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Abolition in the U.S.A. by 2050: On Political Capital and Ordinary Acts of Resistance

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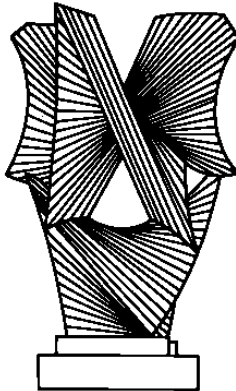
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ABOLITION IN THE U.S.A. BY 2050:
ON POLITICAL CAPITAL AND ORDINARY ACTS OF RESISTANCE

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Chapter for *The Road to Abolition*
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Abstract

The United States, like the larger international community, likely will tend toward greater abolition of the death penalty during the first half of the twenty-first century. A handful of individual states—states that have historically carried out few or no executions—probably will abolish capital punishment over the next twenty years, which will create political momentum and ultimately a federal constitutional ban on capital punishment in the United States. It is entirely reasonable to expect that, by the mid-twenty-first century, capital punishment will have the same status internationally as torture: an outlier practice, prohibited by international agreements and customary international law, practiced illicitly by rogue nations, and defended only by a handful of conservative academics seeking attention.

Within retentionist states, the transition to abolition will most likely occur as a result of elite political leadership and ordinary acts of resistance. Experience suggests that abolition of the death penalty is rarely the result of loud and explicit democratic politics, but is instead more often the product of counter-majoritarian, at times elite-driven judicial or political maneuvers. Abolition is rarely an issue that builds political capital for emerging leaders, but instead one that requires using existing political capital. Another important but rarely discussed factor that promotes abolitionist reforms are ordinary acts of resistance by those who are either knowingly or unconsciously uncomfortable with capital punishment or truly opposed to the death penalty. These men and women—a clerk at the county courthouse, an employee at the local police department, a secretary in the prosecutor's office, sometimes even a judge or law clerk—slow death penalty cases down and effectively undermine the machinery of death.

Neither of these two factors are especially good topics for elaboration since both take place below visibility. Yet they both play important roles and will likely push retentionist states at the cusp into the abolitionist camp, continuing the national and global trend toward greater abolition of the death penalty.

Is the United States on the road to abolition and, if so, by when will it have abolished the death penalty? The federal structure of the United States complicates the answer to these questions; nevertheless, recent trends in the United States and within the larger international community suggest that the country is headed toward abolition of capital punishment. In all likelihood, a number of retentionist states will converge toward abolition over the course of the next twenty years. The combination of this domestic shift and the legal and political pressure of the international community will likely result in the United States Supreme Court imposing a federal constitutional ban on capital punishment, at the latest, by the mid-twenty-first century. It is entirely reasonable to believe that even before then—by 2035 or 2040—there will be no or very few executions in the United States.

Recent statistics are extremely revealing. The United States witnessed significantly decreasing numbers of executions and capital sentences during the first decade of the twenty-first century—despite a continuing political shift toward crime-control policies, as evidenced by the steadily increasing rate of incarceration throughout the country.¹ The historical trends are reflected in the following graphs. The first reflects a steep decline in the number of executions in the first decade of the twenty-first century²:

¹ Federal and state prison populations increased dramatically from under 200,000 persons in 1970 to more than 1.3 million in 2002. That year, our imprisonment rate rose above 600 inmates per 100,000 adults. With the inclusion of an additional 700,000 inmates in jail, the United States incarcerates more than two million people—resulting in the highest incarceration number and rate in the world, five times that of Britain and 12 times that of Japan. The numbers and rates have continued to increase during the first decade of the twenty-first century. *See* Harcourt 2007.

² DPIC 2008

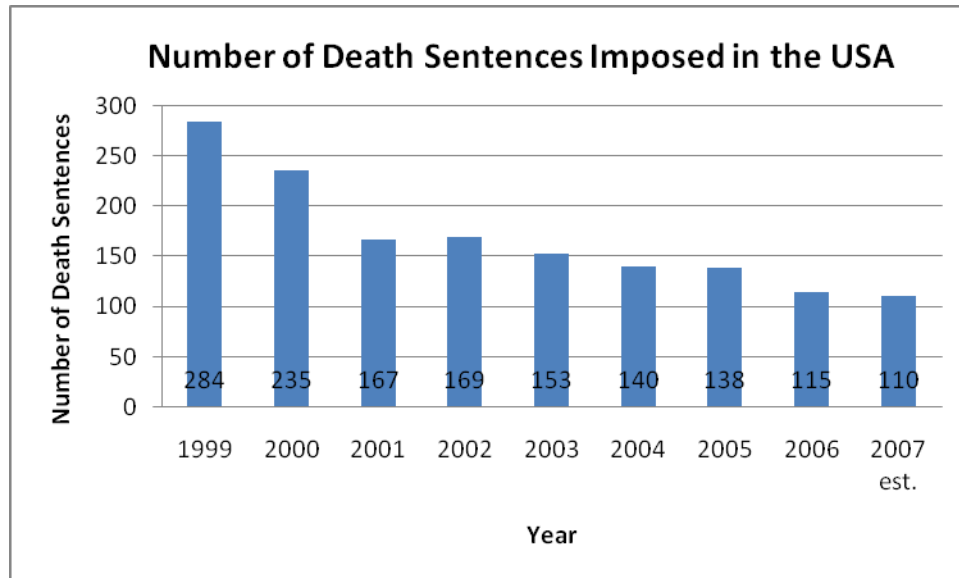


It is important to note that, of the 42 executions that were carried out in 2007, the state of Texas accounted for 26 (or 62%) of the total, and only nine other states participated in the statistic (Alabama and Oklahoma executing three inmates each, Indiana, Ohio and Tennessee two inmates respectively, and Arizona, Georgia, South Carolina, and South Dakota one inmate each).³ This reflects the fact that the death penalty in the United States has become predominantly a Texas phenomenon and that, putting aside Texas (and occasionally a few other outlier states like Alabama or Georgia or Virginia), very few executions are being carried out in the rest of the country.

