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Chinese Homicide Law, Irrationality, and Incremental Change

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I. INTRODUCTION

Having learned that his wife was having an affair, the defendant mulled over his options. After deliberation, he decided to shoot her and her lover. Sneaking up on them as they sat together in an isolated area, the defendant shot each in the chest. Because they were far from the nearest city, they received no first aid and both bled to death.[1] Charged with first degree murder, the defendant has asked you to represent him.

In your first interview, the defendant explains that he did not intend to kill his victims but, instead, intended only to injure them by shooting them in a position in the torso that was away from their hearts. After reflecting on all of the facts, you would quickly explain to your client that his "defense" is inapposite under American criminal laws.

Long ago, American legislatures and courts rejected such a defense for various reasons that make sense under both a utilitarian and retributivist model of punishment.[2] Prior to developments in modern medicine, many injuries that are treatable today led to death[3] and were treated as murder under different theories such as depraved heart murder. Further, based on the immutable facts in the above hypothetical case, the defendant's claim seems inherently implausible. Shooting someone near a vital organ creates too great a risk of death, even in the days of

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1. *Cf.* Public Prosecutor v. Liu Yufang, Gu XX & Others, 1 China L. Rep. 117, 120–23 (1992) (China) (describing an angry wife who recruited family members to beat her husband who, amongst other things, was having an extramarital affair, and, after being beaten, bled to death).

2. *See, e.g.*, People v. Knoller, 158 P.3d 731, 741 (Cal. 2007) ("[A] conviction for second degree murder, based on a theory of implied malice, requires proof that a defendant acted with conscious disregard of the danger to human life.").

3. *See* Susan Ferraro, *The Century's Top Medical Marvels These Advances Have Saved Millions*, N.Y. DAILY NEWS (Dec. 12, 1999), http://www.nydailynews.com/archives/news/century-top-medical-marvels-advances-saved-millions-article-1.847815 (listing the top ten medical advancements that have saved numerous lives).

modern medical procedures.[4]

Distinguishing between a defendant who aims *near* a vital organ and one who aims *at* a vital organ makes little moral sense. Or so it would seem, at least to students of American criminal law: even if one credits the defendant's story—questionable at best—then he still intended to cause harm and must have known of the high probability that death would result from his actions.

By comparison, the post-Maoist Chinese criminal law makes just such a distinction. Enacted in 1987 and re-codified in 1997, Article 5 of the Chinese Criminal Code directly links the degree of one's offense and punishment to one's intent,[5] irrespective of whether the actus reus caused death and whether that death was foreseeable to the actor. Beginning with substantive criminal law reform after Mao's death, two provisions of Chinese law—Articles 232 and 234—distinguish between degrees of homicide: intentional killing versus "intentional injury resulting in death."[6] The former exposes the offender to more harsh punishment than the latter. Thus, the hypothetical defendant can mitigate his crime and punishment by proving that he intended to shoot near a vital organ, but did not intend to kill, even when death was a foreseeable result of his actions and one that he actually foresaw.

When the Authors first encountered these provisions of Chinese law, they were tempted to conclude that they were irrational and indefensible. Further inquiry has convinced the Authors that these provisions demonstrate a small, but present, toehold for death penalty abolitionists.[7] Thus, the "intentional injury resulting in death" statute is one step toward making incremental inroads into reducing the widespread use of capital punishment. Further inquiry convinces the Authors that abolitionists in the United States, over the course of 200 years, proceeded in a similar manner. Unable to build a broad public anti-death penalty consensus, abolitionists have achieved incremental victories by encouraging legislators to enact homicide statutes that ostensibly distinguish heinous offenders from those with lesser culpability. But as with incremental reforms to the Chinese Criminal Code, the resulting legal rules have drawn irrational distinctions, a fact demonstrated by the laws' applications.

That leads to the two main insights of this Article: first, similar to the seeming irrationality produced by post-Maoist reforms in the arena of homicide law, early efforts to divide murder into degrees of homicide in the United States, with an eye

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4. *See generally* John Eligon, *One Bullet Can Kill, but Sometimes 20 Don't, Survivors Show*, N.Y. TIMES (Apr. 3, 2008), http://www.nytimes.com/2008/04/03/nyregion/03shot.html (telling the stories of numerous gunshot victims).

5. Zhōnghuá Rénmín Gònghéguóxinfǎxiūzhèng'ànwǔ (中华人民共和国刑法修正案(五)(附英)) [Criminal Law of the People's Republic of China] (promulgated by the Fifth National People's Congress, Mar. 14, 1997, effective Oct. 1, 1997), art. 5 [hereinafter 1997 Criminal Law of China]. Judges determine the actor's intent based on a number of factors, including: knowledge that the conduct would produce "socially dangerous consequences;" whether the person knew or should have known of dangerous consequences; and whether the consequences were "unavoidable or unforeseeable." *Id.* arts. 14–17.

6. *Id.* arts. 232, 234.

7. *See* discussion *infra* Part II.A.

toward reducing the incidence of capital punishment, led to irrational distinctions in application.[8] Modern efforts at reform in this arena have not eliminated such irrational distinctions in the imposition of the death penalty.[9] For example, even section 210.6 of the Model Penal Code, the highly influential provision dealing with the death penalty, has resulted in a system allowing the imposition of the death penalty in arbitrary and discriminatory ways.[10]

Second, understanding the irrationality of the U.S. system offers insight into what may be afoot in China. Although Articles 232 and 234 have some overlap in punishment, Article 234 invites courts to sentence defendants to prison, instead of imposing the death penalty, despite evidence of mens rea that would allow a conviction for the higher offense.[11] Chinese abolitionists are struggling to effect change in a historically resistant society.[12] Indeed, the seeming irrationality of Chinese homicide law demonstrates the existence of reformist sentiment in a country that, left unchecked, seems all too willing to execute its citizens in large numbers.

Part II of this Article offers a brief evolution of homicide statutes in China and the role of the death penalty from the Imperial to post-Maoist world. The Article then discusses some of the cases decided in Chinese courts under Articles 232 and 234, and explores the anomalous results that appear to flow from the law's odd distinctions between the two homicide offenses that seem to overlap with little basis for rational distinction.[13] Part III compares developments in American homicide law, starting with efforts in Pennsylvania that led to the long-standing division of murder into degrees, and reviews more modern efforts that have led to irrationality in the United States' capital sentencing law.[14] Part IV discusses inferences drawn from developments in Chinese homicide law based on the comparison to developments in the United States. Specifically, while the Authors

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8. *See* discussion *infra* Part III.

