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Symbol and Substance in the Massachusetts Commission Report

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Plenary Address

SYMBOL AND SUBSTANCE IN THE MASSACHUSETTS COMMISSION REPORT

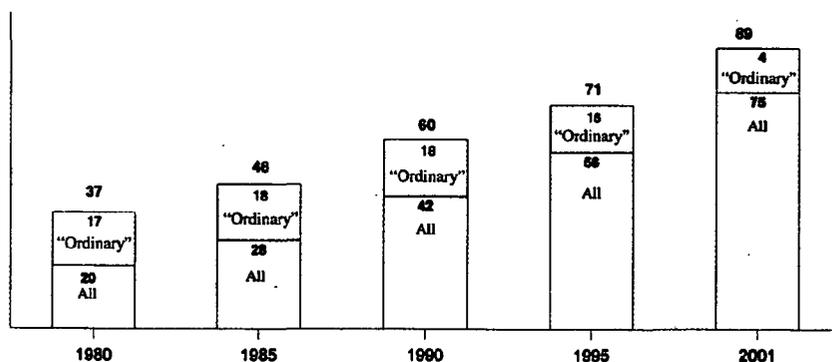
Franklin E. Zimring

Two pieces of gratitude to Professor Hoffmann; the first is for inviting me. This is a beautiful campus and a fine law school, and it's the first time I have ever been in either. I am also thankful for Professor Hoffmann's generosity of spirit. He has mentioned that I've done an awful lot of writing on the death penalty. The Massachusetts Governor's Blue Ribbon Commission comes a little bit late to influence my views on the death penalty, about forty-five years too late. And that is well known to anybody who has gotten beyond page three of anything that I've ever written on the subject. But I was deeply interested in the Massachusetts report as soon as notice of it hit the media. I think it is an important indication of the peculiar present circumstances of capital punishment in the United States.

My ambition today is to discuss two quite remarkable Commission reports that the early twenty-first century has generated: the Illinois Commission report that was issued in 2002 (Governor Ryan's Commission), and the Massachusetts Commission report. I want to put these two documents in a very broad context that can be briefly stated. That will be followed by a more detailed attempt to locate these two reports in that larger picture. The Sixty-Four Million Dollar Question is this: What do these reports signify about the present and future of the death penalty in the United States?

Let's start with three statistical pictures of the recent history of capital punishment policy. My first statistical snapshot summarizes recent world history. It begins in 1980 and then carries forward to 2001.

Figure 1. The Prevalence of Death Penalty Abolition, 1980-2001.



"Ordinary" = "Ordinary" crimes

All = All crimes

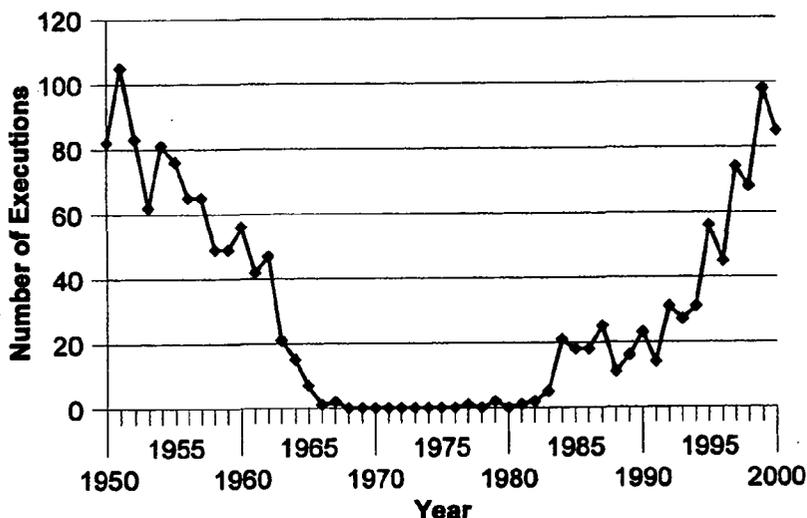
Sources: Amnesty International Reports, 1980, 1985, 1990, 1995 and 2001, see Appendix 1.

Cesare Beccaria's *On Crimes and Punishment* was published in Italy in 1767 and launched the modern preoccupation with reform of capital punishment. In the first 216 years of that campaign a total of about thirty-seven countries actually abolished the penalty, either for all or for "ordinary" crimes. A group of pre-1980 abolitions took place in Western Europe and in the developed nations of the British Commonwealth. Italy, Germany, Austria, Great Britain and Spain were joined by Canada and Australia in the pre-1980 group of non-death penalty nations.

