


2016

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Recommended Citation

David T. Johnson, *Retention and Reform in Japanese Capital Punishment*, 49 U. MICH. J. L. REFORM 853 (2016).
Available at: <http://repository.law.umich.edu/mjlr/vol49/iss4/4>

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RETENTION AND REFORM IN JAPANESE CAPITAL PUNISHMENT

David T. Johnson

INTRODUCTION

The novel *Anna Karenina* begins with the observation that “[a]ll happy families resemble one another, each unhappy family is unhappy in its own way.”¹ This insight suggests that for a marriage to be happy it must succeed in several ways, while failure in one respect means a marriage is doomed. The “*Anna Karenina* principle” has been applied in various fields, from business entrepreneurship² and animal domestication³ to ecology⁴ and ethics.⁵ In many human activities, success “requires avoiding many separate possible causes of failure.”⁶

When it comes to capital punishment, “abolitionist nations all seem alike, but every death penalty nation is retentionist in its own way.”⁷ In this version of the *Karenina* principle, abolition, and death penalty reform more generally, may fail in many ways.

Much has been written about why the United States retains capital punishment, and the causes are contested.⁸ And most empirical

1. LEO TOLSTOY, *ANNA KARENINA* 1 (Louise & Aylmer Maude trans., Knopf Inc. 1912) (1873).

2. PETER THIEL, *ZERO TO ONE: NOTES ON STARTUPS, OR HOW TO BUILD THE FUTURE* 34 (2014).

3. JARED DIAMOND, *GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES* (1997), 157.

4. Dwayne R.J. Moore, *The Anna Karenina Principle Applied to Ecological Risk Assessments of Multiple Stressors*, 7 *HUM. & ECOLOGICAL RISK ASSESSMENT* 231, 231–37 (2001).

5. ARISTOTLE, *NICHOMACHEAN ETHICS* 38 (W.D. Ross trans., Oxford 2009) (c. 384 B.C.E.).

6. DIAMOND, *supra* note 3, at 157.

7. DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION* 22 (2010).

8. Cf. SANGMIN BAE, *WHEN THE STATE NO LONGER KILLS: INTERNATIONAL HUMAN RIGHTS NORMS AND ABOLITION OF CAPITAL PUNISHMENT* (2007); STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (2003); GARLAND, *supra* note 7; ANDREW HAMMEL, *ENDING THE DEATH PENALTY: THE EUROPEAN PERSPECTIVE IN GLOBAL PERSPECTIVE* (2010); ANDREA D. LYON, *THE DEATH PENALTY: WHAT’S KEEPING IT ALIVE?* (2014); FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* (2003); Andrew Moravcsik, *The New Abolitionism: Why Does the U.S. Practice the Death Penalty While Europe Does Not?*, 4 *EUR. STUD.* 1 (2001); Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 *OR. L. REV.* 97 (2002); Moshik Temkin, *The Great Divergence: The Death Penalty in the United States and the Failure of Abolition in Transatlantic Perspective* (Harvard Kennedy Sch., Working Paper No. RWP15-037, 2015).

inquiries about retention and abolition—like most studies of capital punishment— are concentrated on the United States.⁹ This preoccupation with the United States provides a “distorted and partial view” of questions about continuity and change in death penalty law, policy, and practice in the world.¹⁰ The United States is peculiar in many respects,¹¹ including capital punishment.¹²

By focusing on retention and reform in Japanese capital punishment, this Article aims to explain the high degree of continuity in that country’s death penalty. The Japanese case is important for at least two reasons. First, Japan is rich and democratic but not Western. As poor and undemocratic countries develop their economies and polities, Japan could be a positive role model for those countries that want to retain the death penalty and a negative role model for those that prefer to abolish or otherwise reform the institution.¹³ Second, Japan is an important part of Asia, a region home to sixty percent of the world’s population and the majority of the world’s executions.¹⁴ If Asia is “the next frontier” in the two-century debate about whether state executions should continue,¹⁵ then examining how Japan is “retentionist in its own way” should provide insights about obstacles to the campaign for abolition in that region and in the rest of world.

This Article focuses on the failure of abolition and of death penalty reform in Japan in order to illustrate contingencies in the trajectory of capital punishment in the modern world. Part I describes three facts about postwar Japan that help explain why it retains capital punishment today: a missed opportunity for abolition during the American occupation of the country after World War II; the long-term rule of a conservative political party; and economic and geopolitical power that has enabled the country to resist the influence of international norms. Part II describes a few ways in which Japanese capital punishment has changed in recent years—and many ways in which it has not. Part III focuses on four causes of

9. ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 3 (4th ed. 2008).

10. *Id.*

11. *See generally* SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* (1996).

12. GARLAND, *supra* note 7.

13. Matthew J. Wilson, *Seeking to Change Japanese Society Through Legal Reform*, in *CRITICAL ISSUES IN CONTEMPORARY JAPAN* 265 (Jeff Kingston ed., 2014) (describing how “emerging countries study and even model their economic and legal systems after Japan”).

14. DAVID T. JOHNSON & FRANKLIN E. ZIMRING, *THE NEXT FRONTIER: NATIONAL DEVELOPMENT, POLITICAL CHANGE, AND THE DEATH PENALTY IN ASIA* xii (2009).

15. *Id.* at xi.

continuity in capital punishment in Japan: the rarity of exonerations in Japanese criminal justice; a jurisprudence that does not treat death as a special form of criminal punishment requiring extra safeguards for criminal defendants in capital cases; a high degree of secrecy surrounding executions and capital sentencing; and a society in which race is not regarded as a salient factor in the administration of capital punishment. Part IV suggests how reform in Japanese capital punishment might be accomplished by challenging some of the causes of continuity. Part V concludes by observing that the road to death penalty reform is not merely a positive path requiring leadership from the front in the face of public support for the institution. It is also a negative path leading away from beliefs and practices that present obstacles to the institution's diminution and abrogation.

I. JAPANESE RETENTION

The most striking death penalty trend is its decline around the world.¹⁶ A few countries have been carrying out executions more frequently in recent years (Indonesia, Pakistan, Iran, and Saudi Arabia), and a few others have been sentencing more people to death (Egypt and Nigeria), but the overall trend is “towards abolition.”¹⁷ In the United States, seven states have abolished capital punishment since 2007.¹⁸ Among states that retain the death penalty, there have been large declines in death sentences and executions.¹⁹ In Texas, which has carried out more executions since 1976 than the next six most frequent executing states combined, no person was sentenced to death in the first six months of 2015.²⁰ Texas's death row has also declined in size from 460 persons in 1999 to 257 in 2015—a drop of 44 percent.²¹ One question about the future is whether the death penalty will continue to decline, as some experts

16. See HOOD & HOYLE, *supra* note 9, at 14.

17. *On the way out—with grisly exceptions; Capital Punishment*, THE ECONOMIST, July 4, 2015, at 50.

18. *States With and Without Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Apr. 8, 2016).

19. See generally DEATH PENALTY INFO. CENTER, *THE DEATH PENALTY IN 2015: YEAR END REPORT* (2015), <http://deathpenaltyinfo.org/documents/2015YrEnd.pdf>.

20. Rodger Jones, *So far this year in Texas, number of death sentences = zero*, THE DALLAS MORNING NEWS: OPINION BLOG, (July 2, 2015, 4:47 PM), <http://dallasmorningviewsblog.dallasnews.com/2015/07/so-far-this-year-in-texas-number-of-death-sentences-zero.html/>.

21. Eric Nicholson, *Texas Falls Out of Love with the Death Penalty, Embraces Life Without Parole*, DALLAS OBSERVER (Dec. 17, 2005, 4:00 AM), <http://www.mystatesman.com/news/news/crime-law/where-is-the-texas-death-row-class-of-99-now/nnWQw/>.

predict,²² or whether most of the countries and states “likely to embrace the abolitionist cause” have already done so.²³

The retention of capital punishment in Japan is puzzling in several respects. Japan and the United States are the only two developed democracies that retain capital punishment and continue to carry out executions on a regular basis. Other rich and democratic countries have abolished the death penalty in law (Canada, Australia, New Zealand, and all the countries of Europe except Belarus)²⁴ or practice (South Korea and the special administrative region of Hong Kong).²⁵ Japan does not have radically local democracy, which has made abolition difficult in the United States, nor does it have a history of race relations like that which has shaped the death penalty in the United States.²⁶ Conversely, Japan’s governmental structure shares many of the characteristics that explain capital punishment abolition in European countries such as Germany, France, and the United Kingdom. These characteristics include a centralized state, a uniform penal code, a multi-party parliamentary system which insulates representatives from public opinion, and a civil law system with bureaucratic professionalization of judges and prosecutors.²⁷ Yet despite these similarities, Japan’s death penalty has not moved towards abolitionist Europe in policy or practice.

The puzzle of Japanese retention deepens when one considers the two main political circumstances which precipitated abolition in Western Europe after World War II; similar circumstances are also found in recent Japanese history. In Germany, Italy, Portugal, and Spain, the fall of an authoritarian leader (Hitler, Mussolini, Salazar, and Franco) led to death penalty abolition in 1944, 1949, 1976, and 1978, respectively.²⁸ But after Japan’s authoritarian political system collapsed in 1945, the death penalty did not disappear. Similarly, in Austria, Great Britain, and France, the election of a

22. William A. Schabas, *Universal Abolition of Capital Punishment is Drawing Nearer*, 6 INT’L AFF. F. 12, 13 (2015).

23. LEON RADZINOWICZ, *ADVENTURES IN CRIMINOLOGY* 293 (1999).

24. See James Crisp, *Belarus and Ukrainian rebels keep death penalty alive in Europe*, EURACTIV.COM (Apr. 1, 2015), <http://www.euractiv.com/section/europe-s-east/news/belarus-and-ukrainian-rebels-keep-death-penalty-alive-in-europe/>.

25. JOHNSON & ZIMRING, *supra* note 14, at 147–90 (describing the cessation of executions in South Korea since 1997); *id.* at 365–77 (describing Hong Kong, where the last execution occurred in 1966 and where capital punishment was abolished in 1993, though residents of the Special Administrative Region can still be condemned to death and executed in the People’s Republic of China through the process of rendition).

26. Compare GARLAND, *supra* note 7 (discussing how race shapes capital punishment in America).

27. See HAMMEL, *supra* note 8, at 233.

28. See ZIMRING, *supra* note 8, at 23.

left-liberal government led to abolition of capital punishment in 1950, 1965, and 1981, respectively.²⁹ Yet after the left-liberal Democratic Party of Japan (DPJ) took control of Japan's central government in 2009, the death penalty was neither abolished nor significantly reformed.

Japanese retention also seems strange in light of two social facts connected to capital punishment in studies of the United States. First, Japan's homicide rate of approximately 0.6 per 100,000 population is approximately one-tenth of the United States' homicide rate, and is lower than the homicide rates in many abolitionist countries of the European Union.³⁰ In transatlantic comparisons, the high murder rate in the United States has been used to explain why America retains the death penalty while European nations do not. On this theory, "the fear, grief, and outrage" that murder inspires and that fuel public support for state killing "are far more prevalent" in the United States, where murder is far more common.³¹ Yet this logic cannot explain retention in Japan, which has consistently had one of the lowest homicide rates in the world.³² The second puzzling social fact concerns economic inequality, which grew after Japan's economic bubble burst in 1990.³³ In most respects, however, Japanese society remains much less unequal than America,³⁴ where economic, racial, and social disparities help explain retention of the death penalty, the number of capital sentences, and the number of executions.³⁵ Japan is like most other death penalty nations in that the people most likely to be condemned to death and executed are poor and poorly connected,³⁶ but inequality does not seem to explain the failure of abolition in Japan.

29. *Id.*

30. See David T. Johnson, *The Vanishing Killer: Japan's Postwar Homicide Decline*, 9 Soc. Sci. JAPAN J. 73, 77 (2006) (reporting that in the late 1990s, homicide rates in Europe varied from 0.7 in France to 2.2 in Finland).

31. SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* 42 (2003).

32. See Johnson, *supra* note 30, at 73.

33. See generally TOSHIAKI TACHIBANAKI, *CONFRONTING INCOME INEQUALITY IN JAPAN: A COMPARATIVE ANALYSIS OF CAUSES, CONSEQUENCES, AND REFORM* (2009).

34. See *id.* at 242–43.

35. See generally David Jacobs & Jason T. Carmichael, *Ideology, Social Threat, and Death Sentences: Capital Sentencing Across Time and Space*, 83 SOC. FORCES 249 (2004); David Jacobs & Jason T. Carmichael, *The Political Sociology of the Death Penalty: A Pooled Time-Series Analysis*, 67 AM. SOC. REV. 109 (2002); David Jacobs et al., *Vigilantism, Current Racial Threat, and Death Sentences*, 70 AM. SOC. REV. 656 (2005); David Jacobs & Stephanie L. Kent, *The Determinants of Executions Since 1951: How Politics, Protests, Public Opinion, and Social Divisions Shape Capital Punishment*, 54 SOC. PROBS. 297 (2007).

36. JOHNSON & ZIMRING, *supra* note 14, at 307.

What, then, explains the absence of abolition in Japan? Few serious studies address this question, but parallel studies of the failure of abolition in the United States suggest that there are multiple causes.³⁷ The most persuasive explanation of the death penalty's trajectory in Western countries focuses on "state institutions and the political and cultural processes that bear on state action."³⁸ In this view, the death penalty "is always and everywhere an exercise of state power," and it is the "the nature of the state and its context of action" that dictates stability and change in a death penalty system.³⁹ Focusing on the state's role when explaining capital punishment's trajectory produces three insights about the puzzle of Japanese retention.

First, Japan still has the death penalty partly because it missed a prime opportunity for abolition during the postwar Occupation (1945-1952).⁴⁰ As described above, several European nations abolished the death penalty soon after authoritarian regimes fell.⁴¹ Similar abolitions have occurred in Asia as well: in Cambodia after the fall of the Khmer Rouge (1989), in the Philippines after Marcos fled (1987), and in East Timor after it gained independence from Indonesia (1999).⁴² In all of these countries, abolition was a way of symbolically distancing new governments from the state killing performed by their predecessors.⁴³ Japan experienced major regime change after 1945, yet the death penalty endured throughout the subsequent process of state transformation. The reform agenda in the United States-led occupation of Japan was highly ambitious, but capital punishment was not on it. This not only distinguishes the occupation of Japan from the parallel occupation of Germany,⁴⁴ but also helps explain why Japan remains retentionist today. The Tokyo War Crimes Trial is a key part of Japan's retentionist story (seven war criminals were executed in 1948 under American officials).⁴⁵ When a country is defeated in war, the victor's desire to

37. See Temkin, *supra* note 8.

38. GARLAND, *supra* note 7, at 127 (emphasis added).

39. *Id.* at 127-28 (emphases added).

40. David T. Johnson, *Where the State Kills in Secret: Capital Punishment in Japan*, 8 PUNISHMENT & SOC'Y 251, 259 (2006).

41. See ZIMRING, *supra* note 8, at 19.

42. See JOHNSON & ZIMRING, *supra* note 14, at 16.

43. See ZIMRING, *supra* note 8, at 22-23.

44. RICHARD J. EVANS, RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY 1600-1987, at 739-871 (1996).

45. See YUMA TOTANI, THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II (2009), though a detailed account of why capital punishment endured through a period when much else in Japanese society was changing—and in circumstances that have precipitated abolition in many other nations—has never been published; RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 172 (1971).

exact revenge against leaders of the losing regime may cause capital punishment to become more entrenched than it otherwise would be.⁴⁶ Saddam Hussein's hanging in 2006 and the subsequent resurgence of executions in Iraq illustrate the contemporary relevance of this possibility.⁴⁷

Second, the persistence of capital punishment in Japan after the occupation ended in 1952 can be explained by the long hegemony of the conservative Liberal Democratic Party (LDP) and other political parties' inability to change death penalty policy and practice when they controlled government.⁴⁸ The LDP gained control of Japan's central government in 1955, and over the following sixty years it maintained control for all but fifty months. The first interregnum lasted only eight months in 1993-94, and the coalition government of seven parties was too fractious and too brief to enable reform of capital punishment – or much else.⁴⁹ The second interruption of long-term LDP rule began in August 2009, when the Democratic Party of Japan (DPJ) gained control of the central government; the DPJ retained control until it lost power to the LDP following a landslide election in December 2012.⁵⁰ Despite promises to proceed more cautiously with capital punishment than the LDP had done, the DPJ did not move towards abolition or a moratorium on executions during this period.⁵¹

European experience suggests that abolition is more likely to occur under the leadership of a liberal party than a conservative one, as Austria, Great Britain, and France demonstrated, and the same can be said of moratoria on executions in South Korea and Taiwan.⁵² In the United States, abolition at the state level rarely occurred in conservative strongholds, although in 2015 Nebraska became the first predominantly Republican state to abolish the death penalty in forty years.⁵³ The durability of Japan's death penalty reflects not only the long-term hegemony of its ruling party, but

46. See MINEAR, *supra* note 45, at 173.

47. See UNITED NATIONS ASSISTANCE MISSION FOR IRAQ HUMAN RIGHTS OFFICE & OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, REPORT ON THE DEATH PENALTY IN IRAQ (2014), http://www.ohchr.org/Documents/Countries/IQ/UNAMI_HRO_DP_1Oct2014.pdf.

48. JOHNSON & ZIMRING, *supra* note 14, at 81.

49. GERALD L. CURTIS, THE LOGIC OF JAPANESE POLITICS: LEADERS, INSTITUTIONS, AND THE LIMITS OF CHANGE 99-136 (1999).

50. Kenji E. Kushida & Phillip Y. Lipsky, *The Rise and Fall of the Democratic Party of Japan, in JAPAN UNDER THE DPJ: THE POLITICS OF TRANSITION AND GOVERNANCE* 3-4 (Kenji E. Kushida & Phillip Y. Lipsky eds., 2013).

51. *Id.* at 22-24.

52. JOHNSON & ZIMRING, *supra* note 14, at 93.

53. See Grant Schulte & Anna Gronewald, *Nebraska Abolishes Death Penalty in Landmark Override Vote*, ASSOCIATED PRESS (May 28, 2015, 7:26 AM), <http://bigstory.ap.org/article/>

also that other parties that have held power were almost “indistinguishable” from the conservative LDP in policy preferences and commitments.⁵⁴ In Japan, as in other countries, conservative politics has contributed to the conservation of capital punishment.

When examining the state’s role in retaining capital punishment, the third insight stresses the Japanese state’s geopolitical position, especially in the years after 1980, when Japan emerged as an economic power. Like the United States, China, and India, Japan has sufficient size, economic clout, and political importance to make it difficult for external forces—international law, human rights norms, United Nations resolutions, or the lobbying of abolitionist activists—to impose meaningful sanctions for noncompliance. Powerful states seldom cede to supranational entities.⁵⁵ Rather, they tend to only endorse international norms that serve their own purposes. There are many examples of this selectivity: the United States and torture in its war on terror, China and freedom of expression, Japan and whaling, India and caste-based discrimination, and capital punishment retention in all four of these countries. It is more difficult for the “human rights dynamic” that has been driving abolition in many parts of the world⁵⁶ to influence death penalty policy and practice in these global powers than it is for the same dynamic to have an effect in Fiji, Madagascar, or Suriname, three countries that abolished after December 2014.⁵⁷

In some respects, Japan remains committed to a model of law and government that considers self-sufficiency a virtue and that resists and resents attempts at outside influence.⁵⁸ The Liberal Democratic Party, which believes “human rights are not universal,”⁵⁹ rules Japan, yet Japan often follows America’s lead in matters of foreign policy and human rights.⁶⁰ In these spheres, Japan’s subordination to the U.S. is sometimes so extreme that it has been

d41ae74bd2954099aa875375e23554bb/nebraska-abolishes-death-penalty-landmark-override-vote.

54. Arthur Stockwin, *Japanese Politics: Mainstream or Exotic?*, in CRITICAL ISSUES IN CONTEMPORARY JAPAN, *supra* note 13, at 15–22.

55. See, e.g., AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005).

56. Roger Hood and Carolyn Hoyle, *Abolishing the Death Penalty Worldwide: The Impact of a “New Dynamic,”* 38 CRIME & JUST. 1, 3–4 (2009).

57. *On the way out—with grisly exceptions*, *supra* note 17.

58. Cf. Sangmin Bae, *International Norms, Domestic Politics, and the Death Penalty: Comparing Japan, South Korea, and Taiwan*, 44 COMP. POL. 41, 55 (2011).

59. Lawrence Repeta, *Limiting Fundamental Rights Protection: The Role of the Supreme Court*, in CRITICAL ISSUES IN CONTEMPORARY JAPAN, *supra* note 13, at 49.

60. See generally CHALMERS JOHNSON, BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE (2000) (providing examples related to foreign policy, especially chapter 2 and chapter 8); KENNETH PYLE, JAPAN RISING: THE RESURGENCE OF JAPANESE POWER AND PURPOSE (2007) (providing examples related to foreign policy, especially chapter 8).

called a “puppet state.”⁶¹ Japan’s continued capital punishment may also depend on American retention. When a superpower that sees itself as “the archetypal liberal democracy and guardian of human rights,” such as the United States, kills its own citizens, it provides cover and legitimacy for other nations that want to do the same.⁶² If the United States abolishes capital punishment, as some analysts predict,⁶³ Japan may resist pressure to conform to the abolitionist norm; Japan’s resistance with respect to whaling, ever since the International Whaling Commission’s moratorium on commercial whaling went into effect in 1987,⁶⁴ demonstrates its willingness to resist conforming. But Japan’s response to United States abolition would more likely be to do what it has often done in its modern history: adapt to the changing imperatives of its external environment.⁶⁵ Japanese leaders currently perceive little pressure to conform to the emerging norm of abolition; Asia, unlike Europe, has no regional organizations to push Japan (or China, Taiwan, or Thailand) towards abolition, as the European Union and the Council of Europe did to several countries in Central and Eastern Europe after the fall of the Berlin Wall.⁶⁶ In the geopolitics of capital punishment, Asia is not Europe, and Japan is not Latvia or Lithuania.⁶⁷

II. JAPANESE REFORM

The preceding Part argues that Japan is retentionist “in its own way,” largely for reasons related to the state and the contexts of state action in the postwar period. This Part further illustrates the relevance of the *Karenina* principle by arguing that capital punishment in Japan, in addition to being retentionist, is also reformist “in

61. GAVAN McCORMACK, *CLIENT STATE: JAPAN IN THE AMERICAN EMBRACE* 2 (2007).

62. Roger Hood, *Capital Punishment: A Global Perspective*, 3 PUNISHMENT & SOC’Y 331 (2001).

63. See generally THE ROAD TO ABOLITION? (Charles J. Ogletree & Austin Sarat eds., 2009); IS THE DEATH PENALTY DYING? EUROPEAN AND AMERICAN PERSPECTIVES (Austin Sarat & Jurgen Martschukat eds., 2011).

64. HIROYUKI WATANABE, *JAPAN’S WHALING: THE POLITICS OF CULTURE IN HISTORICAL PERSPECTIVE* xiv (2009).

65. PYLE, *supra* note 60, at 9.

66. Eva Puhar, *The Abolition of the Death Penalty in Central and Eastern Europe: A Survey of Abolition Processes in Former Communist Countries*, (2003) (unpublished Master’s thesis, National University of Ireland).

67. David T. Johnson, *Why Does Japan Retain the Death Penalty? Nine Hypotheses*, in CAPITAL PUNISHMENT: A HAZARD TO A SUSTAINABLE CRIMINAL JUSTICE SYSTEM? 139–57 (Lill Scherdin ed., 2014).

its own way.” The most striking reform-related fact is the dearth of death penalty change.