9. *See* discussion *infra* Part III.

10. *See* discussion *infra* Part III; MODEL PENAL CODE § 210.6 (1962) (stating that in determining whether to impose the death penalty, the court must balance aggravating and mitigating factors, including: prior criminal activity; whether the murder was committed with another murder; whether the defendant believed there was "moral justification for his conduct;" and the defendant's age at the time the crime was committed).

11. *See* discussion *infra* Part II.B; *see also* 1997 Criminal Law of China, *supra* note5, art. 234 (stating that a defendant may be sentenced to a fixed term in prison, life in prison, or death for intentionally inflicting bodily injury on another person. The sentencing options are listed in that order, with death last).

12. *Death Penalty 2011: Alarming Levels of Executions in the Few Countries that Kill*, AMNESTY INTERNATIONAL (Mar. 27, 2012, 5:33 PM), http://www.amnesty.org/en/news/death-penalty-2011-alarming-levels-executions-few-countries-kill-2012-03-27 [hereinafter *Amnesty News Release*] ("Thousands of people were executed in China in 2011, more than the rest of the world put together. Figures on the death penalty are a state secret. Amnesty International has stopped publishing figures it collects from public sources in China as these are likely to grossly underestimate the true number.").

13. *See* discussion *infra* Part II.

14. *See* discussion *infra* Part III.

are not apologists for the death penalty systems in the United States or China, the Authors see irrationality as the result of small abolitionist victories. While the United States has a system that no one can love, those small victories have narrowed the application of the death penalty in the United States. It is yet to be determined whether small victories in China will lead to a significant reduction in executions in China.[15]

II. EVOLUTION OF CHINA'S HOMICIDE LAWS

A. A Brief Overview

The death penalty has been part of Chinese culture for thousands of years.[16] As with other undeveloped countries, for most of that history China did not restrict the death penalty to only the most heinous crimes.[17] Through most of China's history, the government used the death penalty as a means of social control and did not attempt to make it a proportional punishment.[18] Over centuries, the list of death penalty eligible offenses increased. One scholar estimates that, at one point in China's Imperial history, the government authorized the death penalty for over 10,000 offenses.[19] These death penalty eligible offenses ranged from minor property theft to murder.[20]

During some dynasties, emperors espoused the importance of the concept of "proportionality in sentencing."[21] But consistent with China's centuries-old commitment to promoting "universal harmony," the emperors' concepts bore little resemblance to western principles of proportionality.[22] As reflected in U.S. Supreme Court Eighth Amendment jurisprudence, Americans now focus on whether the punishment fits the crime.[23] By comparison, for centuries the Chinese

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15. *See* discussion *infra* Part IV.

16. *See* Ryan Florio, *The [Capital] Punishment Fits the Crime: A Comparative Analysis of the Death Penalty and Proportionality in the United States of America and The People's Republic of China*, 16 U. MIAMI INT'L & COMP. L. REV. 43, 65 (2008) ("As early as the Tang Code of 653 A.D., capital punishment was codified . . . ").

17. *See id.* at 63–64 (explaining that the death penalty was consistent with Confucianism which ranked society's importance over the individual's rights and, when combined with historical deference to elder ruling individuals, led to similar criminal offenses receiving varying punishments which were based on the elder rulers' arbitrary decisions).

18. *Id.*

19. Chen Xingliang, *Destiny of the Death Penalty in China in the Contemporary Era*, 1 FRONT. LAW CHINA 53, 54 (2006).

20. *Id.* at 56.

21. *See* Florio, *supra* note 16, at 65 ("[I]mperial China appeared to be generally concerned with proportional punishment . . . .").

22. *See id.* ("Various imperial codes sanctioned the death penalty for many crimes, and included elaborate formulas to calculate mitigating and aggravating circumstances, premised on the notion that 'punishment should correspond to the seriousness of the offense, as determined by its repercussions on universal harmony.' Despite the perceived harshness of the criminal justice system, imperial China remained committed to promoting the interests of the state via the enforcement of its codes. The government viewed individual rights as a secondary matter.").

23. Coker v. Georgia, 433 U.S. 584 (1977) (imposing the death penalty for rape convictions

principle of proportionality focused on the method of execution and the effect that method might have on the criminal's soul.[24]

At various times, Imperial rulers promised reform, but rarely achieved it in the area of death penalty abolition.[25] The Qing dynasty, the last in a long line of Imperial dynasties, was quite typical of purported versus actualized goals in this area.[26] Chinese historians confirm that the Qing dynasty made a commitment to limit the death penalty to the most heinous criminals, consistent with more western notions of proportionality.[27] But by the end of its reign, the number of capital punishments carried out was the highest in centuries.[28]

In 1911, after becoming a republic, China appeared for a brief period of time to embrace western concepts of proportionality in sentencing, including the death penalty.[29] The Nationalist Party led the reform of its criminal law and procedure.[30] Its code reduced death penalty eligible offenses from approximately 800 to 20, by far the lowest number of eligible offenses in its history.[31] However, in 1949, when the Communist Party, led by Chairman Mao Zedong, defeated the Nationalist Party in a civil war, this movement towards greater individual rights proved to be short-lived.[32] One of the first steps Mao's government took included repealing Nationalist Party legislation, effectively curtailing any meaningful efforts to limit the death penalty.[33]

Borrowing heavily from the Soviet Union, the People's Republic of China adopted a "revolutionary judicial system characterized by informal mediation, mass trials, retributive justice, and frequent summary executions."[34] Under Mao's leadership, China returned to its traditional Confucian "rule of the person."[35] The trend culminated with the ten year reign of the Cultural Revolution.[36] Despite the absence of legal codes or a formal criminal justice system, the government executed thousands of citizens, usually for "counterrevolutionary" crimes, without

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is disproportionate and excessive); Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding that the death penalty is inappropriate for child rape cases in which victim's death neither occurred nor was intended to occur).

24. Florio, *supra* note 16, at 65.

25. *See id.* at 66 ("During the last years of the Qing Dynasty, reformers began efforts to draft new codes . . . . The reforms, however, were relatively short-lived and never fully realized.").