The decrease in the annual number of executions has gone hand-in-hand with a similar decrease over the period in the number of persons sentenced to death in the United States, as reflected in this second graph:⁴

³ DPIC; NAACP LDF Death Row USA

⁴ DPIC 2008

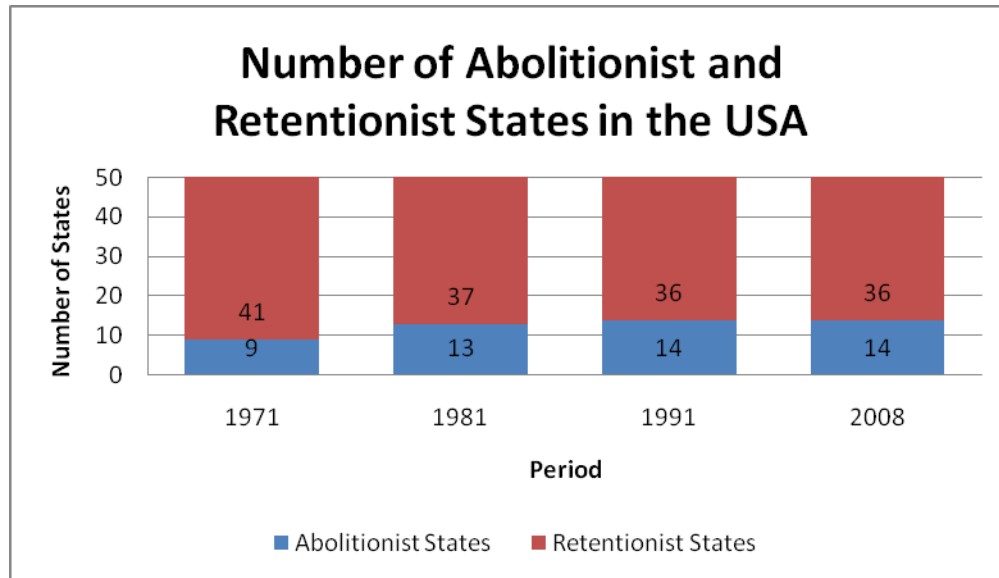


The declining trend in the imposition of capital sentences is not only true at the national, aggregated level, but also at the individual state level. Even in a state like Texas, prosecutors and politicians have tempered their enthusiasm for death sentences.⁵

In addition, the number of abolitionist states has increased since the United States Supreme Court approved post-*Furman* capital statutes. Since then, Massachusetts, North Dakota, Rhode Island, New Jersey, New York, and Vermont joined the ranks of eight other abolitionist states (Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, West Virginia, and Wisconsin) that had never legalized capital punishment.⁶ This trend is reflected in the following graph:

⁵ Steiker and Steiker 2008: ____.

⁶ Jacobs and Carmichael 2002: 115.



These graphs and the underlying data are merely the objective reflection of a series of unexpected developments at the individual state level, many of which are recounted in greater detail in the chapters of this book. New York state reinstated and flirted with the death penalty in the early 1990s, but after several years, ultimately rejected capital punishment. A Republican governor in Illinois, George Ryan, imposed a moratorium on the death penalty because of the mounting number of wrongful convictions and then commuted the death sentences of all inmates on Illinois' death row.⁷ The Supreme Court overturned its prior decisions and restricted the substantive scope of the death penalty, prohibiting its use in the case of juveniles and persons with mental retardation.⁸ In over 125 cases, persons accused of capital crimes and sentenced to death were exonerated after an average of almost 10 years on death row.⁹ In December 2007, Governor Jon Corzine of New Jersey signed a bill abolishing the state's death penalty. At about the same time, the Supreme Court effectively imposed a temporary moratorium on the death

⁷ See Radelet 2008: ____.

⁸ See Steiker and Steiker 2008: ____.

⁹ DPIC 2008 (available at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110>); of those, only 16 of the exonerations are based on DNA evidence. *Id.* See generally, Cole & Aronson 2008: ____ for a nuanced assessment of political influence of the DNA exonerations.

penalty while the justices considered the legality of lethal injection.¹⁰ And, according to reliable reports, “In states like Maryland, New Mexico and South Dakota, legislative efforts to repeal the death penalty—once considered hopeless—now appear to be within a few votes of success. Blue-ribbon committees similar to the one in New Jersey have been appointed in places like Illinois, Tennessee, Maryland and Florida.”¹¹

These domestic shifts mirror the larger international trend toward abolition of the death penalty. As Roger Hood, William Schabas, and others have shown, there has been a global tendency toward abolition over the course of the twentieth and twenty-first centuries—a trend which grew in increasing proportion in the last decades of the twentieth.¹² Whether one considers countries that have abolished capital punishment for ordinary crimes only or for all crimes, the proportion of abolitionist countries has increased significantly. As Roger Hood notes, “the annual average rate at which countries have abolished the death penalty trebled: from roughly one a year in the period 1965-88, to three a year over the years 1989-2000.”¹³ This is demonstrated in the following graph:¹⁴

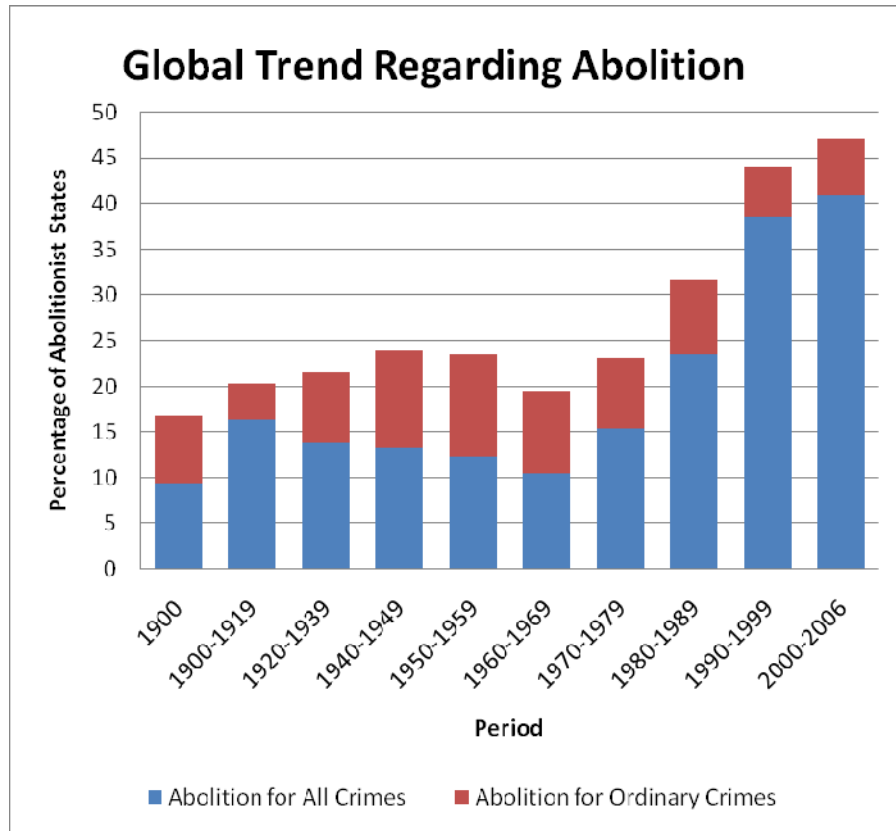
¹⁰ See Denno 2008: ___; Kaufman-Osborn 2008: ___; Martschukat 2008: ___. Deborah Denno, Timothy Kaufman-Osborn and Jurgen Martschukat disagree as to the likely impact of the lethal injection challenges, with Kaufman-Osborn expressing the most cautionary view. What is not contested, though, is that the temporary moratorium created by the Supreme Court’s grant of certiorari on the lethal injection issue significantly reduced the number of persons executed in 2007 and 2008, and that the temporary moratorium contributed to the downward trend in the number of executions. Incidentally, the temporary moratorium also created a natural experiment that will afford social scientists an opportunity to test, once again, the deterrent effect of the death penalty—which will likely provide further fodder for both sides of the death penalty debates.

