed more than three people. Some analysts believe that “the day is not far off when essentially all executions in the United States will take place in Texas,”⁸⁴ but we think that is an unlikely prospect. The day has already arrived, however, when executions in the United States are overwhelmingly a Southern thing. Greater diversification of executions across the United States could increase the vulnerability of death penalty systems to outside scrutiny by generating more attention to the issue in states where it was not previously salient,⁸⁵ but executions are actually becoming more heavily concentrated in the South, not more diversified elsewhere. What is more, there has been a notable trend in the South over recent years to *increase* the range of offenses that are eligible for capital punishment.⁸⁶ It is not surprising, then, that, immediately after the Supreme Court’s recent ruling in *Baze*, “execution dockets are quickly filling up.”⁸⁷ Less than three weeks after the ruling, 14 execution dates had been set, all except one in Southern states.⁸⁸

Finally, some abolitionists believe that the current financial crisis will cause some states, including California and Georgia, to deal with the high public costs of capital punishment by eliminating the institution.⁸⁹ Recent evidence suggests that this might happen to some degree. In February 2009, the *New York Times* reported that lawmakers in at least eight states—Colorado, Kansas, Nebraska, New Hampshire, Maryland, Montana, New Mexico, and Washington—have seriously discussed abolishing the death penalty in order to cut costs amid huge budget deficits.⁹⁰ However, all of these are low execution states, and none is in the South. By contrast, the next day’s headline in the *Dallas Morning News* reported that “high costs

figure into the death penalty debate, but Texas holds firm.”⁹¹ It appears cost concerns are most salient where executions are infrequent, especially outside the South, and even then, fiscal imperatives have not yet led to many abolitions (though cost was one concern among many in the New Jersey abolition of 2007). To date, the main response of most states to fiscal pressures has been to release prisoners sentenced for the least violent crimes and to leave funding in place for dealing with the worst, and (in Louisiana and elsewhere) to cut back on the number of death sentences that prosecutors pursue.⁹² This is consistent with one study comparing state policies on capital punishment which found that, “in themselves, economic factors do little to explain death penalty abolition in the United States.”⁹³

If “the beginning of the end” of American capital punishment has already started, as some analysts contend,⁹⁴ the actual end remains beyond our ability to see. The fact is, only one American state has abolished the death penalty since the Supreme Court reinstated it in 1976 (New Jersey, in December 2007). Several other states may now be teetering on the edge, but none is sufficiently Southern to suppose that abolition in them could spark change in those parts of the country that have long given American capital punishment its distinctively Dixie quality.

Imagining Change

Skepticism is not certainty. We think the prospects for formal abolition in the United States during our lifetimes are not good,⁹⁵ but we also can imagine circumstances in which the pace of change could accelerate. In this section, we explore some possibilities for change, including the potential for a reversal on the American “road to abolition” and the chance of one or more European jurisdictions restarting their own death penalty engines.

In some respects, there has been remarkable progress toward the desired destination of *de jure* abolition in the United States. In Amnesty International’s terms, the United States remains in the same “retentionist” death penalty category as it always has been, even though its death penalty policy and practice are vastly different from what prevailed in Pilgrim society or even in the period before World War II: this occurs in the crimes punished with death, in execution methods and rituals, in arguments for and against state killing, in the centrality of religious justifications and

ceremonies, in the way Americans experience and understand the death penalty, and in countless other ways.

There have been major changes in more recent years, too. Nationwide, the number of death sentences has dropped by almost two-thirds, and the volume of executions by nearly three-fifths since their post-*Furman* peaks in the late 1990s. Some numbers are down in Texas, too, with only 14 death sentences in 2006 compared with 40 a decade before. At present, fewer than 3 percent of the nation's death-row prisoners are executed in any given year, and in states such as California, execution is the third leading cause of death for death-row inmates (after suicide and natural causes). Concerns about lethal injection prompted 12 states to temporarily ban executions before the U.S. Supreme Court decided late in 2007 to stop executions everywhere until it ultimately decided (in *Baze v. Rees*) that Kentucky's lethal injection procedure does not pose an unconstitutional risk of pain to the condemned.⁹⁶ And we already noted that the nation's highest court recently declared that it is unconstitutionally "cruel and unusual" to impose capital punishment on the mentally retarded or on persons who committed their crimes while juveniles. In these ways, we are in "an amazing moment of national reconsideration that would have been unimaginable a decade ago."⁹⁷

So we shall try to imagine another unimaginable outcome: the disappearance of the death penalty throughout the United States before the year 2030. What could cause that to happen? More precisely, what sorts of forces have the capacity to break through the gridlock of cultural ambivalence, institutional inheritance, and American angst over "the contradictions of capital punishment" and lead the country to the end of "the road to abolition" and the demise of a "thoroughly screwed-up system" of capital punishment that pleases almost no one?⁹⁸

We see two possibilities. The first is some dramatic triggering event, such as a clear case of wrongful execution involving a sympathetic offender who gets put to death despite strong protests of actual innocence that are vindicated after the fact. This issue is raised by the film *The Life of David Gale*, and something like it was one proximate cause of the formal abolitions in the United Kingdom and Australia.⁹⁹ In South Korea, too, the president who moved Asia's abolitionist vanguard far along the road to abolition (Kim Dae Jung) was himself wrongly sentenced to death in the early 1980s, and his own personal experience with capital punishment—and the personal experiences of other Korean leaders and abolitionists—helps explain why that country has rapidly changed from being

a vigorous executing state to being "abolitionist de facto."¹⁰⁰ Another step toward abolition in Korea could come from a 2007 court decision that posthumously acquitted eight innocent men who were executed in 1975.¹⁰¹ As these and other national experiences suggest,¹⁰² high-profile miscarriages of justice could provoke rapid and significant change in the United States as well, where "the issue of innocence, more than any other factor, has changed the climate surrounding state killing"¹⁰³ and prompted "a reconsideration of the legitimacy of capital punishment."¹⁰⁴