The contrast between Japan and the United States is stark. Public support for capital punishment in the United States has declined to its lowest levels since the 1960s.⁶⁸ Several American states have declared moratoria on executions. The U.S. Supreme Court has prohibited executing the intellectually disabled⁶⁹ and minors convicted of murder who were under eighteen at the time of the crime.⁷⁰ There have been numerous political and legal struggles over the method of execution—and much experimentation with the chemicals used to perform lethal injections.⁷¹ Death penalty sentencing in the United States has declined 75 percent since 1990, and executions have declined 60 percent. The declines in death sentences and executions have several causes, including a large decrease in homicides and the increased use of life-without-parole sentencing alternatives.⁷² But the most important cause appears to be anxiety about mistakes in the U.S. capital punishment administration.⁷³ Concerns about wrongful convictions and other miscarriages of justice have made prosecutors, judges, juries, and governors more cautious about capital punishment.⁷⁴

68. On public opinion and capital punishment in America, see *Public Opinion About the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/public-opinion-about-death-penalty>; on public opinion and capital punishment in Japan, see MAI SATO, *THE DEATH PENALTY IN JAPAN: WILL THE PUBLIC TOLERATE ABOLITION?* 189-93 (2014) (arguing that the support for capital punishment found in government surveys is softer than press reports suggest and concluding that the Japanese public would likely accept abolition); MAI SATO & PAUL BACON, *THE PUBLIC OPINION MYTH: WHY JAPAN RETAINS THE DEATH PENALTY* 44 (2015), <http://www.deathpenaltyproject.org/wp-content/uploads/2015/08/The-Public-Opinion-Myth.pdf> (arguing that the Japanese public is more discerning about capital punishment than the results of superficial surveys suggest and that they are, in fact, “largely ready for abolition”).

69. See *Atkins v. Virginia*, 536 U.S. 304 (2002).

70. See *Roper v. Simmons*, 543 U.S. 551 (2005).

71. TUROW, *supra* note 31, at 20; David Von Drehle, *The Last Execution: Why the Era of Capital Punishment is Ending*, TIME, June 8, 2015, at 27.

72. David G. Savage, *Capital Punishment in U.S. Continues Its Decline*, L.A. TIMES (Dec. 17, 2014, 9:00 PM), <http://www.latimes.com/nation/la-na-death-penalty-20141218-story.html>.

73. See generally FRANK R. BAUMGARTNER ET AL., *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* (2008).

74. See generally NAT’L REGISTRY OF EXONERATIONS, *EXONERATIONS IN 2015* (2016), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf; ALLISON D. REDLICH ET AL., *EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD* (2014). Recent reforms in American criminal justice (such as cutting back on mandatory minimum sentences, limiting solitary confinement, reducing barriers to reentry for ex-inmates, and so on) have been driven partly by a push from political conservatives such as U.S. Representative Patrick J. Nolan of California and former Chief Justice of the North Carolina Supreme Court Isaac Beverly Lake, Jr. See Bill Keller, *Prison Revolt*, THE NEW YORKER (June 29, 2015), <http://www.newyorker.com/magazine/2015/06/29/prison-revolt>; Japan has seen no

It is sometimes claimed that Japan “rarely” uses capital punishment.⁷⁵ In reality, Japan looks similar to the United States in its inclination to use death as a criminal sanction. In per capita terms, Japan’s execution rate is lower than the overall rate for the United States and lower than the rates in high-rate American states such as Texas, Oklahoma, and Virginia.⁷⁶ But the per capita execution rate can be a misleading measure to determine frequency of use because (Stalinist nightmares aside) persons are not randomly selected for death. They are convicted and executed from a larger pool of potentially capital cases. The pool in the United States and Japan consists entirely of homicide crimes.⁷⁷ Thus, to assess the scale of capital punishment prevalence in these two countries, one must consider the size of the relevant capital-crime pools. The size of America’s murder pool has declined by almost half since 1990,⁷⁸ but in per capita terms it remains about ten times larger than Japan’s murder pool. A recent study found that about 2.2 percent of all known murder offenders were sentenced to death in the United States from 1977 through 1999.⁷⁹ By state, the range ran from a low of 0.4 percent in Colorado to a high of six percent in Nevada.⁸⁰ The probability of a known murderer being sentenced to death in Japan is not much different. From 1994 through 2003, Japan sentenced ninety-three persons to death, with approximately 7000 murders occurring in Japan during that period.⁸¹ The chance of a murderer being sentenced to death was 1.3 percent—about the same rate as in California and Virginia.⁸² And in 2007, when Japan had fourteen death sentences in courts of original jurisdiction and the United States had 110, the ratio of death sentences to homicides was about three times higher in Japan than in the United States.⁸³

In short, when it comes to the probability of imposing a sentence of death, Japan looks like many American death penalty states. When it comes to execution, Japan is even more aggressive than the United States, where more than two-thirds of death sentences are

parallel push for criminal justice or capital punishment reform from the LDP, the country’s conservative ruling party.

75. GARLAND, *supra* note 7, at 338.

76. David T. Johnson, *American Capital Punishment in Comparative Perspective*, 36 L. & Soc. INQUIRY 1033, 1052 (2011).

77. *Id.*

78. *Id.*

79. *Id.*

80. John Blume et al., *Explaining Death Row’s Population and Racial Composition*, 1 J. OF EMPIRICAL LEGAL STUD. 165, 172 (2004).

81. Johnson, *supra* note 76, at 1052.

82. Blume et al., *supra* note 80.

83. JOHNSON & ZIMRING, *supra* note 14, at 77.

overturned on appeal.⁸⁴ In Japan, by contrast, most persons who receive a sentence of death are eventually executed.⁸⁵ In these ways, Japan is not “relatively sparing” in its capital punishment usage, as some analysts contend.⁸⁶ It can be called a “vigorous killing state,”⁸⁷ and in some respects its use of capital punishment has been surging since 1993.⁸⁸

By comparison to the United States, there has been much more continuity than change in Japan’s death penalty policy and practice. My analysis starts with a summary of the modest changes that have occurred in recent years.

In 2009, Japan implemented a new trial system in which six laypersons sit with three professional judges to adjudicate guilt and determine sentences in serious criminal cases.⁸⁹ This “lay judge system” (*saiban-in seido*) places citizen participation at the center of Japanese criminal trials—and criminal justice—for the first time since 1943, when the Jury Act of 1928 was suspended after fifteen years.⁹⁰ The lay judge reform has stimulated reform in several parts of Japan’s pretrial process, from recording interrogations and expanding discovery rights for defendants to relaxing bail policy and invigorating the criminal defense system.⁹¹ Since the lay judge reform took effect, all murder defendants have been tried by lay judge tribunals.⁹² Formally, this is a major change from the previous practice in which murder defendants were tried by a panel of three professional judges.

In terms of trial outcomes, however, the continuities between the old and new trial systems are striking. Under the new trial system,

84. JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES 1973-1995 i–iii (2000), http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf.

85. Johnson, *supra* note 76.

86. GARLAND, *supra* note 7, at 319.

87. Johnson, *supra* note 40, at 267.

88. The main signs of resurgence in Japanese capital punishment are increases in the number of death sentences, executions, and condemned persons on death row, and increased public support for capital punishment in government surveys. See JOHNSON & ZIMRING, *supra* note 14, at 69–78.

89. DIMITRI VANOVERBEKE, JURIES IN THE JAPANESE LEGAL SYSTEM: THE CONTINUING STRUGGLE FOR CITIZEN PARTICIPATION AND DEMOCRACY 1 (2015).

90. *Id.*

91. Satoru Shinomiya, *Saiban'inho wa Keiji Jitsumu no Genba ni Nani o Motarashite Iru ka* [What Is the Lay Judge Act Doing to Criminal Justice Practice?], 644 HOGAKU SEMINA [JURISPRUDENCE SEMINAR] 1, 1–3 (August 2008).

92. See David T. Johnson, *Japan's Lay Judge System*, in HANDBOOK ON COMPARATIVE CRIMINAL PROCEDURE (Jacqueline Ross & Stephen Thaman eds., forthcoming 2016).

Japan's famously (and notoriously) high conviction rate has not declined.⁹³ Under the new trial system, lay judge panels are at least as likely to impose a death sentence when prosecutors seek one as professional judges were in the previous trial system. Under the new trial system, lay judge panels impose a death sentence in approximately seventy percent of the cases where prosecutors seek one.⁹⁴ This seventy percent rate is also higher than the rates that prevail in American death penalty jurisdictions. Sentencing severity for other crimes has changed little under the new trial system, except in serious sex crime cases, where sentences have become somewhat harsher.⁹⁵

In addition to the lay judge reform, three other death penalty changes occurred while the Democratic Party of Japan ruled the country from 2009 to 2012. All are modest, and none has had a significant effect on the number of death sentences or executions or on the way in which capital punishment is administered.

First, Minister of Justice Keiko Chiba, an avowed opponent of capital punishment, attended two hangings in Tokyo on July 28, 2010.⁹⁶ Before that day, no sitting Minister of Justice had attended a hanging for several decades.⁹⁷ Minister Chiba watched these two executions—of Shinogawa Kazuo (age 59) and Ogata Hidenori (age 33)—at her own discretion because she wanted to witness firsthand the executions she had authorized.⁹⁸ Customarily, the only persons who observe hangings in Japan are a prosecutor, a prosecutor's assistant, the warden of the jail where the hangings are held, and several members of the jail's execution team.⁹⁹ From an American

93. DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 214 (2002).

94. SATORU SHINOMIYA, *NIHON NI OKERU SHIKEI RYOKEI NI TSUITE: SONO KOSEISEI, RINRISEI, SOSHITE KEMPōtekigōsei* [ON CRIMINAL PROCEDURE FOR DEATH SENTENCING IN JAPAN: FAIRNESS, ETHICS, AND CONSTITUTIONALITY] 775–77 (2014).

95. Takeda Masahiro, *Kensatsu wa Taishō Jiken o Shinchōni Kiso: Saiban'in Kōhosha no Jitairitsu, 60% o Koeru* [Prosecutors are Charging Lay Judge Cases Cautiously: And the No-Show Rate for Lay Judge Candidates Exceeds 60 Percent], *JĀNARIZUMU* [JOURNALISM] 136, 136–43 (2014).

96. Keiko Chiba, *Shikko no Shomei wa Watashi Nari no Koishi: Shikei – Nayami Fukaki Mori* [I Signed the Execution Orders 'to Throw a Pebble into a Pond' in My Own Fashion: Death Penalty . . . The Deep Wood of Woe], *ASAHI SHIMBUN* [ASAHI NEWSPAPER], Nov. 20, 2011, at 19.

97. Keiko Chiba wrote about her decision to authorize and attend the executions in *Shikko no Shomei wa Watashi Nari no Koishi: Shikei – Nayami Fukaki Mori*, *supra* note 96. For an extended interview of Chiba on the same subjects, see the NHK documentary *ETV Tokushū Shikei Shikkō: Hōmudajin no Kunou* [ETV Documentary Special Execution: Suffering of Minister of Justice] (ETV television broadcast Feb. 27, 2011).

98. David T. Johnson, *Progress and Problems in Japanese Capital Punishment*, in *CONFRONTING CAPITAL PUNISHMENT IN ASIA: HUMAN RIGHTS, POLITICS, AND PUBLIC OPINION* 170 (Roger Hood & Surya Deva eds., 2013).