¹¹ Drehle 2007.

¹² Hood 2001; William A. Schabas, *The Abolition of the Death Penalty in International Law*. Third Edition. Cambridge: Cambridge University Press, 2002; Neumayer 2006.

¹³ Hood 2001:333.

¹⁴ Relying on data from Neumayer 2006 (Tables 1 and 2).



It is worth noting here that the graph does not even include, in the category of abolitionist states, countries that have not executed anyone in the past ten years—what are referred to as *de facto* abolitionist states. These numbered eighteen as of 2004.¹⁵

As a result of this global trend, Amnesty International reports that, at year end 2005, 86 countries had abolished the death penalty for all crimes and another 36 countries were abolitionist in practice (either because they had abolished capital punishment for ordinary crimes, retaining it only for military or other exceptional circumstances, or because they had not executed anyone in the past 10 years). In other words, 122 countries were effectively abolitionist.¹⁶ This represents a significant majority of the countries in the world, over 60

¹⁵ Neumayer 2006, table 3.

¹⁶ Amnesty 2006: 17.

percent. Only 71 countries retained the death penalty for ordinary crimes at the beginning of the twenty-first century.¹⁷

Part of this trend is certainly attributable to Europe's militant opposition to capital punishment and the requirement that states abolish the death penalty in order to gain European Union membership. This influence can be expected to continue for the next several decades. But the European Union does not explain the depth of the global trend. Some of the countries that have abolished the death penalty for all crimes since 2000 include, for instance, the Philippines, Samoa, Mexico, Liberia, Cote d'Ivoire, and Bhutan. The depth of the international sentiment is widely spread and reflected well in the vote of the United Nations General Assembly in December 2007 calling for a worldwide moratorium on executions. As Michael Radelet suggests in his contribution, "The vote was overwhelming: 104 of the U.N.'s member states supported the resolution, while only 54 opposed it and 29 abstained."¹⁸

The most rigorous, quantitative, cross-national analyses of the global trend toward abolition have identified a number of leading predictors, including for instance regional peer pressure and the level of democratization of a country. Along practically all of these predictor dimensions, the United States as a whole should already be in the abolitionist camp—not just fourteen of the fifty states plus the District of Columbia, but the whole country. To be sure, the fact that the United States as a whole does not now rank among abolitionist states may simply be the fortuitous and contingent result of the Supreme Court's near miss decision in *Furman v. Georgia* in 1972.¹⁹ It is also difficult to speak of the United States "as a whole"—putting aside the federal death penalty—given the unique federalist structure of the country in the area of

¹⁷ Hood, *Capital Punishment* at 350 (Table 1) (71 countries retained death penalty for ordinary crimes in December 2000).

¹⁸ Radelet 2008: ____.

¹⁹ Carol S. Steiker, "Capital Punishment and American Exceptionalism," *Oregon Law Review* 81 (2002):97-130.

penal administration. Regardless, it is likely that the political forces that have shaped these trends toward abolition at the international level will continue to exercise pressure on the United States and individual retentionist states in this country. Peer and regional international political pressure—combined with the overall decline in violent crime,²⁰ a more moderated public opinion when presented with the sentencing option of life imprisonment without parole,²¹ and increased awareness of cases of innocence and wrongful convictions²²—will likely push several other states from *de facto* abolitionist and retentionist ranks to the abolitionist camp over the course of the next two decades—barring, naturally, unforeseen global shifts or catastrophes. This is most likely to occur first in states such as Colorado, Connecticut, Idaho, Kansas, New Hampshire, New Mexico, South Dakota or Wyoming, which have executed only one or no inmates since resumption of the death penalty in 1976, or in states such as Maryland, Illinois, or Tennessee, which are currently reviewing their capital punishment practices; but the political momentum created by these states likely will extend to other retentionist states.

The gradual convergence of a number of retentionist states toward abolition of the death penalty, in combination with the increased role of international legal and political opposition to capital punishment, in all probability will lead the United States Supreme Court to ban capital punishment as a federal constitutional matter. The numerical trend and political momentum

²⁰ Some commentators suggest that the war on terrorism—which has displaced the war on crime—will have the effect of reinvigorating the death penalty. I am skeptical of this argument and tend to believe that the terrorist acts of September 11, 2001, have in fact reduced the national appetite for capital punishment in the context of ordinary crime. The contrast between terrorist acts and typical capital murders, from my observations, has undermined the strength of the death penalty appeal in cases of ordinary crime.

²¹ Radelet 2008: _____. Naturally, there is significant debate in the United States whether life imprisonment without parole is more cruel a punishment than death. I will not address this normative question. As a factual matter, support for the death penalty decreases when respondents are presented with the alternative of life imprisonment without parole and this sentencing option has been increasingly used in the United State over the past twenty years.