The second stimulus for abolition could be international. Led by Europe, some nations of the world are using extradition policy and treaty obligations to pressure the United States to end capital punishment. So far, American political leaders have remained deaf to such cries, but the toll of domestic challenges about procedure and foreign challenges about substance has grown. If the United States finds itself vulnerable in some foreign policy venture and in need of allies in this age of terrorism, we can imagine an American leader making significant death penalty concessions. If, for example, Osama bin Laden is arrested for planning to blow up the Eiffel Tower in Paris or the Coliseum in Rome, the Ministry of Justice in either of those nations might refuse to extradite him to the United States for trial on charges of killing 3,000 people on that blue September morning unless American officials agree not to seek the death penalty.¹⁰⁵ A concession like that in a case involving an offender who is widely regarded as the very "worst of the worst" could undermine commitments to capital punishment in other cases and places, though that is not what happened in the Washington State case of the "Green River Killer," Gary Ridgeway, one of the most prolific serial murderers in American history (he admitted killing 48 women and may have killed many more) who plea bargained his way to a noncapital sentence in 2003. Alternatively, if America's "war on terror" takes a turn from the very bad to the considerably worse, the United States could find itself desperate for support from Europe in order to solve a pressing problem in (say) Iran or North Korea. If European leaders do something they have not done before—link their own cooperation to American compliance with the continent's death penalty orthodoxy—then America's executioners could be retired in relatively short order.

The confluence of domestic concern over a high-profile miscarriage of justice and an international imperative that gets linked to capital punishment might be an especially powerful combination,¹⁰⁶ but the conjuncture of two triggering events is a lot less likely than the occurrence of only one or the other. In any event, these seem to us unlikely possibilities. Since

1973, Americans have watched 126 persons walk away from death rows in 26 states because of evidence of their innocence (Florida and Illinois have the most releases, with 22 and 18, respectively). While this innocence movement has had several salutary consequences, including the commutation of 167 capital sentences in Illinois in 2003, formal abolition has not been one of them. Even in New Jersey, the only state that has abolished the death penalty since the *Gregg* decision of 1976, the commission that recommended abolition and the State Assembly and governor who passed the legislation were motivated by a collection of concerns much wider than the possibility of miscarriage.¹⁰⁷ More fundamentally, public opinion about crime and punishment “may be much more fixed and inflexible” than abolitionist analysts would like,¹⁰⁸ and public opinion about capital punishment may be considerably more central to the issue of its retention and considerably more resistant to change through rational argument than was the case in Europe.¹⁰⁹ Among other things, racial prejudice tends to be a strong and stable value, white support for capital punishment has a strong basis in racial prejudice, and white support is therefore “relatively intractable to intentional efforts by informational campaigns to change it.”¹¹⁰ Similarly, the transnational scenarios raised in the preceding paragraph are possible to imagine, but the persistent American insensitivity to European claims and frames seems to us a much likelier feature of America’s death penalty future than would be significant death penalty concessions made during a foreign policy crisis. Indeed, it is unclear how the executive branch of government could dictate death penalty policy to Texas or Oklahoma even if the international stakes were nuclear.

So we end this attempt to imagine change with the same notes of caution and skepticism that introduced this essay. It is possible to visualize future events that could trigger the early demise of America’s death penalty, and it is certainly easier to imagine that possibility than it is to see how America’s prison complex could reduce its enormous scale by, say, one-half in the next 20 or 30 years. But it is still hard to imagine. For us, anyway, imagining an early funeral for American capital punishment is no easier to do than imagining scenarios in which the death penalty accelerates again, as it did after the decision in *Gregg*. This is also what happened in Japan after the gas attacks in the Tokyo subways in 1995. In the only other developed democracy that still uses capital punishment on a regular basis, records were set in 2007 for the number of death sentences (46), the number on death row (106), and the number of executions (9),¹¹¹ and these capital indicators could well go higher in the years to come. In the

United States, a terrorist attack at the Houston Astrodome or the Orlando Disney World could unleash enthusiasm for executions that has not been seen for decades. Although unlikely, an aggressively anti-death penalty decision by the U.S. Supreme Court—a second *Furman* decision—could also stimulate another death penalty backlash in some states.

The other pessimistic possibility to consider is whether terrorism or some other triggering event in Europe could cause the executioner’s resurrection on the continent. Writers in this volume assume that the puzzle to explain is the pace of death penalty change, not its direction. The premise deserves scrutiny because the chance of a European comeback may not be negligible. In some parts of central and eastern Europe, leaders and citizens “pine for the capital punishment that they had to give up to join the European club.”¹¹² On the eve of the millennium, public support for the death penalty in eastern Europe was 60 percent, compared with 60 percent against in western Europe, and in recent years politicians in the east have started to recognize and appeal to that sentiment. The guardians of European abolition tend to dismiss talk of a resurrection as little more than political gamesmanship, and they threaten to impose sanctions (or even expulsion from the European Union) on any death penalty deviants that might emerge. But if a terrorist attack strikes Budapest or Warsaw, where leaders have spoken openly and often about restoring capital punishment, the subject could shift from whether to have the death penalty to how to conduct executions. To venture a guess, we believe the chance of a terrorist-related execution in Europe before 2030 is at least as large as the chance of abolition in Texas by the same date.

