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## Book Review: The Death Penalty in The United States And its Future

## BOOK REVIEW

### THE DEATH PENALTY IN THE UNITED STATES AND ITS FUTURE

*Review by Christa Schuller\**

What separates the United States from other developed nations on the issue of the death penalty; what influences are affecting the current death penalty in the United States; and what changes must take place for the United States to follow suit and abolish the death penalty? Franklin Zimring addresses each of these questions in his book, *The Contradictions of American Capital Punishment*, explaining the United States' view in the context of a history of vigilante tradition.<sup>1</sup>

Zimring relies on a variety of sources including national polls, national publications, and foreign publications, first to document the history of the death penalty in the United States since the late 1800s; and second, to explain the American divergence from current international views.<sup>2</sup> Zimring also seeks "to explain the contradictions in American culture that generate conflict over the death penalty and the changes that will be necessary to bring American capital punishment to a peaceful end."<sup>3</sup> In sum, *The Contradictions of American Capital Punishment* attempts to explain four questions that pertain to the character of American policy regarding capital punishment: (1) why the U.S. reintroduced the death penalty when other developed democracies abolished and pushed for prohibition; (2) why patterns have developed within the U.S. concerning the prevalence of the death penalty; (3) why conflicts over the death penalty have increased; and (4) what the future holds for conflicts over the death penalty.<sup>4</sup>

#### I. DIVERGENT TRENDS BETWEEN THE UNITED STATES AND OTHER DEVELOPED NATIONS

The United States and Europe began to diverge in their death penalty positions after World War II, which has led to the current contro-

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1. FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* (2003).

2. *See id.* at 243-49.

3. *Id.* at ix.

4. *Id.* at 13-14.

versy between the U.S. and the rest of the Western world.<sup>5</sup> The United States initially followed other nations with decreasing rates of executions each year that eventually led to a nationwide moratorium in 1967.<sup>6</sup> However, the Supreme Court did not declare the death penalty unconstitutional as other nations were starting to do. Rather, the Supreme Court invalidated the current death penalty statutes and gave the states an opportunity to address procedural concerns.<sup>7</sup> As a result, individual states rewrote their death penalty statutes leading to a reintroduction of state executions starting in 1977 in the United States.<sup>8</sup> In contrast, the European nations, which had prevalently used capital punishment prior to World War II, abolished its use after World War II.<sup>9</sup> Postwar abolition in Europe took place from 1944-1981, and the last execution took place in France in 1977.<sup>10</sup>

The divergence in death penalty positions between the United States and Europe is the result of different death penalty images that emerged after World War II.<sup>11</sup> "It is not that the two sides differ on the answers to a common question; instead, there is a fundamental difference of opinion on what the key questions are that should determine whether governments should be allowed to kill citizens intentionally as a criminal punishment."<sup>12</sup> Zimring also sets forth the notion that:

What other nations see as a basic political question about the proper limits of government is not regarded in the United States as a fundamental question of governmental structure. The death penalty instead is regarded as a policy intended to serve the interests of the victims of crime and those who love them, as a personal rather than a political concern, an undertaking of government to serve the needs of individual citizens for justice and psychological healing.<sup>13</sup>

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5. See *id.* at 5-6 ("While the rest of the Western world has been creating and attempting to enforce non-execution as a human rights orthodoxy, the policy of the . . . United States has shifted to the toleration of capital punishment by the states . . .").

6. *Id.* at 5.

7. *Id.* at 5-6.

8. See *id.* at 6. In 1976 the Supreme Court issued a series of opinions which permitted the reintroduction of capital punishment by states. See *Gregg v. Georgia*, 428 U.S. 153, 172-73 (1976) (permitting the death penalty if it conforms with the Eighth Amendment); *Roberts v. Louisiana*, 428 U.S. 325, 331-32 (1976) (finding that the imposition of the death penalty is not per se unconstitutional); *Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (finding that the specific procedural requirements in place in Florida were sufficient to withstand Eighth Amendment inquiry); *Jurek v. Texas*, 428 U.S. 262, 268 (1976) (finding that the Texas death penalty survived Eighth Amendment standards because the Texas legislature had sufficiently "narrowed the scope of its laws relating to capital punishment").

9. See ZIMRING, *supra* note 1, at 17.

10. *Id.* at 22-23 tbl.2.1 (citing Michel Forst, *The Abolition of the Death Penalty in France*, in *THE DEATH PENALTY: ABOLITION IN EUROPE* 105, 113 (1999); Amnesty International, *Abolitionist and Retentionist Countries*, at <http://web.amnesty.org/pages/deathpenalty-countries-eng> (last visited Jan. 13, 2004)).

11. See *id.* at 45.

12. *Id.*

13. *Id.* at 49.

When the death penalty was reintroduced in the United States in 1976, it was reinvented through the personalization and modernization of capital punishment, which neutralized Americans' distrust of government.<sup>14</sup> The modernization of the death penalty through the introduction of lethal injection likely addressed many American concerns that the death penalty was cruel and unusual punishment.<sup>15</sup>

Personalization of the death penalty resulted when the death penalty was made into a process to serve the personal interests of the victim's family.<sup>16</sup> The trial has changed into one in which the victim's family asks the jury for execution during the penalty phase by attesting to the loss that the family must face now that the victim is gone.<sup>17</sup> These attestations are called "victim impact statements," which can be introduced in the penalty phase of a bifurcated criminal trial.<sup>18</sup> Victim impact statements are introduced through the prosecutor's reading of a summarized version of interviews with the victim's friends and family, or by direct testimony of those individuals.<sup>19</sup> This has transformed the death penalty trial into a competition between vindicating the interests of the victims and their families and showing mercy for the murderers.<sup>20</sup> Prosecutors present the death penalty as the only option to serve the victim's interest.<sup>21</sup> A process that ideally should be about the defendant's moral fault has developed into "an evaluation of the social worth of victims of homicide."<sup>22</sup> This status competition may cause discontent among victims' families involved in cases in which the prosecutor never sought the death penalty or a defendant's guilty plea led to a lesser sentence.<sup>23</sup>

The personalization of the death penalty into a service for victims serves three functions: first, "it gives the horrifying process of human execution a positive impact that many citizens can identify with: closure, not vengeance;"<sup>24</sup> second, "citizens do not have to worry about executions as an excessive use of power by and for the government;"<sup>25</sup> and third "it links the symbolism of execution to a long American history of

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14. See *id.* at 50.

15. See *id.* at 51 ("[T]here is no doubt that the institutionalization of lethal injection has neutralized the reputation for brutality and anachronism associated with the electric chair and the gas chamber.").

16. *Id.* at 52.

17. *Id.* (reasoning that the penalty phase in death penalty trials "is a measure of the value of the homicide victim's life").

18. *Id.*

19. *Id.* at 53; see, e.g., *Booth v. Maryland*, 482 U.S. 496, 499-500 (1987).

20. ZIMRING, *supra* note 1, at 55.

21. See *id.* The irony is that prosecutors only seek the death penalty in 2 percent of murder cases, leaving the majority of victims seemingly unvindicated. See *id.* at 57.

22. *Id.* at 56.

23. See *id.* at 56-57 (quoting Jo Napolitano, *National Briefing Midwest: Missouri: Stepfather Gets Life Term in 5 Killings*, N.Y. TIMES, Apr. 20, 2002, at A13). "[R]elatives of victims whose death does not produce a capital sentence . . . are made to feel that their terrible loss has not been properly recognized." *Id.* at 57.

24. *Id.* at 62.