26. *See id.* at 65–66 (discussing the Qing dynasty's approach to criminal punishment).

27. *Id.*

28. Xingliang, *supra* note 19, at 55.

29. Florio, *supra* note 16, at 66.

30. *Id.*

31. *See id.*

32. *Id.* at 66–67.

33. WILLIAM C. JONES, UNDERSTANDING CHINA'S LEGAL SYSTEM 20–21 (C. Stephen Hsu ed., 2003).

34. Stephen B. Davis, Note, *The Death Penalty and Legal Reform in the PRC*, 1 J. CHINESE L. 303, 309 (1987).

35. Florio, *supra* note 16, at 63–64.

36. *Id.* at 68.

any semblance of due process.[37] One could find no trace of western notions of proportionality in connection with most of these executions.

Beginning in 1979, Mao's successors attempted to repair some of the extensive damage caused by the Cultural Revolution by promulgating new criminal laws.[38] In 1979, China enacted new criminal law and criminal procedure statutes, which contained due process protections and reforms.[39] Scholars maintain that supporters of the Code, in both an effort to increase China's presence in the global economy and in response to world pressure, intended, in part, to limit the death penalty.[40] These Codes contained laws that included a number of reforms, including a provision allowing a judge to suspend a death sentence for two years.[41] The condemned criminal could then engage in hard labor, and at the end of that period, the judge had discretion to commute the death sentence to a term of years.[42] The Code mandated that, any time a court imposed the death penalty, the country's Supreme Court granted automatic review.[43] Further, in a precursor to Articles 232 and 234, discussed below, for the first time in China's history the law broke homicide into varying degrees, with the lesser offenses less likely to lead to the imposition of the death penalty.[44]

Despite significant retrenchment in the 1980s,[45] China's tentative reform of its criminal law regained an abolitionist toehold in the 1990s. While the government cracked down on the new criminal class for more than a decade, the 1990s saw the enactment of an amended Criminal Code that may have had the effect of reducing the number of death sentences imposed.[46] The relevant portions of that Code are explored in more detail below.

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37. *Id.* at 67–68.

38. *See id.* at 69 (explaining that after the damage caused by the Cultural Revolution, people were in need of a more structured system).

39. *See id.* (naming a number of the reforms—appellate review, regularized proceedings for capital crimes, and limited procedural protections).

40. *See* Xingliang, *supra* note 19, at 56 (discussing limitations to the death penalty, including making only the "most atrocious" crimes death penalty eligible, proscribing use of the death penalty against pregnant women and minors, and reducing the roster of capital offenses to twenty-eight).

41. Florio, *supra* note 16, at 69.

42. *Id.*

43. *Id.* at 69–70.

44. Zhōnghuá Rénmín Gònghéguóxíngfǎxiūzhèng'ànwǔ (中华人民共和国刑法修正案(五)(附英)) [Criminal Law of the People's Republic of China] (promulgated by the Fifth National People's Congress, July 1, 1979, effective Jan. 1, 1980) arts. 11–13 [hereinafter 1979 Criminal Law of China].

45. As has often happened in China's history, this period of liberalizing reforms was followed by a crackdown. Deng's reforms led to relaxation of governmental controls of economic activity. Florio, *supra* note 16, at 70. The resulting increase in criminal activity, including white-collar crime, drug use, and blackmail, led to a period of repression. The government engaged in repeated "Strike Hard" campaigns. For example, in 1983, the government rounded up as many as 50,000 people deemed antisocial, and thousands were executed without benefit of due process. *Id.* The Standing Committee of the National People's Congress suspended the Supreme Court's mandatory review of capital sentences. *Id.*

46. *Id.* at 73.

B. Articles 5, 232, and 234

By the 1990s, China was under pressure from the West on various fronts.[47] As it sought full economic engagement, its human rights record came under increased scrutiny.[48] Having just gone through a period of quelling the rise in criminal activity through the imposition of severe strikes and the suspension of due process, China responded in various ways, including enactment of Article 5 of the Chinese Criminal Code.[49] The Criminal Code now provides that "the death penalty shall only be applied to criminals who have committed extremely serious crimes."[50] Article 5 states a principle equivalent to the American proportionality principle: "The degree of punishment shall be commensurate with the crime committed and the criminal responsibility to be borne by the offender."[51]

To implement these reformist goals, the National People's Congress broke homicide into three separate offenses, limiting instances in which the death sentence would be imposed.[52] Anyone who "intentionally commits homicide" can be charged with a violation of Article 232 of the Criminal Code.[53] Article 14 defines an intentional crime as "an act committed by a person who clearly knows that his act will entail harmful consequences to society but who wishes or allows such consequences to occur, thus constituting a crime."[54] Thus, literally construed, any person who knows his act will result in death is guilty of "intentional" killing.[55]

The Code also defines offenses equivalent to voluntary and involuntary manslaughter. The second sentence of Article 232 states that if the "circumstances are relatively minor," then the court should reduce the offender's sentence.[56] Despite this parallel to American law—specifically to heat of passion voluntary manslaughter and incomplete self-defense manslaughter[57]—Chinese law goes

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47. DAVID M. LAMPTON, SAME BED, DIFFERENT DREAMS: MANAGING U.S.-CHINA RELATIONS, 1989–2000 3 (2001).

48. *Id.*

49. Florio, *supra* note 16, at 73; 1979 Criminal Law of China, art. 5.

50. ZhōnghuáRénmínGònghéguóxínfǎxiūzhèng'ànwǔ (中华人民共和国刑法修正案 (五) (附英)) [Criminal Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Feb. 28, 2005, effective Feb. 28, 2005) art. 48 [hereinafter 2005 Criminal Law of China].

51. *Id.* art. 5.

52. *Id.* arts. 232–234.

53. *Id.* art. 232.

54. *Id.* art. 14.

55. *Cf.* BLACK'S LAW DICTIONARY 1043 (9th ed. 2009) (defining malice aforethought as "[t]he requisite mental state for common-law murder, encompassing any one of the following: (1) the intent to kill, (2) the intent to commit grievous bodily harm, (3) extremely reckless indifference to the value of human life . . . or (4) the intent to commit a dangerous felony . . . .").

56. 2005 Criminal Law of China, art. 232.