Final Thoughts

So where is the United States on the road to abolition? In this essay, we argue that we are both close and far. Except for the fact of retention, the death penalty in America today is little like what it was in previous centuries and decades. At the same time, in some parts of the country capital punishment is still moving along “with all cylinders working.”¹¹³ In short, we believe American capital punishment has been rocked but still is rolling along, and in the preceding pages we have tried to demonstrate that there are good reasons to believe it will continue rolling—if neither smoothly nor fast—for some years to come.¹¹⁴ Ironically, many of the repairs that have helped “tame” and “civilize” capital punishment—introducing

degrees of murder, ending public executions, giving capital juries sentencing discretion, humanizing methods of execution, and federalizing appellate review—may well have had the effect of fortifying what remains of the ultimate penalty, making what survives even “more resistant to complete repeal.”¹¹⁵

More broadly, the death penalty in the United States today is supported and sustained by many of the same institutional, historical, and cultural features that produce “harsh justice” in American penalty more generally.¹¹⁶ Abolition may depend on weakening the larger complex of penalty and Americans’ attachment to severe punishment as a preferred means of solving problems and expressing values. It is possible to imagine scenarios in which the death penalty and harsh justice could be decoupled, but if abolition is separated from reform of the larger penal complex, the advance will be limited and perhaps even Pyrrhic.

In recent years, America’s anti-death penalty movement has made progress not seen for decades, and the increase of life without parole (LWOP) alternatives to capital punishment has played a prominent role in that push. But the availability of LWOP has had little effect on the number of executions, while causing significant increases in sentence lengths for offenders who never would have been sentenced to death under the preexisting system. In this regard, the increasing number of those who die on death row while awaiting execution parallels the increasing number of those who die while serving life terms. Since research shows that LWOP statutes are “neither a necessary nor a particularly useful step toward eliminating the death penalty,” abolitionists “have a responsibility to consider carefully the effects of such laws on non-capital defendants before they engineer or encourage their passage.”¹¹⁷ But “careful consideration” of that kind is rarely seen. Abolition of capital punishment is an important good, but it is not the only good. This reminder would be facile were it not so frequently forgotten.

Another troubling possibility is that successful abolition could make other punishments harsher. Abolition was one precursor of America’s massive prison expansion after the U.S. Supreme Court effectively eliminated the death penalty in 1972. In some contexts, the presence of capital punishment deflects attention from the harshness of punishments for noncapital crimes, thereby “normalizing” severe noncapital sanctions,¹¹⁸ but the absence of capital punishment could also perform similar legitimating functions. The *Furman* Court’s rejection of the death penalty gave rise to a major punitive pushback in the form of LWOP statutes, and the Supreme Court’s decision on abolition for juveniles in the *Roper* case of

2005 had a similar effect in Texas.¹¹⁹ As of 2005, almost 10 percent of the nation’s prisoners—about 132,000 persons—were serving life sentences, and 28 percent of them (37,000) had no chance of parole.¹²⁰ Fully 10,000 American lifers in 48 states committed their crimes before they were old enough to vote, serve on a jury, or gamble in a casino, and more than one-fifth of them have no chance for parole.¹²¹ This volume of life and life without parole punishment represents a reliance on severe sanctions that is unmatched in the world.¹²² Indeed, the American life imprisonment rate—44 life sentences per 100,000 population—is higher than the overall incarceration rate was in Japan until the year 2000. It is by no means obvious that America’s noncapital harshness will decrease merely because more states abolish the ultimate punishment. In this regard, it is notable that one impulse for abolition comes from “death in prison” proponents, who would make LWOP even more severe than it already is as a replacement for execution: “People so sentenced would still be sent to death row, a special prison unit where there would be no recreation time, no rehabilitation programs, no socializing, no life-extending medical treatment.”¹²³

Conversely, it is possible that retaining the death penalty in principle could provide politicians with the cover they need to reduce the severity of other sanctions and to begin dismantling some features of the carceral state, especially in the environment of fiscal crisis that now prevails in many states. In the end, this might be the best that realists can hope for in the anxious, stratified, neoliberal American present: few executions, some reduction in the incarceration of lower-level offenders, and retention of capital punishment as a symbol that assures the many people who believe harsh punishment is necessary in order to secure the freedoms of the deserving members of the moral community.¹²⁴

NOTES

1. David Von Drehle, “Death Penalty Walking,” *Time*, Jan. 3, 2008. Available at <http://www.time.com/time/magazine/article/0,9171,1699855,00.html>.
2. Richard Dieter, executive director of the Death Penalty Information Center, quoted in Ed Stoddard, “Religion, Culture behind Texas Execution Tally,” *Reuters*, Aug. 12, 2007.
3. Dahlia Lithwick, “The Capital Gang: The Supreme Court Jump Starts the Machinery of Death,” April 19, 2008. Available at <http://www.slate.com/id/2189284/> (last accessed April 20, 2008).

4. Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (New York: Oxford University Press, 2008), p. 410.
5. James Payne, *A History of Force* (Sandpoint, Id.: Lytton, 2004).
6. We use the term "state killing" much as other abolitionists do, but we do so warily. Many states conduct extrajudicial executions (a category that includes police shootings, "disappearances," counterinsurgency efforts, and war), and the relationship between levels of extrajudicial and judicial killing is a neglected topic of inquiry. For research suggesting there is little correlation between the two but there may be "common causation," see David T. Johnson and Franklin E. Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (New York: Oxford University Press, 2009).
7. Hugo Adam Bedau, "An Abolitionist's Survey of the Death Penalty in America Today," p. 24, in Hugo A. Bedau and Paul G. Cassell, eds., *Debating the Death Penalty* (Oxford: Oxford University Press, 2004).
8. For example, Nassim Nicholas Taleb, *The Black Swan: The Impact of the Highly Improbable* (New York: Random House, 2007); and Philip E. Tetlock, *Expert Political Judgment: How Good Is It? How Can We Know?* (Princeton, N.J.: Princeton University Press, 2005).
9. David Garland, "Capital Punishment and American Culture," *Punishment and Society* 7 (2005), p. 347.
10. Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* (Princeton, N.J.: Princeton University Press, 2001).
11. Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2007), p. 41.
12. Franklin Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* (Cambridge: Cambridge University Press, 1986); Garland, "Capital Punishment"; Payne, *History of Force*.
13. Richard J. Evans, *Rituals of Retribution* (Oxford: Oxford University Press, 1996); Stuart Banner, *The Death Penalty: An American History* (Cambridge: Harvard University Press, 2002).
14. For more, see Peter Fitzpatrick, chap. 10 in this volume. In our view, the degree to which the United States has followed a different trajectory from Europe in reliance on the mechanisms of discipline and punishment is critical to understanding the history outlined here.
15. Franklin E. Zimring, *The Contradictions of American Capital Punishment* (Oxford: Oxford University Press, 2004), p. 17. See also Zimring and Hawkins, *Capital Punishment*, and Garland, "Capital Punishment."
16. Zimring, *Contradictions*, p. 18.
17. Garland, "Capital Punishment."
18. For a compelling documentation of this transformation, which grew out of aversion to war and state violence more generally, see the powerful book by James J. Sheehan, *Where Have All the Soldiers Gone? The Transformation of*

Modern Europe (New York: Houghton Mifflin, 2007). The linkage between capital punishment and other forms of state violence, especially war, is implied in our analysis, but systematic study of the subject is rare. For an exception, see Robin Wagner-Pacifici, chap. 9 in this volume.

19. Zimring, *Contradictions*, p. 18.
20. *Ibid.*, p. 23.
21. *Ibid.*, p. 27.
22. William A. Schabas, "Public Opinion and the Death Penalty," p. 317, in *Capital Punishment: Strategies for Abolition*, ed. Peter Hodgkinson and William A. Schabas (Cambridge: Cambridge University Press, 2004).
23. Mary L. Dudziak, *Cold War, Civil Rights: Race and the Image of American Democracy* (Princeton, N.J.: Princeton University Press, 2000); Azza Salama Layton, *International Politics and Civil Rights Policies in the United States, 1941-1960* (Cambridge: Cambridge University Press, 2000); Philip A. Klinkner, with Rogers M. Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America* (Chicago: University of Chicago Press, 1999); Thomas Borstelmann, *The Cold War and the Color Line* (Cambridge: Harvard University Press, 2001). In addition, the novels by Walter Moseley about life for the returning soldier Ezekial "Easy" Rawlins capture this aspect of black experience.
24. Quoted in Dudziak, *Cold War*, p. 87. John Rankin was a U.S. Representative from Mississippi who called civil rights activists "commies."
25. Carol Anderson, *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights* (Cambridge: Cambridge University Press, 2003).
26. Many national leaders recognized the issue, including Congressman Jacob Javits of New York, who repeatedly made this point in pressing for civil rights reforms: "With Communist China as a propaganda base, segregation and discrimination on grounds of race, creed or color in the U.S. can be used to win tens of millions to the Communist cause." The problem of discrimination was "a question of great relevance to the foreign policy of the U.S." Quoted in Dudziak, *Cold War*, p. 87.
27. Herbert Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1974* (New York: Oxford University Press, 1996), pp. 23-54.
28. *Ibid.*, p. 44.
29. *Ibid.*
30. Naomi Murakawa, "The Origins of the Carceral Crisis: Racial Order as 'Law and Order' in Postwar American Politics," unpublished ms., 2006.
31. Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics* (New York: Oxford University Press, 1997).
32. Stuart Scheingold, *The Politics of Law and Order: Street Crime and Public Policy* (New York: Longman, 1984).

