Introduction

Toward and Beyond the Abolition
of Capital Punishment

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Civil societies have historically tried to distinguish the crime of murder from other offenses. Typically, murder has been subject to the most severe punishment and most intense public outcry. Countries with vastly different forms of government and systems of punishment find common ground on the seriousness of the crime committed by a person who causes another human being’s death. The twentieth century, though, witnessed yet another kind of convergence around murder: nations of every political persuasion ended their use of death as a punishment for murder and other crimes. They declared the death penalty to be unconstitutional, unacceptably cruel, or a violation of human rights (or all of them).

To take but one example, in a major decision by the new democratic court of the Republic of South Africa, the justices, citing various theories to support their conclusion to end capital punishment, abolished the penalty, despite growing concern about crime. Justice Arthur Chaskalson, writing for the court, stated:

Constitutionalism in our country also arrives simultaneously with the achievement of equality and freedom, and of openness, accommodation and tolerance. . . . [T]he framers of our Constitution rejected not only the laws and practices that imposed domination and kept people apart, but those . . . that brutalized us as people and diminished our respect for life. Everyone, including the most abominable of human beings, has the right to life, and capital punishment is therefore unconstitutional.
The emergent global consensus marked the United States, with its seem-
ingly intractable attachment to capital punishment, as an outlier. But what was unimaginable only a decade ago—namely, that the United States would join most of the rest of the world in abolishing capital punishment—seems within the horizon of possibility at the time of this writing. At the start of the twenty-first century, we are in the midst of a profound national reconsideration of the death penalty.

One of the most powerful and important touchstones for today’s reconsideration of capital punishment is the U.S. Supreme Court’s 1972 decision in Furman v. Georgia. The Furman Court ruled that the way capital punishment was then applied violated the Eighth Amendment, and it imposed a moratorium on execution. At the time, Justices William Brennan and Thurgood Marshall wanted to go further and hold the death penalty to be cruel and unusual. Thus Marshall wrote:

In striking down capital punishment, this Court does not malign our system of government. On the contrary it pays homage to it. . . . In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve “a major milestone in the long road up from barbarism” and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.

Similarly, Brennan argued:

The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person’s humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose “the right to have rights.” A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a “person” for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, yet the finality of death precludes relief. An executed person has indeed “lost the right to have rights.”

He concluded:

Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.⁶

Marshall and Brennan repeated their views consistently and unequivocally during their remaining years on the Court. Meanwhile, doubts about capital punishment developed among other Justices. Just before his retirement from the Supreme Court, Justice Harry Blackmun, in the 1994 decision, *Callins v. Collins;* determined that, despite the Court’s efforts over two decades to ensure its fairness and reliability, the death penalty remained irretrievably flawed:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.⁸

In a 2001 speech at the David A. Clarke School of Law in Washington, D.C., Justice Ruth Bader Ginsburg observed, “In the United States, the most daunting of those criminal matters currently are cases in which death may be the punishment. (I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial.)”⁹

That same year, Justice Sandra Day O’Connor described her own concerns about the application of the death penalty. Talking to a gathering of the Minnesota Women Lawyers, she cited the fact that, at of the time of
her speech, 90 people had been exonerated from death row. She noted: “Serious questions are being raised about whether the death penalty is being fairly administered in this country. . . . Perhaps it’s time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel.”

In 2008, Justice John Paul Stevens used his concurrence in *Baze v. Rees*, a case about lethal injection, to register his unease with capital punishment:

The thoughtful opinions written by the Chief Justice and by Justice Ginsburg have persuaded me that current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty. . . . The time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely arrived.

At the state level, where support for the death penalty historically has been strong, and where elected officials routinely have affirmed death penalty sentences, we see other evidence of increasing doubts. Governor George Ryan of Illinois, a long-time supporter of capital punishment, found himself facing an insurmountable dilemma when he examined the application of capital punishment in his state. Having learned through an investigation by journalists and others that several people had been wrongly convicted, Governor Ryan ordered a full-scale examination of capital punishment in Illinois, which resulted in his decision to commute the sentences of the 167 people who were on death row at the time he left office. The Illinois case offers a stunning example of the way in which the legal system, with its ostensible procedural and substantive protections, failed to protect those accused of capital crimes. In further explanation of his decision, Ryan said:

Thirty-three of the death row inmates were represented at trial by an attorney who had later been disbarred or at some point suspended from practicing law. Of the more than 160 death row inmates, 35 were African American defendants who had been convicted or condemned to die by all-white
juries. More than two-thirds of the inmates on death row were African American. Forty-six inmates were convicted on the basis of testimony from jailhouse informants. . . . That is an absolute embarrassment. Seventeen exonerated death row inmates is nothing short of a catastrophic failure.  