57. BLACK'S LAW DICTIONARY, *supra* note 55, at 1050 (defining voluntary manslaughter as "[a]n act of murder reduced to manslaughter because of extenuating circumstances such as adequate provocation (arousing the 'heat of passion') or diminished capacity"); *id.* at 1481 (defining imperfect self-defense as "[t]he use of force by one who makes an honest but

much further. For example, the government may charge righteous and indignant killers under this provision.[58] Article 233 is similar to involuntary manslaughter in the United States in that it creates criminal liability for negligent killers.[59]

Of special interest for this Article is Article 234 of the Code. It establishes an unusual crime, at least from an American perspective, which in its application leads to irrational results. Article 234 provides that one is guilty of a crime if that person "intentionally inflicts injury upon another person . . . if he causes death to the person."[60] Article 234 overlaps with Article 232, China's murder statute.[61] As developed below, Article 234 allows a defendant to be found guilty of that lesser offense—*with the likelihood that she will avoid the death penalty*—based on facts that could rationally be charged as murder under Article 232.[62]

Concededly, Chinese law makes both Article 232 and 234 violations death penalty eligible. The intentional homicide and "intentional injury resulting in death" statutes, however, place the death penalty in different positions in their respective lists of available punishments, suggesting that the drafters felt that imprisonment rather than death was the appropriate punishment in the event of conviction under this statute. Article 232 lists the available punishments for intentional homicide as "death, life imprisonment or fixed-term imprisonment of not less than 10 years,"[63] while Article 234 charges that "intentional injury resulting in death" is punishable by "fixed-term imprisonment of not less than 10 years, life imprisonment, or death."[64] The Code does not specify the relevance of the order in which the National People's Congress listed the available punishments, but from the differences one can infer that the recommended punishment for intentional homicide is that which is listed first—death. The same would be true of "intentional injury resulting in death," which starts with ten years. If the drafters had no preference as to punishment, then they likely would have organized the lists identically. Further, in keeping with China's ostensible desire to utilize the death penalty only in the cases of the "most serious crimes," the National People's Congress must have intended that the more serious cases of intentional homicide receive the death penalty more often than those of "intentional injury resulting in death."

One might argue that Article 234 allows a prosecutor to charge a negligent offender with "intentional injury resulting in death" as a way to expose the offender to the death penalty. Imagine a case in which an offender commits an intentional act or intentionally omits an act, with knowledge that it exposes the

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unreasonable mistake that force is necessary to repel an attack. In some jurisdictions, such a self-defender will be charged with a lesser offense than the one committed.").

58. Wei Luo, *China*, *in* THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 166 (Kevin Jon Heller & Markus D. Dubber eds., 2011).

59. *See* 2005 Criminal Law of China, art. 233 (stating that an offender is liable, at least as defined in the Code, for what would be ordinary, not criminal, negligence in the United States).

60. *Id.* art. 234.

61. *Id.* art. 232, 234.

62. *See infra* notes 65–89 and accompanying text.

63. 2005 Criminal Law of China, art. 232.

64. *Id.* art. 234.

victim to potential harm.[65] That scenario seems to fit both the definition of negligence and "intentional injury resulting in death." A conviction of an Article 234 offense would expose the actor to the death penalty as one of the possible sentences. But upon closer examination, the alternative inference—that Article 234 allows prosecutors to charge killers who satisfy Article 232's elements with a lesser offense—is more plausible.

Practice supports the latter inference, and suggests the seeming irrationality of the law. In at least some cases, prosecutors charge defendants with "intentional injury resulting in death" even when the criminal act exhibits all elements of intentional homicide. The following cases are illustrative of this practice.

In *Tang Tao*,[66] the defendant noticed the victim, Wang Ying, ogling Tao's girlfriend in an Internet café.[67] Tao confronted the man, and the man struck him and knocked him to the ground.[68] Tao then walked up to the cashier and demanded the personal items he had stowed behind the counter.[69] From his possessions, Tao withdrew a forty to fifty centimeter dagger from its scabbard and shouted: "Whoever looks at me, I'll dig his eyeballs out."[70] Tao then stabbed the victim in the belly.[71] The victim ran outside, followed by Tao and his friends, one of whom knocked the victim to the ground with an ashtray.[72] While the victim was on the ground, Tao pushed his friends out of the way, stabbed the victim again in the abdomen, and walked away.[73] The wounds were deep, puncturing his liver and stomach.[74] The victim died from hemorrhagic shock.[75] The State charged and convicted Tao of "intentional injury resulting in death," and sentenced him to twelve years in prison.[76]

Tao's act demonstrated an intention to kill the victim, rather than merely injure him, and thus Tao possessed the requisite "malice aforethought" necessary to have committed intentional murder. First, the victim knocked the defendant to the ground in front of his friends and girlfriend. This attack provided a motive for the defendant to kill him, and increased the probability that he intended to do so.

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65. *See, e.g.*, State v. Williams, 484 P. 2d 1167 (Wash. Ct. App. 1971) (finding parents who failed to seek out medical attention for their son's abscessed tooth prior to it becoming gangrenous and causing the child's death were guilty of manslaughter because they had been sufficiently put on notice that the child did not merely have a toothache).

66. People's Procuratorate of Shenyang, Liaoning Province v. Tang Tao, (唐涛故意伤害案) (Shenyang Interm. People's Ct., Oct. 26, 2005), [2005]沈刑一初字第151.

67. *Id.*

68. *Id.* at 2.

69. *Id.* at 3.

70. *Id.*

71. *Id.*

72. People's Procuratorate of Shenyang, Liaoning Province v. Tang Tao, (唐涛故意伤害案) (Shenyang Interm. People's Ct., Oct. 26, 2005), [2005]沈刑一初字第151, 3.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

The defendant escalated the physical altercation from a simple fistfight when he withdrew the dagger he had stowed at the front desk. The introduction of a deadly weapon indicates his desire to inflict more than minor physical injury on the victim. The defendant stabbed the victim twice in the abdomen, a minimally protected part of the human body where he could cause severe damage, and heighten the risk of death. The medical examiner described the wounds the defendant inflicted as "deep."[77] Such deep wounds indicated Tao's lack of hesitation and desire to exact as much damage as possible, which further enhanced the likelihood of death. Finally, Tao inflicted the second stab wound, where he plunged his dagger deep into the victim's abdomen, while the victim was on the ground and restrained by a group of the defendant's friends.