99. Johnson, *supra* note 40, at 254.

perspective, hangings in Japan are most notable for who is *not* present: there are no journalists, there are no scholars, and there are no friends, family, or relatives of the condemned or of the victim. As of 2015, Japan remains “the state that kills in secret.”¹⁰⁰

Second, shortly after Minister of Justice Chiba watched the hangings in 2010, she gave a handful of carefully chosen journalists from one of Japan’s conservative press club access to the gallows in Tokyo.¹⁰¹ This was the first time in half a century that reporters were permitted to view one of the seven locations where hangings are carried out in Japan.¹⁰² The Japanese media discussed this show-and-tell, but the meaning of this “opening” is minimal: viewing the gallows when no one is being hanged provides as much insight into the execution process as allowing admission to the Tokyo Dome when no baseball game is being played.¹⁰³ On this occasion, elite journalists collaborated with high-ranking prosecutors to “stage-manage a difficult story about an uncomfortably controversial issue.”¹⁰⁴ This is part of a larger Japanese pattern where mainstream reporters “shun critical stories” about capital punishment, war crimes, the imperial family, and other sensitive issues.¹⁰⁵

Third, Minister of Justice Chiba ordered the creation of a death penalty study group.¹⁰⁶ Chiba charged the group with examining Japan’s death penalty from various perspectives to discern what should be maintained or changed.¹⁰⁷ In the end, however, nothing changed. The study group met monthly for about two years. Its meetings were closed to the public, and insiders reported that discussions were scripted and controlled by prosecutors in the Ministry of Justice who constituted the study group’s secretariat.¹⁰⁸ In Japanese criminal justice, ratifying the status quo is often a central function of study groups and reform commissions.¹⁰⁹ The most recent illustration of this tendency occurred in 2014 and 2015 when

100. *Id.* at 267.

101. Johnson, *supra* note 98, at 170.

102. Hanging has been the only method of execution in Japan since the 1870s. See DANIEL V. BOTSMAN, PUNISHMENT AND POWER IN THE MAKING OF MODERN JAPAN 152 (2005).

103. Johnson, *supra* note 98, at 170.

104. David McNeill, *Japan’s Contemporary Media*, in CRITICAL ISSUES IN CONTEMPORARY JAPAN, *supra* note 13, at 68.

105. *Id.* at 64.

106. The Ministry of Justice death penalty study team’s report can be found at SHIKI NO ARIKATA NI TSUITE NO BENKYŌKAI [DEATH PENALTY STUDY TEAM], TORIMATOME HŌKOKUSHO [SUMMARIZED FINAL REPORT] (2012), <http://www.moj.go.jp/content/000096631.pdf>.

107. See *id.*

108. Johnson, *supra* note 98, at 170–171.

109. MASAYUKI SUO, SORE DE MO BOKU WA KAIGI DE TATAKAU: DOKUMENTO KEIJI SHIHO KAIKAKU [EVEN SO, I WILL STRUGGLE ON THE COMMITTEE: DOCUMENTS ON CRIMINAL JUSTICE REFORM] 3–9, 221–26 (2015).

Japan established a “Special Subcommittee for a Criminal Justice System for a New Era.”¹¹⁰ The Subcommittee issued remarkably modest recommendations for criminal justice reform after a high-profile scandal involving prosecutor misconduct (forging floppy disk evidence) and the acquittal of a high-level bureaucrat (Muraki Atsuko) created pressure to do something about longstanding problems in Japan’s approach to criminal interrogation.¹¹¹ The most fundamental reason reform failed was because the subcommittee was stacked with conservative members who supported the efforts of prosecutors and police to preserve the status quo.¹¹² Ironically, the subcommittee’s main reform recommendations suggested changes in Japanese criminal justice that would *expand* the powers of the law enforcement institutions whose misconduct stimulated the reform process in the first place—a requirement to video record approximately three percent of all interrogations combined with broader authority for police and prosecutors to wiretap and new authority for prosecutors to plea bargain.¹¹³

Compared to these modest changes in Japanese capital punishment and criminal justice, the continuities are numerous and significant. There has been no decline in the propensity to condemn murder defendants to the gallows since 2009—contrary to what some analysts predicted before the lay judge reform took effect.¹¹⁴ Japan has not abolished capital punishment in Japan since its last abolition ended more than a millennium ago in 810 C.E. That abolition, which lasted about 350 years, seems to have been enabled by two social conditions: the peace Japan enjoyed during the Heian period, and the flourishing of Buddhism, which arrived in Japan from China in the sixth century.¹¹⁵ The Heian abolition was preceded by another abolition starting in 724, at the beginning of the reign of Emperor Shomo, which lasted “only for a few years.”¹¹⁶ In postwar Japan, there have been no moratoria on executions since the last (unofficial) one ended in March 1993. Prompted by public and prosecutorial concern about four condemned inmates who were exonerated in the 1980s after spending a combined total of 123 years on death row for murders they did

110. *Id.*

111. Johnson, *supra* note 93, at 243–75.

112. Masayuki, *supra* note 109.

113. *Id.*

114. *Tokushu: Saiban'in Seido – Shikei o Kudasu no wa Dare ka* [Special Focus: The Lay Judge System: Who Will Impose Death Sentences?], 36 GENDAI SHISO [MODERN THOUGHTS] 27, 27–245 (2008).

115. SHIGEMITSU DANDO, SHIKEI HAISHIRON [THEORY OF THE ABOLITION OF CAPITAL PUNISHMENT] 493 (Yuhikaku 6th ed. 2000).

116. See MARIO MARAZZITI, 13 WAYS OF LOOKING AT THE DEATH PENALTY 72 (2015).

not commit, the moratorium began in November 1989 and lasted for forty months.¹¹⁷ Between 1993, when executions resumed, and the end of 2014, Japan hanged at least one inmate every year except 2011, the last full year that the Democratic Party of Japan ruled the country. During this twenty-two-year period, the average number of executions per year was 4.6, with a high of fifteen in 2008.¹¹⁸ In the last five years for which evidence is available (2010–2014), eleven of the twenty persons hanged in Japan were over age fifty at the time they were marched to the gallows, and six of those eleven were over age sixty. On Christmas Day in 2007, four Japanese men were hanged. Their ages were forty-four, sixty-four, sixty-five, and seventy-seven. Japan may well have the most elderly death row population in the world, for two main reasons: because a relatively small proportion of homicides in the country are committed by young people,¹¹⁹ and because usually there is a long delay between death sentence imposition and execution.¹²⁰ Another Japanese capital punishment distinction further reflects a continuing commitment to this institution: in an era when death row populations in many countries and many U.S. states are declining, Japan's has grown from fifty-six in 1993 to 135 in 2012—an increase of 140 percent in twenty years.¹²¹

There are four additional features of continuity in Japanese capital punishment. First, and unlike every U.S. death penalty state (and every U.S. state except Alaska), Japan does not have a life-without-parole sanction.¹²² In the United States, the availability of the LWOP sanction has given prosecutors and courts an extremely severe alternative to a death sentence; this has helped drive down the number of death sentences in many jurisdictions, including the formerly high use counties of Harris (Houston), Oklahoma

117. Daniel H. Foote, *Japan's Death Row to Freedom*, 1 PAC. RIM L. & POL'Y J. 11 (1992); Johnson, *supra* note 40, at 262.

118. NENPŌ SHIKEI HAISHI HENSHŪ IINKAI [EDITORIAL BOARD FOR ANNUAL REPORT FOR ABOLITION OF DEATH PENALTY] NENPŌ SHIKEI HAISHI 2014: HAKAMADA SAISHIN KARA SHIKEI HAISHI E [2014 ANNUAL REPORT FOR ABOLITION OF DEATH PENALTY: FROM NEW TRIAL OF HAKAMADA CASE TO ABOLITION OF DEATH PENALTY] 219 (2014).

119. Johnson, *supra* note 30, at 78.

120. The long delays between death sentence and execution have two main causes: inmate appeals to one of the country's eight High Courts and then to the Supreme Court, each of which may take several years to conclude, and a norm in Japan's Ministry of Justice not to seek execution warrants for the half or so of death row inmates who have petitioned for a retrial (as of October 2015, 128 persons were on death row). See JOHNSON & ZIMRING, *supra* note 14, at 87; Nathan Shiga, *128 Convicts on Death Row Live On in Japan*, ZAIKEI NEWS (Oct. 3, 2015), <http://www.zaikeinews.com/articles/746/20151003/128-convicts-death-row-live.htm>.

121. NENPŌ SHIKEI HAISHI HENSHŪ IINKAI, *supra* note 118, at 217.

122. Cf. *Life Without Parole*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/life-without-parole> (last visited Jan. 20, 2016).

(Oklahoma City), and Philadelphia.¹²³ There have been a few attempts to introduce bills in Japan that would create an LWOP or LWOP-like sentence.¹²⁴ These bills, however, have never gone to a Parliamentary vote, partly because of opposition from prosecutors and other proponents of capital punishment who fear that the availability of this harsh alternative sentence would mean less use of the ultimate penalty.¹²⁵

Second, there have been no decisions by Japan's Supreme Court analogous to those by the U.S. Supreme Court that have narrowed the scope of capital punishment for juveniles and the intellectually disabled. Japan's Supreme Court has also upheld the constitutionality of capital punishment on several occasions in the postwar period and has, with few exceptions, upheld the death sentences it has been asked to review on appeal.¹²⁶ Moreover, the norm on Japan's Supreme Court is to discourage dissenting opinions in capital cases that might suggest problems in Japan's death penalty administration.¹²⁷ This is a problem because societies need dissent, and so do Supreme Courts and systems of capital punishment.¹²⁸ Without it, problems are more likely to persist, and progressive change is less likely to occur.¹²⁹

Third, there has been no change in Japan's execution method since hanging became the only means of execution more than a century ago. Even the design of Japan's gallows remains much as it was in the Meiji era (1868-1912).¹³⁰ In the United States, by contrast, there have been several changes in execution method,

123. See Simone Seiver, *Why Three Counties that Loved the Death Penalty Have Almost Stopped Pursuing It: A Closer Look at Get-Tough DAs*, THE MARSHALL PROJECT (Aug. 11, 2015, 1:09 PM), <https://www.themarshallproject.org/2015/08/11/why-three-counties-that-loved-the-death-penalty-have-almost-stopped-pursuing-it>.

124. David T. Johnson, Shiten [Opinion], *Shūshinkei Dōnyū: Shikei Yokushi ni wa Chokketsu Sezu* [Life Without Parole Is Not Directly Connected to the Death Penalty], ASAHI SHIMBUN [ASHAHI NEWSPAPER], June 20, 2008, at 14.

125. MIKIO KAWAI, SHUSHINKEI NO SHIKAKU [DEAD PERSPECTIVES ON LIFE SENTENCES] (2009).

126. KENJI NAGATA, SHIKEI SENTAKU KIJUN NO KENKYŪ [RESEARCH ON SENTENCING STANDARDS FOR DEATH PENALTY] (2010).

127. SUSUMU YAMAGUCHI & YU MIYAJI, SAIKŌSAI NO ANTŌ: SHŌSŪ IKEN GA JIDAI O KIRIHIRAKU [SECRET BATTLES INSIDE THE SUPREME COURT: DISSIDENTING OPINIONS WILL OPEN UP A NEW ERA] 51 (2011).

128. See generally CASS SUNSTEIN, WHY SOCIETIES NEED DISSENT (2003).

129. See BRUCE SCHNEIER, DATA AND GOLIATH: THE HIDDEN BATTLES TO COLLECT YOUR DATA AND CONTROL YOUR WORLD 97-99 (2015).

130. NAKAGAWA TOMOMASA BENGŌ DAN, KŌSHUKEI WA ZANGYAKU NA KEIBATSU DE WA NAI-NOKA? SHINBUN TO HOIGAKU GA KATARU SHINJITSU [ISN'T HANGING A CRUEL CRIMINAL PUNISHMENT? THE TRUTH TOLD BY NEWSPAPERS AND MEDICAL FORENSICS] (2011); KENJI NAGATA, GHQ Bunsho ga Kataru Nihon no Shikei Shikkō Kōbunsho kara Semaru Kōshukei no Jittai [The Administration of Executions in Japan as Told by GHQ Documents: Approaching the Reality of Hanging from Public Records] (2013).

advancing from hanging to electrocution to the gas chamber to various types of lethal injection.¹³¹ The U.S. changes have not produced many abolitions or moratoria, but the proximate causes of change (botched executions especially) have stimulated many reform discussions and some reform.¹³²

Fourth, public support for capital punishment in Japan has not softened as it has in the United States. In fact, support for capital punishment in Japan has been increasing for about twenty years, though it did take a small dip in November 2014.¹³³ Even with that dip, more than eighty percent of respondents said that having the death penalty is “unavoidable,” while less than ten percent said that it should be abolished (the latter figure is a rise of four percentage points since the previous poll in 2009).¹³⁴ Japan’s death penalty surveys are methodologically flawed, for the questions are leading and simplistic and the samples are not random.¹³⁵ Survey results also find firmer support for capital punishment than more nuanced measures suggest.¹³⁶ When Japanese citizens assess the propriety of capital punishment in the context of particular cases and with a choice set that includes harsh alternative sanctions (such as life imprisonment), their support softens—some.¹³⁷ But even when these more sophisticated measures are employed, public support for capital punishment remains strong.¹³⁸ In a democracy, this form of continuity in capital punishment can be fundamental. The stability in public support over time is partly explained by the secrecy that surrounds capital punishment in Japan, which makes the death penalty a low salience issue,¹³⁹ and by media reporting about capital punishment characterized by the themes of avoidance and ambivalence.¹⁴⁰

131. AUSTIN SARAT, *GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY* (Stanford University Press 2014).

132. *Id.* at 146.