Other evidence of our entrance into a period of national reconsideration of capital punishment can be found in public opinion polls, which show that support for life without parole, as an alternative to the death penalty, has steadily increased to the point where the country is evenly split when people are asked whether they prefer the death penalty or life without parole as a punishment for murder. Moreover, politicians across the country are now willing to openly raise questions about capital punishment without fear that they will be labeled soft on crime. As a result, we have witnessed, among other things, a widespread moratorium movement and legislative abolition of the death penalty in New Jersey and New Mexico.

Indeed, supporters of capital punishment now seem to be on the defensive. To take but one example: in April 2005, then Massachusetts Governor Mitt Romney filed a long-awaited bill to reinstate the death penalty in his state. The bill, which Romney called “a model for the nation” and the “gold standard” for capital punishment legislation, limited death eligibility to a narrow set of crimes, including deadly acts of terrorism, killing sprees, murders involving torture, and the killing of law enforcement authorities. It excluded entire categories of crimes that many believe also warrant the death penalty, including the murders of children and the rape-murders of women. It also laid out a set of hurdles for meting out capital punishment sentences, in an effort to neutralize the kind of problems that have led to dozens of death-row exonerations across the nation in recent years. The measure called for verifiable scientific evidence, such as DNA, to be required before a defendant can be sentenced to death, as well as a tougher standard of “no doubt” of guilt (rather than the typical “guilty beyond a reasonable doubt” standard) for juries to sentence defendants to death. The limited nature of Romney’s bill, which nonetheless ultimately was defeated in the Massachusetts legislature, provides a sign that the tide has turned in the national conversation about capital punishment.

Another key indicator is that the number of people being sentenced to death and executed in the United States has steadily declined in recent years. In 1998, some 302 people were sentenced to death; in 2008, just 111 were. The number of executions dropped from 98 in 1998 to 42 in 2007 and 37 in 2008.
Fueling this changing sentiment is a growing awareness of the fallibility of the death penalty system. Exonerations from death row have become common. Since 1973, more than 125 people in 25 states have been released from death row with evidence of their innocence. These exonerations have had a great impact on the debate about the death penalty, leading to the imposition of moratoria on executions in some states. In addition, they have spurred the introduction of congressional legislation like the Innocence Protection Act, a comprehensive package of criminal justice reforms aimed at reducing the risk that innocent persons may be executed. Finally, approximately 80 percent of the American public now believes that an innocent person has been executed in the preceding 5 years.15

The specter of convicting the innocent has fueled the growth of a new abolitionist politics. Opposition to the death penalty traditionally has been expressed in several guises. For instance, some abolitionists traditionally have opposed the death penalty in the name of the sanctity of life. Even the most heinous criminals, they urge, are entitled to be treated with dignity. Other traditional abolitionists have emphasized the moral horror, the “evil,” of the state’s taking a life. Still others believe that death as a punishment is always cruel and thus incompatible with the Eighth Amendment’s prohibition of cruel and unusual punishment.

New abolitionists, though, focus less on moral values and more on legal values. They use the familiar language of due process, equal treatment, fairness, and the incontrovertible proposition that the innocent should not be executed. They speak in the language of the “American mainstream”—of scrupulous, fair-minded people committed to the view that even in death cases, and perhaps especially in death cases, justice must be done justly. As Wisconsin Senator Russ Feingold put it, “The continued use of the death penalty demeans us. [It] is at odds with our best traditions.”16

Meanwhile, the recent debate about lethal injection emphasizes another way by which the death penalty might be undermined. The Supreme Court in Baze affirmed the constitutionality of lethal injection, but did it in such a way that left the door open to continuing challenges. Until recently, lethal injection has been used in 35 of the 38 states that allow capital punishment and in the federal system. From hanging to electrocution, to lethal gas, to lethal injection, we have moved from one technology to another. And with each new invention of a killing technology—or, more precisely, with each new application of technology to killing—the law has proclaimed the previous methods either barbaric or archaic.
Today the legitimacy of capital punishment seems to hinge on the belief that we can execute in a humane way. If lethal injection were found deficient in this regard, might that threaten the viability of the death penalty?