Similarly, in *Liu Yufang*,[78] the defendant and her son organized a group of three men to attack her husband.[79] Yufang's husband was a notorious deadbeat who neglected the family's household and abused her.[80] The three men bound and beat the victim while he was alone in a field.[81] They then slit the blood vessels in the victim's heels and left him to die, which he did.[82] All five members of the group were charged and convicted of "intentional injury resulting in death."[83] The court sentenced Yufang, as the group's organizer, most severely. She received a fifteen-year prison sentence.[84]

The actions of the three who physically instigated the attack bear the hallmark of "malice aforethought" required for murder. They attacked and bound the victim where they knew he would be isolated—the middle of a field. They then slit the blood vessels in his feet and left him bound, bleeding, and without help. The mere intent to injure the victim became an intent to kill when they opened the heels of his feet to let him bleed out and fled. Had they only intended to injure him, they could have done so; instead, they inflicted a mortal wound and abandoned him to bleed to death as a result. Under Chinese law, a person who organizes and leads a criminal group is punished according to the crime organized.[85] Therefore, if the group Yufang organized to attack her husband displayed the requisite intent to commit murder, then Yufang would be guilty of the same crime. Yet, even with these signs of "malice aforethought," the court convicted her of intentional injury resulting in death.

The circumstances of both cases appear to have been sufficient to support charges under Article 232. Both killers had the victims at their mercy prior to

77. *Id.*

78. Public Prosecutor v. Liu Yufang, Gu XX & Others, 1 China L. Rep. 117, 122 (1992) (China).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Public Prosecutor v. Liu Yufang, Gu XX & Others, 1 China L. Rep. 117, 122 (1992) (China).

85. 2005 Criminal Law of China, art. 26.

inflicting the mortal injuries. Thus, in either case, the killer could have inflicted an intentional injury that fell short of a slaying, and yet intentionally inflicted additional injuries that resulted in the victim's death. In both cases, the killers had homicidal motives. Tao's victim knocked him to the ground when he started a fistfight; Tao vengefully upped the ante and returned to the melee with a knife. Yufang wanted to escape an abusive marriage—a daunting prospect for a rural Chinese woman in 1992.[86] In both cases, the killer displayed a degree of premeditation even beyond an intent to kill. Tao removed himself from the altercation to obtain his dagger and shouted he would cut out the victim's eyeballs. Yufang and her co-conspirators planned the attack prior to following through with it.[87] While premeditation is not a formal requirement for intentional murder under Chinese law, it does demonstrate that the killers had time to reflect upon the results of their actions prior to undertaking them. Both murders exhibit a degree of brutality most likely associated with an intentional killing rather than mere injury: in *Tang Tao*, the "deep" stab wounds to the victim's gut, and in *Liu Yufang*, a vicious beating and leaving the victim to bleed to death slowly.

In both cases, there were circumstances that may have persuaded a prosecutor to avoid pursuing the more serious charges of intentional homicide. The *Tang Tao* Court addressed certain aspects of Tao's circumstances that demonstrate a need for that punishment to be mitigated—his youth and the fact that he voluntarily surrendered to the police.[88] The same factors that mitigated his punishment may have led to his reduced initial charges.[89] In *Liu Yufang*, the victim's history of abuse and poor family leadership likely made him less sympathetic and his long-suffering wife more so. While there is no explicit discussion of the rationale for charging the perpetrators of these crimes with "intentional injury resulting in death," the presence of such mitigating circumstances in both cases suggests that the prosecutors may have sought the lesser charges in an effort to limit intentional murder charges and the accompanying death sentence. Circumstances like the defendants' mentioned above, while compelling, do not affect the assessment of whether they committed the crime of intentional murder. Their actions were chargeable as intentional murder, and their personal circumstances cannot explain the apparent irrationality in the charging of their crimes.

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86. *See* Jim Yardley, *Women in China Embrace Divorce as Stigma Eases*, N.Y. TIMES, Oct. 4, 2005, at A9 (stating that prior to the Chinese government's 2003 streamlining of divorce laws, the process was extensive, even requiring approval from the prospective divorcees' respective employers).

87. If the facts of these cases arose in the United States, then a prosecutor could charge the defendants with first degree murder because of the defendants' ample time to premeditate their actions. Precedent in many U.S. jurisdictions would support such a charge. *Cf.* Commonwealth v. Carroll, 194 A.2d 911, 914–16 (Pa. 1963); State v. Guthrie, 461 S.E.2d 163, 178–83 (W.Va. 1995).

88. People's Procuratorate of Shenyang, Liaoning Province v. Tang Tao, (唐涛故意伤害案) (Shenyang Interm. People's Ct., Oct. 26, 2005), [2005]沈刑一初字第151.

89. Because Tang Tao was a minor, he could not have been executed under Criminal Law Article 49. *See id.*; 2005 Criminal Law of China, art. 49. However, there is no such limitation on charging him with intentional murder rather than "intentional injury" resulting in death.

In summary, while Article 234 overlaps with involuntary manslaughter—leaving open the possibility of exposing an offender to the death penalty for what would otherwise be a negligent killing—the case law seems to be to the contrary. In practice, as the cases above illustrate, the statute has been applied irrationally. Prosecutors have charged slayers whose acts are intentional homicides under the "intentional injury resulting in death" statute, perhaps because of their individual mitigating characteristics. While the likely intention of the statute was to link punishment to the culpability of the actions of the perpetrator, and thus reduce death sentences, prosecutors have charged individuals under the statute whose actions are as culpable as that of the intentional murderer.

Despite frequent scholarly criticism when courts or legislatures create irrational rules, courts and legislatures often create such rules out of compromise. The Authors' conclusion is that the kind of irrational lines described above reflect the small toehold established by death penalty abolitionists. That irrationality is not simply a product of the law's application but is inherent in the distinction drawn in Articles 232 and 234. This conclusion is supported by the irrational distinctions in American murder and death penalty law, which are discussed below.