From 1980 on, the abolition business has been picking up steadily. From a base of thirty-seven countries in 1980, we observe fifty-two additions to the abolitionist camp in twenty-one years for a total of eighty-nine by 2001. And if you were to add in places that hadn't had an execution in ten years and are not likely to have one, places like the Ukraine, Russia, and Turkey that are at least promising not to have anymore, well over half the countries in the world have abolished capital punishment by the year 2000. This important trend in world history is also an important context even for discussing what has been happening in the United States. For more background on recent international trends, I invite you to read Chapter 2 of *The Contradictions of American Capital Punishment* [2003].

Figure 2 shows us trends in executions in the U.S. over the half-century after 1950.

Figure 2. U.S. Executions by Year, 1950–2000.

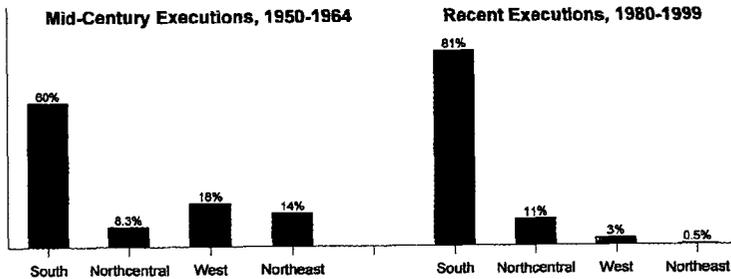


Source: U.S. Department of Justice, Bureau of Justice Statistics. Available at <http://www.ojp.usdoj.gov/bjs/glance/tables/exetab.htm>.

Between 1950 and 1977, trends in the United States looked like those in a lot of other Western countries. Executions fell off from a high in 1933 of 199 to about thirty-five to forty a year by the late 1950s. Then the federal courts stepped in. The country went for ten years without an execution after 1967. The Supreme Court tiptoed to the edge of abolishing capital punishment in its decision in *Furman v. Georgia* in 1972, and then stepped back from that four years later in a group of cases generally known as *Gregg v. Georgia*. Since 1977, the United States has had twenty-five years of documented experience with capital punishment.

The geography of executions in the United States since 1977 is one aspect of recent history relevant to the fact that the conference here has a Massachusetts Blue Ribbon Commission report under discussion. Figure 3 compares the distribution of executions in the United States by region in the twenty-five years before the moratorium in 1967 and in the twenty-five years after executions resumed in 1977.

Figure 3. Regional Distribution of Executions, 1950-1964 Versus 1977-1999.



Sources: Death Penalty Information Center, <<http://www.deathpenaltyinfo.org/>>; Espy, M. Watt, *Executions in the United States, 1608-1987*, ICPSR 8451.

Executions in the early period are dominated by the South with a 60% share of all executions, but after the South they are spread fairly evenly through the North Central, Western, and Northeastern states. During this era, the South had 60% of all executions, and the Northeastern states had 14%, a ratio of about four to one.

After *Gregg v. Georgia* the pattern by region in states adopting death penalties was almost identical to the 1950-64 pattern. There were two exceptions. It took New York a while (that is, until 1995) to pass a statute, because of vetoes by Democratic governors. And the State of Massachusetts passed a post-*Furman* death penalty, but the state's Supreme Court struck it down in 1984.

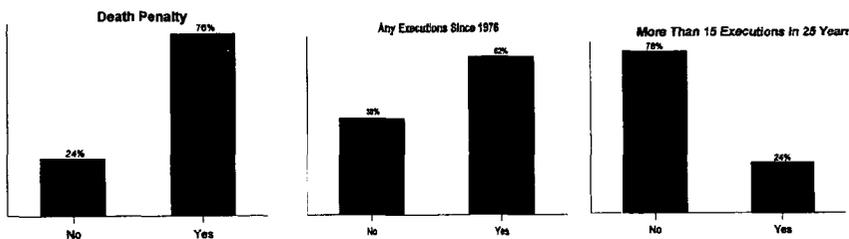
But most of the major states in the Northeast had death penalties of long standing by 2001, including Pennsylvania, Ohio, New Jersey (1980), and Connecticut. But when you consult the regional distribution of executions, the concentration in the south increased markedly, and the ratio of Southern executions to others has increased.