25. *Id.*

community control of punishment."<sup>26</sup> Whereas the death penalty once was seen as vengeance for the crime, it is now portrayed as necessary closure for the family, contributing to the personalization of the death penalty.<sup>27</sup> The modernization and personalization of the death penalty in the United States has thus served to make international concerns irrelevant, specifically international concerns about government power.<sup>28</sup>

In other nations, the death penalty has become a political issue concerning the limits of government power and the morality of sanctioning death.<sup>29</sup> Europe's current view of the death penalty revolves around three elements of the orthodox position: (1) "[t]he question of capital punishment is fundamentally a matter of human rights, not an isolated issue of criminal justice policy;"<sup>30</sup> (2) "[f]or that reason, policy on the death penalty should not be governed by national prerogatives but by adherence to international human rights minimum standards;"<sup>31</sup> and (3) "[s]ince there is no case where capital punishment can be justified under the international human rights standard, European citizens, organizations, and governments are fully justified in demanding the end of all executions by all governments."<sup>32</sup> Currently, capital punishment has become a human rights issue and has moved from a national to an international movement.<sup>33</sup>

Western countries have been successful in abolishing capital punishment.<sup>34</sup> "A stand against capital punishment is now an orthodoxy in Europe and most Commonwealth nations . . . ."<sup>35</sup> This orthodoxy is "a moral imperative believed necessary to the status of any civilized modern state, and this morality is exported to other nations with missionary vigor."<sup>36</sup> Once the abolition movement became international the progress was swift, partly as a result of the number of respected nations that took the lead.<sup>37</sup> Currently, Japan is the only other fully developed nation that

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26. *Id.*

27. *See id.* at 49.

28. *See id.* The United States' personal service image of the death penalty has no limited government component, rather, the death penalty is regarded as "an undertaking of government to serve the needs of individual citizens," meaning that fear of government is not included in the American death penalty debate. *Id.* at 48-49.

29. *See id.* at 49.

30. *Id.* at 27.

31. *Id.*

32. *Id.* "The orthodox belief in current European politics is that the death penalty is fundamentally a question about human rights and the proper limits of government power rather than merely a question of the costs and benefits of a particular punishment." *Id.* at 25.

33. *See id.* at 24-25. Protocol 6 in 1983 was the first international statement against the death penalty, making it an international standard of human rights and providing a foundation for judging other nations' positions on the death penalty. *Id.* at 29.

34. *See id.* at 23 ("Indeed, nowhere in Europe did the death penalty stay an important political issue for very long after abolition.").

35. *Id.* at 17.

36. *Id.*

37. *See id.* at 37.

retains the death penalty.<sup>38</sup> Less developed nations also retain the death penalty, possibly following the lead of the United States.<sup>39</sup> This intense commitment to abolition of the death penalty is a direct challenge to the legitimacy of capital punishment in the United States, and indicates that the international controversy will continue.<sup>40</sup>

Despite divergent trends between the United States and the rest of the Western world, public support for the death penalty has remained stable and consistent, even among nations that have abolished the death penalty.<sup>41</sup> Polls indicate that there is not a link between public support and the prevalence of the death penalty among nations or states.<sup>42</sup> On average, two-thirds of the American population supports the death penalty.<sup>43</sup> “[T]he American public believes that death is an appropriate penalty for murder, but the average citizen neither trusts nor supports the system that determines who shall be executed.”<sup>44</sup> “If American support for the death penalty turns out to be distinctive, it is in the intensity with which people identify with the death penalty rather than in the proportion of respondents who express support.”<sup>45</sup> Although the public still overwhelmingly supports the death penalty in those countries that have abolished it, abolition is apparently tolerated.<sup>46</sup> Perhaps this toleration is the result of a conflicted and uncertain majority without the desire to expend resources to reintroduce the death penalty as an important national issue.<sup>47</sup>

## II. EXPLAINING THE AMERICAN DIFFERENCE BY EXAMINING THE PATTERNS IN THE UNITED STATES

Zimring attempts to explain the United States' different death penalty experience and the extraordinary patterns of the death sentences and execution.<sup>48</sup> He provides two explanations for revival of the death penalty in the United States: (1) federalism and the amount of power states

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38. *Id.* at 38.

39. *See id.* at 39 (explaining that it is difficult to label capital punishment as the refuge of only primitive regimes when the United States is still executing, providing an example for less developed nations to follow in setting their capital punishment policy).

40. *See id.* at 39-40 (“Some of the high-intensity enthusiasm invested in the death penalty may stem from the opportunity this issue presents to catch the United States in an indefensible human rights position.”).

41. *See id.* at 10-11 (citing FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT & THE AMERICAN AGENDA 12-15, 21 (1987)). In 1975 a public opinion poll in Great Britain showed that 82 percent of the public supported the death penalty, despite its abolition in 1965. *Id.*

42. *See id.* at 11.

43. *Id.* at 11 fig.1.3.

44. *Id.* at 10.

45. *Id.* at 11.

46. *See id.* at 23 (citing Tom Wicker, *In the Nation; Refusing the Rope*, N.Y. TIMES, July 15, 1983, at A23; Howard Witt, *Canada Refuses to Bring Back Death Penalty*, CHI. TRIB., July 1, 1987, at C3).

47. *Id.* at 23-24.

48. *See id.* at 14.

have in administration of the death penalty; and (2) the persistence of strong vigilante traditions, most concentrated in the South where the majority of executions take place.<sup>49</sup>

#### A. Federalism and the Amount of Power States Have Over the Administration of the Death Penalty

The 1972 decision in *Furman v. Georgia*<sup>50</sup> marked a substantive change in administration of the death penalty by making capital punishment a federal issue.<sup>51</sup> The Supreme Court invalidated every state death penalty statute then in effect<sup>52</sup> by holding that it was cruel and unusual punishment to have unguided discretion in deciding between life and death.<sup>53</sup> However, although *Furman* invalidated the death penalty and started a moratorium in 1972, *Furman* did not result in abolition.<sup>54</sup> Instead, *Furman* made the Supreme Court the ultimate authority on the status of each state's death penalty, creating a need to establish explicit substantive principles to govern the death penalty process nationally.<sup>55</sup> Whereas once states had almost complete control over the death penalty, the Supreme Court, by extending its constitutional reach over death penalty procedures, changed the death penalty from primarily a state issue to a federal one.<sup>56</sup>

The Supreme Court has since tried to "loosen the links between federal constitutional law and the administration of the death penalty" by giving deference to the states through implementation of strict requirements for attaining federal review.<sup>57</sup> Statutes enacted during the 1990s ensured state deference by requiring defendants to "'exhaust state remedies' prior to federal habeas corpus . . . , allowing them to correct errors even on federal questions, and exposing the case to federal judges only after all state remedies have been pursued."<sup>58</sup>

49. *Id.* at 65-66.

50. 408 U.S. 238 (1972).

51. ZIMRING, *supra* note 1, at 69-70 (citing ZIMRING & HAWKINS, *supra* note 41, at 50-76).

52. *Id.* at 69.

53. *See, e.g., Furman*, 408 U.S. at 256 (Douglas, J., concurring). The Eighth Amendment cruel and unusual punishment clause "require[s] legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups." *Id.*

54. *See* ZIMRING, *supra* note 1, at 70 (noting that although the Supreme Court struck down "open-ended discretionary systems in 1972," it "approv[ed] some state systems in 1976" when it decided *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Jurek v. Texas*, 428 U.S. 262 (1976)).

55. *See id.*

56. *See id.* at 69-70.

57. *Id.* at 9-10.

58. *Id.* at 78 (citing 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 941 (4th ed. 2001)). *See infra* notes 127-134 and accompanying text, discussing the Antiterrorism and Effective Death Penalty Act of 1996, implementing procedural barriers to habeas corpus.