33. Garry Wills, *Nixon Agonistes: The Crisis of the Self-Made Man* (New York: Houghton-Mifflin, 1969), p. 533.
34. Quoted in Beckett, *Making Crime Pay*, p. 31.
35. Scheingold, *Politics of Law and Order*.
36. For more, see Naomi Murakawa's path-breaking empirical study, "Elected to Punish: Congress, Race, and the Rise of the American Criminal Justice State" (Ph.D. diss., Yale University, 2004).
37. By 1997, over 50 percent of the American prison population was black or Hispanic, which was twice the percentage of 1930. Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage, 2006).
38. For example, Scheingold, *Politics of Law and Order*; Beckett, *Making Crime Pay*; and Jonathan Simon, *Governing through Crime* (New York: Oxford University Press, 2008). The most complex and subtle analysis of these processes is David Garland, *The Culture of Control* (Chicago: University of Chicago Press, 2001). See also Gottschalk, *Prison and the Gallows*.
39. Michael Tonry, "Crime and Human Rights: How Political Paranoia, Protestant Fundamentalism, and Constitutional Obsolescence Combined to Devastate Black America—The American Society of Criminology 2007 Presidential Address," *Criminology* 46 (2008), p. 1. The considerable overlap between the "Bible belt" and the "death belt" has received much scholarly attention. See, for example, Carol S. Steiker, "Capital Punishment and American Exceptionalism," *Oregon Law Review* 81 (2002), p. 124; and Carol S. Steiker and Jordan M. Steiker, "A Tale of Two Nations: Implementation of the Death Penalty in 'Executing' versus 'Symbolic' States in the United States," *Texas Law Review* 84 (2006), p. 1869.
40. Jimmy Carter supported capital punishment while governor of Georgia. He signed legislation to authorize the death penalty for murder, rape, and other offenses, as well as to implement trial procedures invited by *Furman* and approved in *Gregg*. Carter later became an opponent of capital punishment, but his previous role as a supporter was crucial to his bid for the presidency.
41. The best book connecting the matters discussed in this paragraph is Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* (Princeton, N.J.: Princeton University Press, 2002).
42. For related insights, see Pacifici-Wagner, chap. 9 in this volume.
43. This dimension is well captured in Benjamin Barber's *Jihad vs. McWorld* (New York: Ballantine, 1996).
44. On the relationship between a nation's international involvement in war and internal punitiveness, see the chapter "Violent Acts and Violent Times: The Effect of Wars on Postwar Homicide Rates," in Dane Archer and Rosemary Gartner, *Violence and Crime in Cross-National Perspective* (New Haven, Conn.: Yale University Press, 1984), pp. 63–97.
45. Domestic discourse did pit righteous Judeo-Christian America against the godless Soviets and Chinese, but this was muted by the need to appeal to allies

around the world where our religious traditions were less prevalent. One result was an emphasis on secular civic visions, including faith in rule of law and scientific progress.

46. Carol Steiker has observed that the focus on terrorism may actually reduce concern about "everyday" murder: obsession with 9/11 terrorists may overshadow fear of routine violence at the 7/11 (conference on "The Road to Abolition," Harvard University, 15 February 2008). Even if this is true, it may reduce demand for executions without leading to termination of the death penalty itself.
47. Gottschalk, *Prison and the Gallows*, p. 233.
48. Steiker and Steiker, "Tale of Two Nations."
49. Stuart Scheingold, *The Politics of Street Crime* (Philadelphia: Temple University Press, 1992).
50. Scheingold, *Law and Order*.
51. James Q. Wilson, *Thinking about Crime* (New York: Basic Books, 1975); Banner, *Death Penalty*.
52. Beckett, *Making Crime Pay*; Gottschalk, *Prison and the Gallows*; Simon, *Governing through Crime*.
53. Gottschalk, *Prison and the Gallows*, p. 198.
54. For more, see Naomi Murakawa's study of congressional dynamics in the "law and order" surge from the 1970s through the 1990s, "Elected to Punish."
55. *McCleskey v. Kemp*, 481 U.S. 279 (1987).
56. This argument is also made by Timothy Kaufman-Osborne in "A Critique of Contemporary Death Penalty Abolitionism," *Punishment and Society* 8, no. 3 (2006), pp. 365–83. In several ways, Kaufman-Osborne's more philosophical argument parallels and complements the analysis in this chapter.
57. *Callins v. Collins*, 114 S.Ct. 1127 (1994). See also Antonin Scalia, "God's Justice and Ours," *First Things: A Journal of Religion and Public Life* (2002), pp. 17–21 (arguing that the constitutionality of capital punishment is clear and its morality is grounded in the conviction that government derives its authority from divine sources).
58. Bedau, "Abolitionist's Survey," p. 30.
59. Mark Graber, "The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7 (1993), pp. 35–36; George I. Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* (New York: Cambridge University Press, 2003); Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* (Princeton, N.J.: Princeton University Press, 2008).
60. Lithwick, "Capital Gang."
61. *Roper v. Simmons* (03-633) (2005) and *Atkins v. Virginia*, 536 U.S. 304 (2002), respectively.
62. Frank R. Baumgartner, Suzanna L. Deboef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (New York: Cambridge University Press, 2008).