133. Sato & Bacon, *supra* note 68, at 17–20.

134. Takuya Kitazawa, *Slight Drop Seen for First Time in Japanese who Support Capital Punishment*, ASIA & JAPAN WATCH (Jan. 25, 2015), http://ajw.asahi.com/article/behind_news/social_affairs/AJ201501250038 [https://web.archive.org/web/20151008013332/http://ajw.asahi.com/article/behind_news/social_affairs/AJ201501250038].

135. SATO, *supra* note 68, at 63–76; Sato & Bacon, *supra* note 68.

136. SATO, *supra* note 68, at 105–80.

137. *Id.* at 165, 179.

138. *Id.*

139. See generally Johnson, *supra* note 40 (arguing that the secrecy surrounding capital punishment in Japan lowers the salience of the issue).

140. See Mari Kita & David T. Johnson, *Framing Capital Punishment in Japan: Avoidance, Ambivalence, and Atonement*, 9 ASIAN J. CRIMINOLOGY 221, 229–33 (2014) (concluding that Japanese newspaper’s focus on atonement leads to attitudes of avoidance and ambivalence about the death penalty).

III. EXPLAINING JAPANESE CONTINUITY

The causes of continuity in Japanese capital punishment have not been the subject of much study, but some parts of the puzzle seem clear. This Part summarizes four ways in which capital punishment in Japan differs from capital punishment in the United States and thereby helps explain the dearth of death penalty reform in Japan. Section A discusses the infrequency with which wrongful convictions are revealed in Japan; Section B analyzes the jurisprudence of Japanese capital punishment, which rejects the premise that “death is different” from other kinds of criminal punishment; Section C examines the secrecy which surrounds Japanese capital sentencing and executions; and Section D considers the relative racial homogeneity of Japanese society.

A. *Wrongful Convictions Are Rarely Revealed*

The United States has been the subject of more wrongful conviction research than any country in the world. In the quarter century or so since 1989, more than 1400 persons have been released from prison because of evidence of their innocence.¹⁴¹ This is about 4.5 exonerations per month, or one per week every week for the past twenty-five years. About three-quarters of these victims were wrongly convicted of homicide or sexual assault—crimes which tend to leave physical evidence behind and which tend to attract more media attention than other offenses.¹⁴² Less than one quarter of exonerees were cleared based on DNA evidence; in the United States, biological evidence (saliva, semen, blood, and the like) is available in only ten to fifteen percent of all serious felony cases.¹⁴³

All wrongful convictions are tragic, but the most worrisome are those that result in a mistaken sentence of death. Between 1973 and July 2015, 154 persons in twenty-six American states were released from death row because of evidence of their innocence (DPIC). More than half of these exonerations occurred in just five states: Florida (twenty-five), Illinois (twenty), Texas (thirteen), Oklahoma (ten), and Louisiana (ten).¹⁴⁴ The true size of America’s wrongful

141. See *Exonerations Map*, NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (last visited Apr. 9, 2016).

142. DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE SYSTEM 228 (2012).

143. *Id.*

144. *Fact Sheet*, Death Penalty Info. Center, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited Apr. 9, 2016).

conviction problem is even bigger than these figures suggest, because an unknown number of wrongly convicted persons are never discovered and exonerated. Studies suggest that approximately four percent of persons convicted in capital homicide cases are wrongfully convicted,¹⁴⁵ and one analyst believes the rate could be as high as one in seven.¹⁴⁶ These estimates are much larger than observers supposed before America's "discovery of innocence" in the 1990s raised awareness of the problem.¹⁴⁷ The steep decline in capital punishment in the United States since 2000—death sentences have dropped seventy-five percent and executions are down sixty percent¹⁴⁸—has several causes, but the most important appears to be public concern about wrongful convictions, which has made prosecutors, judges, juries, and governors more cautious about capital punishment.¹⁴⁹

Since 1945, only eight persons have been sentenced to death or life imprisonment in Japan and subsequently acquitted at retrial. (Hakamada Iwao will likely become number nine if he does not die before his retrial is completed; he was released in March 2014 after serving forty-five years on death row for four murders he probably did not commit.)¹⁵⁰ This is an average of one exoneration every eight years or so—a small fraction of the frequency in the United States.¹⁵¹

More broadly, it is impossible to know how many persons have been wrongfully convicted in Japan, and educated estimates are rare. But one recent effort to count identified a total of only 162 cases of confirmed or strongly suspected wrongful conviction between 1910 and 2010.¹⁵² All the wrongful convictions were discovered after the Pacific War ended in 1945, and more than half

145. See Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. 7230 (2014); see also Samuel R. Gross, Opinion, *The Staggering Number of Wrongful Convictions in America*, WASH. POST (July 24, 2015), https://www.washingtonpost.com/opinions/the-cost-of-convicting-the-innocent/2015/07/24/260fc3a2-1aae-11e5-93b7-5eddc056ad8a_story.html.

146. MARAZZITI, *supra* note 116, at 187.

147. See generally BAUMGARTNER ET AL., *supra* note 73.

148. See DEATH PENALTY INFO. CENTER, *supra* note 19.

149. BAUMGARTNER ET AL., *supra* note 73, at 166–68.

150. See Hiroko Tabuchi, *Soul-Searching as Japan Ends a Man's Decades on Death Row*, N.Y. TIMES, Mar. 27, 2014, at A1.

151. Johnson, *supra* note 92.

152. Nishijima, Katsuhiko, *Enzai Jiken Ichiranhyo: Kaisetsu* [Summary of Wrongful Conviction Cases: An Interpretation], in ENZAI GEN'IN O CHOSASEYO KOKKAI NI DAISANSHA KIKAN NO SETCHI WO [SEARCH FOR THE CAUSES OF WRONGFUL CONVICTIONS AN APPEAL TO PARLIAMENT TO ESTABLISH AN INDEPENDENT INSTITUTION], *infra* note 159, at 155–68.

involved the crime of homicide.¹⁵³ In this survey, the average number of wrongful convictions per decade is sixteen, with a high of thirty-seven in the 1950s. Even in the peak decade, there were less than four wrongful convictions per year. In a century of Japanese criminal justice, 162 wrongful convictions is surely a large undercount. This number probably represents the “tip of an iceberg” of wrongful convictions for three reasons: because old cases are difficult to document (the prewar totals are implausibly low); because less serious crimes such as drug offenses and sexual molestation fell outside the scope of this study; and because, most fundamentally, many cases of wrongful conviction are never discovered. How big is the rest of Japan’s iceberg?¹⁵⁴

The small number of recognized wrongful convictions in Japan allows two interpretations. One explanation is that Japanese prosecutors tend to be cautious about charging criminal cases. A conservative charging policy—to avoid taking defendants to trial who might be acquitted—is probably the main reason for Japan’s high conviction rate.¹⁵⁵ In Japan’s procuracy, this charging policy is enforced through organizational mechanisms. One mechanism is a *kessai* system of consultation and approval, where front-line prosecutors must discuss the propriety of their charge and sentence request decisions with, and obtain approval from, their superiors. These superiors also have a penchant for punishing prosecutors who charge or try cases that end in acquittal.¹⁵⁶ In this view, because Japan’s prosecutors send fewer innocent persons to trial than do their counterparts in the United States and other countries with higher acquittal rates, Japanese criminal justice probably produces fewer wrongful convictions.

The other explanation for the rarity of wrongful convictions in Japan stresses their discovery, not their production. Japan has few actors or institutions that focus on finding wrongful convictions, which is why few are found. Japan has far fewer lawyers per capita than the United States, and only a handful of them concentrate on

153. *Id.*

154. David T. Johnson, *Nihon no Enzai to “Hitei no Bunka”* [*Wrongful Convictions and the “Culture of Denial” in Japan*], 864 *SEKAI* 216, 216–226 (2015), http://japanfocus.org/-David_T_Johnson/4273/article.html. NIHON BENGOSHI RENGOKAI JINKEN YOGO IINKAI HEN [COMM. FOR THE PROT. OF HUMAN RIGHTS IN JAPAN FED’N OF BAR ASS’NS], GOHAN GEN’IN NO JISSHOTOKI KENKYU [EMPIRICAL RESEARCH ON THE CAUSES OF WRONGFUL CONVICTION] (1998); NIHON BENGOSHI RENGOKAI JINKEN YOGO IINKAI HEN [COMM. FOR THE PROT. OF HUMAN RIGHTS IN JAPAN FED’N OF BAR ASS’NS], GOHAN GEN’IN NI SEMARU KEIJI BENGU NO SHITEN TO GIJUTSU [ATTACKING THE CAUSES OF WRONGFUL CONVICTION: PERSPECTIVES AND TECHNIQUES OF CRIMINAL DEFENSE] (2009).

155. JOHNSON, *supra* note 93, at 237.

156. *See id.* at 237–42.

criminal defense.¹⁵⁷ The country's major newspapers do little investigative reporting.¹⁵⁸ Few Japanese scholars study wrongful convictions.¹⁵⁹ Japan's appellate courts tend to rule in favor of the state by ratifying the status quo.¹⁶⁰ Japan has no exoneration registries or Innocence Projects like those that exist in the United States.¹⁶¹ Japan has few case review commissions of the kind found in the United Kingdom; the main exception is the Japan Federation of Bar Association's Committee for the Protection of Human Rights, which has reviewed some problematic cases and has published two reports on this problem (in 1998 and 2009).¹⁶² However, the Committee is hardly capable of providing assistance to all victims of wrongful conviction in the world's tenth most populous nation.¹⁶³

The number of wrongful convictions revealed in any country depends on how many are produced and how effectively they are discovered and acknowledged. Japan's institutional shortcomings suggest that its wrongful conviction problem may well be much larger than it appears. When Kitani Akira was a chief judge in Urawa city in the late 1980s and early 1990s, he acquitted two or three defendants each year; none of the acquittals were overturned on appeal.¹⁶⁴ Is it plausible that Japanese judges in Urawa and other jurisdictions could go year after year without issuing a single acquittal or wrongfully convicting a single defendant? Surveys of Japanese lawyers in 1989 and 1999 suggest the answer is no. In both years, more than forty percent of respondents said that they believed they had handled cases in which a wrongful conviction occurred.¹⁶⁵ One

157. See David T. Johnson, *War in a Season of Slow Revolution: Defense Lawyers and Lay Judges in Japanese Criminal Justice*, 9 ASIA-PAC. J., July 2011, at 1–11, <http://japanfocus.org/site/view/3554>; J. Mark Ramseyer & Eric B. Rasmusen, *Comparative Litigation Rates, Discussion Paper No. 681*, JOHN M. OLIN CENTER FOR LAW, ECON., & BUS. 5 (2010), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Ramseyer_681.pdf.

158. See LAURIE ANNE FREEMAN, *CLOSING THE SHOP: INFORMATION CARTELS AND JAPAN'S MASS MEDIA* 21 (2000); IVAN P. HALL, *CARTELS OF THE MIND: JAPAN'S INTELLECTUAL CLOSED SHOP* 48 (1998).