Eighty-one percent of the post-*Furman* executions have been in the South. Eleven percent took place in the North-Central states. That is where Illinois, one of my Commission Report case studies, is located. Only 3% of the post-1977 executions

happened in the West. The Northeast, where most big states have death penalties on the books, was the location of only .5% of all American executions. The South to Northeast ratio was about four to one in the twenty-five years of postwar execution in the United States, prior to *Furman*. The ratio in the period since is 160 to one!

My last statistical exhibit is a breakdown of the United States of America in 2004, taking the 50 states by recent execution record as shown in Figure 4.

Figure 4. The Division of American States by Capital Punishment Records (1977-2001).



Source: Death Penalty Information Center (<http://www.deathpenaltyinfo.org>).

If one asks what proportion of states have a death penalty on their statute books, only one quarter of the states don't, and 70% of the states do. If you ask a separate question, has anyone been executed since 1977, it turns out that 38% of the states are no-execution states after 1977, 24% because they don't have a death penalty; and 14% because they didn't use it at all. A total of 62% have executed someone.

And then we confront the final set of bar chart comparisons: How many American states use the penalty with any regularity? My standard for regularity is whether there were more than fifteen executions in twenty-five years. And when the states are distributed on that criterion, we get exactly the opposite of the distribution for a death penalty on the books; a quarter of the American states execute as often as once every twenty months, and 76% of the American states do not. It is an amazing saga of criminal procedure and political science how this comes to pass in the United States. I cannot present the data now to tell that story in its entirety. I'm trying, instead, simply to give us a context to think about these two very important state Commission reports.

Let me start with an unsurprising conclusion: everybody thinks that capital punishment in the United States is a mess. Into this mess come two extraordinary official Blue Ribbon Commission reports in a field which has been virtually non-literate prior to 2002. Great Britain had its Royal Commission on Capital Punishment that reported in 1953. The rest of European abolition came about without any real written record. In the United States, we have had a lot of cases and tons of law briefs, but we haven't had any publicly documented investigations until the beginning of the twenty-first century. Here is an assignment for the legal historians among this audience: we need to find out why there has been so much change in the United States in death penalty policy, but so little discourse about the death penalty.

Then two things happened swiftly. The first development was in Illinois. Illinois in the 1990s was about to become one of the 24% of the American states—most of the rest of them are in the South—that executed with some regularity. They had their first

execution during the 1990s. But also in the 1990s they executed a total of twelve people, which turned out to be the most executions north of Missouri in the period. The problem was, through happenstance and a very good investigative program at Northwestern University Journalism School, thirteen innocent men were discovered on Illinois' death row. The number of exonerations, I think, is up to seventeen or eighteen now. This was a major scandal, not only in the Chicago newspapers, but in Illinois government. Then Governor Ryan appointed a Blue Ribbon Commission of thirteen members. Nine of the thirteen had prosecutorial experience. The task of the Commission was to recommend reforms prospectively in Illinois death penalty cases to avoid future false convictions. In April of 2002, this Commission issued a very serious 215-page report with several appendices that contained no fewer than eighty-five recommendations for changes in Illinois substantive law, procedural law in death cases, and special training and minimum requirements for counsel in capital cases. And even with that, there was no promise to the Governor that false convictions would stop. The commission only said they could minimize the chances of miscarriage of justice.

The Governor used that document to justify commutation of all active death sentences in the state. He hadn't asked his commission for advice about what to do with the people then on death row. But the Governor commuted the death sentences of all of the defendants convicted under the old system, including some who hadn't even asked for commutations. The Commission's reform proposals, most of the big-ticket items, are still being debated in the Illinois legislature. But the pressure is off. Illinois will go at least a decade without an execution unless somebody enthusiastically volunteers for execution by dropping appeal processes sometime in the future. The second Blue Ribbon Commission takes place in the state of Massachusetts, in the northeastern sector of the United States where only .5% of all post-1977 executions have occurred. Massachusetts has gone four decades without an execution, and hasn't had a death penalty on its books since a statute that the legislature passed was struck down by the Supreme Judicial Court of Massachusetts twenty years ago. But recently the Massachusetts legislature came very close to passing a death penalty. And the current Governor would like to have a capital punishment statute. It is a principle that he supports.