²² Simon Cole and Jay Aronson express reservation about the political influence of the DNA and other scientific exonerations in their contribution to this book. While I agree that the argument from science does not normatively resolve the death penalty debate, *see* Cole & Aronson 2008: _____, I do believe that the fact of so many innocent persons having been sentenced to death has exerted a dampening effect on the national enthusiasm for the death penalty, and will continue to do so.

toward abolition likely will play an important role in the decision; but so will the greater role of international law in the Supreme Court's interpretation of the Eighth Amendment's "evolving standard of moral decency," as discussed by Carol Steiker and Jordan Steiker in their contribution to this book.²³

Though it is difficult to chart the likely path of abolition, it is most probably that, within retentionist states, the transition to abolition will occur as a result of elite political leadership and ordinary acts of resistance. Experience has shown that abolition of the death penalty is rarely the result of loud and explicit democratic politics, but is instead more often the product of slightly counter-majoritarian, at times elite-driven judicial or political maneuvers. Abolition most often occurs against the backdrop of mild popular support for the death penalty. As such, it often entails an *expenditure* of political capital: it is not an issue that *builds* political capital for emerging leaders, but instead one that requires using existing political capital. Another important but rarely discussed factor that promotes abolitionist reform are ordinary acts of resistance by those who are either knowingly or unconsciously uncomfortable with capital punishment or truly opposed to the ultimate punishment. These men and women—a clerk at the county courthouse, an employee at the local police department, a secretary in the prosecutor's office, sometimes even a judge or law clerk—gummy up the system and slow death penalty cases down, sometimes to a snail's pace. Texas is, again, the outlier here, but it is revealing precisely for that fact: the reason that many other states are far less efficient than Texas at executing death row inmates is the product of ordinary, minor acts of resistance, sometimes conscious but often unconscious.

Neither of these two factors are especially good topics for elaboration since both take place below visibility. Yet they both will likely play important roles and will push states at the cusp into the abolitionist camp, continuing the national and global trend toward greater abolition

²³ Steiker & Steiker 2008: ____.

of the death penalty. This chapter explores these less visible dimensions of abolitionist reform, after first analyzing the leading indicators of abolition at the cross-national level.

I.

The cross-national models confirm what the recent trends show: in all likelihood, the United States will tend toward greater abolition. There are fewer such studies than one might expect, but there exist two recent quantitative studies that attempt to systematically assess the determinants of death penalty abolition using cross national models.²⁴

Eric Neumayer, a professor at the London School of Economics, has an excellent cross-national quantitative study of global abolition and finds that the foremost determinants of abolition are political factors, namely democratization and regional peer pressure. In his study, *Death Penalty: The political foundations of the global trend toward abolition*, Neumayer tests a number of political, cultural, social and economic explanations for the significant shift, over the past 50 years, toward abolition. His data, for the most part, span fifty years, from 1950 to 2002.

Neumayer tests six political factors, including (1) a measure of the democratic nature of the state; (2) an indicator of regime transition to democracy (or what Neumayer calls “democratization”); (3) whether the country has a left-wing political orientation, measured by the World Bank’s assessment of whether the chief executive’s party is considered left-wing; (4) the historical experience with armed political conflict or the country’s history of warfare, which is expected to correlate positively with retention of capital punishment at least for treason; (5)

²⁴ There are a number of other comparative studies by criminologists and sociologists that do not use quantitative methods that may also be insightful, but I will focus here exclusively on those that use multiple regression analysis. Those other studies include Martin Killias, “Power Concentration, Legitimation Crisis and Penal Severity: A Comparative Perspective,” *Annales Internationales de Criminologie* 24 (1986): 181-211; Dannies Wiechman, Jerry Kendall, and Ronald Bae, “International Use of the Death Penalty,” *International Journal of Comparative and Applied Criminal Justice* 14 (2) (1990): 239-260; Jerome Neapolitan, “An Examination of Cross-National Variation in Punitiveness,” *International Journal of Offender Therapy and Comparative Criminology* 45 (6) (2001): 691-710.

Western European pressure on Eastern European countries; and (6) international pressure from regional peers and neighbor countries. Neumayer also includes in his models another five cultural, religious, economic and social factors, including (1) whether the country's legal system is based on English common law, which is believed to have a retentionist influence, (2) whether the society is strongly Islamic, as measured by the fraction of the Muslim population, (3) economic inequality, (4) ethnic and racial fractionalization, and (5) lagged rates of violent crime and homicide.

Using a proportional hazards model, Neumayer finds that, with regard to abolition for all crimes, three political factors seem to be strongly related to abolition: the democratic nature of the state, transitions to democracy, and regional pressure. A fourth, participation in the Council of Europe, is also important, but obviously less generalizable. Having a left-wing chief executive is also important, but the data for the model that includes this variable is limited and covers only 1975 to 2000 (n of 768 instead of n of 5,458 in the first model). The historical experience with armed political conflict is not significant. In contrast, three cultural, economic, and social factors seem to be associated with retention, and these are the greater degree of ethnic fractionalization, higher income inequality, and legal systems that are based on English common law. High homicide rates are also associated with retention, but here again the data are few and cover only the period 1975 to 2000.²⁵

Neumayer's findings are mostly similar with regard to abolition for ordinary crimes, except that ethnic fractionalization, homicide rates, and economic inequality are no longer statistically significant. As a result, the key factors are predominantly political: "democracy, a

²⁵ This also seems unreliable because, as Neumayer observes, "a higher lagged homicide rate lowers the likelihood of abolition for all crimes, but not for ordinary crimes," (Neumayer 2006:29); yet one would think that the higher homicide rates should be more influential on abolition for ordinary crimes since homicide and violent crimes are ordinary crimes.

regime transition toward democracy, membership in the Council of Europe, a higher share of abolitionist countries within the region as well as the left-wing orientation of the chief executive's party all raise the likelihood of abolition. A legal system built on English common law and a predominantly Muslim population have the opposite effect in some regressions with relatively large sample sizes."²⁶

Neumayer concludes that "the continuation of the abolitionist trend is contingent on a further spread of democracy around the world, on political pressure imposed on retentionist countries, on regional peer group effects and on the political balance between conservative and left-wing parties within countries."²⁷

With regards specifically to the United States, Neumayer decided to code the country as retentionist, but also ran the analyses dropping the US from the dataset and found that this "hardly affects the results."²⁸ Neumayer writes:

Many talk about American exceptionalism since with Japan it is the only democratic and developed country still holding on to the death penalty. Discussing possible reasons for this exceptionalism is beyond the scope of this paper. Unfortunately, for statistical reasons it is not possible to include a dummy variable for the US into the estimations to see whether the retentionist status of the US can be explained sufficiently by the explanatory variables, in which case the dummy variable would be insignificant, or whether there is something truly exceptional about the US, in which case the dummy variable would be statistically significant. Loosely speaking this is because with the US being retentionist over the entire period, such a dummy variable would predict failure to abolish perfectly and therefore be dropped from the model. If we exclude the US, or the US and Japan together, from the estimations, then results are not much affected. This is not very surprising given that these represent just two out of a great many countries. If we include dummy variables for the regions of Western Europe as well as South America to account for the fact that countries from these regions were often frontrunners of abolition, then again our results are hardly affected. It is not simple regionalism that drives abolition.²⁹

²⁶ Neumayer 2006:26.