Unfortunately, attempting to create national standards did not guarantee any uniformity in the outcome of death penalty cases.<sup>59</sup> Instead, the post-*Furman* federal system enhanced the variation in death penalty policy and created procedural complications and delays.<sup>60</sup> These procedural complications, while ensuring state deference, effectively delay review of the substantive issues: determining the constitutionality of each state's death penalty procedures are federal questions that cannot be raised until exhaustion of state remedies and appeal to the federal courts.<sup>61</sup> This means that the most important part of the review process, reviewing the substantive deficiencies of a capital trial, cannot be addressed for many years.<sup>62</sup> Also, federal review is "the most critical stage for any of the quality controls on state capital punishment outcomes that were supposed to rescue the systems from the arbitrary lawlessness that *Furman v. Georgia* struck down."<sup>63</sup>

### B. *Vigilante Tradition in the South Caused Variations that Remained After National Standards Were Imposed*

#### 1. Variation in Execution Patterns Today

The variation of execution rates between states in the U.S. that existed before *Furman* have remained in the current system, despite the imposition of national standards.<sup>64</sup> Fifteen American states conduct no executions, twelve have no death penalty statutes<sup>65</sup> and six other states have not had an execution since 1976.<sup>66</sup> Of the thirty-eight states that authorize executions, there is a vast gap in the number of executions, ranging from under fifteen per year in the four most populous Northern states, to over forty per year in the Southern states.<sup>67</sup> The regional patterns and variations are most dramatic between the South and Northeastern regions, with the South executing 100 times more frequently.<sup>68</sup> In the year 2000, eighty-nine percent of executions occurred in the South.<sup>69</sup> This variation indicates that the homogenous efforts applied since the re-

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59. ZIMRING, *supra* note 1, at 71.

60. *See id.* at 72, 78.

61. *Id.* at 78.

62. *Id.*

63. *Id.* at 79.

64. *See id.* at 7.

65. Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin have no death penalty statute. Death Penalty Information Center, *State by State Death Penalty Information*, at <http://www.deathpenaltyinfo.org/article.php?did=121&scid=11> (last visited Jan. 18, 2004).

66. Connecticut, Kansas, New Hampshire, New Jersey, New York and South Dakota have not conducted an execution since 1976. *Id.*

67. *See ZIMRING, supra* note 1, at 7.

68. *Id.* at 11.

69. *Id.*

implementation of the death penalty have not decreased the arbitrary results that the Supreme Court addressed in *Furman*.<sup>70</sup>

There have also been several changes in the post-*Furman* death penalty era: a higher death row population, longer delays between a death sentence and actual execution, and a small likelihood of death sentences leading to actual execution.<sup>71</sup> There is currently a more attenuated link between death sentences and execution.<sup>72</sup> There has also been an increased concentration of execution in a few states, as exemplified by three of the states comprising two-thirds of all executions.<sup>73</sup> Capital sentences and capital statutes are less concentrated than executions.<sup>74</sup> For example, the South has just over half of all condemned prisoners, but accounts for over four out of every five executions.<sup>75</sup>

## 2. The Variation of Execution Rates is a Reflection of the Variation During the Lynching Era

Zimring attempts to explain the variation among states by comparing the current death penalty with the earlier era of lynchings prevalent a century ago.<sup>76</sup> Lynching is "the killing of one or more people by groups of citizens without government authority."<sup>77</sup> Zimring asserts that the variation of executions among states prevalent today is a reflection of the variation between the North and South prevalent during the lynching era.<sup>78</sup> This assertion is that the extraordinary patterns of execution are a result of the vigilante values that were widespread in only some areas in the 1800s, but that have had a residual effect today.<sup>79</sup>

The link between the two eras is best exemplified by comparing lynching rates with current execution rates.<sup>80</sup> The fourteen states with the lowest lynching rates account for only three percent of current state executions.<sup>81</sup> The highest lynching states were those that have current death

70. *See id.* at 77. "The system is slow, redundant, and expensive yet produces very little evidence of quality control or consistent principles in the selection of those criminal defendants who are sentenced to death or eventually executed." *Id.* at 88.

71. *Id.* at 7-8. In 1950 one out of two individuals receiving a death sentence was executed, while currently only one in forty is actually executed. *Id.* at 7.

72. *See id.* at 7-8.

73. *Id.* at 7. Texas, Oklahoma, and Virginia are the three states that are responsible for two-thirds of all executions. *Id.*

74. *Id.* at 87. The difference in death row population between the South and the West is 29 percent while the difference in execution rates is 78 percent. *Id.* at 87 fig.4.5 (citing Department of Justice, *Capital Punishment Statistics*, at <http://www.ojp.usdoj.gov/bjs/cp.htm> (last visited Jan. 14, 2004); Death Penalty Information Center, *Death Row Inmates by State and Size of Death Row by Year*, at [www.deathpenaltyinfo.org/DRowInfo.html#state](http://www.deathpenaltyinfo.org/DRowInfo.html#state) (last visited Jan. 14, 2004)).

75. *Id.*

76. *See id.* at 86. Zimring assumes that the explanation for variation among the states will also explain why the United States differs from Western governments on the death penalty issue. *See id.*

77. *Id.* at 90.

78. *Id.* at 89.

79. *See id.*

80. *See id.* at 95-96.

81. *Id.* at 96.

penalty statutes, including the ten states with the highest execution rates.<sup>82</sup> Consistent with current execution trends, the Southern states accounted for eighty-eight percent of all lynchings, the Northeast accounting for the least amount at 0.3 percent.<sup>83</sup> "The statistical contrast between these two groups of states shows that they occupy the same extreme positions on the distribution of two distinct varieties of lethal violence in the United States separated by almost a century and the formal participation of government authority in the killing."<sup>84</sup> Lynching reflects a tradition of vigilante values,<sup>85</sup> and the link between the variations in execution rates then and today indicates that vigilante tradition has some effect on the current status of the death penalty.<sup>86</sup>

The vigilante tradition creates intense support for the death penalty today because it neutralizes the fear of unlimited government power by portraying capital punishment as a community, rather than a governmental, response to crime.<sup>87</sup> The image of the death penalty as community justice reduces the fear of government because it is not seen as a governmental power.<sup>88</sup> "As long as this tradition is the animating symbolism of the death penalty, the executioner is imagined as an agent of the community rather than of the government."<sup>89</sup> Therefore, in those areas where vigilante tradition is the strongest, such as the South, there is more intense support for the death penalty because they can identify with the punishment process better than those lacking a vigilante tradition.<sup>90</sup>

The American tradition of lynching was unique from other nations, due to their regular occurrence, the volume of killings, the extended period of time over which they occurred, and its link to racism.<sup>91</sup> There were close to 5,000 lynchings between 1882 and 1968, with ninety-eight

82. *Id.* at 91 fig.5.1. Texas, Virginia, Florida, Missouri, Oklahoma, Louisiana, South Carolina, Georgia, Alabama and Arkansas have the highest execution rates. *Id.* at 95 tbl.5.1.

83. *Id.* at 90. "The values and behavior of the late nineteenth and early twentieth century generated a vigilante tradition in the South that was not reflected in vigilante violence in the Northeast." *Id.* at 92.

84. *Id.* at 96.

85. *See id.* at 98. The vigilante tradition prevalent during the lynching era is the "tradition of regarding the punishment of criminals as a local [rather than governmental] concern," because the perpetrator is identifiable and the government cannot be trusted to protect the public from these enemies. *See id.* at 98, 122.

86. *See id.* at 98.

87. *Id.* at 98-99. "Those parts of the United States where mob killings were repeatedly inflicted as crime control without government sanction are more likely now to view official executions as expressions of the will of the community rather than the power of a distant and alien government." *Id.* at 89.

88. *Id.* at 136-37 ("This vigilante tradition imagines the power behind punishment to be citizens acting collectively.").

89. *Id.* at 111.

90. *Id.* at 98-99. "The citizen who has positive feelings about vigilante values will identify more closely with the punishment process, will think of punishments as a community activity rather than the conduct of a governmental entity separate from community processes." *Id.* at 99.