63. Bedau, "Abolitionist's Survey," pp. 24–25.
64. Carol Steiker and Jordan Steiker, "The Shadow of Death: The Effect of Capital Punishment on American Criminal Law and Policy," *Judicature*, March/April (2006), p. 250.
65. Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (New York: Little, Brown, 2000), p. 7.
66. Lawrence W. Sherman, "Evidence-Based Crime Prevention: A Global View from the U.S. to Japan," *Hanzai Shakaigaku Kenkyu* 29 (2004), pp. 82–93, at 91. See also Joel Best, ed., *How Claims Spread: Cross-National Diffusion of Social Problems* (New York: Aldine De Gruyter, 2001).
67. Von Drehle, "Death Penalty Walking," 2008.
68. *Ibid.* The states with zero executions are New Hampshire, New Jersey, New York, and South Dakota, and the states with one execution are Connecticut, Colorado, Idaho, Wyoming, and New Mexico. David Von Drehle, "New Jersey: A Death Penalty Trend?" *Time*, Dec. 17, 2007. See also <http://www.deathpenaltyinfo.org>, under "state execution rates."
69. Roger Hood, "Capital Punishment: A Global Perspective," *Punishment and Society* 3, no. 3 (2001), pp. 331–54, at 331. See also Johnson and Zimring, *Next Frontier*. If one counts the number of countries in all three abolitionist categories—complete abolitionist, abolitionist for ordinary offenses only, and abolitionist de facto (no executions for at least 10 years)—then the percentage of abolitionist countries in the world has increased from 44 percent in 1988 to 69 percent in 2007. Hood, *Death Penalty*, p. 334, and Amnesty International reports for 2007.
70. Zimring, *Contradictions*, p. 35.
71. The global effects of the anti-death penalty movement are also evident in the distribution of votes on the December 2007 U.N. resolution calling for a worldwide moratorium on executions with a view to abolishing capital punishment. After several similar efforts failed in the 1990s, the vote this time in the 192-member body was 104 nations in favor (54 percent) with 54 opposed (28 percent), 29 abstentions (15 percent), and 5 absences (3 percent). Overall, the ratio of "for" to "against" was almost 2 to 1, though support varied considerably by region. All the countries of Europe supported the resolution except Belarus, which abstained and which executed a serial killer by firing squad in the same month the U.N. acted (Kuban Abdymen, "Uzbek Abolition Draws Line under Past," Inter Press Service News Agency, Jan. 17, 2008). In North, South, and Central America, only four nations voted against the resolution: Belize, Guyana, Suriname, and the United States. The nations of Oceania also supported the resolution by an 8–2–1 margin. In the Middle East and the Caribbean, by contrast, only 3 of 26 nations supported it: Israel, Haiti, and the Dominican Republic. The votes in Africa (17–11–20–4) and Asia (7–15–4–0) were more mixed (email report from Hands Off Cain, Dec. 18, 2007).

72. Hood, "Capital Punishment," p. 337.
73. Bernard Harcourt, chap. 3 in this volume. See also Eva Puhar, "The Abolition of the Death Penalty in Central and Eastern Europe: A Survey of Abolition Processes in Former Communist Countries," paper prepared for the European Master's Degree in Human Rights and Democratisation, National University of Ireland, pp. 1–54.
74. John F. Galliher, Larry W. Koch, David Patrick Keys, and Teresa J. Guess, *America without the Death Penalty: States Leading the Way* (Boston: Northeastern University Press, 2002), p. 3.
75. Roger Coleman was the convicted rapist and murderer who, leading abolitionists passionately argued, had been wrongfully electrocuted in 1992 right up until the January morning in 2006 when a Q-tip's worth of semen finally convinced them that Coleman was indeed a killer. Glenn Frankel, "Burden of Proof," *Washington Post*, May 14, 2006, p. W08.
76. Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972–1994* (New York: Oxford University Press, 1996), p. 167.
77. *Ibid.*, p. 168.
78. Galliher et al., *America without the Death Penalty*, p. 206.
79. The Pew Research Center for the People and the Press, "Religion and Politics: Contention and Consensus," July 14, 2003. See also G. Jeffrey MacDonald, "Religious Foes of Capital Punishment See New Momentum," *Religion News Service*, Jan. 7, 2008.
80. For more, see David Jacobs and Jason T. Carmichael, "The Political Sociology of the Death Penalty: A Pooled Time Series Analysis," *American Sociological Review* 67 (2002), pp. 109–31; David Jacobs and Jason T. Carmichael, "Ideology, Social Threat, and Death Sentences: Capital Sentencing across Time and Space," *Social Forces* 83 (2004), pp. 249–78; David Jacobs, Jason T. Carmichael, and Stephanie L. Kent, "Vigilantism, Current Racial Threat, and Death Sentences," *American Sociological Review* 70 (2005), pp. 656–77; and David Jacobs, Zhenchao Qian, Jason Carmichael, and Stephanie Kent, "Who Survives on Death Row? An Individual and Contextual Analysis," *American Sociological Review* 72 (2007): 610–32.
81. Banner, *Death Penalty*, p. 137.
82. Zimring, *Contradictions*, p. 189.
83. Johnson and Zimring, *Next Frontier*, pp. 20, 312. Between 1997 and 2005, the execution rate per million population in Texas was more than 100 times higher than in the Muslim-majority nation of Bangladesh. *Ibid.* Similarly, executions in the Islamic Republic of Pakistan surged to 82 in 2006, giving that country the third highest volume of executions in the world (after China and Iran), but Pakistan's per capita rate of 0.5 executions per million population was still less than half the execution rates in Texas and Virginia. Since the late 1990s, Southern states such as

Texas, Virginia, Missouri, Oklahoma, and South Carolina have ranked among the few jurisdictions in the world with per capita execution rates greater than 1.0 per million population. Hood and Hoyle, *Death Penalty*, p. 92. Their company in that category includes China, Singapore, Vietnam, Saudi Arabia, and Iran.

84. Adam Liptak, "Executions Decline Elsewhere, but Texas Holds Steady," *New York Times*, Dec. 26, 2007.

85. Zimring, *Contradictions*, p. 190.

86. Justices Scalia and Alito made much of this trend during oral argument regarding challenges to Louisiana's effort to extend the death penalty to nonhomicidal rapists. Lithwick, "Capital Gang."

87. Ralph Blumenthal, "After Hiatus, States Set Wave of Executions," *New York Times*, May 3, 2008. Available at <http://www.nytimes.com/2008/05/03/us/03execute.html?th&emc=th>.

88. *Ibid.* Texas unsurprisingly led the way with five scheduled execution dates, Virginia with four, Louisiana with two; one was scheduled each in Oklahoma, Georgia, and South Dakota, the only non-Southern state. Officials in each of these states have proclaimed that more scheduled executions will follow.