²⁷ Neumayer 2006:2.

²⁸ Neumayer 2006:18.

²⁹ Neumayer 2006:26-27.

On the political factors, the United States should tend toward abolition: a strong democracy surrounded by two abolitionist countries, Canada and Mexico, with, at least occasionally, a center-left chief executive at the federal and state levels. The factors that would tend toward retention—setting aside the peculiarities of our federal system—would include the English common law tradition and the high incidence of violent crime and homicide. But the latter should be diminishing as a contributing factor, at least since the early 1990s. To be sure, as Neumayer notes, “The unique character of state-determined criminal law and substantial laymen participation and influence on the extent of punitiveness of the criminal sanction system might provide hints why many states in the US maintain the death penalty and execute a great number of people.”³⁰ But the political forces should still be at play and will likely influence the further trend toward abolition in the USA.

Terance Miethe, Hong Lu and Gini Deibert, in their 2005 study on *Cross-National Variability in Capital Punishment*, explore the comparative sociopolitical conditions of 185 countries in order to determine the correlates for the legal retention or abolition of capital punishment. Their principal predictors include measures of economic development, political conditions, primary religion, location in world region, and the extent of extrajudicial executions. To be more specific, the measures of economic development are based on each nation’s per capita GDP in 2000 (the authors reach similar results using per capita income, and, due to missing observations for infant mortality and literacy, were unable to use a human development index). The political condition variables measured two separate dimensions, first, an index measuring how much citizens are able to participate in the selection of governments (“voice and accountability”) and, second, measures of the perception of political stability and presence of political violence. Primary religion and world region are self-explanatory. The extent of

³⁰ Neumayer 2006:10.

extrajudicial executions were derived from a 1996 report from the Special Rapporteur of the United Nation's Commission on Human Rights, augmented by annual reports of Amnesty International and Human Rights Watch.³¹

Simple bivariate patterns reveal that each one of these predictors are significantly associated with the legal status of capital punishment. Miethe, Lu and Deibert find that the likelihood of retaining capital punishment is significantly higher for countries that (1) have lower economic development, (2) experience lower political voice and accountability; (3) have lower political stability; (4) are dominated by religions other than Christianity; (5) are located in the Middle East, Asia, or the Caribbean regions; and (6) have recent histories of extrajudicial killings.³²

Multivariate logistic regression analysis reveals that the first three factors remain significant when all the variables are taken into consideration. The authors report that "[t]he association between increasing economic development and legal abolition remains statistically significant even after successive controls for the nation's primary religion, history of extrajudicial executions, and various measures of political conditions. ... [U]nit increases in economic development decreased by about 50% the odds of legal retention of the death penalty after controlling for other variables."³³ There are of course exceptions, and the United States and Japan stand out as such among large industrialized nations. But the correlation is strong and capital punishment remains much more highly associated with low economic development. As the authors note, "more than two thirds of the developing countries (i.e., defined by GDP per capita of less than US\$4,000 in 2000) have retained the death penalty in law."³⁴

³¹ Miethe, Lu & Deibert 2005:121-122.

³² Miethe, Lu & Deibert 2005:122.

³³ Miethe, Lu & Deibert at 123.

³⁴ Miethe, Lu & Deibert at 127.

The other two measures of political conditions—political voice and stability—also had “significant net effects on the legal status of capital punishment. Countries with greater political voice had substantially lower net risks of legal retention, whereas the conditional odds of retaining the death penalty were about 2.3 times higher among more than less politically stable countries.”³⁵ Along most of these dimensions then, with the single exception of political stability, the United States is an outlier: the resulting model would suggest that the United States should rank among abolitionist states.

The authors also used qualitative comparative analyses which look at the joint or conjunctive effects of the different variables to determine which combinations of variables are more or less likely to result in retention of the death penalty. Here too, the United States is an outlier, located in a cluster with a sociopolitical profile of predominantly abolitionist nations that includes, for instance, Australia, Canada, France, Italy, and Norway. This cluster—predominantly Christian nations with high political voice, high political stability, and high economic development—contains 22 nations, of which 91% are abolitionist.³⁶ The United States is singled out, in the analysis, as one of the few “Examples of exceptions to the dominant pattern.”³⁷

In sum, the two existing quantitative models intended to predict whether a jurisdiction should have the death penalty would suggest that the United States should have already abolished the ultimate penalty. In terms of highly industrialized large nations, the United States and Japan are the only countries that continue to use the death penalty. In terms of culturally and socio-politically similar countries, such as the United Kingdom or Canada, the United States is the only country with a death penalty. Even when we narrow the comparison group to these

³⁵ Miethe, Lu & Deibert at 123-124.

³⁶ Miethe, Lu & Deibert 2005:125.

³⁷ Miethe, Lu & Deibert 2005: 125 n.a..

“matching countries” – countries that have very similar cultural values and histories, such as Great Britain and Canada or even, to expand a little more, Germany, Mexico, Australia —the United States remains an outlier that should tend toward abolition.

There are, naturally, a host of cross-national cultural variables that are not as easily quantifiable and that have been offered to explain differences in death penalty regimes. Some are more convincing than others. At least in the U.S.-E.U. comparison, that one of the more important cultural factors should be the fact that the death penalty was used in a far more politicized manner in 18th and 19th century Europe and, as a result, the penalty itself had a very different symbolic meaning. It was not so closely tied to crime and punishment, but instead to the repression of political dissent. The repression of the Paris Commune in 1871, for instance, led to the execution of as many as 20,000 civilians—the number is contested, but Benedict Anderson places the number at 20,000 and others have estimated it as high as 50,000. In the United States, the primary political connection to the death penalty is racism—the use of capital punishment as a way to repress the African-American community. (Note that during the antebellum period, capital punishment of slaves was expensive to masters and therefore not used extensively. The death penalty and lynchings became more efficient tools of repression after emancipation). But I do not think that racism has the same resonance in the United States as political killings—whether of Communards, anti-Jacobins, or Resistance members—has on the Continent. Another important cultural difference, again in the U.S.-E.U. context, is that the Left in Europe is much further to the left than in the United States. However, as Carol Steiker demonstrates ably in her article, *Capital Punishment and American Exceptionalism*, even the most convincing non-quantifiable cultural explanations leave a lot to be desired—which leaves us with the handful of quantitative predictors, which predominantly point in the direction of abolition for the U.S.