91. *Id.* at 90 (citing W. FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930*, at 2-8 (1993)).

percent occurring before 1936.<sup>92</sup> Because this identification with vigilante values is unique to the United States, it not only explains the variation within the United States, but also the different approach taken by other nations.<sup>93</sup>

### III. THE UNITED STATES EXPERIENCES A CONFLICT UNIQUE FROM OTHER COUNTRIES WHICH PREDICTS A DIFFERENT EXPERIENCE WITH ABOLITION

The conflicting values in the current American tradition, the vigilante tradition (discussed above) and Due Process values are unique to the United States.<sup>94</sup> The source of unrest about the death penalty is the result of a conflict in traditions between fear of government without limits, producing Due Process concerns on the one hand, and the vigilante tradition remnants of the lynching era on the other.<sup>95</sup>

In addition to the strong vigilante tradition, many Americans also value the Due Process tradition while distrusting the government to fairly administer the death penalty.<sup>96</sup> These individuals fear that the government may wrongly accuse citizens, that it is hard to identify the innocent from the guilty, and fear government abuse and wrongful punishment in the system.<sup>97</sup> This creates the contradiction in poll results, which show overwhelming support for the death penalty, but also illustrate concern about abuse and injustice within the system.<sup>98</sup> The same person could have both values, the vigilante tradition winning when a defendant is clearly guilty, and the Due Process values controlling when it is less clear whether a defendant is guilty.<sup>99</sup> These two traditions create conflict over the procedural aspects of the death penalty because vigilantism insists upon immediate punishment, while Due Process creates long delays.<sup>100</sup> Because these two traditions have contradictory implications,

92. *Id.*

93. *See id.* at 126.

94. *Id.* at 119. "The conflict in the United States is unique not because of what is missing in our political culture, but because of what is present: two distinct contradictory sets of traditions." *Id.* at 121.

95. *See id.* at 109.

96. *See id.* at 122.

97. *Id.*

98. *See id.* at 121.

99. *Id.* at 123.

100. *Id.* at 123-24.

The conflict between vigilante and legality traditions on the question of capital punishment often plays out as a competition between two competing images of the death penalty. Those who oppose the capital sanction stress that the penalty is after all the administration of state power and seek to invoke due process standards and concern about fact finding and discrimination. The image is one of government as powerful strangers.

Those who favor execution try to bring the whole death penalty process within the tradition of community control. The death penalty is in this view protecting victims and potential victims from predators who threaten the community . . . .

*Id.* at 109.

“public attitudes toward capital punishment can be ambivalent and volatile.”<sup>101</sup>

The contradictory reform cries of the 1990s provide an example of the dynamics of the conflict between the vigilante and Due Process traditions.<sup>102</sup> These demands for change were focused on expediting the process between the death sentence and execution, and increasing certainty of guilt before imposition of the death penalty.<sup>103</sup> Unfortunately, these two reforms were mutually exclusive because the margin of error increases with the decrease in delay.<sup>104</sup>

Delay in the system was essential for correcting error, as evidenced by the amount of time exonerated defendants served on death row.<sup>105</sup> There have been 98 death row exonerations since 1970.<sup>106</sup> Zimring assumes that there are as many innocent people that were not exonerated as there were exonerated, and uses the error rate of one in seventy death sentences to estimate the number of innocents executed.<sup>107</sup> Zimring considers that only one in ten death sentences result in execution, and compares that with the one in seventy error rate, to conclude that probably between five and seven innocent people have been executed.<sup>108</sup> He concludes that it is the inefficiency of the capital punishment system that limits the number of innocent executions.<sup>109</sup> When the average delay between a death sentence and exoneration is eight years, delaying the process is essential in preventing erroneous executions.<sup>110</sup>

The conflicting values reflect a difference in views concerning proof of error in the system.<sup>111</sup> Proponents of the death penalty argue that discovery of the innocent on death row is proof that the system is working, while opponents argue it is evidence that major errors are routine.<sup>112</sup> “[T]he absence of an unambiguously innocent defendant who has been executed might be regarded as a challenge to those who believe on actuarial grounds that innocent defendants are missed by the current sys-

101. *Id.* at 109.

102. *See id.* at 144 (“[T]he dissatisfaction with the death penalty that proliferated in the 1990s was a classic result of two contradictory value traditions driving policy in two inconsistent directions.”).

103. *Id.*

104. *Id.* at 168 (“The fundamental conflict is that any reforms that speed up the appeal and execution process would also increase both the odds that innocent defendants are executed and the volume of such wrongful executions.”).

105. *See id.* at 174-75.

106. *Id.* at 164-65.

107. *See id.* at 165. “Given the unselective nature of appeals processes and the accidents of fate that were necessary to deliver many of the ninety-eight exonerated defendants from the death chamber, it would not be unreasonable to estimate that another one-seventieth of the death sentences . . . involve[d] innocent defendants.” *Id.* at 167.

108. *See id.* at 169.

109. *Id.*

110. *See id.* at 174-75.

111. *See id.* at 158.

112. *Id.*

tem.”<sup>113</sup> The reason there is no poster child is because many on death row do not provoke inquiry; they have no resources or social contacts to generate the concern.<sup>114</sup> Also, states have resisted efforts to vindicate the executed, fearing it would generate uncertainty in the system without reaping any benefits.<sup>115</sup> There is neither a proceeding to reexamine evidence after conviction nor procedural necessity, so claims of innocent executions are never tested.<sup>116</sup>

Ironically, public opinion shows that the majority of Americans believe innocent defendants have been executed, and many believe it happens with regularity.<sup>117</sup> “If the American tolerance for deadly error is relatively low, only the absence of clearly identified cases is saving the system from major embarrassments.”<sup>118</sup> In contrast, those opposing the death penalty are extremely concerned about putting innocent people to death.<sup>119</sup>

In an attempt to address this problem, there is a movement for a moratorium of the death penalty until the mistakes can be resolved.<sup>120</sup> Several states, and likely many citizens, support halting executions until the death penalty can be restructured to address the mistakes.<sup>121</sup> However, there are two different views of moratorium: (1) “prelude to abolition” and (2) “prelude to a reformed death penalty.”<sup>122</sup> Those who wish to reform the death penalty suggest several ways, including: better funding, more resources, better counsel, and decreasing uncertain evidence such as jailhouse snitches and coerced confessions.<sup>123</sup> The extent of efforts apparently required to reform the death penalty raise questions as to whether it is worth the effort.<sup>124</sup> Furthermore, the system will never have zero margin of error: the death penalty would need to be abolished to have zero risk of erroneous executions.<sup>125</sup> Thus, moratorium may serve as a quick solution to the conflicting values, but eventually Americans will have to choose between the two value traditions: between ending

113. *Id.* at 168-69. The innocent defendants that are “missed” are those that were executed, or are still serving out sentences on death row. *See id.*

114. *Id.* at 169.

115. *See id.*

116. *Id.* at 170.

117. *Id.* at 163.

118. *Id.* at 164.

119. *See* PollingReport.com, *Crime*, at <http://www.pollingreport.com/crime.htm> (Newsweek Poll conducted by Princeton Survey Research Associates, June 1-2, 2000) (last visited Jan. 14, 2004). Most opponents answered that their reason for opposing the death penalty was the possibility of executing the innocent. *Id.*

120. *See* ZIMRING, *supra* note 1, at 161 (“The Illinois exonerations have provoked sympathetic responses in other states where there is conflict about the legitimacy and reliability of the capital punishment system.”).

121. *Id.*

122. *Id.* at 173.

123. *See id.*

124. *Id.* at 174.