159. There are, however, two notable recent exceptions: ENZAI GEN'IN O CHOSA SEYO KOKKAI NI DAISANSHA KIKAN NO SETCHI WO [SEARCH FOR THE CAUSES OF WRONGFUL CONVICTIONS AN APPEAL TO PARLIAMENT TO ESTABLISH AN INDEPENDENT INSTITUTION] (Nichibenren Enzai Gen'in Kyumei Daisansha Kikan WG eds., 2012) and HARADA KUNIO, *GYAKUTEN MUZAI NO JIJITSU NINTEI* [REVERSED ON THE FACTS] (2012).

160. JOHNSON, *supra* note 93, at 62.

161. JOHNSON, *supra* note 154.

162. NIHON BENGOSHI RENGOKAI JINKEN YOGO IINKAI HEN, *supra* note 154.

163. Nishijima, *supra* note 152; JOHNSON, *supra* note 154.

164. AKIRA KITANI, "MUZAI" O MINUKU: SAIBANKAN KITANI AKIRA NO IKIKATA [SEEING "ACQUITTALS": THE WAY OF JUDGE KITANI AKIRA] (Ryudi Yamada et al. eds., 2013).

165. NIHON BENGOSHI RENGOKAI [JAPAN FED'N OF BAR ASS'NS], ATARASHII SEIKI NO KEIJI TETSUZUKI O MOTOMETE: KEIJI SOSHŌ HŌ 50 NEN EMATSUE TAIRAI KARA 10 NEN NO KISEKI TO

prominent Japanese defense lawyer estimated that the country's true total of wrongful convictions is much larger than the tiny number that is captured in official statistics and published studies. In his view, Japan may produce as many as 1,500 wrongful convictions per year, only a small fraction of which are ever discovered.¹⁶⁶

B. *Death Is Not Different*

After four men on Japan's death row were exonerated in the 1980s,¹⁶⁷ some analysts expected Japanese capital punishment to wither away or be abolished.¹⁶⁸ The exonerations did motivate an informal forty month moratorium on executions from 1989 to 1993, but little else in the country's capital punishment complex changed.¹⁶⁹ In the United States, the "accumulating aberrations" of wrongful convictions¹⁷⁰ have been the most important force for change in capital punishment.¹⁷¹ But where wrongful convictions are rare, as in Japan, the failure of "aberrations" to accumulate helps explain the failure of reform urgency in death penalty law and practice.

"Actual innocence" is hardly the only problem that afflicts capital punishment in the United States, for death sentences are also imposed on many U.S. defendants who are guilty but whose crimes do not warrant execution. A classic study of 4,578 death sentences imposed between 1973 and 1995 found that sixty-eight percent were overturned on appeal because of "serious error" in the original capital trial.¹⁷² When those cases were retried, eighty-two percent resulted in a sentence less than death, and seven percent ended in acquittal.¹⁷³ These findings suggest that U.S. capital punishment

TENBŌ_FDai 42 Kai JINKEN YŌGO TAikai SHINPOJIUMU Dai 1 BUNKA Kai KICHŌ HŌKOKUSHO; QUEST FOR CRIMINAL PROCEDURE IN THE NEW CENTURY AT 50TH ANNIVERSARY OF CODE OF CRIMINAL PROCEDURE: DEVELOPMENTS IN THE DECADE AFTER MATSUE CONVENTION AND FUTURE PROSPECTS: THE BASELINE REPORT FOR THE 1ST BREAKOUT SESSION OF THE SYMPOSIUM IN 42ND CONVENTION FOR PROTECTION OF HUMAN RIGHTS] (1999).

166. Takashi Takano, *Nihon no Kensatsu wa Hetare nanoka*, KEIJI SAIBAN O KANGAERU BLOG (June 23, 2009).

167. Foote, *supra* note 117, at 11.

168. Yoshihiro Yasuda, *Nagoya – Fukuoka no Nimei Shikko ni Kogi Suru*, in SHIKEI HAISHI HOAN – NENPO SHIKEI HAISHI HENSHU [ANNUAL REPORT FOR ABOLITION OF DEATH PENALTY: THE BILL TO ABOLISH THE DEATH PENALTY] 258-261 (2003).

169. See Part II, *supra*.

170. Alan Berlow, *The Wrong Man*, THE ATLANTIC, Nov. 1999, at 70.

171. See BAUMGARTNER ET AL., *supra* note 73, at 200.

172. Liebman et al., *supra* note 84, at 38.

173. *Id.* at ii.

has all the consistency of a lottery. Errors in fact-finding and assessing culpability are so pervasive that U.S. capital punishment has been called “a broken system.”¹⁷⁴ One reason so much error is found in American capital trials is the U.S. Supreme Court’s death penalty jurisprudence, which holds that since death is different¹⁷⁵ than other criminal sanctions, special procedures and protections are required in capital cases.¹⁷⁶ Most notably, ordinary due process is not enough; there must be “super due process.”¹⁷⁷ Super due process has at least five implications in American criminal procedure.¹⁷⁸ First, capital trials must be carried out in two separate stages: first determining the guilt of a defendant and then, if the verdict returns guilty, deciding the sentence.¹⁷⁹ Second, judges must give capital juries guidelines on “aggravating” and “mitigating” factors to help direct their discretion at the sentencing stage.¹⁸⁰ Third, after a death sentence has been imposed, it receives automatic appellate review, regardless of the defendant’s wishes. In most U.S. jurisdictions, defendants who have been sentenced to death cannot waive their right to appeal.¹⁸¹ Fourth, some U.S. appellate courts engage in proportionality review to identify inappropriate disparities in sentencing practice.¹⁸² The underlying principle for this practice is that like cases should be treated alike and different cases differently.¹⁸³ Finally, in order to impose a capital sentence, all twelve jurors must agree that death is the appropriate sanction.¹⁸⁴ For the defense, this means that a sentence of death can be prevented by convincing a single juror to oppose that outcome. Clarence Darrow, one of the most famous defense lawyers in U.S. history, defended more than one hundred persons in capital trials during a career that spanned half a century.¹⁸⁵ Not one of his clients was sentenced to death.¹⁸⁶ If Darrow had faced a majority decision rule like the one that prevails in lay judge trials in Japan,¹⁸⁷ he surely would have had a different record.

174. *Id.* at 116.

175. *Furman v. Georgia*, 408 U.S. 238, 285–291 (1972).

176. See ROBERT M. BOHM, *ULTIMATE SANCTION: UNDERSTANDING THE DEATH PENALTY THROUGH ITS MANY VOICES AND MANY SIDES* vi–xxi (2010).

177. *Id.* at vii.

178. See *id.* at vii–ix, xvii.

179. See *id.* at vii.

180. See *id.* at vii–ix.

181. See *id.* at ix.

182. See *id.*

183. See *id.*

184. See *id.* at xvii.

185. See JOHN A. FARRELL, *CLARENCE DARROW: ATTORNEY FOR THE DAMNED* (2011).

186. See *id.*

187. See *supra* notes 89–95 and accompanying text.

In Japan, death is not different. In Japan, there is no promise of super due process for capital defendants and appellants. In Japan, the jurisprudence of capital punishment looks much like the jurisprudence for ordinary criminal cases. In Japan, there is no advance notice from prosecutors about whether a case is capital and prosecutors only make this disclosure on the penultimate day of trial. In Japan, there is no separate stage for sentencing as criminal trials are not bifurcated. In Japan, death sentencing standards are hopelessly vague (the 1983 *Nagayama* decision listed nine factors,¹⁸⁸ but there is no guidance about how to weigh them). In Japan, there is no automatic appellate review for defendants who have been sentenced to death, and more than one-third of persons executed in recent years never had their case heard by the Supreme Court. In Japan, there are no special procedures for selecting lay judges, and lay judges are not permitted to discuss their trial experiences after a verdict is rendered. In Japan, the law is not explained in open court, but is explained to these lay judges in the privacy of the deliberation room. In Japan, death sentence decisions may be made by a mere majority (a “mixed majority” of five votes suffices, provided that at least one of the five comes from a professional judge). And in Japan, prosecutors are allowed to, and regularly do, appeal sentences less than death.¹⁸⁹

“Law seeks to work in the world,”¹⁹⁰ and it can fail in more than one way. When it comes to capital punishment, law in the United States does not fulfill many of its promises,¹⁹¹ whereas law in Japan fails by refusing to make many promises at all.¹⁹² Japan’s failure of aspiration and political will helps explain the continuity in that country’s system of capital punishment; this failure explains why no justices on the Japanese Supreme Court have converted to anti-death penalty stances, as several U.S. Supreme Court justices have done.¹⁹³ When few legal conditions are required to issue or confirm

188. The Nagayama factors are: (1) the character of the crime, (2) the defendant’s motive, (3) the crime situation (cruelty and heinousness), (4) the importance of the result (especially the number of victims), (5) the feelings of victims and survivors, (6) the social effects of the crime, (7) the age of the defendant, (8) his or her prior record, and (9) the circumstances after the crime (such as whether the defendant repents and apologizes). See Saikō Saibansho [Sup. Ct.] July 8, 1983, 1981 (A) 1505, 37 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 609 (Japan); KENJI, *supra* note 126.

189. Johnson, *supra* note 98, at 180.

190. AUSTIN SARAT, *THE SOCIAL ORGANIZATION OF LAW: INTRODUCTORY READINGS 1* (2004).

191. TUROW, *supra* note 31, at 114–15.

192. Johnson, *supra* note 98, at 182.

193. See generally Carol Steiker, *The Marshall Hypothesis Revisited*, 52 HOWARD L.J. 525, 525–58 (2009); see also Andrew Cohen, *Why Don’t Supreme Court Justices Ever Change Their Minds in Favor of the Death Penalty*, THE ATLANTIC (Dec. 10, 2013), <http://www.theatlantic.com/national/archive/2013/12/why-dont-supreme-court-justices-ever-change-their-minds-in-em->

a sentence of death, there is little reason for Japanese Justices to be disappointed about how death is administered or to change their minds about the institution. When the large majority of capital sentences are deemed to be legally and constitutionally proper, there is little reason to push for reform because the system does not look broken.

The method of appointing justices to Japan's Supreme Court also explains the maintenance of the country's death is not different jurisprudence and the deference the Supreme Court routinely shows towards other parts of government, including the procuracy.¹⁹⁴ Article 79 of Japan's postwar constitution (1947) empowers the Cabinet to appoint Supreme Court justices.¹⁹⁵ The LDP-dominated Cabinets have exercised this control through three practices not written into law.¹⁹⁶ First, and with few exceptions, appointees to Japan's Supreme Court must be at least sixty-four years old (the Court Act requires that they retire by age seventy).¹⁹⁷ Second, the appointment process is carried out in such secrecy that the media and public only learn the identities of new justices after they have been appointed.¹⁹⁸ Third, a fixed number of seats on Japan's Supreme Court are allocated to different segments of the legal and governmental communities, with ten of the fifteen seats reserved for professional judges, prosecutors, and other career public officials, and only five allocated to persons who have worked for most of their careers outside of government, thereby ensuring that career government officials control the grand bench and all three of the petty benches.¹⁹⁹ As long as these appointment patterns remain in place, Japan's Supreme Court is unlikely to take a strong stance on behalf of capital defendants or other individuals in conflict with the state.²⁰⁰

favor-em-of-the-death-penalty/282100/; EVAN J. MANDERY, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA 432–40 (2013).

194. Daniel H. Foote, *Policy-making by the Japanese Judiciary in the Criminal Justice Field*, 72 HOSHAKAIGAKU 6, 6–45 (2010).

195. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 79 (Japan).