89. Michael Radelet, chap. 1 in this volume. See also Jeffrey Toobin, "Death in Georgia: The High Price of Trying to Save an Infamous Killer's Life," *New Yorker*, Feb. 8, 2008.

90. Ian Urbina, "Citing Cost, States Consider End to Death Penalty," *New York Times*, Feb. 25, 2009.

91. Feb. 26, 2009.

92. See Michelle Mill Hollon, "Economics of Execution," *Advocate*, Mar. 8, 2009. The Louisiana case also illustrates our assertion that even where cost concerns cause capital punishment cutbacks, they are unlikely to lead to formal abolition. In this Southern state (which has the highest incarceration rate in the United States but which has not carried out an execution since May 2002), local prosecutors "are limiting the number of executions they pursue because of the price tag and the length of appeals," yet elected officials—including Governor Bobby Jindal, Senate President Joel Chaisson, and House Speaker Jim Tucker—insist that the death penalty's "deterrent value is worth the cost, however high" (Hollon, "Economics of Execution"). Many prosecutors claim the costs are "staggering" and "unbelievable," and defense lawyers seem to agree. Jean Faria, the head of the Louisiana State Public Defender Board, says that \$9 million of her \$28 million budget—nearly one-third—is spent on capital cases (*ibid.*). In this state and elsewhere, one important cause of the high costs is post-conviction appeals and delays (Zimring, *Contradictions*, p.78). In 2007, the average time between sentencing and execution was 12.7 years, compared with a seven-year wait in 1990 and a 14.4-month wait for 1956–1960 (Hollon, "Economics of Execution"); Robert M. Bohm, "The Economic Costs of Capital Punishment: Past, Present, and Future," p. 574, in James R. Acker, Robert M. Bohm, and Charles

S. Lanier, eds., *America's Experiment with Capital Punishment* [Durham, N.C.: Carolina Academic Press, 2003]). The average wait on death row today is thus 10 times longer than it was 50 years ago. And significant delay seems here to stay. For one thing, the quick is often the enemy of the careful in death penalty decision making, but even in the post-Furman delay-plagued system, some 130 people from 26 states have been released from death row with evidence of their innocence (Death Penalty Information Center, at <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>). For another, on March 9, 2009, the U.S. Supreme Court ruled that a Florida inmate's 32-year wait on death row did not constitute cruel and unusual punishment (*Thompson v. McNeil*, No. 08-7369; see also Adam Liptak, "Justices Rule on Legal Effects of Slow-Moving Cases," *New York Times*, Mar. 10, 2009). Like many rulings before it, this one enables the death penalty to keep rolling along, however slowly it might move.

93. Galliher, et al., *America without the Death Penalty*, p. 211.

94. Zimring, *Contradictions*, p. 179.

95. This pessimistic hunch depends not only on the future course of capital punishment but also on the quality of our genes, our luck, and our health care providers—and perhaps on providence, too.

96. Elizabeth Weil, "The Needle and the Damage Done," *New York Times Magazine*, Feb. 11, 2007, pp. 46–51.

97. *Ibid.*, p. 48.

98. Zimring, *Contradictions*; Von Drehle, "Death Penalty Walking."

99. In the United Kingdom, concerns about the wrongful execution of Derek Bentley and the wrongful conviction of Timothy Evans helped produce "a healthy majority for abolishing the death penalty for murder in 1965 for a trial period of five years," a shift that was made permanent in 1969. Hood, *Death Penalty*, p. 26. In Australia, the last person executed (in 1967) was Ronald Ryan, who received a mandatory death sentence after his conviction for murder of a prison officer during an escape from a Melbourne prison. Defense lawyer Phillip Opas argued that Ryan was innocent, a position he has maintained to the present: "The controversy surrounding Ryan's hanging generated widespread revulsion at the use of the death penalty—and its politicization—and created the momentum for eventual abolition" (Asia Death Penalty Blog, Feb. 5, 2007, available at <http://asiadeathpenalty.blogspot.com>).

100. Johnson and Zimring, *Next Frontier*.

101. Byung-Sun Cho, "Is Abolition Close? Reflections on South Korea's Changing Capital Punishment Policy," *Punishment and Society* (forthcoming).

102. In Japan and China, miscarriages of justice in capital cases did not lead to abolition but did spark significant execution declines. For more, see David T. Johnson, "Where the State Kills in Secret: Capital Punishment in Japan," in *Punishment and Society* 8, no. 3 (2006), pp. 281–85 at 282; Johnson and Zimring, *Next Frontier*, chap. 7.