125. *Id.*

capital punishment or redesigning and re-implementing capital punishment, “[e]ither choice will provoke anger and dissatisfaction.”<sup>126</sup>

The Supreme Court and the legislature have attempted to address these policy issues by creating iron clad time and manner restrictions on death penalty appeals in the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>127</sup> The AEDPA “modifie[d] the habeas corpus statute to make more restrictive the rules applicable to all habeas petitions . . . .”<sup>128</sup> It sets a statute of limitations, one year from completion of the direct appeal, for filing habeas corpus applications.<sup>129</sup> Also, it limits review of state factfinding by “limit[ing] the circumstances under which an evidentiary hearing will be granted when material facts were not developed in the state court.”<sup>130</sup> Last, “the act substantially narrows the circumstances under which a federal court may hear a successive petition.”<sup>131</sup> “The effect of all three of these changes is to limit significantly the substantive scope of habeas corpus review and to deny a remedy for constitutional violations for which relief would be available on direct appeal.”<sup>132</sup> Because these rules turn on procedure rather than on the merit of the claims on appeal, those with good lawyers will make the deadlines and have their cases heard, even if their claims are less meritorious than those who cannot afford good lawyers.<sup>133</sup> “So the same bad lawyering and low level of resources for the defense that prejudice the client’s trial chances will cost the defendant the chance to appeal when procedural defaults govern access to the courts.”<sup>134</sup>

The problem with procedural rather than substantive limitations to death penalty appeals is that a court’s refusal to allow constitutional claims guarantees injustice in the system, likely generating hostility in those to whom Due Process is important.<sup>135</sup> Zimring gives two examples of the conflict between procedural defaults and substantive justice:<sup>136</sup> *Coleman v. Thompson*<sup>137</sup> and *Herrera v. Collins*.<sup>138</sup>

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126. *Id.* at 177.

127. *Id.* at 148 (citing The Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 40 & 42 U.S.C. (2000))).

128. NINA RIVKIND & STEVEN F. SHATZ, CASES AND MATERIALS ON THE DEATH PENALTY 605 (West Group 2001) (citing 28 U.S.C. §§ 2244, 2253, 2254 (2000)).

129. *Id.* at 606.

130. *Id.*

131. *Id.* at 607.

132. *Id.*

133. See ZIMRING, *supra* note 1, at 148.

134. *Id.* at 148-49. Thus, “the most disadvantaged defendants at trial face a form of double jeopardy because bad lawyering handicaps the defendant at trial and prejudices his chances of having the merits of his appeal ever examined.” *Id.* at 149.

135. See *id.* at 148.

136. *Id.* at 149, 151.

137. 501 U.S. 722 (1991).

138. 506 U.S. 390 (1993).

In *Coleman*, the defendant, Coleman, claimed he was innocent of the rape and murder of his sister-in-law, and the Supreme Court granted certiorari presumably because both the state and federal courts refused to consider his substantive complaints because his lawyers filed the notice of appeal three days late.<sup>139</sup> The Virginia Supreme Court granted the Commonwealth's motion to dismiss based solely on this procedural default.<sup>140</sup> Coleman raised eleven claims in his federal habeas petition, and the Fourth Circuit held that the Virginia Supreme Court's decision to dismiss based on procedural default constituted independent and adequate state grounds and that Coleman had not shown cause to excuse the default.<sup>141</sup> The Supreme Court affirmed, holding:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.<sup>142</sup>

State deference is the rationale for this harsh result.<sup>143</sup> In order to meet this narrow exception to state procedural deadlines, the defendant must present strong evidence that he is innocent, and there is no parallel exception for failure to meet federal procedural deadlines.<sup>144</sup> Coleman was put to death without either the state or federal courts examining his substantive complaints concerning his criminal trial, including ineffective assistance of council.<sup>145</sup>

In *Herrera*, the defendant sought to produce evidence of innocence in a second federal habeas proceeding, even though the procedural rule provided that subsequent habeas proceedings could not involve new claims not mentioned in the previous appeals.<sup>146</sup> Defendant brought his second habeas petition ten years after his conviction, urging that he was innocent of the murder for which he was sentenced to death.<sup>147</sup> Defendant argued it was a violation of the "Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process of law" to execute an innocent person.<sup>148</sup> In-

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139. *Coleman*, 501 U.S. at 727-28.

140. *Coleman v. Commonwealth*, 307 S.E.2d 864, 876 (1983).

141. *Coleman v. Thompson*, 895 F.2d 139, 143-44 (4th Cir. 1990).

142. *Coleman*, 501 U.S. at 750.

143. *See id.* ("We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.").

144. *See ZIMRING, supra note 1*, at 151.

145. *Id.* at 149.

146. *Herrera*, 506 U.S. at 396, 400.

147. *Id.* at 396.

148. *Id.* at 393.



stead of deciding whether a claim of innocence precludes application of the procedural bars, the Court decided that the showing in this case fell short of what would be required to get a new habeas proceeding based on new evidence.<sup>149</sup> The Court held that “[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”<sup>150</sup> The Court further concluded that the “fundamental miscarriage of justice” exception was not available absent an independent constitutional violation.<sup>151</sup> In dicta, the Court discussed the high burden of proof necessary to show actual innocence and warrant federal habeas relief.<sup>152</sup> The rationale behind this strict rule was to serve the need for finality in capital cases.<sup>153</sup> The problem is that requiring such a high burden of proof to show actual innocence may increase the “number of procedural default cases that lead to execution,” which creates grave risks of executing the innocent.<sup>154</sup>

Changes in policy in the 1990s made it “all but impossible to find an informed observer who was content with the system . . . .”<sup>155</sup> There were increases in executions, and by the year 2000, the death row population had nearly doubled.<sup>156</sup> Also, the South continued accounting for three-fourths of all executions, even though the states that executed defendants more than doubled.<sup>157</sup> The conflict over capital punishment will probably continue as long as the U.S. implements the death penalty, because changes in the procedures or execution rates will upset one of the conflicting values, creating a stalemate.<sup>158</sup>

#### IV. THE FUTURE OF THE DEATH PENALTY IN THE UNITED STATES

##### *A. Influences on the Future of the Death Penalty*

Zimring argues that the end of capital punishment is near, but will not come about without severe conflict that will continue until the United States changes itself.<sup>159</sup> The United States’ experience with abolition, should it come, will not be nearly as diplomatic as the process in Europe because “values and traditions might have to change in the United States

149. *Id.* at 417 (stating that the burden of showing actual innocence is an “extraordinarily high” one).

150. *Id.* at 400.

151. *See id.* at 404.

152. *Id.* at 417 (“[T]he threshold showing for such an assumed right would necessarily be extraordinarily high.”).

153. *See id.* (discussing “the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases”).

154. *See ZIMRING, supra* note 1, at 154.

155. *Id.* at 144.

156. *Id.*

157. *Id.*

158. *See id.* at 130-31. “Fewer executions means more anger about punishment avoided. More executions means larger anxieties about injustice and arbitrariness.” *Id.* at 129.

159. *See id.* at 141.

before a peaceful adjustment to government without executions can be completed."<sup>160</sup> Commitment to the vigilante tradition has not been tested, but the bigger the commitment, the more intense the struggle will be to end executions.<sup>161</sup> Therefore, "[a]s long as the vigilante image of execution has substantial public acceptance, the aftermath of abolition in the United States will be anger and the urge to reverse policy."<sup>162</sup>

Zimring explores four key cultural and political influences on the fate of the American death penalty.<sup>163</sup> First, Zimring explores the trend in other developed nations to abolish the death penalty.<sup>164</sup> The "gap between the United States and the rest of the developed West, along with the willingness of foreign leaders to criticize and stigmatize American practice, is a brand new factor in the American discourse on capital punishment."<sup>165</sup> The damage to the view of the United States as according high regard for individual liberties is most important for persuading American views.<sup>166</sup> Also, it is the personal relations between nations with students and businessmen that may influence public opinions on the issue.<sup>167</sup> Government extradition of suspects and criminals is also an important complication should the U.S. keep the death penalty.<sup>168</sup>

The second influence that Zimring explores is the changing political views on the United States Supreme Court.<sup>169</sup> There are three pressures shaping the capital punishment views of the Court: (1) "tendency for centrist judges to grow impatient with using procedural defaults as a strategy for managing capital cases;"<sup>170</sup> (2) "pressure from the negative opinion of foreign elites,"<sup>171</sup> and (3) "their own commitment to the due process tradition that is in conflict with the operation of state death penalty machinery in the United States."<sup>172</sup> The views of the centrist justices are slowly becoming concerned enough to place limits on state execu-

160. *Id.* at 135.