III. CAPITAL MURDER IN AMERICA

American homicide statutes had their antecedents in early English common law.[90] At common law, murder was defined as "the unlawful killing of another with malice aforethought."[91] Jurisdictions routinely executed offenders found guilty of murder[92] as well as for a host of other offenses.[93] Further, the scope of felonious homicide was broad with few homicides considered innocent.[94] A defendant's best hope for many years was jury nullification in cases where a wound causing death may have been minor or where the death penalty seemed otherwise disproportionate.[95]

The most significant change in homicide laws in the colonial and immediate post-colonial era took place in Pennsylvania. In 1776, in its first constitution,

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90. *Cf.* Thomas Andrew Green, *The Jury and English Law of Homicide, 1200–1600*, 74 MICH. L. REV. 413, 472–87 (1976) (explaining the rise of the distinction between murder and manslaughter in Tudor statutes, a distinction present in the United States today).

91. AMERICAN LAW INSTITUTE, MPC AND COMMENTARIES 13–14 (1980).

92. *See* Green, *supra* note 90, at 419 (stating that there were narrow exceptions to the imposition of the death penalty, including "justifiable homicide," defined as killings authorized by the government of the law, *e.g.*, killing pursuant to a royal order or killings in connection with arresting an escaping felon).

93. *See Death Penalty for Offenses Other Than Murder*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/death-penalty-offenses-other-murder (last visited July 15, 2012) (listing capital, non-murder offenses existing in state law, including aggravated kidnapping, espionage, and placing a bomb near a bus terminal).

94. Early on, the only "innocent" killings were those resulting from enforcement of justice. Over time, courts developed the concept of "excusable" homicide, allowing defendants found guilty of killing by accident or in self- defense to avoid the death penalty. Green, *supra* note 90, at 420.

95. *See id.* at 452–56.

Pennsylvania included language emphasizing the importance of proportionality in punishment.[96] Influenced by Quaker abolitionists,[97] the Pennsylvania legislature, in 1794, departed from common law classifications by dividing murder into degrees.[98] The new law provided that:

> [A]ll murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate or premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree.[99]

The clear purpose of the law was to limit the death penalty to the most heinous killings.[100] Prior to the post-*Furman*[101] era, this legislation was the template for most states in the United States.[102]

While the intent of the 1794 legislation was clear, the distinction between first and second degree murder—in essence, premeditation—does not do a very good job of dividing the most heinous from less heinous killings. Anyone who has taught criminal law knows how the leading casebooks make sport of the distinction. For example, both the Kadish et al.[103] and Dressler[104] casebooks lead students through a series of cases where the courts have had to determine whether the defendant had sufficient time to premeditate. Students are introduced first to cases in which courts find that the defendant may have had sufficient time to premeditate or deliberate, even though the killer may not seem like the worst of the worst. For example, Kadish and Dressler use *State v. Guthrie*[105] to introduce students to the temporal problem. Guthrie killed a co-worker who teased the defendant and snapped a dishtowel at him.[106] Enraged, Guthrie stabbed the victim

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96. Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 766–67 (1949) (quoting Pa. Const. § 38 (1776), 9 Stat. at Large 600 ("the penal laws, as heretofore, used, shall be reformed by the future Legislature of this State, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to the crimes")).

97. Albert Post, *Early Efforts to Abolish Capital Punishment in Pennsylvania*, 68 PA. MAG. HIST. & BIOGRAPHY 38, 39–40 (1944) ("Like their English brethren the Friends of Pennsylvania showed a keen interest in the reformation of the criminal code.").

98. Keedy, *supra* note 96, at 771–72.

99. MPC AND COMMENTARIES, *supra* note 91, at 16 cmt. 2.

100. *Id.*

101. Furman v. Georgia, 408 U.S. 238 (1972) (stating, in a divided decision, that the death penalty, as then administered, was unconstitutional).

102. *See* MPC AND COMMENTARIES, *supra* note 91, at 1 (noting that the Pennsylvania reforms of 1794 "dominated American murder provisions").

103. SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 427–37 (Vicki Been et al. eds., 2012).

104. JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 253–64 (2009).

105. 461 S.E.2d 163 (W. Va. 1995); KADISH, *supra* note 103, at 432–34; DRESSLER, *supra* note 104, at 253–56.

106. *Guthrie*, 461 S.E.2d at 171.

in the neck.[107] Mentally ill and prone to panic attacks, Guthrie hardly seems like a suitable candidate for first degree murder. Nonetheless, the jury convicted him.[108] The Supreme Court of Appeals of West Virginia remanded the case for a retrial with proper jury instruction on whether the defendant had sufficient time to premeditate;[109] on retrial, however, the jury again convicted him of first degree murder.[110]

Both casebooks use other cases in which the offenders have clearly premeditated. For example, Kadish includes *Commonwealth v. Carroll*,[111] a case in which a man killed his wife who was mentally ill and abusive to the couple's children.[112] In the notes following *Carroll*, the editors describe the particularly gruesome killing in *People v. Anderson*,[113] where a drunken live-in boyfriend brutally murdered the young daughter of his girlfriend, as evidenced by over sixty stab wounds.[114] Additionally, Dressler juxtaposes *Midgett v. State*[115] and *State v. Forrest*.[116] Midgett, a large man, beat to death his eight year old son,[117] whereas Forrest shot his ailing father, presumably out of concern for his father's deteriorating condition.[118]

The cases present clear examples where evidence is insufficient to show premeditation (*Anderson* and *Midgett*) and where evidence of premeditation is quite clear (*Carroll* and *Forrest*). Students almost universally get the point: if they rank various offenders based on their culpability, then the brutal killers who act without prior reflection seem far more heinous than the killers who act after deliberating. As summarized by the Model Penal Code drafters:

> Prior reflection may reveal the uncertainties of a tortured conscience rather than exceptional depravity. The very fact of a long internal struggle may be evidence that the homicidal impulse was deeply aberrational and far more the product of extraordinary circumstances than a true reflection of the actor's normal character. Thus, for example, one suspects that most mercy killings are the consequence of long and careful deliberation, but they are not especially appropriate cases for imposition of capital punishment.[119]

That is, the major early reform to limit the scope of the death penalty by using

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107. *Id.*

108. *Id.* at 172.

109. *See id.* at 182–83 (remanding on other grounds and explaining that a new jury instruction should be used at Guthrie's retrial).

110. DRESSLER, *supra* note 104, at 258.

111. 194 A.2d 911 (Pa. 1963); KADISH, *supra* note 103, at 427–31.

112. *Carroll*, 194 A.2d at 913–14.

113. 70 Cal. 2d 15, 21–22 (1968); KADISH, *supra* note 103, at 436.