The Blue Ribbon Commission report was designed to prescribe minimum conditions for a fair death penalty that the Massachusetts legislature could then consider. The Blue Ribbon Commission, while it took no formal position pro or con on capital punishment, devoted itself to the mission of quality control, generating substantive and procedural standards for capital punishment that are higher than that in any jurisdiction, anywhere in the world, ever. I don't think anybody would disagree with that characterization.

When one measures what the Massachusetts Blue Ribbon Commission is asking for with what the Illinois Blue Ribbon Commission was demanding, the Massachusetts Commission is substantially more limiting in the scope of its death penalty. The Massachusetts report has abolished felony murder as an aggravating circumstance. It seems not to aggravate for the law enforcement status of the homicide victim. (I must add here, incidentally, that my analysis is only going to be of the Blue Ribbon Commission report, rather than of the statute that any legislature is going to pass in its wake.) If we ever do get an American state legislature that passes a death penalty statute without the killing of a law enforcement official as a normal aggravating circumstance, I will come back to the Indiana University campus and push a nickel with my nose from the Student Union to the Law School. But that detail of political

infeasibility isn't important because I do not doubt the heroic sincerity of the Blue Ribbon Commission in asking for substantive restriction. But it is the two documents, the Illinois and Massachusetts reports, that I want to focus on. They are an important indicator of where we are in the discourse about the death penalty.

The guidelines which the Massachusetts Commission created restrict potential capital cases on two dimensions, somewhat like a Chinese menu. The offense must survive all the commission's standards on culpability, which is minimum blameworthiness, even to be eligible for death—that is Column A. But even then, all of the minimum standards for certainty of guilt, the forensic matters that were discussed in the previous session of this meeting will further reduce the death eligible. On culpability, the Commission wants the penalty—and I'm using its term here—only for “the worst of the worst” murders. But, one of the weaknesses of the Commission report is it doesn't tell us its criterion for the worst of the worst or justify its moral choices. The only way we can determine the Commission's priorities is by examples, what they included and what they excluded.

The big numbers, in terms of current death sentences in the United States, are felony killings, but all of these were excluded in the report unless they result in multiple killings. Felony killings alone are responsible for more than 70% of the people on death row in the United States. There is no analysis on this in the report. There are no provisions for death when law enforcement officers or firemen are murdered. Indeed, very few of the aggravators that are in most capital statutes of the United States make the commission's “worst of the worst” list.

So what would make that list and how many cases are there in the state that might generate a death penalty on culpability standards? We don't know. Yet, if the Commission had looked at the supplemental homicide records turned into the FBI by the Boston Police Department for a year or two, it could have estimated the population of killings that would survive the culpability criteria for offences it was proposing.

My guess, as a long-time student of homicides, is that more than 90% of the very small number of killings that would qualify under their report are in the multiple killing category. But when one examines the fact patterns of those cases, a substantial number of intrafamily killings will be found. I wonder: Are these eruptions of rage and depression truly the “worst of the worst” of all murders?

And then there is the second hurdle, the requirement of certainty. Only a tiny few of the worst of the worst would actually be death penalty eligible because of the certainty standards that would be imposed on all of the worst of the worst culpability cases. This would not only exclude cases where proof depends on eyewitness identification, but also confession cases. What could be more reliable than a confession? Plenty, it turns out when you look at the standards.

This particular law professor reached that point in the Blue Ribbon Commission report wondering whether there has been any single case in Massachusetts in the last four or five years that would meet the Commission's twin criteria. And I read those twin criteria far more tightly than did the director of the state crime lab in his presentation today. I don't know that there are any cases. If there are, I don't know how many cases, and I don't know whether the unlucky one or two multiple killing cases that might be provable beyond any doubt would in fact be anything near “the worst of the worst” of Massachusetts murders.

But now let me get to the heart of what I want you to think about and what I want to address. It seems to me that the rhetorical point that the Blue Ribbon Commission is making is that they think it would be better that one hundred real monsters only get life

imprisonment for murder than to run any significant risk of executing an innocent person in Massachusetts. That's a value judgment that they're making, and oddly enough, I don't think that judgment displeased Governor Romney, who wants a death penalty in his state. I also think that both the Illinois and Massachusetts reports speak volumes about our current feelings about the death penalty in the United States. And I think they give us a pretty good indication of some likely future developments.