161. *Id.* at 137.

162. *Id.* at 139.

163. *Id.* at 180.

164. *Id.*

165. *Id.* at 181.

166. *Id.* at 183 ("[I]t is the damage that foreign attitudes do to U.S. dignity rather than the financial or law enforcement consequences of U.S. policy that carries the most important potential for the American debate . . .").

167. *See id.*

168. *Id.* The intensity of the current death penalty controversy was exemplified by the deterioration of the concert of action in the war on terrorism. *See id.* at 43-44. When the U.S. sought the death penalty against the twentieth hi-jacker of September 11, a French national, France refused to release any information. *See id.* Even in these extreme circumstances, France demanded that the United States seek only life in prison because they believed the death penalty was never acceptable. *See id.* This may illustrate that the opposition is absolute, as not many can imagine someone more deserving of the death penalty as one who was involved in a conspiracy that killed thousands.

169. *See id.* at 180.

170. *Id.* at 185.

171. *Id.*

172. *Id.* at 186.

tions, such as the prohibition against executing the mentally retarded.<sup>173</sup> The belief system of the justices who join the Court in upcoming years will determine how much active involvement the Court will take in the future.<sup>174</sup>

Third, the disposition of the President is a big influence on capital punishment because he chooses the Supreme Court justices, who determine the constitutionality of all issues surrounding the death penalty.<sup>175</sup> Increased public concern over the death penalty will increase federal participation in the issue from the executive and legislative branches of government.<sup>176</sup>

Fourth, the levels of execution in the future, and the execution policy in general, will influence the future of the death penalty.<sup>177</sup> The two elements changing in execution policy that will affect death penalty policy and public opinion are, first, the role of federal government in conducting executions themselves and, second, the increase of executions in the non-Southern states to match the South's levels that will intensify the scrutiny and controversy.<sup>178</sup> "What happens in the federal system will probably be an early indicator of trends in the state death penalty systems and in the federal court regulation of state cases."<sup>179</sup> The rate and pattern of executions across the states will also influence the future execution policy.<sup>180</sup>

### *B. Changes That Must Take Place to Make Abolition Possible*

First, making "the death penalty a major issue in every important part of American public life" will help bring about abolition.<sup>181</sup> Increasing the number of groups, promoting new ideas and public debate, will increase the importance of the issue.<sup>182</sup> Public information campaigns are necessary to make more Americans aware of the problems with the death penalty.<sup>183</sup> In order to soften support, the focus must be on those groups most conflicted, such as conservative minorities and conservative Catho-

173. See *id.* at 184 (citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)).

174. *Id.* at 185.

175. See *id.* at 191.

176. *Id.* ("The more salient the question of the death penalty becomes in the nation, the larger will be the influence of leadership in the federal executive and legislative branches to its resolution.")

177. See *id.* at 187.

178. *Id.*

179. *Id.* at 188.

180. See *id.* at 189. "So a continuation of the extreme concentration of execution risk in a very few states seems objectionable, but any real diversification of executions will increase the vulnerability of death penalty systems to outside scrutiny." *Id.* at 190.

181. *Id.* at 194.

182. *Id.* at 201 ("The larger the number of groups concerned with the death penalty, the more likely that the number of concerned groups will continue to grow.")

183. *Id.* at 200-01.

lics.<sup>184</sup> Zimring argues that “finding and motivating activist campaigners on America’s campuses” is a key to motivating opposition groups who need to recast abolition as a limit on government power.<sup>185</sup>

Next, creating opposition to aspects of the death penalty is a step in creating momentum towards opposing capital punishment as a whole.<sup>186</sup> In order to weaken the intensity of support, opponents will have to focus on the elements of the death penalty that create doubt.<sup>187</sup> These include distrust of government power and government mistakes in convicting the innocent.<sup>188</sup> Creating the image of capital punishment as primitive, brutal and undesirable, and stereotyping supporters as such helps facilitate abolition.<sup>189</sup> Zimring argues that shaking the American commitment to capital punishment will facilitate its end.<sup>190</sup> Increasing the intensity of those opposing the death penalty is also important.<sup>191</sup> “A visible and persistent activist presence within the community can serve as a stimulus to the moral uncertainties that destabilize the mainstream support for the death penalty.”<sup>192</sup>

#### VI. ANALYSIS: THE AMERICAN DIFFERENCE IS THE RESULT OF A MISINFORMED PUBLIC, AND INFORMING THE PUBLIC OF THE REALITIES AND DEFICIENCIES OF THE DEATH PENALTY WILL LEAD TO ABOLITION

Zimring’s thesis that a strong vigilante and Due Process tradition create the American difference and unique conflict within the United States is an inadequate explanation of the current problem and the steps that need to be taken to achieve abolition. Although the vigilante tradition may account for the variation in execution rates among the states, it is not the primary reason that the United States still imposes the death penalty in the face of international opposition. The death penalty is still an option because the United States has a bigger problem with violent crime, and it is the perceived will of the majority.<sup>193</sup> Since Zimring fails to account for these important facets of capital punishment, he also fails to include ways to decrease the struggle and pave the road for abolition.

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184. See *id.* (arguing that focus should be on “the next 30 percent or so of the population that stands in support of a death penalty but may be uneasy about executions. . . . Particular targets might include the libertarian right and Catholic intellectuals with right-of-center political orientations.”).

185. *Id.* at 202.

186. See *id.* at 196.

187. *Id.* at 197-98 (arguing that the “primitive essence of the killing process” may be an element of capital punishment capable “of softening up significant segments of death penalty support.”).

188. *Id.* at 197.

189. *Id.* at 197-98.

190. See *id.* at 198.

191. *Id.*

192. *Id.* at 199.

193. See *infra* notes 199-243 and accompanying text.

As of 2000, the United States had the highest homicide rate among the developed nations.<sup>194</sup> Although violent crime rates in the United States are declining, the rates are significantly higher than the rates in the non-death penalty developed nations.<sup>195</sup> According to the international homicide statistics, the United States has the highest homicide rate of any developed nation studied, 5.87 per 100,000.<sup>196</sup> This high rate of homicide is “four to 14 times higher than in other Western, industrialized nations.”<sup>197</sup> The significant difference in violent crime rates alone could account for why the United States continues to implement the death penalty in the face of international opposition.<sup>198</sup>

Capital punishment is the perceived will of the majority because the misperceptions and lack of information that pervade the United States create abstract support in the face of uncertainty.<sup>199</sup> Thus, Zimring’s argument that part of the American difference from other countries is the intensity of their support for the death penalty<sup>200</sup> is flawed. Comparing different poll results indicates that support for the death penalty is shallow.<sup>201</sup> For instance, “[w]hen Americans are asked about the death penalty in the context of particular facts, support drops.”<sup>202</sup> These polls suggest that “[m]ost Americans favor the death penalty because they feel that killing is wrong . . . .”<sup>203</sup>

This abstract support for the death penalty is not conclusive of support because Americans lack the information they need to make informed decisions about whether or not they support the death penalty.<sup>204</sup> Studies and articles document the incorrect perceptions of Americans on numerous aspects of the death penalty.<sup>205</sup> Significant misperceptions are the

194. See Gordon Barclay & Cynthia Tavares, *International Comparisons of Criminal Justice Statistics*, at \*10 tbl.1.1, at <http://www.homeoffice.gov.uk/rds/pdfs2/hosb502.pdf> (last visited Jan. 19, 2004). Because international statistics come from several sources it is often difficult to make absolute comparisons, but because the “definition of homicide is similar in most countries, absolute comparisons of rates are possible.” *Id.* at \*3.