II.

Recent developments and these statistical analyses suggest strongly, then, that a number of retentionist states at the cusp will likely join abolitionist ranks, further pushing the United States to join its international abolitionist peer group. The question this raises, naturally, concerns the mechanics of abolition. What political and social factors will lead retentionist states at the cusp to tilt toward repeal of their capital statutes?

In addressing this question, the quantitative research is somewhat less helpful. There are a number of studies that have tried to identify the *domestic* factors that predict whether an individual state is abolitionist or retentionist. The leading predictors in this set of studies tend to include measures of ethnic or racial diversity, of inequality, of political ideology, and of religious faith. The difficulty with the quantitative research, though, is that in reality it tends to ultimately map the different regional characteristics of the predominant death states, notably the “Death Belt” states. Moreover, although the studies identify likely predictors of variation between retentionist and abolitionist states, they do not necessarily indicate which *mechanisms* influence abolition.

David Jacobs and Jason Carmichael have tested the leading hypotheses that have been offered to explain retention versus abolition in a series of studies. In their first, published in 2002, *The Political Sociology of the Death Penalty*, Jacobs and Carmichael test three different hypotheses using state-level panel data. The first hypothesis is that enhanced minority presence may intimidate or threaten the majority population, and the majority may respond by deploying more repressive penal measures. To test this theory, Jacobs and Carmichael rely on measures of ethnic or racial diversity as a proxy for this theory of racial threat and tension. These measures

generally correspond, simply, to the proportion of the population consisting of African-American or Hispanic persons. The underlying rationale of the second hypothesis is similar, namely that political elites will use more repressive punitive methods when economic inequality and therefore potential conflict are greater. The authors rely on measures of economic inequality here, also as a proxy for social and economic threat. The third hypothesis concerns the political strength of law-and-order conservative ideology in the population. Jacobs and Carmichael include other factors as well, such as the strength of the Republican party.

In their 2002 study, Jacobs and Carmichael find that their state-level data support both the racial and economic threat explanations: “states with the largest black populations are more likely to retain capital punishment after the amount of violent crime and many other explanations are held constant, but we find no evidence that Hispanic presence matters.”³⁸ They also find “strong support for the less prominent economic version of threat theory.”³⁹ Jacobs and Carmichael also find a positive correlation between Republican party strength and the existence of capital punishment in cross-state comparisons. These findings are consistent with research in the broader area of punishment and incarceration. David Jacobs and Ronald Helms, in their 1997 study on the determinants of prison admission rates, for instance, find that the increased political strength of the Republican party in a jurisdiction produces a subsequent growth in incarceration.⁴⁰ In their 2004 study, Jacobs and Carmichael 2004 find that greater numbers of death sentences correlate with states with greater membership in conservative churches, and states with higher violent crime rates.⁴¹

³⁸ Jacobs and Carmichael 2002:126.

³⁹ Jacobs and Carmichael 2002: 126.

⁴⁰ Jacobs and Helms 1997.

⁴¹ Jacobs and Carmichael 2004.

The difficulty, again, is that these models are static in the sense that they identify the factors that explain the difference between retentionist and abolitionist states, but are not dynamic. They do not identify what changes occurred to move retentionist states into the abolitionist camp. To address this question, it is necessary instead to explore more anecdotal evidence regarding the historical shifts that have taken place in the broader movement toward abolition.

A review of the larger historical literature suggests that, within those states at the cusp, two political forces will likely play important roles. The first is elite political leadership—or what one might think of as political leadership from the top. The second consists in ordinary acts of resistance—or what one might think of as bottom-up political opposition. I will address these in order, but begin by backing up one step.

Abolition of the death penalty is not a political issue that *creates* political capital, that *builds* political support, or that *makes* a political career. A young or emerging politician at the local or national level, especially in a retentionist state, will never attract a majority of political support by advocating abolition of the death penalty. That is simply not the kind of political issue that *works* on the campaign trail.

There are, in effect, two kinds of political issues in a democracy. There are political issues where the public is evenly divided. On these issues, it is possible to acquire political capital independently of the position advocated, based on oratory skill, charisma, or political ability. On these issues, even if the population is deeply emotionally invested, even if the issues raise deep cultural cleavages, it is possible to build political capital by changing a few votes. But there are other political issues—like the death penalty—where public sentiment is extremely lopsided. On those issues, a young politician cannot build political capital by taking the minority

position. On the contrary, it entails *expending* political capital. And the term “political capital” should be understood here literally: a politician will use up a portion of his or her popularity by advocating abolition, regardless of the fact that there may be, ultimately, a return on the investment. It may pay a political dividend in the future, but often it is a form of political recognition or admiration that has the quality of martyrdom rather than populism. The abolitionist political leader is viewed as someone who had moral conviction despite popular opposition; someone who went against the current of public opinion and who, in prevailing, acquired some moral status, recognition, or respect. These are the political leaders who are thought of as “just” or “righteous,” though not necessarily as popular.

In this sense, abolitionist politics can produce a political aura, but rarely political votes. This was true, for instance, with regard to François Mitterand in France. Before the abolitionist reform, there was only a political debt to be paid—no votes to be had. Mitterand and Robert Badinter, his justice minister, understood this well and tried to minimize the damage. During the 1974 electoral campaign between Valéry Giscard d’Estaing and Mitterand, both candidates were hostile to the death penalty—Mitterand far more than d’Estaing—yet neither of them mentioned the issue.⁴² As Robert Badinter writes, speaking of Mitterand on the death penalty, “he would only make a rare reference to the issue. Announcing an unpopular measure is not the best way to win votes. And it was a victory in the ballot box that he had to achieve first. Abolition would follow by itself.”⁴³

This is not to suggest that abolitionist politicians should or do lie about their convictions. Again, taking the case of France, François Mitterand never lied about his position. Rather, he and

⁴² Robert Badinter, *L’Abolition*, at page 24, Paris: Fayard, 2000.