Early in the twenty-first century, the road to abolition is paved with decisions by judges and legislators and growing public doubts about the wisdom of state killing. Each of the authors of the chapters that follow helps us understand where we are on that road. If the death penalty is to end, how will it happen? What factors will engender abolition?

In *The Road to Abolition?* we treat abolition as a historical, cultural, and political phenomenon and assess the state of our national reconsideration of the death penalty. We explore some of the factors propelling us toward abolition and look at the roadblocks in the way. Here we bring together distinguished scholars—some long-time experts in the study of the death penalty, others new to this field. We begin with a set of broad reflections on the recent history of the abolitionist movement and contrasting perspectives on the prospects for abolition, and then we consider the importance of the debate about lethal injection in that movement. We conclude by putting the debate about the abolition of capital punishment in a broader political and historical context, considering, first, the connections between our attitudes toward war and toward the death penalty and, second, how the progress of struggle against the death penalty in the United States depends on our success in “becoming modern.”

Part I of the book, “Assessing the Prospects for Abolition,” begins with Michael Radelet’s optimistic view that abolition of the death penalty in the United States will be achieved within the next 25 years (chapter 1). Progress toward abolition, he suggests, has accelerated greatly in since the early 1980s. Rather than focus on the more visible victories of the moment, however, Radelet concentrates his analysis on more subtle changes in the discourse about executions. He claims that a shift in discourse and, subsequently, public opinion, is what accounts for the recent dramatic move toward abolition.

Radelet argues that empirical research (and a corresponding increase in the scrutiny of previous research methods which produced misleading results) has provided abolitionists with data discrediting traditional pro-death penalty arguments, such as deterrence, cost savings, and incapacitation. He contends that assertions that the death penalty can be applied fairly, without racial bias, and reliably, only to guilty parties, are similarly misguided.
In chapter 2, Simon Cole and Jay Aronson note that science has been, and will continue to be, essential to arguments for the abolition of the death penalty. They take up three key aspects of the recent abolitionist struggle: the “innocence revolution” brought about by DNA evidence and subsequent exonerations, the recent de facto moratorium on executions associated with the constitutional contestation surrounding lethal injection, and “incremental abolition”—the efforts to win Supreme Court judgments such as those prohibiting executions of juveniles based on diminished moral culpability. In each of these efforts and events, Cole and Aronson contend, the “cultural authority of science” has played a key role.

Yet Cole and Aronson recognize that science alone is not enough; discourse based on science, like discourse based on morality, may lead to a stalemate because it can be interpreted differently and employed in arguments for both sides. In the end, science is a useful tool in the effort to shift public opinion against the death penalty because it may provide a discursive terrain on which a social consensus against capital punishment may coalesce.

The next three chapters turn from an assessment of the way knowledge practices shape the prospects for abolition and focus on the politics of, and strategies for, abolition. In chapter 3, Bernard Harcourt foresees the end of capital punishment in the United States by the middle of the twenty-first century. Harcourt does not expect support for the death penalty to wither away in the face of financial cost-benefit analysis or the cultural authority of scientific evidence. Instead, he asserts that abolition will be achieved because of the strength of moral opposition to the death penalty, specifically manifested in the forms of elite political leadership and ordinary acts of resistance, which will ultimately propel a federal constitutional ban on capital punishment.

Harcourt suggests that acts of resistance among ordinary people often occur in retentionist states when individuals who deal with capital punishment develop a certain level of disgust or discomfort with the practice. The deliberate stalling techniques employed by these men and women throw a metaphorical monkey wrench into the system and slow down the machinery of executing death-row inmates, thereby “erod[ing] the political support necessary for capital punishment to continue to function.” It is these ordinary acts of resistance along with elite political leadership that will provide the momentum for swing states to embrace abolition, which, in turn, Harcourt notes, will result in a change of the political climate and shift public opinion strongly enough that, in his view, a federal constitutional ban on capital punishment will be in place by 2050.
In chapter 4, Carol Steiker and Jordan Steiker offer a more cautious optimism about the prospect of abolition in the United States. They assert that, should it happen, abolition will occur through a distinctive process. European abolition, for example, ultimately came from legislative action in the face of strong popular support for retention. Yet Steiker and Steiker argue that the differences between the European and American political systems are too great for the United States to follow the European path. Moreover, they disagree with Harcourt about the importance of elite political leadership, claiming that “European leaders are more likely to view themselves as leading rather than following public opinion,” whereas in the United States, “the duty of political representatives to be responsive to the electorate is beyond question.”