I want to start with ex-Governor Ryan of Illinois, the man who emptied his death row. Let's say that somebody came to Governor Ryan in 1999 and told him that thirteen innocent men had been found in the Stateville Penitentiary. Or even a hundred. What should be done? I am sure Governor Ryan would identify a lot of reforms to push. The first thing the Governor would do is release the innocent, we don't want them in prison. And then he would try to find out what the police and prosecutors did wrong in false conviction cases and what's wrong with the state's criminal defense services. But would Governor Ryan close his prisons? Of course not. But why is that? Well, we need prisons. They're part of our crime control apparatus. I don't think Governor Ryan or anybody else who ever hopes to run for any office in any state in this Union would ever suggest closing the prisons because of the dangers of miscarriage of justice. But why, then, did he empty death row?

To the same effect, let's put Governor Romney in a different problem. Governor Romney appoints another Blue Ribbon Commission. This time he tells them to examine forensic evidence and false conviction risks in all felony cases and asks for guidelines. Back comes the Blue Ribbon Commission, and it says Governor Romney we should never, ever send people to prison if there is any chance at all that they're innocent of the crimes that they have been convicted of. Consider, first, the political question here. Would Governor Romney be happy with that kind of report? I don't think so. Why? I know they're liberal in Massachusetts, but they need prisons! People get mugged in Massachusetts, too. And they know they need prisons to confine criminal offenders.

What then do these two Blue Ribbon Commissions tell us about capital punishment and the current American condition? All over the modern world, the abolition of capital punishment, that now extends to every developed nation but the United States and Japan, has been a two-stage process. Stage one, which happens long before capital punishment is ever abolished, is that execution ceases to play any significant part in the process of crime control. Then later, sometimes a lot later, we stop the practice. We have policy debates after stage one about state execution. We know we don't need it. But now we can debate whether nonetheless we might still want it. It might make us feel good. But the debate is fatefully altered by the fact that we know we don't need it.

Executions, in my analysis, stopped being anything we needed for crime control in the United States by the middle of the twentieth century, if not before. Since about 1997, virtually everybody acknowledges in one way or another that we don't need executions in the United States. Now we're only debating whether we want them.

There are so many indications that this is true. Let me just mention a few of them. Let's talk about my home state of California, which has 250,000 people behind bars. That is ample proof that we are no slouches on the Left Coast about social control of crime. But, we also have the largest death row in the United States in California; 640 and counting. And we have averaged .8 of one execution a year for the last twelve years. In the last four years, the execution average has gone down from .8. But we tolerate it. We complain about it, but we tolerate it. The reason we tolerate it is that everybody knows we don't really need executions.

We also hear arguments from time to time, including during the 2000 presidential election, about whether one innocent man was executed in Texas or not. I'm not going to take a position on that debate, but what I want to say instead is why are we worried about just one innocent Texan being executed? Here is the reason: when we acknowledge that the penalty itself is not necessary, execution is in that sense gratuitous, even one such mistaken killing becomes not a tragic necessity but a gratuitous and arrogant error.

Now, what does this have to do with the Massachusetts Blue Ribbon Commission? I'm going to use a Texas expression to describe the Massachusetts Blue Ribbon Commission Report's penalty standard. I think that that report describes a death penalty that is "all hat and no cattle." It prescribes a death penalty that would never in all likelihood produce a single execution. Does that make the report unimportant? No, it doesn't.

But it gives the report a different kind of importance. The death penalty in Massachusetts, certainly for Governor Romney, has a great symbolic importance. But it isn't that Governor Romney wants actual executions. Not with this Commission Report! What he needs is a statute on the books. But the long-range actuarial problem with that in political morality and legal theory is that if we really don't wish to take gratuitous risks of fatal mistakes, and if we really know we don't need a death penalty for public safety, why take chances at all? Why play with symbols? What do we have to gain?

I do not think that that is a question that the Blue Ribbon Commission was designed to answer, and I'm not arguing that the work of the Commission in any sense answered that question. But I think the risks they were willing to take to avoid error and the standards that they provided as minima for the invocation of capital punishment have made it quite clear that the penalty that they are legislating for is no longer regarded as a necessity in the control of crime in the state that they were discussing. And since we are all now sure we don't need state executions, sooner, rather than later, they will cease. End of sermon.

OPEN DISCUSSION

- | | |
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| ZIMRING | Questions? |
| POKORAK | In <i>Capital Punishment and the American Agenda</i> , one of my favorite books that you wrote, you talked about the inevitable weight of this system collapsing it, even though day to day, which I won't hold you to, it was . . . |
| ZIMRING | I did not. Read Chapter 8 carefully. |
| POKORAK | Okay. |
| ZIMRING | I said between 15 and 50 years. |
| POKORAK | That's what I wanted to say. |

ZIMRING And no matter how much healthy eating I do, I may not be around to be strictly held to the back end of that prediction.