114. *Anderson*, 70 Cal. 2d at 21–22.

115. 729 S.W.2d 410 (Ark. 1987); DRESSLER, *supra* note 104, at 258–60.

116. 362 S.E.2d 252 (N.C. 1987); DRESSLER, *supra* note 104, at 261–63.

117. *Midgett*, 729 S.W.2d at 411.

118. *Forrest*, 362 S.E.2d at 253–54.

119. MPC AND COMMENTARIES, *supra* note 91, at 127.

premeditation unquestionably led to irrational results.[120]

The recognition of how badly the premeditation formula worked as a gatekeeper, separating the most heinous from less heinous offenders, explains the original approach taken by the Model Penal Code drafters. Ultimately, the Model Penal Code rejected the deliberation formula.[121] The American Law Institute was divided over whether to endorse the death penalty.[122] But while the Model Penal Code took no position on the desirability of the death penalty,[123] it included provisions intended to make the imposition of the death penalty for states retaining capital punishment more rational.[124]

After discussing a trend among states to limit the mandatory imposition of the death penalty for certain crimes, the Institute also rejected unguided discretion. Noting that discretionary sentencing obscured the problems with death penalty administration, the drafters observed that "[d]iscretion always includes the possibility of abuse, and discretion that is neither disciplined nor informed by intelligible standards is all the more likely to be exercised on unacceptable bases."[125] States retaining the death penalty, the Institute concluded, should adopt a forum of guided discretion reflected in section 210.6.[126]

Section 210.6 rejected categorically the death penalty for certain offenders, including defendants under age eighteen at the time of the homicide and those who were sufficiently mentally and physically impaired.[127] For other offenders, section 210.6 instructs the court to conduct a separate sentencing hearing after a finding of guilt.[128] At that hearing, litigants may present aggravating and mitigating evidence.[129]

In 1972, a deeply divided Supreme Court found that the death penalty as then-administered violated the Constitution.[130] The five justices constituting the majority did not agree on a rationale, with three justices suggesting ways in which states could comply with the Constitution.[131] Subsequent decisions by the Court

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120. *Id.* at 128 ("In short, the notion that prior reflection should distinguish capital from non-capital murder is fundamentally unsound.").

121. *See id.* at 132 (explaining that the Model Penal Code does not follow the degree structure of the Pennsylvania reforms of 1794).

122. *See* AMERICAN LAW INSTITUTE, REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY, Annex 5, at 39–42 (2009) (listing various views of legal scholars and attorneys from across the country on whether the ALI should assume a position on capital punishment).

123. MPC AND COMMENTARIES, *supra* note 91, at 111.

124. *Id.*

125. *Id.* at 132.

126. *Id.*

127. MODEL PENAL CODE §§ 210.6(1)(d)-(e) (1962) (repealed 2009).

128. *Id.* at § 210.6(2).

129. *Id.* at §§ 210.6(2)–(4).

130. *See* Furman v. Georgia, 408 U.S. 238, 240 (1972) (noting that each Justice filed a separate opinion on the constitutionality of the death penalty as applied).

131. *See* MPC AND COMMENTARIES, *supra* note 91, at 153–56 (summarizing the 230 pages

have held, in effect, "that Section 210.6 of the Model Code is a model for constitutional adjudication as well as for state legislation."[132] Many state statutes enacted in the 1970s "resemble the Model Code provision and provide for bifurcation and consideration of specified aggravating circumstances."[133]

Again, while the Institute did not endorse adoption of the death penalty, the commentaries suggest that its approach was influential, and, implicitly, sensible.[134] So the story goes. Indeed, if so inclined, a professor using Kadish or Dressler might ask her class how cases like *Anderson*, *Midgett*, *Carroll*, and *Forrest* might be decided under section 210.6. Students should see that a prosecutor pursuing the death penalty for Anderson or Midgett might point to section 210.6(3)(h) as support for its imposition: the crimes were "especially heinous, atrocious or cruel, manifesting exceptional depravity."[135] Similarly, defense counsel for Carroll or Forrest might point to various mitigating factors in section 210.6(4), including the offenders' lack of prior criminal record and emotional disturbance at the time of the killing, and perhaps, the moral justification of the offenders' conduct.[136]

But even this brief description of the Model Penal Code approach suggests the obvious criticism of balancing aggravating and mitigating circumstances.[137] Such an approach begs many questions, including one suggested in the commentaries. If unguided discretion is a bad thing—and it is, largely beyond dispute—then how much guidance does the Model Penal Code criteria provide? By fast-forwarding to the 2000s, no one familiar with the death penalty in America can pretend that the prevailing approach yields consistent results. Critics point to the sheer randomness of the imposition of the death penalty across America[138] and the real fear that improper criteria, notably race, influence the imposition of the death penalty.[139]

Thus, as with the early efforts of Pennsylvanian abolitionists and reformers, the American Law Institute, unable to achieve a majority to oppose the death penalty, proposed an alternative reform. It did so because it believed earlier reforms produced irrational, indefensible results.[140] But its reform also produced similarly irrational results.

While some states have abolished the death penalty, abolition remains controversial.[141] This became obvious once again in the American Law Institute

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of opinion in *Furman*).

132. *Id.* at 167.

133. *Id.* at 169.

134. *Id.*

135. MODEL PENAL CODE § 210.6(3)(h) (1962) (repealed 2009).

136. *Id.* § 210.6(4) (1962) (repealed 2009).

137. *See* LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW 131–50 (2008) (discussing that an additional problem is determining which circumstances should count as aggravating and mitigating circumstances; over time, the Supreme Court has opened the door to many additional circumstances that a defendant may introduce as mitigation).

138. *See id.*

139. *Id.* at 279–96.

140. REPORT OF THE COUNCIL, *supra* note 122, at 3–5.

141. FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 5–15 (2003).

deliberations. After the Institute decided to reexamine the Model Penal Code sentencing provisions in 2001,[142] law professors Roger Clark and Ellen Podgar introdueed a resolution in 2007 that would have had the Institute take a position opposing the death penalty.[143] The Institute submitted the matter for further study.[144] Ultimately, it rejected the Clark-Podgar resolution, but in a subsequent move, Clark and Podgar achieved part of their objective—the Institute has withdrawn its support for section 210.6.[145] Because the Institute members' doubts that the death penalty can be imposed rationally and fairly, the Institute no longer supports the predominate model for its imposition around the country.[146]

Thus, at least according to one of the most highly respected law reform organizations, the imposition of the death penalty in America is irrational.[147] That is not especially surprising to any student of the criminal law. But, at least in part, irrationality has been a bi-product of reformist-abolitionists' efforts. In 1794, few Americans outside religious groups like the Quakers[148] would have voted to abolish the death penalty entirely. Abolitionists gained ground by limiting the crimes for which death was the appropriate sentence.