Steiker and Steiker highlight three different paths toward abolition, which they label (1) judicial abolition, (2) waiting and hoping “that capital punishment will become increasingly marginalized as an outlier practice in a few jurisdictions rather than attempt to stamp it out altogether,” and (3) the relatively new practice of substantive regulation of capital processes in order to constrict the death penalty past the point of viability. In the end, whatever path is chosen, Steiker and Steiker believe that the United States is well on the road to abolition such that the end of capital punishment is in sight.

Michael McCann and David Johnson conclude this section in chapter 5, with a note of skepticism about the prospects of abolition. First, they argue that drastic changes in public policy often follow drastic “triggering events” and thus are hard to predict. Second, they assert that the present historical context—the chipping away at the machinery of death, which abolitionists have touted as the long fuse for the eventual explosion of nationwide prohibition of capital punishment—paradoxically has made it more difficult than ever to terminate the practice of state killing.

Like others in this book, McCann and Johnson emphasize the distinctive institutional structure of the United States and how its associated cultural norms matter in the debate between abolition and retention. They argue that variation in norms and subsequent changes in death penalty policy are contingent on subtle divergences in public discourse. McCann and Johnson analyze the potential for change in the historical contexts of post–World War II European abolition and the purported “near miss” abolition period in the United States in the 1960s and 1970s. They use these examples to show how unique institutional features of the United States (especially federalism) that have allowed for the decline of capital
punishment in practice have also “fortified the endurance of capital punishment as a symbolic institution.”

McCann and Johnson see two possible ways de jure abolition might be achieved in the United States. The first is a dramatic triggering event such as a high-profile miscarriage of justice. Yet the wrongful convictions in Illinois suggest that time unnecessarily spent in prison is not itself enough; a wrongful execution would likely be required, but this is unlikely, in their view, in this age of postconviction DNA testing during appeals. The second is a treaty obligation imposed by Europe at a time of American desperation on the international stage, which McCann and Johnson assert is also unlikely, given the history of American insensitivity in the international community.

Part II of this book, “Debating Lethal Injections,” focuses on the significance of the ongoing debate about lethal injection. Deborah Denno, chapter 6, begins by taking up recent challenges to lethal injection methods and by analyzing how such challenges relate to debates about the death penalty in general. She argues that those challenges have been more successful than broader issues such as race and innocence in sidetracking the death penalty. Despite this success, she contends that “the oft-perceived link between execution methods litigation and the potential abolition of the death penalty is a double-edged sword” since that litigation distracts officials from paying attention to the nature of states’ execution protocols.

Though lethal injection challenges may encourage “deeper reflection” about the death penalty in general, Denno worries that such reflection leads judges to uphold methods of execution, all the while criticizing execution itself. In Baze v. Rees, for example, Justice Stevens concurs with Chief Justice John Roberts's opinion upholding the constitutionality of Kentucky’s execution protocols, despite including Stevens's declaration that he opposes the death penalty in general.

In chapter 7, Timothy Kaufman-Osborn contends that the Court’s ruling in Baze v. Rees, in fact, was a setback for abolitionists. While he predicts that the lack of consensus in Baze will result in future methods suits, Kaufman-Osborn argues that Chief Justice Roberts’s interpretation of the Eighth Amendment requiring a “demonstrated risk of severe pain” and a “readily available alternative” in order to declare current practices unconstitutional will make success in future challenges to lethal injection less likely.

Kaufman-Osborn situates Baze in the context of a long-standing search for the perfect execution. Like Denno, Kaufman-Osborn believes that the
recent challenges to lethal injection provide an opportunity to consider whether it is wise to pursue abolition through legal challenges based on methods. To pursue methods challenges invites a response from the state that attempts to make us forget the violent elements of capital punishment; but to abandon them involves the risk of great suffering for the executed. In the end, he notes that, if abolitionists continue to pursue this strategy, the ideal of the perfect execution and its contradictory imperatives will continue to haunt attempts to abolish the death penalty.