195. See *id.* at \*10.

196. *Id.*

197. Julia Sommer, *Distinguishing Crime From Violence*, BERKELEYAN CAMPUS NEWSPAPER, Oct. 1, 1997, at [http://www.berkeley.edu/news/berkeleyan/1997/1001/crime\\_violence.html](http://www.berkeley.edu/news/berkeleyan/1997/1001/crime_violence.html) (last visited Jan. 19, 2004).

198. See *id.* (“Lethal violence is a distinctively American problem.”).

199. See *infra* notes 205-243 and accompanying text.

200. ZIMRING, *supra* note 1, at 11.

201. Richard C. Dieter, *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty* (Apr. 1993), at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=481> (“These polls repeatedly showed that when people were presented with alternatives to the death penalty, their support for the death penalty dropped dramatically.”) (last visited Jan. 19, 2004).

202. Samuel R. Gross, *Update: American Public Opinion on the Death Penalty-It’s Getting Personal*, 83 CORNELL L. REV. 1448, 1473 (1998) (explaining that death penalty support drops in the context of a particular defendant, whereas simply asking whether individuals support the death penalty yields higher support).

203. *Id.* at 1472.

204. See Dieter, *supra* note 201, at Introduction.

205. See Gross, *supra* note 202, at 1457-59; see also Dieter, *supra* note 201 (citing J. Mark Lane, “Is There Life Without Parole?: A Capital Defendant’s Right to a Meaningful Alternative Sentence,” 26 LOY. L.A. L. REV. 327, 392 (1993)).

deterrent effect of the death penalty<sup>206</sup> and the length of time convicted murderers serve when they receive life in prison or life without parole.<sup>207</sup> Furthermore, Americans are not informed on the extent of the problems facing the death penalty, including the cost<sup>208</sup> and the prevalence of racial discrimination.<sup>209</sup> In polls in which people are asked simply whether they support the death penalty or not, majority support reflects only abstract feelings, but when presented with specific information regarding particular defendants, support for the death penalty decreases.<sup>210</sup> This decrease in support may be the result of the misperceptions discussed below.

Although there is evidence that the death penalty is not a deterrent to homicide,<sup>211</sup> approximately half of the population believes it does.<sup>212</sup> Using national demographics, including race, age, education, income, region and political preference, over forty percent of people believe the death penalty has a deterrent effect.<sup>213</sup> When asked about the reason for supporting the death penalty, thirty-four percent say they support the death penalty because it deters others.<sup>214</sup> However, there is a negative correlation between capital punishment and deterrence of violent crime, as evidenced by comparing the crime rates between the death penalty states within the U.S. with the non-death penalty states.<sup>215</sup> Although nationwide murder rates have decreased, there is an identifiable gap in the murder rates between non-death penalty and death penalty states that continues to increase.<sup>216</sup> As of 2001, the murder rate in the death penalty states was thirty-seven percent higher than the rate in states without the death penalty.<sup>217</sup> These statistics may indicate that, at least, that the death penalty has a negligible, if any, deterrent effect.

Americans also misperceive the length of time a convicted murderer will serve in prison should he or she be spared the death penalty.<sup>218</sup> The

206. *E.g.*, Dieter, *supra* note 201, at Recurrent Problems Erode Death Penalty Support.

207. *See id.*

208. See Gerald Kogan, *Errors of Justice and the Death Penalty*, 86 JUDICATURE 111, 114 (2002).

209. See Kenneth Williams, *The Death Penalty: Can It Be Fixed?*, 51 CATH. U. L. REV. 1177, 1180-82, 1203 (2002).

210. See Gross, *supra* note 202, at 1471.

211. *Id.* at 1459 (citing Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 7-9, 12-15 (1996)).

212. *Id.* (citing Telephone Survey of 1,024 Adult Americans by Yankelovich Partners Inc., for Time/CNN (June 5, 1997)).

213. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001, at 146 tbl.2.69 (2002).

214. PollingReport.com, *supra* note 119.

215. Death Penalty Information Center, *Deterrence: States Without the Death Penalty Fared Better This Decade*, Chart I, at <http://www.deathpenaltyinfo.org/article.php?scid=12&did=168> (showing that "[i]n every year, the death penalty states had the higher murder rate") (last visited Jan. 19, 2004).

216. *Id.* Chart II compares murder rates of states that have the death penalty with states that do not. *Id.*

217. *Id.*

218. See Dieter, *supra* note 201, at Recurrent Problems Erode Death Penalty Support, Results From State Polls.

public believes that the average person convicted of murder will only serve fifteen years, unless they receive the death penalty as their punishment.<sup>219</sup> Furthermore, only eleven percent of Americans believe that those sentenced to life without parole will never be released from prison.<sup>220</sup> These estimates are inaccurate considering that “[t]wo-thirds of the states utilize sentences for first degree murder which guarantee that the inmate will never be eligible for release,” and “[m]ost of the remaining states forbid considering parole for at least 25 years.”<sup>221</sup>

Jurors lack information concerning alternatives to the death penalty, which they need to make informed decisions about whether to sentence a convicted murderer to death.<sup>222</sup> Studies indicate that “many jurors are sentencing people to death because they either lack adequate alternatives or because they are unaware that such alternatives exist.”<sup>223</sup> The death penalty is discussed in politics at length, but other alternatives, such as restitution and life without parole, are not.<sup>224</sup> Thus, although most states, 45 out of 50, offer the option of life without a parole possibility for twenty-five years or more, most Americans do not know about this available alternative.<sup>225</sup>

Contributing to this misinformation is that most states do not allow the jury to be informed about alternative sentences should they not impose the death penalty.<sup>226</sup> Even when jurors ask the judge how soon the convict would be paroled they are given no information.<sup>227</sup> This lack of information creates a dilemma between choosing a death sentence, which jurors may not believe the perpetrator deserves, and releasing those convicted in a short amount of time to wreak havoc on society once again.<sup>228</sup> This uncertainty leads to imposition of the death penalty for fear these convicts will be walking the streets in less than ten years.<sup>229</sup> “People are frustrated and frightened about violent crime. If they are offered no alter-

219. *Id.* at Recurrent Problems Erode Death Penalty Support. Jurors specifically assume that a defendant not sentenced to death will be out in seven years. *Id.* at Results From State Polls.

220. *Id.* at Recurrent Problems Erode Death Penalty Support.

221. *Id.* at fig.4 (citing Julian H. Wright, Jr., *Life-Without-Parole: An Alternative to Death or Not Much of a Life At All?*, 43 VAND. L. REV. 529, 540-57 (1990)).

222. *Id.* at Effectiveness of Alternative Sentencing.

223. *Id.*

224. *See id.* at The Politics of Death (“[P]oliticians who favor the death penalty have resisted stiffer sentences which eliminate parole because they fear that with real alternatives in place there will be no more need for the death penalty.”).

225. *See id.* at Introduction.

226. *See id.*

227. *Id.* at Results From State Polls (“Jurors faced with making life and death decisions repeatedly inquire about the true meaning of a ‘life sentence,’ apparently hoping that this sentence will provide them with an acceptable alternative to sentencing someone to death.” (citing Lane, *supra* note 205, at 333-34)).

228. *Id.* at Effectiveness of Alternative Sentencing.

229. *Id.* (citing William W. Hood, III, *The Meaning of “Life” for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605, 1624-25 (1989)).

natives which reasonably meet their concerns for protection and punishment, then the death penalty seems attractive."<sup>230</sup>

Another problem is that life without parole is not even offered in a state with one of the highest execution rates. Texas, the state with the third-highest execution rate,<sup>231</sup> does not offer life without the possibility of parole.<sup>232</sup> In states that do not offer life without parole as an option, politicians admit they fear the option will lead to less death penalty support.<sup>233</sup>

The difference that offering these alternatives makes is exemplified Maryland, which specifically instructs its juries that they have a choice between life without the possibility of parole and a death sentence.<sup>234</sup> Since Maryland implemented this option, merely eight new defendants were added to that state's death row between 1987 and 1992.<sup>235</sup> This is a tremendous contrast with those states that do not offer life without parole such as Florida, which added 45 new defendants to death row in 1991 alone.<sup>236</sup>

Giving Americans information and alternatives will likely decrease support for the death penalty.<sup>237</sup> Polls conducted in several states<sup>238</sup> all concluded that many people, when presented with such choices, have a preference for alternative sentences as opposed to the death penalty.<sup>239</sup> "Although a majority of those interviewed said they favored capital punishment abstractly, that support is reversed when the sentence of life without parole, coupled with a requirement of restitution, is offered as an alternative."<sup>240</sup> Forty-four percent of Americans support such alternatives

230. *Id.* at Results From State Polls.