196. Repeta, *supra* note 59, at 48.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 49.

C. The State Kills in Secret

The German sociologist Georg Simmel observed that “the purpose of secrecy is, above all, protection.”²⁰¹ Executions in Japan are surrounded by secrecy that is taken to extremes seldom seen in other death penalty nations.²⁰² This secrecy mainly functions to protect Japan’s system of capital punishment—including the premise that death is not different—from outside criticism.²⁰³ This insulates the prosecutors who largely control the inputs in Japan’s capital justice system (for whom is a sentence of death sought?) and the system’s outputs (who gets executed?).²⁰⁴ The policy of secrecy also helps explain why Japan’s sole method of execution—hanging—has not been changed since the 1870s. In the United States over the same period of time there have been numerous changes, from hanging, to the electric chair, to the gas chamber, to various protocols for lethal injection.²⁰⁵ Executions are regularly botched in the United States,²⁰⁶ and sometimes these “gruesome spectacles” have prompted judicial intervention and legislative reform.²⁰⁷ Executions are also botched in Japan, but they never become newsworthy because the state officials who observe hangings are not permitted to discuss them.²⁰⁸ There is “no government power greater than the power of life and death and no government intrusion more invasive than the death penalty.”²⁰⁹ There is, therefore, no government power in greater need of public oversight. In Japan that oversight is

201. GEORG SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* 345 (Kurt H. Wolff ed., trans., 1950) (original emphasis omitted).

202. See generally David T. Johnson, *The Death Penalty in Japan: Secrecy, Silence, and Salience*, in *THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVES* 251 (Austin Sarat & Christian Boulanger eds., 2005).

203. See generally Johnson, *supra* note 40.

204. Japanese prosecutors, like most criminal justice officials, want to preserve their discretion to decide matters that matter. One lesson from America is that the effort to tame a criminal justice system by controlling discretion “faces a number of important obstacles,” including sheer inertia and the lack of commitment to change. See SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990*, at 151 (1993).

205. Deborah W. Denno, *Lethally Humane? The Evolution of Execution Methods in the United States*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 547, 693–762 (James A. Acker, et al. eds., 1998).

206. See generally Marian J. Borg & Michael L. Radelet, *On Botched Executions*, in *CAPITAL PUNISHMENT: STRATEGIES FOR ABOLITION* 143 (Peter Hodgkinson & William A. Schabas eds., 2004); Michael L. Radelet, *Examples of Post-Furman Botched Executions*, DEATH PENALTY INFO. CENTER (July 24, 2014), <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions> (showing 46 examples of botched executions as of July 24, 2014).

207. See generally SARAT, *supra* note 131.

208. See generally Johnson, *supra* note 40.

209. *Id.* at 256.

missing, and so are efforts to reform a method of execution that has not been used in the United States (in Delaware) since 1996.²¹⁰

Some analysts expected Japan's lay judge reform to make capital punishment more salient in society by requiring citizen participation into the death sentencing process.²¹¹ The new trial system has attracted more media attention to capital punishment, but this attention has not problematized the death penalty as an institution, nor has it raised serious questions about the propriety of capital sentencing.²¹² Even after the lay judge reform, *avoidance* of capital punishment and *ambivalence* toward the institution remain two central frames in Japan's media coverage.²¹³ The norm of secrecy has extended to cover lay judges, who are forbidden by law from disclosing information about their experiences at trial; lay judges can be criminal sanctioned for violating this rule.²¹⁴ The coerced silence of Japan's lay judges prevents them from discussing problems they perceived in hearings or deliberations and prevents the public from learning how life and death decisions get made. Perhaps the most critical function of this secrecy is the protection of professional judges, whose attitudes, words, and actions cannot be revealed or criticized.²¹⁵

Where the state kills in secret and imposes silence on execution teams and life-and-death decision-makers, capital punishment is less salient than it otherwise would be. Public support for capital punishment remains the main official justification for retaining the institution and carrying out executions.²¹⁶ But the Japanese public's understanding of capital punishment is neither deep nor sophisticated, so this rationale for retention may be "based on very shaky grounds."²¹⁷

210. MARAZZITI, *supra* note 116, at 79.

211. See generally Leah Ambler, *The People Decide: The Effect of the Introduction of the Quasi-Jury System (Saiban-In Seido) on the Death Penalty in Japan*, 6 NW. U. J. INT'L HUM. RTS. 1 (2007).

212. See generally Johnson, *supra* note 92.

213. See generally Kita & Johnson, *supra* note 140.

214. SAIBANIN NO ATAMA NO NAKA: 14NIN NO HAJIMETE MONOGATARI [INSIDE THE HEADS OF LAY JUDGES: 14 PEOPLE TELL THEIR STORIES FOR THE FIRST TIME] 7 (Masayoshi Taguchi ed., 2013).

215. See generally Mark Levin & Virginia Tice, *Japan's New Citizen Judges: How Secrecy Imperils Reform*, 7 ASIA-PAC. J. May 2009, at 1-13, <http://www.japanfocus.org/-Virginia-Tice/3141/article.html>.

216. SATO, *supra* note 68, at 191.

217. Carolyn Hoyle, *Foreword* to SATO, *supra* note 68, at 8.

D. Race Is Not Salient

Following the U.S. Supreme Court's *Furman v. Georgia* decision in 1972, which held that capital punishment as then practiced was unconstitutional, the Court "reinvented" the death penalty in three ways.²¹⁸ The Court's rationalizing and juridifying jurisprudence aimed to subject capital punishment administration to "the discipline of legal rules and procedures."²¹⁹ Its civilizing and humanizing jurisprudence aimed to "minimize the more disturbing elements" of America's death penalty process.²²⁰ And its democratizing and localizing jurisprudence insisted on "returning control of capital punishment" to state legislators and to prosecutors, judges, and juries at the local level.²²¹ Of course, the U.S. Supreme Court's efforts to reinvent capital punishment have failed in many ways.²²² The Court's ambition was large, and one result of its reform attempts is a death penalty system that is "peculiar" and that is "presided over with weary resignation by a Supreme Court that no longer seems interested in the issue but that retains responsibility nevertheless."²²³

Most Justices on the U.S. Supreme Court were not eager to reform capital punishment.²²⁴ Rather, they were pushed to pursue reform by forces in American society, especially by concerns that capital punishment administration was racially biased.²²⁵ This racial spur to reform is nothing new in American capital punishment. In the first half of the nineteenth century, debates over capital punishment engulfed the northern states but were almost absent in the South; that difference was "a product of slavery."²²⁶ Today, the history of race relations in the United States creates public sensitivity to the fact that minorities are wrongfully accused and convicted and that the seriousness of their victimization is discounted for no principled reason.²²⁷ In American criminal justice, communities of

218. GARLAND, *supra* note 7, at 262.

219. *Id.*

220. *Id.*

221. *Id.*

222. *See generally* TUROW, *supra* note 31.

223. GARLAND, *supra* note 7, at 284.

224. *See id.* at 258.

225. *See* MANDERY, *supra* note 193, at 428; *see generally* DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990).

226. BANNER, *supra* note 8, at 113.

227. *See generally* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

color and their allies “routinely come forward to push for the interests of criminal suspects and convicted persons.”²²⁸ In American capital punishment, the reality of racial disparity and discrimination remains a major reason for reform.²²⁹

Japan is different in this regard too, even if it is not as homogeneously mono-ethnic as many people suppose.²³⁰ Despite the presence of many “visible minorities” in Japan,²³¹ the *perception* of homogeneity makes it difficult to move the country toward a system of capital punishment that “sufficiently contemplates the rights and circumstances” of criminal suspects and defendants, since persons suspected or accused of murder garner little sympathy in Japanese society.²³² The homogeneity assumption means there is little grassroots motivation to push for reform. Instead, “Japan’s reform process is driven almost entirely by legal and governmental elites,” with “little participation by the broader public.”²³³

Altering the perception that Japan is homogeneous is a formidable challenge, not least because Japan is nationalistic. Invocations of racial purity, however unfounded they may be, resonate with large segments of the Japanese public and are politically useful to many Japanese leaders.²³⁴ If there is any hope for changing the presumption that Japan is homogenous, perhaps it lies in the possibility that the country will open its doors to more foreigners as a way of addressing a growing demographic crisis (rising lifespans and falling birthrates) that will lead to major shrinkage in Japan’s population and big challenges for Japan’s economy (how to provide labor and pay for pensions in a society that is getting grayer every year?).²³⁵ More open borders would mean more immigrants and more visible minorities, which might lead to more consciousness of racial inequalities in the criminal and capital justice systems. This kind of opening to the world, however, is unlikely to occur on a large enough scale to make a significant difference anytime soon.

228. Mark A. Levin, *Considering Japanese Criminal Justice from an Original Position*, 857 SEKAI 112 (2014).

229. See generally GARLAND, *supra* note 7; see FROM LYNCH MOBS TO THE KILLING STATE, *supra* note 227 at 228–29.

230. See DEBITO ARUDOU, EMBEDDED RACISM: JAPAN’S VISIBLE MINORITIES AND RACIAL DISCRIMINATION 8–9 (2015).

231. *Id.*

232. Levin, *supra* note 228, at 122.

233. *Id.* at 3.

234. See CHRISTOPHER P. HOOD, JAPAN: THE BASICS 110–30 (2015).

235. See ARUDOU, *supra* note 230, at 289.

In sum, American capital punishment—and American criminal justice generally—functions partly as a system of racialized control,²³⁶ but the racial inequalities reflected and reproduced in American law have also been a force for progressive reform.²³⁷ Focusing on America illustrates how social conflict can foster significant institutional change. Focusing on Japan, by contrast, shows how a paucity of conflict can inhibit change. Reform of capital punishment sometimes fails in this way, too.

IV. REFORM

Reform in Japanese capital punishment could occur by altering the causes of its continuity. As explained above, making race, class, and inequality in Japanese criminal justice more salient will be hard to do, but the other causes of continuity described in the previous Part are susceptible to change if there is political will.²³⁸

Japanese public support for capital punishment would probably soften if the country developed the kinds of institutions that helped expose wrongful convictions in countries such as the United States and the United Kingdom. These institutions include Innocence Projects, innocence commissions, exoneration registries, and aggressive investigative journalism. There are signs that Japan is trying to address some of these structural reform challenges.²³⁹ At the same time, for more wrongful convictions to be revealed and reversed, Japan needs to change a culture that is reluctant to acknowledge their possibility.²⁴⁰ This cultural imperative requires adopting at least three principles.²⁴¹ First, in order to reduce error, one must assume error is inevitable.²⁴² Second, successful strategies of error prevention identify and learn from mistakes through processes that are open and transparent.²⁴³ Third, error prevention works best when criminal justice is administered based on data and

236. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 21–22 (2012).

237. See ROBERT BLECKER, *THE DEATH OF PUNISHMENT: SEARCHING FOR JUSTICE AMONG THE WORST OF THE WORST* 236 (2013).

238. See *supra* notes 141–218 and accompanying text.

239. See, e.g., *New Technologies, Improved Practices May Boost Number of Criminal Retrials*, JAPAN TIMES (Nov. 2, 2015), <http://www.japantimes.co.jp/news/2015/11/02/national/crime-legal/new-technologies-improved-practices-may-boost-number-of-criminal-retrials> (explaining that DNA forensic science innovations and implementation of a lay judge system could aid the wrongfully convicted).

240. See Johnson, *supra* note 154, at 216.

241. KATHRYN SCHULZ, *BEING WRONG: ADVENTURES IN THE MARGIN OF ERROR* 304 (2010).

242. *Id.*

243. *Id.* at 304–05.

facts rather than on opinions, assumptions, and standard operating procedures.²⁴⁴

Capital punishment in Japan might also change if death were deemed to be a sufficiently “different” criminal sanction so as to require special procedures and protections in capital cases. Several reforms are essential. In murder cases, prosecutors should be required to provide the defense with advance notice of whether they will seek a capital sentence. Capital trials should be bifurcated so that defendants can put on more mitigating evidence without undermining their efforts to obtain an acquittal. Victims should not be allowed to express their desire for punishment before the guilt stage of a trial has concluded.²⁴⁵ Capital sentencing standards should be made clearer and more precise. Automatic appellate review should follow every capital conviction and sentence. Prosecutors should not be permitted to appeal sentences less than death. And in murder trials, conviction and a capital sentence should require more than a mere mixed majority of the three professional and six lay judges who sit in judgment. Until Japan implements these reforms, it cannot credibly claim that its system of capital punishment is “cautious” (*shincho*) about administering the ultimate sanction.²⁴⁶ And by raising legal expectations in potentially capital cases, more problems in Japanese capital punishment will be exposed, creating more pressure to change the present system.²⁴⁷

Finally, changes in the secrecy that surrounds Japanese executions are long overdue, and greater transparency might make capital punishment both more salient and more problematic in Japan’s political culture.²⁴⁸ Three changes seem crucial. Death row inmates should be told the time of their execution at least several days before they are hanged (instead of a mere hour or two), and the Japanese media and public should be informed at the same time an inmate is. A few members of the media and a limited number of relatives and friends of the victim(s) and the condemned should be allowed to observe hangings. And inmates on death row should have significantly more freedom to meet visitors and correspond with people in the free world. Secrecy protects capital punishment from scrutiny in many of the world’s death penalty systems, but in Japan that secrecy is “taken to extremes not seen in

244. *Id.* at 305–07.