In the final chapter of this section, chapter 8, Jürgen Martschukat suggests that it is not merely lethal injections that epitomize the push for perfection; rather, a more comprehensive movement underscores debates over technical procedures governing lethal injections. In general, Martschukat asserts that notions of speed and timing have been at the forefront of attempts to make executions “appear tolerable” by providing a “reliable, precise, and painless death” for the convicted.

In our search for a humane execution we are obsessed with speed and an aesthetic of death, which Martschukat says is “emblematic of a major delusion of modern cultures.” In accord with Enlightenment thought, the guillotine was developed in order to kill without pain. The guillotine was accepted because it eliminated the risk of botched manual beheadings; mechanized executions were hailed as more rapid and reliable. Yet assertions that the head continued to live after being detached—supported by scientific experiments that registered blinking and grimacing after decapitation—led to a search for a new and improved execution procedure. In the late-nineteenth century, electricity was considered lightning fast and was presented as a neater and more dignified alternative to decapitation.

Martschukat argues that changes in execution methods have been prompted by the diagnosis of a “crisis” in execution procedures; people wanted state killings to be instantaneous and pain-free, and the replacement of one procedure by another after new technological innovations became inevitable. Thus, the expertise of medical professionals in anesthetization “seemed to offer the best of all solutions” for capital punishment procedures. By rendering the victim unconscious, this addition to the process was purported to eliminate the need for precise timing and speed because the condemned would no longer have any possibility of experiencing that crucial moment between the beginning of the execution and the end, or, more dramatically, between life and death. In addition to eliminating pain for the condemned, lethal injection became popular because it eliminated discomfort for witnesses.
Yet to achieve any progress on the road to abolition, those opposing the death penalty must reject the suggestion that the integration of experts and modification of execution procedures will ever provide a painless means of taking life. The perfect execution is an unattainable goal. Martschukat encourages abolitionists to stop debating how effectively executions are carried out and, instead, concentrate on the question of whether the practice of state killing should exist at all.

In Part III, “Putting the Death Penalty in Context,” we are reminded that the debate about capital punishment provides a lens through which to view other pressing political, social, and cultural issues. In chapter 9, Robin Wagner-Pacifici focuses on connections between various modes of implementing state violence. She argues that torture, war, and capital punishment, though separate arenas of violence, collide in meaningful ways that have been previously overlooked. She claims that “debates in the United States about the death penalty and about torture ought to be connected” because they both revolve around shifting definitions of sovereignty and state violence.

To illuminate her arguments, Wagner-Pacifici examines the “war on terror.” International public law, she argues, has demonstrated the quirky ability to undermine domestic law; specifically, the “war on terror” promotes “military necessity over humanitarian values.” She parses state violence via degrees of risk, where war is a contest with roughly equal risk for both parties, torture is a contest in which the victim has little control, and the death penalty is “no contest at all.”

Wagner-Pacifici demonstrates that almost every imaginable base has been invoked in the continuing search for a grounding of state violence, from the technological expertise of professionals to moral evolution and sovereign exceptionalism. She observes that, although all of these contexts are distinct, the very existence of so many areas of debate over one topic reflects a “resistance to settling into one order of justification.” Thus contradictions and confusion abound as the public discourse flows in and out of various arenas attempting to assess various justifications for state killing. This confusion, she suggests, is itself a barrier to change.

Wagner-Pacifici ends her chapter by stating that “when the state engages its monopolized violence, it necessarily identifies and categorizes its targets and victims,” and racism has always been present in the use of state violence in the United States. Racism, she argues, may be the link between the discursive frames around capital punishment, torture, and the “war on terror” in that racism has prompted a movement in state violence
away from capital punishment and its bias against African Americans to-ward torture and its focus on Arabs during the present “war on terror.” She also suggests that racism may be the strongest source of support for both practices in the public arenas. Thus, “the decline of the death penalty concomitant with [the] rise of (thinkable) torture against fundamental-ist Islamicists (mostly Arabic) might not be an accidental contingency of separate historical frames but, rather, a reflection of a single mechanism.” Making this connection explicit might be an essential prerequisite in the struggle to end state violence in any single domain, whether in the do-main of capital punishment or elsewhere.