231. Death Penalty Information Center, *State Execution Rates*, (Aug. 11, 2003), at <http://www.deathpenaltyinfo.org/article.php?scid=8&did=477> (last visited Jan. 19, 2004).

232. Death Penalty Information Center, *Life Without Parole*, at <http://www.deathpenaltyinfo.org/article.php?did=181&scid=12> (last visited Jan. 19, 2004).

233. Dieter, *supra* note 201, *The Politics of Death*.

234. *See id.* at *The Effects of a Life Sentence*.

235. *Id.*

236. *Id.* (citing LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: CAPITAL PUNISHMENT 1991, at 15 (1992)).

237. *See id.* at Results From State Polls ("[P]olls repeatedly showed that when people were presented with alternatives to the death penalty, their support for the death penalty dropped dramatically." (citing Death Penalty Information Center, *Summaries of Recent Poll Findings*, at <http://www.deathpenaltyinfo.org/article.php?scid=23&did=210> (last visited Jan. 19, 2004) [hereinafter *Recent Poll Findings*])).

238. *Id.* (stating that polls were conducted in California, Florida, Georgia, Kentucky, Minnesota, Nebraska, New York, Oklahoma, Virginia and West Virginia (citing *Recent Poll Findings, supra* note 237)).

239. *Id.* (citing *Recent Poll Findings, supra* note 237).

240. *Id.* at *Public Opinion and the Death Penalty*.

Compared to the 77% who favor the death penalty in the abstract, support drops by 21% when a sentence of life with no parole for 25 years is considered; if a requirement of restitution is added to that sentence, support drops by 33%. And the sentence of life without parole plus restitution causes a support drop of 36% and relegates capital punishment to a minority position.

*Id.* at fig.2.



when given the choice.<sup>241</sup> Thus, jurors and the public in general need to be informed of the alternatives to capital punishment. Stating the alternatives is not enough. The alternatives must be explained in detail, otherwise the majority will continue misinterpreting the meaning of a life sentence and life without possibility of parole.<sup>242</sup>

Also, the public and political leaders need to learn the extreme difference in cost between the death penalty and life without parole.<sup>243</sup> Life in prison without parole is more cost effective than the death penalty, because it only costs \$600,000 per defendant, whereas it costs \$3.2 million to execute an individual.<sup>244</sup> Thus, the death penalty costs \$2.6 million more per defendant than a life sentence without parole.<sup>245</sup> Furthermore, capital cases are time-consuming. In Florida, for example, death-penalty cases account for only 3 percent of those reviewed by the state's highest court, but take up almost 50 percent of the court's time.<sup>246</sup>

Last, the public needs to be informed that the death penalty can never be fixed because of the inherent problems in its administration that can not be eradicated.<sup>247</sup> Some scholars contend that one of the biggest problems is that the death penalty is administered in a racially discriminatory way.<sup>248</sup> According to those contentions, even if every other problem could be fixed, the death penalty will never be administered in a racially indiscriminate way.<sup>249</sup> Minorities continue to account for a much higher percentage of the death row population than their percentage in the population at large, which is an indication that discrimination continues to pervade the system.<sup>250</sup> There have been several studies of juror decisions that illustrate the pervasiveness of racial views in the system.<sup>251</sup> There are actual decisions in which members of the jury explicitly stated their racism.<sup>252</sup> Studies suggest that jurors act subconsciously in sentenc-

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241. *Id.*

242. *See id.* at Effectiveness of Alternative Sentencing.

243. Kogan, *supra* note 208, at 114.

244. *Id.* at 113 (citing Dave Von Drehle, *Capital Punishment in Paralysis: Huge Caseload Bloats Lethargic, Costly System in Florida, U.S.*, MIAMI HERALD, July 10, 1988, at 1A).

245. *See id.* (citing Von Drehle, *supra* note 244).

246. *Id.*

247. Williams, *supra* note 209, at 1224 ("Rather than legitimate the death penalty by calling for a moratorium, opponents should call for its abolition on the ground that it cannot be fixed because it will never be fairly implemented.").

248. *Id.* at 1180.

249. *Id.* at 1203-04.

250. *Id.* at 1205-06 (explaining the pervasiveness of racial disparity in federal implementation of the death penalty by observing that "the proportion of minority defendants in federal capital cases exceeds the proportion of minority individuals in the general population" (citing U.S. Dep't of Justice, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review*, (June 6, 2001), at <http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm> (last visited Jan. 19, 2004))).

251. *Id.* at 1212-16 (citing generally David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998)).

252. *Id.* at 1226 (quoting Bob Herbert, *In America; Tainted Justice*, N.Y. TIMES, Aug. 6, 2001, at A13).

ing minorities to death more frequently than whites.<sup>253</sup> The same studies have shown that race is a factor in capital sentencing among prosecutors, judges, and jurors.<sup>254</sup> Prosecutors request the death penalty more often in cases where the defendant is a minority.<sup>255</sup> Also, the race of the victim seems to make a difference in whether the death penalty is sought.<sup>256</sup> Blacks are now allowed on juries, but prosecutors have used their peremptory challenges to disqualify black candidates in order to have an all white jury.<sup>257</sup> Considering the current prevalence of racism in the criminal justice system, some scholars contend that the death penalty cannot effectively be reformed.<sup>258</sup>

Attempting to reshape individual values, as Zimring suggests in bringing about abolition, is a difficult, if not impossible task that will take many resources. Instead, approaches to abolition should focus on informing the public of the realities of the death penalty, which may be sufficient to achieve abolition. In general, people need to be made aware that the death penalty "requires far more of our resources than this country should be willing to invest" and for that reason innocent people will be executed due to our human limitations.<sup>259</sup>

#### CONCLUSION

Because of the pressure and changing support for the death penalty, abolition may be inevitable. The pressure is too strong to ignore, regardless of the vigilante tradition. In order to minimize the struggle towards abolition the best course of action is to first encourage the spread of the moratorium movement. It will provide the time that will be necessary to educate the public and generate support for abolition. Zimring's premonition of a long struggle<sup>260</sup> even after abolition will likely not come true. "[A]s the public's preference for alternative sentences becomes more widely known, and as those sentences become incorporated into law, the justifications for the death penalty will have finally disappeared."<sup>261</sup> If Zimring's ultimate conclusion that "[s]ooner or later, both the executioner and the vigilante tradition will leave the American scene,"<sup>262</sup>

253. *Id.* at 1215-16.

254. *Id.* at 1181.

255. *Id.* (citing Paul Butler, *Starr Is to Clinton as Regular Prosecutors Are to Blacks*, 40 B.C. L. REV. 705, 714-16 (1999)).

256. *Id.* at 1180 (citing David Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 709-10 (1983)).

257. *Id.* at 1181 (citing William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 175 (2001)).

258. *See id.* at 1220-22 ("[T]he death penalty, as presently applied in the United States, cannot be completely reformed. There is simply too much racism and too many mistakes for it to be an effective and morally justifiable form of punishment.").

259. Kogan, *supra* note 208, at 114.

260. *See* ZIMRING, *supra* note 1, at 203.

261. DIETER, *supra* note 201, *The Politics of Death*.

262. ZIMRING, *supra* note 1, at 202.

comes true, the United States will likely join other developed nations in opposing capital punishment.