245. See Masahiko Saeki, *Victim Participation in Criminal Trials in Japan*, 38 INT’L. J.L., CRIME & JUST. 149, 150 (2010) (stating that victim statements may not be used by fact-finders as evidence of the crime).

246. See Johnson, *supra* note 98, at 172–75.

247. *Id.* at 175–82.

248. See Johnson, *supra* note 202, at 264–68.

other nations,”²⁴⁹ and the justifications for killing in secret are not convincing:

If the extreme isolation on death row helps some condemned ‘accept the inevitable’ and ‘prepare for death,’ it does so by killing them twice, first socially and then physically. If secrecy is designed to protect the ‘privacy and dignity’ of offenders and their families, it does so by sacrificing democratic values—transparency, accountability, and public reasoning—at precisely those times when they should be most operative. And if silence helps maintain ‘stability’ on death row, it does so through a mechanism of terror that profoundly destabilizes the psyches of the condemned (and turns some of them psychotic). ‘Am I next?’ and ‘Is today the day?’ are questions that naturally preoccupy the people on death row. The uncertainty which surrounds them makes them easier to govern, for some condemned believe their own misbehavior could hasten an appointment with the hangman.²⁵⁰

There is not much public pressure in Japan for the reforms proposed here.²⁵¹ Nonetheless, for people who would like to see change in Japanese capital punishment, the good news comes from other countries, where major death penalty reforms, including outright abolitions and multi-year moratoria on executions, seldom depended on public opinion or on changes in other parts of their criminal justice systems. The Philippines, Thailand, South Korea, and Taiwan have all experienced abolition or moratoria, and the key cause of reform was not a large shift in public opinion or a reform revolution in criminal justice, but rather “leadership from the front” by elite officials in the face of public resistance, apathy, or both.²⁵² In this respect, the reform of capital punishment in Japan is primarily a political challenge.

249. Johnson, *supra* note 40, at 253.

250. *Id.* at 267–68 (citations omitted).

251. See generally SATO, *supra* note 68; Johnson, *supra* note 40, at 268–72.

252. See, e.g., JOHNSON & ZIMRING, *supra* note 14. “Leadership from the front” was also a crucial cause of abolition in Germany, France, the United Kingdom, and other Western countries. See ANDREW HAMEL, ENDING THE DEATH PENALTY: THE EUROPEAN EXPERIENCE IN GLOBAL PERSPECTIVE 168 (2010).

V. CONCLUSION

There is a triumphalism in much writing about capital punishment. Some of it is in response to the remarkable progress toward abolition that has occurred in the world, and some of it is in anticipation of a future that is believed to hold the certainty of abolition everywhere. According to two prominent analysts, “great progress [has been] made towards worldwide abolition of capital punishment over the past quarter of a century.”²⁵³ According to another, “it seems that nothing can stop continued progress towards universal abolition.”²⁵⁴ I, too, would like to see abolition spread, and I favor some reforms that would restrict the scope and scale of capital punishment in retentionist countries such as the United States and Japan. But in death penalty scholarship, there are few serious studies of failures of abolition, especially outside the United States.²⁵⁵ This Article has aimed to describe and explain the failure of abolition and of death penalty reform in Japan, one of three major democracies to retain capital punishment (the others are the United States and India).

The case of Japan suggests that abolition may be neither near nor certain in some societies, and something similar might be said about reforms that would restrict the scope and scale of capital punishment in other retentionist nations.²⁵⁶ This Article’s focus on reform failure seeks to be instructive to death penalty analysts and activists in two ways: by revealing contingencies and complexities in the future trajectories of capital punishment in the world, and by helping death penalty opponents discern how to move toward reforms they favor by identifying obstacles to change. Paying attention to how “every death penalty nation is retentionist in its own way”²⁵⁷ may also create greater curiosity about this institution’s “possible positive effects,”²⁵⁸ which have been neglected in death penalty scholarship.²⁵⁹ The notion that capital punishment “represents the pointless and needless extinction of life with only

253. Roger Hood & Carolyn Hoyle, *Progress Made for Worldwide Abolishment of Death Penalty*, 6 INT’L AFF. F. 8, 8 (2015).

254. Schabas, *supra* note 22, at 13.

255. Temkin, *supra* note 8.

256. For a variety of views about the future of capital punishment in America, see THE ROAD TO ABOLITION?, *supra* note 63.

257. GARLAND, *supra* note 7, at 22.

258. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 23 (Vintage Books 1977).

259. See GARLAND, *supra* note 7, at 285.

marginal contributions to any discernible social or public purposes”²⁶⁰ may be inspiring rhetoric to many abolitionists, but it is bad sociology. So is the sweeping claim that “even when its aims are modest, capital punishment fails to achieve them.”²⁶¹ As David Garland has shown in his masterful account of U.S. capital punishment in “the age of abolition”:

If we insist, with Foucault, on a positive account of capital punishment’s uses and utilities, even those that at first seem marginal or unimportant, then a picture emerges that turns the conventional wisdom upside down. What becomes apparent is that the state’s power to kill is actually productive, performative, and generative—that it *makes things happen*—even if much of what happens is in the cultural realm of death penalty discourse rather than in the biological realm of life and death.²⁶²

Capital punishment persists in Japan (and the United States) partly because it performs some positive functions. For prosecutors, it is a practical instrument that allows them to “harness the power of death in the pursuit of professional objectives.”²⁶³ For elected officials, it is “a political token in an electoral game” that is played before viewing and voting audiences.²⁶⁴ For the media and on-looking public, it is “variously an edifying morality play, a vehicle for moral outrage, a prurient entertainment, or an opportunity for the expression of hatreds and aggressions otherwise prohibited.”²⁶⁵ For victims and survivors of crime, it is believed to be a mechanism for achieving retribution and atonement.²⁶⁶ And for the general public, it is deemed to deter homicide.²⁶⁷ Even if these beliefs are founded in faith more than fact, they are subjectively meaningful to the believers and therefore are sociologically significant.

260. *Baze v. Rees*, 553 U.S. 35, 85 (2008) (Stevens, J., concurring) (internal quotations omitted).

261. MARAZZITI, *supra* note 116, at 201.

262. GARLAND, *supra* note 7, at 285–86.

263. *Id.* at 288; *see generally* AOKI OSAMU, KOSHUKEI [Hanging] (2009).

264. GARLAND, *supra* note 7, at 288; *see also* Setsuo Miyazawa, *The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy*, 10 PUNISHMENT & SOC’Y 47, 72–73 (2008).

265. GARLAND, *supra* note 7, at 288–89.

266. Kita & Johnson, *supra* note 140, at 227.

267. Kanji Muramatsu, David T. Johnson, and Koichi Yano, *Nihon ni okeru Shikei to Genbatsuka no Hanzai Yokushi Kōka no Jisshōteki Bunseki* [Empirical Analysis of Crime Deterrence by Death Penalty and Harsher Punishment], in NIHON KEIZAI GAKKAI SHUNKI TAİKAI [JAPAN ECONOMIC ASSOCIATION SPRING MEETINGS], NIIGATA UNIVERSITY 1–37 (May 23, 2015).

Yet the stasis in Japanese capital punishment described in this Article stems more from what is *not* found in and around the institution than from how it “makes things happen” in Japanese law and society. Japan has *not* discovered many wrongful convictions. Japan has *not* operationalized the principle that death is a different kind of criminal punishment. Japan is *not* open about how the state kills. And Japan has *not* confronted social pressure to make its system of capital punishment fairer to disadvantaged minorities. In all these respects, Japan can be contrasted with the United States, where markedly more death penalty reform has occurred.²⁶⁸

Other retentionist countries also resemble Japan in some of these respects. In Singapore, which long has employed one of the most aggressive death penalty systems in the world,²⁶⁹ and which is hardly a paragon of due process,²⁷⁰ an article in the country’s leading law journal cavalierly concludes that “no sweeping reforms are necessary” to reduce the risk of wrongful conviction.²⁷¹ In Taiwan, where the number of executions dropped dramatically as the country democratized²⁷² but have rebounded in recent years, death is not different as a matter of law or practice—and Taiwan has made major mistakes in administering capital punishment, including the wrongful execution of Chiang Kuo-Ching, which Taiwan’s government acknowledged in 2011.²⁷³ And in the People’s Republic of China, which continues to execute more prisoners than any other country in the world, debate about the death penalty has become more vigorous since 2000.²⁷⁴ But in spite of increased debate, many parts of China’s capital punishment complex remain shrouded by state-enforced secrecy, including prohibiting disclosure of how many executions the country performs each year. The number is still a top state secret.²⁷⁵

268. Temkin, *supra* note 8, at 7–8.

269. See Franklin E. Zimring, Jeffrey Fagan, & David T. Johnson, *Executions, Deterrence, and Homicide: A Tale of Two Cities*, 7 J. EMPIRICAL LEGAL STUD. 1, 2 (2010).

270. See JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE* 4–13 (2012).

271. Chen Siyuan & Eunice Chua, *Wrongful Convictions in Singapore: A General Survey of Risk Factors* 28 SING. L. REV. 98 (2010).

272. Fort Fu-Te Liao, *From Seventy-Eight to Zero: Why Executions Declined After Taiwan’s Democratization*, 10 PUNISHMENT & SOC’Y 153, 154 (2008).

273. THE DEATH PENALTY PROJECT, *THE DEATH PENALTY IN TAIWAN: A REPORT ON TAIWAN’S LEGAL OBLIGATIONS UNDER THE INTERNATIONAL COVENANT OF CIVIL AND POLITICAL RIGHTS*, v (2014).

274. See Michelle Miao, *The Politics of Change: Explaining Capital Punishment Reform in China* (Trinity Term 2013) (unpublished DPhil thesis, Univ. of Oxford) (on file with author).

275. See THE DEATH PENALTY IN CHINA: POLICY, PRACTICE, AND REFORM 13 (Bin Liang & Hong Lu eds., 2016).

The *Anna Karenina* principle suggests that success at reforming or abolishing capital punishment “requires avoiding many separate possible causes of failure.”²⁷⁶ The principle also implies that the road to abolition is not merely a positive path that embraces “leadership from the front” in the face of public opposition²⁷⁷ and the human rights dynamic,²⁷⁸ although these are important proximate causes of change. The road to abolition is also a “negative path”—what the Greeks and Romans called *via negativa*—leading away from assumptions, doctrines, and practices that present obstacles to capital punishment’s abrogation or diminution.²⁷⁹ As in the pursuit of happiness and success, so in the pursuit of a world without this form of state killing: negative knowledge (what not to do) can be even more potent than positive knowledge (what to do).²⁸⁰ Thinking about what makes each country “retentionist in its own way” may inhibit the impulses to celebrate and lament in writing about capital punishment, but it may also have the salutary effect of improving our understanding of why it persists.

276. DIAMOND, *supra* note 3, at 157.

277. ZIMRING, *supra* note 8, at 22 (internal quotations omitted).

278. See, e.g., Hood & Hoyle, *supra* note 253, at 9 (discussing the role of the human rights dynamic in the road to abolition).

279. ROLF DOBELLI, *THE ART OF THINKING CLEARLY* 299 (Nicky Griffin trans., 2013).

280. *Id.*