⁴³ Badinter, 2000, at 117.

others—d’Estaing and even Chirac in 1981⁴⁴—did not raise the issue on their own and did not campaign as abolitionists. On two occasions, Mitterrand was asked about his position on the death penalty and on both occasions he responded honestly. But he never sought out the question as a campaign strategy. And his responses were always from the heart. During the 1981 elections, for instance, Mitterrand was asked about his position on the death penalty, and he responded without hesitation: “In my conscience, in the deepest recesses of my faith, I am opposed to the death penalty... I don’t need to read the opinion polls to know that a majority of the people favor the death penalty. I’m a candidate for President of the Republic.... I say what I think, what I sincerely believe, my deepest spiritual attachments, my faith, my concern for our civilization. I am not in favor of the death penalty.”⁴⁵

In this sense, abolition is not a political strategy. It is a political cost. The 2008 Democratic primaries in the United States were illustrative. None of the three early democratic front-runners were willing to stake out a clear position against the death penalty. Whenever they expressed support for the ultimate punishment, it was always qualified. But frankly, it was difficult to know where they really stood—in their conscience. Hillary Clinton appears not to have made any direct statements on the death penalty, but according to some reports, she had difficulty with the issue.⁴⁶ In the 2004 debates, Edwards cautiously supported the death penalty, noting that reforms were necessary: “I believe the death penalty is the most fitting punishment for the most heinous crimes, and I support it. But we need reforms in the death penalty to ensure that defendants receive fair trials, with zealous and competent lawyers, and with full access to

⁴⁴ Badinter 2000 at 228. Chirac, as presidential candidate in 1981, was personally opposed to the death penalty, but did not make a big deal of his opposition. As a political matter, he proposed a referendum on the death penalty and stated that he would vote against. But again, he did not emphasize the death penalty issue.

⁴⁵ Badinter 2000 at 230.

⁴⁶ God and Hillary Clinton, by Paul Kengor, p. 81-82.

DNA testing.”⁴⁷ Barack Obama, in his book, *The Audacity of Hope*, declared that “While the evidence tells me that the death penalty does little to deter crime, I believe there are some crimes—mass murder, the rape and murder of a child—so heinous that the community is justified in expressing the full measure of its outrage by meting out the ultimate punishment. On the other hand, the way capital cases were tried in Illinois at the time was so rife with error, questionable police tactics, racial bias, and shoddy lawyering, that 13 death row inmates had been exonerated.”⁴⁸ Only marginal candidates—candidates with no hope of winning the primaries, such as Democrat Dennis Kucinich or Ron Paul on the GOP side—expressed opposition to the death penalty.

At the national level and within most retentionist states, capital punishment is a litmus test issue, somewhat like abortion and gay marriage. Advocating abolition is perceived by the vast majority of citizens as being weak on crime, almost unpatriotic. As a result, it is only possible for an elected politician to effectively oppose the death penalty once he or she is already in a political position with excess political capital. Illinois Governor George Ryan’s commutations are a good example of this. Ryan effectively *expended* political capital when he placed a moratorium on the death penalty. Ryan was a charismatic, populist Republican politician. He was a talented orator and had a gift with political audiences—and he had a lot of political capital. What is clear from the historical record is that he used up a lot of political capital when he intervened in the capital punishment arena. He did so in a charismatic and populist way. In fact, Ryan had a very compelling, “man on the street” approach to discussing his reforms. In discussing the moratorium, he would explain that being governor in a state with the death penalty is just like being the CEO of an airline: if 12 flights make it to their destination,

⁴⁷ Associated Press policy Q&A, “Death Penalty” Jan 25, 2004.

⁴⁸ *The Audacity of Hope*, by Barack Obama, p. 58 .

but 13 crash and burn, you simply have to stop outgoing flights to find out what is happening.⁴⁹ It was that simple. And, of course, in Illinois, since the state had reinstated executions in 1977, 12 inmates had been executed, while 13 had been exonerated. It was just good management to stop and inspect the planes. Ryan was extremely compelling and a formidable politician, but there was no question he was using up his political capital. In his case, the later commutations were shrouded in allegations of political corruption and he was accused of taking the moral high-ground on the death penalty in order to whitewash his political shenanigans and dry clean his reputation. But notice that the moratorium and commutations will remain one of his principal political legacies—something he did out of conviction, despite the fact that it was not popular. It may bring him respect in some quarters, but it did not build political capital. It was only possible because he had political capital to spare.

Elite political leadership of this type has always been important in the shift toward abolition. As Roger Hood explains, “political leadership has been a potent factor.” This was true in France, but also in “the former German Democratic Republic, which in 1987 declared that capital punishment was no longer essential to defend socialism from violent crimes or even the legacy of Nazi war crimes. Georgia abolished capital punishment on the initiative of its President Edouard Shevardnatze in 1997, two years before becoming a member of the Council of Europe in 1999.... In South Africa, where the abolitionist movement had been unable to make any headway, it was the influence of Nelson Mandela and his new government which encouraged the Constitutional Court, in the landmark judgment in *The State v. Makwanyane and Mchunu* handed down in June 1995, to declare that capital punishment was incompatible with the prohibition

⁴⁹ I recall participating at an event with Governor Ryan in Chicago after he had placed a moratorium on executions and this was how he presented the matter.

against ‘cruel, inhuman or degrading’ punishment and with a ‘human rights culture,’ despite the heightened concerns about rising crime in that country.”⁵⁰

Abolition is simply not a democratic issue. As Neumayer remarks, “leadership by the political elite is important since in many countries abolition has been achieved against the majority opinion of the people.”⁵¹ Naturally, this raises an interesting question about the link Neumayer discovered between democracy and abolition. The answer, though, seems to revolve around the fact that democracies often leave room for elite politics. As Neumayer suggests, “any positive link between democracy and abolition is not caused by the fact that democracies are more accountable to the will of the people. Rather, what matters is that in most (full) democracies the political elite is willing to grant inviolable rights to all individuals, even if they are criminals, and to ignore public opinion, which might at times remain in favor of the death penalty.”⁵²

III.

Another important factor on the road to abolition—one that receives far less attention because it is so much less visible—is the minor acts of resistance that tend to delay, prolong, and generally disrupt death penalty cases. These are the actions of men and women in retentionist states who, sometimes consciously but even more often unconsciously, delay death penalty cases. Though not necessarily abolitionists themselves, they may find capital punishment unpleasant, uncomfortable, slightly disturbing, perhaps even a bit disgusting, something they would prefer simply not to deal with. The parallels in the debates over methods of execution and forms of torture, or for that matter the similarities in the discourses of suffocation in the lethal

⁵⁰ Hood 2001:338.

⁵¹ Neumayer 2006:10.