In chapter 10, Peter Fitzpatrick notes that the end-goal or “telos” of embarking on the road to abolition does not necessarily require that that road be straight and unswerving. There are contradictions inherent in modern political formations in which both sides of the argument about the death penalty can seem rational, and the challenge of resolving the contradictions “both sustains and counters the death penalty.” Fitzpatrick argues that modernity disallows a “transcendent resolution,” and he con-siders two opposing possibilities at the road’s end: the first is an adoption of “hyperdeterminacy” and the resulting assumption of “a confident com-petence to deal death;” the second is acceptance of “responsiveness to life that is imperative for our being-together in modernity.” He then suggests that, in order to be modern, we must abandon the former outcome for the latter; furthermore, since “modern political formation and the death penalty are incompatible,” we must exclude the death penalty from our state practices. He laments that “the ‘sovereign’ affirmation of [the first] dimension embeds the death penalty and denies the modernity of the formation.”

Fitzpatrick concludes that the road to abolition, like the path of mod-ern political formation, is an open one; yet, “there were clear markers . . . indicating what direction the road takes in its orientation towards abolition . . . [and] the cumulation of these markers quite undermined that sovereignty still affirmed as the generative basis of the death penalty.”

From debates about deterrence and the status of scientific evidence in considerations of the future of capital punishment to an examination of the linkages of capital punishment, torture, and war and of the concep-tions of sovereign power that support capital punishment, charting where we are on the road to abolition is a complex and challenging enterprise. It is as much a project of understanding as of prediction, as much an enter-prise open to the political theorist as the legal scholar. The perspectives of
each are necessary if we are to unpack this moment of national reconsideration and chart its various possible trajectories.

As we move ever so carefully down the road to abolition, we must begin to consider the pragmatic compromises that might be required if we are to end capital punishment. Will we end the death penalty only to replace it with life in prison without parole? And thus, will life without the possibility of parole become, in essence, the new death penalty? For abolitionists, might that be a pyrrhic victory? In addition, we must consider what underlying, unstated, perhaps even unconscious impulses have helped justify the death penalty and, thus, could very well serve to justify whatever punishment might replace it.

In this regard, we need to think about the racial disparities within the system of punishment in the United States—in particular, in executions—that have been well documented for decades. In the 1987 case, *McCleskey v. Kemp*, which brought these disparities starkly to light in the case of Georgia’s application of the death penalty, the Supreme Court, in a 5 to 4 decision, declared that such statistical realities, though indisputable, were not a violation of the Equal Protection Clause of the Fourteenth Amendment. Writing for the Court, Justice Lewis Powell wrote that a decision in McCleskey’s favor “taken to its logical conclusion, throws into serious question the principles that underlie the entire criminal justice system.” This, of course, was precisely the point that McCleskey’s lawyers tried to make. The system, they maintained, was broken due to underlying racial bias that seemed to value white life over black. The death penalty was only the starkest, most severe manifestation of that bias.

More than two decades later, in 2008, a black man was sentenced to death for the murder of a white policeman in New Hampshire. It is the first time in 49 years that the state has sentenced a person to death. It is impossible to know whether or not racial bias played a role in this particular case. However, scholarly research clearly demonstrates that bias and stereotypes, albeit unintentional and unconscious, are likely factors in creating and perpetuating racial disparities within the entire criminal justice system. Ending capital punishment will not end those disparities. Taking honest account of this reality—the very thing that Powell said “throws into serious question the principles that underlie the entire criminal justice system”—may indeed be our most crucial work as we move toward abolition and even after we have achieved it.

Much remains to be done as we look to, and beyond, the end of capital punishment. The road before us is uncharted and uncertain. This is why
the title of this book is posed as a question, not fact. Yet we take heart from the fact that, until very recently, no one could have predicted that today we would be as far as we are on the road to abolition.

NOTES

4. Ibid. (Marshall, J., concurring), p. 371
5. Ibid. (Brennan, J., concurring), p. 290.
6. Ibid., p. 305.
8. Ibid. (Blackmun, J., dissenting), p. 1145.
13. Ibid.
20. Available at http://unionleader.com/article.aspx?headline=Jury%3a+Death+for+Addison&articleId=a52d3423-e67a-4f6f-aaa5-5d1423ab0c86.