POKORAK How do you think that “15 to 50 years” is going?

ZIMRING I think we’re significantly closer to abolition in 2004 than in 1986, when the book was written. The first thing that happened, of course, is that executions go way up in the ‘90s. But we also saw that coming in 1986, in Chapter 8. And I think that we are significantly closer to a turning point toward abolition in the United States in 2004 than we were in 1986.

Remember that that first book that you’re mentioning, the one that I wrote with Gordon Hawkins, begins its last chapter with a real puzzle. We said that when you look at the next five years, if you look at the short-term future of American capital punishment in the mid-80s, you say boy, there is going to be a real bloodbath.

People were then talking about hundreds of executions a year. They hadn’t been to law school, the ones that were talking about that. But it was quite clear that the politics and practice of capital punishment would become much more extensive in the period after the mid-80s.

But we also said that in the middle and long term, American executions would end. The book said the real question is how do we get from that short-term to that long-term condition?

I didn’t have the slightest idea in 1986, which is good, because my publisher wanted another book in 2003. And it seems to me that what we have recently seen—and the crucial period of time we saw it develop in was during the 1990s—is what is going to happen, in the middle-term, and what is not.

There’s a chapter in the new book called, “The No-Win 1990s.” It begins with some of the most amazing Supreme Court law on any subject since the Dred Scott case. *Herrera v. Collins* [506 U.S. 390 (1993)], decided by the Court in 1993, has got one immortal line, just the introductory clause to a sentence: Chief Justice Rehnquist said, “Even assuming for the sake of argument that it would be unconstitutional to execute an innocent man,” . . . And he couldn’t understand why Sandra Day O’Connor got mad and wrote one of the most aggressive concurrences you will ever read. She said, in effect, well, of course it’s unconstitutional. By the end of the decade, Sandra O’Connor was saying to the lady lawyers in Minnesota, “I understand you don’t have a death penalty here.” Justice O’Connor, a conservative Republican politician from Arizona, said, “You must breathe a sign of relief everyday.”

The 1990s was a decade when we passed the Antiterrorism and Effective Death Penalty Act in 1996. We decided we were going to speed up the execution process, but then we discovered innocence problems. Well, of course it's wonderful to find out who is innocent on death row and release them. But there is a tricky little problem here. In 36% of those innocence cases so far uncovered, we find out about innocence more than nine years after the verdict. So, there is a zero-sum game between the two reform objectives of the 1990s. Speeding up the system would have killed 36 innocent persons. The system can be fast or fair, but it can't be both.

Now, the political solution to that, Massachusetts Commission style, is this: If you only have one or two cases, or even none, you can provide all the due process in the world. The problem is, in an era of victims' rights, what you're doing then is cheating not the current 98% of all murder victim families out of the vindication of the law's ultimate penalty, now you're cheating 99.7% out of the maximum penalty. I don't know whether that's a large constituency for political purposes, but the trade-offs seem awful.

I want to go back to that other major document that was written about the death penalty in the middle of the twentieth century; "The Great Britain Royal Commission." At the time of that report, the formal penalty for all murder in Great Britain was either life or death, with no standards for the choice. And one of the questions that the Commission was asked was, "Well, can't we cut back on murder as a capital crime and just use it for the worst of the worst?"

What the Royal Commission did, after giving the matter a great deal of thought, was to refuse to narrow classes of murder. They concluded that, at the end of the day, making fine distinctions in terms of the levels of culpability within the substantive law of murder is probably not going to be an effective route. They said, instead: "We've come far enough now so that the decision is whether to have the penalty or not."

Nothing happened for eleven years in Great Britain. But then, in 1964, the same thing that's been happening everywhere else in the developed world happened there. And I think the difference between the two books of mine that you mention—the difference between 1986 and 2004—is that what I have now seen is a pattern, both in public opinion and in governmental and political leadership, that will lead us toward abolition in the United States.

The intermediate steps will be horribly insincere. We're going to have things called moratoria, which are phony in one way or another. Either they say we are going to revolutionize the

criminal justice system in death cases and make it goof-proof. Or they say, "Well, we're just trying out non-execution to see what happens." Inevitably, the right kind of moratorium is just a way of buying abolition of the death penalty on the installment plan.