⁵² Neumayer 2006:10

injection and the “water-boarding” controversies—discussed so ably in Robin Wagner-Pacifici’s chapter in this book—are hard to escape or ignore. They infiltrate and permeate our thoughts about the death penalty, even if unconsciously. They make many people uncomfortable with the death penalty, even if unknowingly. And the resulting denial, discomfort, suppression, or simple plain disregard for death penalty cases has a significant impact on the life course of these capital cases. These men and women, whether by unconsciously trying to suppress these thoughts or deliberately ignoring the cases, effectively gummy up the capital punishment system—they slow it down, they put it on hold, they create delay, often unknowingly or unconsciously.

Clerks in the back office, secretaries and administrative assistants, a police officer, an investigator, a prison guard, people who have had their own brushes with the law or whose family members have been incarcerated—and given the high rate of incarceration in the United States today, reaching one percent of the adult population, there are many such people—these people render the death penalty system inefficient and somewhat ineffectual. In several death penalty cases that I have been involved as a litigator, I have encountered more than just inertia—more than just laziness or distraction. I have experienced almost intentional or deliberate delay by men and women in all categories of life who take it upon themselves to stall a death penalty prosecution by ignoring it. It is these acts of resistance—one could say unconscious minor acts of sabotage—that render the death penalty simply ineffectual in many states. The deliberate resistance of doctors to participate in the mechanics of capital punishment is the conscious and public manifestation of these forms of resistance, but the phenomenon tends to be far more unconscious and, as a result, pervasive.

The model to understand these acts is that of “everyday acts of resistance” developed by James C. Scott⁵³ and notions of “moral economy” developed in the work of E.P. Thompson.⁵⁴ Everyday acts of resistance offers a model to understand the way that politically less-powerful groups achieve resistance to a dominant political framework. Through hidden transcripts and minor deviant acts, the less-powerful groups challenge the dominant regime, and gum up the system. Those same acts of resistance can also be understood through the lens of moral economy. In his essay, *The Moral Economy of the English Crowd in the Eighteenth Century*, Thompson discusses how actions that may otherwise be interpreted through more familiar lenses of delay, deviance or even criminality, may actually bear important political dimensions. Thompson argued, for instance, that acts traditionally described as simple vandalism are often forms of political expression, of political protest or resistance to a political economic system which may appear to the actor as oppressive, disgusting, alien, or morally wrong. In his essay, Thompson describes how the food “riot” in eighteenth-century England may not have been mere spasmodic and occasional social disturbances brought about by a bad harvest, but actually politically engaged resistance to, at the time, a relatively new *laissez faire* political economy. These acts, Thompson argues, were “a highly complex form of direct popular action. . . . operat[ing] within a popular consensus as to what were legitimate and what were illegitimate practices in marketing, milling, baking, etc.”⁵⁵ The food riots were not about hunger, but about the perceived violation of a moral economy. The act of rioting was not about stealing food, but about damaging the mills and machinery — acts which were counterproductive from a hunger

⁵³ James C. Scott, *The Moral Economy of the Peasant: Subsistence and Rebellion in Southeast Asia* (1976); James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (1985); James C. Scott, *Domination and the Arts of Resistance: The Hidden Transcript of Subordinate Groups* (1990).

⁵⁴ E.P. Thompson, “The Moral Economy of the English Crowd in the Eighteenth Century,” in *Customs in Common*, 185-258. New York: Penguin Books, 1991.

⁵⁵ Thompson 1991:188.

perspective. The riots were a response to the perceived violation to the legitimate beliefs and moral order of the economy.

A traditional critique of resistance theories is that the ordinary acts of resistance tend to serve as substitutes for more direct and significant reform, thereby impeding political change. This critique may be more powerful in other contexts, but in the death penalty arena it seems to operate differently. The minor acts of resistance here seem to be effectual precisely because they tend to sap the capital punishment system of its moral legitimacy. The lengthy delays undermine the primary justifications for the death penalty—whether it is the deterrent effect of the sentence of death, the finality of the punishment, or the moral equivalence, the *jus talionis* of the death sentence. This may reflect the unique ways in which sovereignty is constituted in the death penalty context—a question raised poignantly in Peter Fitzpatrick’s contribution to this book.⁵⁶ But in this particular context, those minor acts of resistance seem to erode the political support necessary for capital punishment to continue to function.

Another sentiment, also frequent in the United States, tends to contribute to the everyday acts of resistance: rooting for the underdog. This too is a strong strain in American culture. Many ordinary citizens are willing to help someone condemned to death when they feel that the system is stacked against them. There need not always be moral opposition to the death penalty, but simply a feeling that the scales are too heavily weighted in favor of the state. Naturally, these are not the dominant passions that are always encountered in death penalty cases. These are not the more public transcripts, but the hidden ones. The majority of actors in death penalty cases are deliberately seeking to promote the execution of the sentence of death. But the small acts of resistance—and the sustaining acts of kindness—have an important effect on the capital punishment system.

⁵⁶ Fitzpatrick 2008.

IV.

The empirical data reflect a clear trend toward abolition: in all probability, the United States, like the larger international community, will experience greater abolition of the death penalty during the first half of the twenty-first century. There is no reason to believe that the movement toward abolition will be especially rapid. As Michael McCann and David Johnson ably discuss in their chapter, there are important institutional impediments to abolition in the United States. There are numerous features unique to our federal system of criminal justice—such as localized elections, decentralized policing and corrections, and multiple and dispersed layers of appellate court review—that present obstacles to abolition in the individual states.⁵⁷ Nevertheless, the evidence pointing toward greater abolition has been steady and consistent not only in the last quarter of the twentieth century, but also in the first decade of the twenty-first century. It may well take twenty years for the momentum to reach a tipping point, but the direction of change favors abolition rather than retention.

It is unlikely that the momentum will start in the deepest corridors of the Death Belt—in Texas or Alabama. It is far more likely that states such as Kansas or New Hampshire that have not executed anyone since the resumption of the death penalty in 1976 or states such as Colorado, Connecticut, Idaho, New Mexico, South Dakota or Wyoming that have only executed one inmate since 1976, will gravitate toward abolition first. But in the process, it is probable that the movement toward greater abolition will eventually bring about a federal constitutional ban on capital punishment in the United States. And it is likely that this will occur before 2050.

With the eventual abolition of capital punishment in the United States, it is entirely reasonable to expect that, by the mid-twenty-first century, capital punishment will have the same

⁵⁷ McCann and Johnson 2008: ____.

status as torture within the larger international community: an outlier practice, prohibited by international agreements and customary international law, practiced illicitly by rogue nations, and defended only by a handful of conservative academics seeking attention.

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