Almost 200 years later, members of the Institute could not agree on whether to abolish the death penalty. They knew that no single criterion could do the job of dividing the worst of the worst from less heinous killers. Many must have known that their solution would produee irrational results as well. And yet, again, the effect of section 210.6 was to reduce the number of offenders who would be subject to the death penalty.

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142. REPORT OF THE COUNCIL, *supra* note 122, at 2.

143. *Id.* at 5–6.

144. *Id.* at 2–3.

145. *Id.* at 3–4 (stating that the American Law Institute would withdraw § 210.6, but would not "endorse capital punishment or call for its abolition").

146. *Id.* at 4 ("Many on the Council have concerns, convincingly described in the Steikers' paper and other sources, about the administration of the law of capital punishment in the United States, including the administration of death-penalty laws derived from § 210.6").

147. *See id.* at 5 (stating reasoning for why there is concern about the fairness of death penalty systems in the United States, including racial bias, judicial elections, and inadequate legal representation).

148. *See Introduction to the Death Penalty*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/part-i-history-death-penalty (last visited July 19, 2012) (although public opinion polls are not available from that era, we draw the inference of wide public support for the death penalty from its availability in such a wide array of cases, including "striking one's mother or father, or denying the 'true God'").

IV. INFERENCES TO BE DRAWN

Many Europeans look at America's use of the death penalty as barbaric.[149] After all, the United States remains one of the few advanced democracies where the death penalty remains in force.[150] Yet, abolitionists can point to a number of incremental developments moving slowly towards the elimination of the death penalty, or at least to its infrequent use.[151] For example, in recent years, the Supreme Court has reduced the categories of cases in which the death penalty may be imposed by holding that executing mentally handicapped defendants[152] and offenders who were minors when they committed their crimes[153] violates the Eighth Amendment. Further, while leaving open whether the death penalty is ever proportional absent a death, the Court has come close to so holding in a case involving the brutal rape of a child who did not die.[154] While juries wax and wane on their willingness to impose the death penalty,[155] courts, especially federal courts, reverse a high percentage of all death penalty cases.[156] In some states, like

149. *See* Editorial, *Europe's Views of the Death Penalty*, N.Y. TIMES (May 13, 2001), http://www.nytimes.com/2001/05/13/opinion/europe-s-view-of-the-death-penalty.html ("European politicians and intellectuals, who view the death penalty as a human rights issue, are incredulous that Americans support a punishment that fails to deter crime, targets mainly those who cannot afford a decent lawyer, is used on the mentally retarded and has often gotten the wrong man. America's high execution rate stands in striking contrast to its history of respect for individual rights and its role as an international champion of human rights."); *see also EU Memorandum on the Death Penalty*, EUROPEAN UNION, DELEGATION OF THE EUROPEAN COMMISSION TO THE USA, http://www.eurunion.org/legislat/deathpenalty/eumemorandum.htm (last visited July 19, 2012) ("At the dawn of a new millennium the EU wishes to share with the USA the principles, experiences, policies and alternative solutions guiding the European abolitionist movement, all the EU Member States having abolished the death penalty. By doing so, the EU hopes that the USA, which has risen upon the principles of freedom, democracy, the rule of law and respect for human rights, considers joining the abolitionist vanguard, including as a first step towards abolition establishing a moratorium in the use of the death penalty, and by this way becoming itself a paradigm for retentionist countries.").

150. *Europe's Views of the Death Penalty*, *supra* note 149 ("The McVeigh saga and the media's response are 'the latest twisted piece of Americana,' according to The Sunday Herald of Glasgow, expressing a typical view. Such commentary underscores the fact that the United States, in its belief that execution is an appropriate punishment, stands nearly alone in the community of democracies.").

151. *States With and Without the Death Penalty*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited July 19, 2012) (listing 17 states that have abolished the death penalty).

152. Atkins v. Virginia, 536 U.S. 304 (2002).

153. Roper v. Simmons, 543 U.S. 551 (2005).

154. Kennedy v. Louisiana, 554 U.S. 407 (2008).

155. *See Federal Death Penalty, Recent Summaries of the Results of Federal Capital Prosecutions*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/federal-death-penalty (last visited July 19, 2012) (stating that, as of 2010, where juries could choose life or death, "they imposed 138 life sentences and 69 death sentences").

156. *See* James S. Liebman, et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1850 (2000) (stating that there was a 68% error rate in death penalty cases between 1973 and 1995).

California, procedural protections contribute to a startling reality that a death row inmate is more likely to die of natural causes than from execution.[157]

The death penalty system in the United States may be a system that no one can like, but it is one where application of the death penalty is in slow decline.[158] Abolitionists have not been able to win a decisive victory declaring the death penalty illegal across the country. Nonetheless, they have won enough incremental victories that have led to the decline in the use of the death penalty. As this Article has argued, those victories may come at the expense of applying the law irrationally. Outside observers have relatively little reason to be optimistic about a dramatic decline in the application of the death penalty in China. Most international human rights organizations remind the world that the death penalty is still in full force there.[159] The Authors do not pretend that China is close to abolishing or dramatically reducing its dependence on the death penalty. Instead, the Authors' conclusion is much more modest: the willingness of Chinese legislators to adopt Article 232 is a small toehold for abolitionists. Yes, the provision seems to lead to irrational results. However, that seems to be symptomatic of incremental change, as has been the case in the United States.

157. Arthur L. Alarcon & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. (Special Issue) S41 (2011), *available at* http://www.deathpenaltyinfo.org/documents/LoyolaCalifCosts.pdf.

158. Editorial, *A Welcome Drop in Executions in 2011*, WASH. POST (Jan. 1, 2012), http://www.washingtonpost.com/opinions/a-welcome-drop-in-executions-in-2011/2011/12/21/gIQAGGe0SP_story.html.

159. *Amnesty News Release*, *supra* note 12.