103. Austin Sarat, "Innocence, Error, and the 'New Abolitionism': A Commentary," *Criminology and Public Policy* 4, no. 1 (2005), pp. 45–54 at 45.
104. James D. Unnever and Francis T. Cullen, "Executing the Innocent and Support for Capital Punishment: Implications for Public Policy," *Criminology and Public Policy* 4, no. 1 (2005), pp. 3–37 at 3.
105. Something like this resistance is what France gave the United States in the case of Zacarias Moussaoui, who was said to be "the twentieth hijacker" on September 11, though the United States ultimately did decide to seek death for this French national of Moroccan descent, despite France's refusal to provide information that could be used in a capital trial. For more, see Zimring, *Contradictions*, p. 42. In 2006, Moussaoui received a life sentence in the U.S. District Court for the Eastern District of Virginia.
106. Alan W. Clarke and Laurelyn Whitt, *The Bitter Fruit of American Justice: International and Domestic Resistance to the Death Penalty* (Boston: Northeastern University Press, 2007).
107. Editorial, "A Long Time Coming," *New York Times*, Dec. 15, 2007.
108. Lawrence D. Bobo and Devon Johnson, "A Taste for Punishment: Black and White Americans' Views on the Death Penalty and the War on Drugs," *Du Bois Review* 1 (2004), pp. 151–80 at 155.
109. Gottschalk, *Prison and the Gallows*, p. 233.
110. Steven E. Barkan and Steven F. Cohn, "On Reducing White Support for the Death Penalty: A Pessimistic Appraisal," *Criminology and Public Policy* 4, no. 1 (2005), pp. 39–44 at 42. Barkan and Cohn also argue that "[i]f white support during the 1990s dropped only 9.4 percent despite the publicity over wrongful convictions in capital cases and a sharp drop in homicide rate and still remained at almost 70 percent, we do not hold much hope that this opinion can be swayed through the public education campaigns [other] observers advocate" (p. 42). We do not hold much hope, either.
111. "46 Sentenced to Death in 2007, Most Since 1980," *Japan Times*, Jan. 14, 2008.
112. Craig S. Smith, "In Europe, It's East vs. West on the Death Penalty," *New York Times*, Nov. 19, 2006, Week in Review section, p. 4.
113. Dieter, quoted in Stoddard, "Religion, Culture."
114. Our use of the term "rocked" suggests two related meanings. First, the legitimacy of capital punishment as an institution has been rocked by repeated challenges, especially from abolitionist critics. Second, these assaults have rocked the machinery of death itself, destabilizing and slowing it down, as a crowd might rock a police car to take it out of commission. Yet judicially authorized killing in the United States is still rolling along, we argue, quite a ways away from some imagined abolitionist terminus.
115. Bedau, "Abolitionist's Survey," p. 25; Gottschalk, *Prison and the Gallows*.
116. James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widen- ing Divide between America and Europe* (New York: Oxford University Press, 2003). See also Gottschalk, *Prison and the Gallows*; Simon, *Governing through Crime*.
117. "A Matter of Life and Death: The Effect of Life-without-Parole Stat- utes on Capital Punishment," *Harvard Law Review* 119 (2008), pp. 1838–54 at 1854.
118. Carol Steiker and Jordan Steiker, "The Shadow of Death: The Effect of Capital Punishment on American Criminal Law and Policy," *Judicature* 89, no. 5 (2005), pp. 250–53 at 253.
119. "Matter of Life and Death," p. 1841.
120. Adam Liptak, "To More Inmates, Life Term Means Dying behind Bars," *New York Times*, Oct. 2, 2005.
121. As of 2007, a total of 73 American prisoners were serving life without parole for crimes they committed at age 13 or 14. Adam Liptak, "Lifers as Teen- agers, Now Seeking Second Chance," *New York Times*, Oct. 17, 2007. See also Adam Liptak, "Jailed for Life after Crimes as Teenagers," *New York Times*, Oct. 3, 2005; Human Rights Watch, "The Rest of Their Lives: Life without Parole for Child Offenders in the United States," October 2005, at <http://www.hrw.org/en/reports/2005/10/11/rest-their-lives>; Marc Mauer, Ryan S. King, and Malcolm C. Young, "The Meaning of 'Life': Long Prison Sentences in Context," Sentencing Project, May 2004, at [http://sentencingproject.org/Admin/Documents/publica- tions/ins-meaning-of-life.pdf](http://sentencingproject.org/Admin/Documents/publications/ins-meaning-of-life.pdf).
122. In December 2006, the United Nations introduced a resolution calling for the abolition of LWOP for children and young teenagers. The vote was 185 to 1, and the sole dissenter was the United States. Liptak, "Lifers as Teenagers." In practice, there is a big difference between the situation of prisoners in other countries who have remained in custody for the rest of their lives while retaining the opportunity to earn early release and the situation of many prisoners in the United States where "a life sentence can from the outset be for a full-life period with no possibility of review or parole." Roger Hood, "Developments on the Road to Abolition: A Worldwide Perspective," paper prepared for the workshop Global Survey on Death Penalty Reform, Beijing, August 25–26, 2007, pp. 1–23 at 17. The substitution of LWOP for capital punishment "simply raises many of the human rights issues that have been at the heart of the attack on the death pen- alty itself." Hood, "Developments," p. 23; see also Hood and Coyle, *Death Penalty*, chap. 11.
123. Steve Blow, "Time for Texas to Try Death Penalty without Ex- ecutions," *Dallas Morning News*, Jan. 13, 2008. Available at <http://www.dallasnews.com/sharedcontent/dws/dn/localnews/columnists/sblow/stories/012408dnmetblow.223b668.html>.

124. Kaufman-Osborne, "Critique." This cultural logic reminds us of Davis Grubb's American literary gothic, *The Night of the Hunter*. The story, translated by James Agee's screenplay into a film featuring Robert Mitchum, focused on a suave, indulgent, and murderous country preacher (Harry Powell) whose trademark sermon illustrated the eternal struggle between love and hate, with the letters of each word tattooed on his writhing, clasped hands—*l-o-v-e* on one, and *h-a-t-e* on the other. Love wins out (barely) in the preacher's demonstrative sermons and also when matriarch Lillian Gish saves the children from his villainy. That Gish's love was backed up by her shotgun and culminated in condemning the preacher to the gallows captures well some of the complexities that still haunt America.

Part II

Debating Lethal Injection