The politics of steps toward abolition that are going to take place in the United States over the next several years are not going to be pretty for those of us in theory land. But the end result, it seems to me, is more inevitable and much closer than the view from 1986 suggested. I feel more like a curmudgeon with a vision now, and less like a radical than then.

SHERMAN

You said that Mitt Romney probably doesn't need to execute people in Massachusetts, what he needs is a statute on the books. But I think what he really needs is votes and, to get that, a statute on the books is something that will translate to votes.

ZIMRING

Not this statute. It will be neutral in Massachusetts. It may get Romney recognition in national Republican circles. This wasn't designed to be a practical death penalty. If it were, why didn't they do a study of how many people would be death eligible? You've got to know what your market share is.

SHERMAN

I think legal people and politicians probably agree with what you said—that the death penalty is not necessary for crime control. Why, then, is there such a huge disjuncture between that recognition and the fact that most states have very little or no capital punishment—even though it's on the books—and yet the importance of it to people who vote? It is an important issue when people talk about it.

ZIMRING

Let me explain something about public opinion as a general matter. In the first instance, when you study it all over the world, you find out an interesting thing. Support for the death penalty is just as high in Great Britain in 1984, twenty years after abolition, as it is anywhere in the United States now or at anytime. Eighty-two percent support. That was during the IRA bombings in London that you may have heard of. There were bombs going off in perfectly respectable department stores at the time.

But the paradox of abolition in democracies is this: When the penalty is abolished, public opinion supports capital punishment for murder by at least 2:1 at the point of abolition. The only exceptions to that occur in politically revolutionary situations, such as the fall of the Iron Curtain when Eastern and Central European countries were suddenly removed from Soviet domination. That setting produces very interesting patterns of abolition.

The most extraordinary story is Romania, where they overthrew the previous dictatorship and they then did two things. The first thing they did is they shot Ceausescu and his wife and other central figures in the old regime. Then they swiftly abolished the death penalty. Well, was that inconsistent? Not in one sense, for these were two forceful ways of rejecting the previous regime. But those revolutionary settings are the only situations where public sentiment supports abolition, because then it's seen as a limit on governmental power.

But even though the public says it supports the death penalty, in most of the democracies that abolish capital punishment, there is almost never any serious attempt to reverse abolition. The public accepts political leadership away from executions in Germany, France, England, Australia, Canada and many other representative democracies.

Whenever the question on a survey is, "What do we do with murderers?" the answer is, "Boil them in oil." So there is nothing remarkable about public opposition to abolishing the death penalty for murder. But there is also nothing predictive about such opposition, either. Support for capital punishment, in terms of the percentage in favor of it, is slightly smaller in the South, with 81% of the executions in the United States, than it is in the Northeast, with .5 % of the executions. Go figure.

The odd thing about public opinion, and here I'm using year 2000 polls that are analyzed in some detail in my book, is that the major change isn't support for the penalty; it's the story the public tells you about why they support capital punishment.

Deterrence went from 60% to 40% support by the public as "a good reason to have a penalty." That sounds like crime control. But what is now called "closure" for victims' families went to 60% as a good reason to execute. We have an image now that we have sort of "privatized" this sanction. I don't take that seriously, in terms of that being a philosophical position to justify the death penalty. But what I'm saying is that pro-death penalty emotions are malleable in the governmental system when there is political leadership.

What I'm not clear about, and this is the other big difference between the book I wrote twenty years ago and the book I just wrote, is whether the intensity of public support in the execution belt of the U.S.—not the number of people who support it, but the intensity with which they are attached to execution—might be a great deal stronger. We don't know that on the strength of the survey research that we have, but we don't not know it either. And that's something I think we better find out.

LEIPOLD

Your discussion of a death penalty has been really confined to political subdivisions in the United States. When you quote these figures, do they include federal executions, which I would think are quite small by comparison with any state?

ZIMRING

No. There's a real problem. You see, the United States gets a bad shake, because there are a lot of countries that kill people and there are a fair number of countries in the world that count carefully in the administration of criminal justice. But the overlap between the countries that kill people and the ones that count carefully is very, very poor.

No developed nation other than Japan, which has averaged between one and four hangings a year over the last decade, no other developed country except us executes anybody. Some of the former Iron Curtain countries did until the European Union ruled that the price of admission to anything European was going to be no death penalty. So all twelve of the Central European states that had death penalties in 1987 abolished them by 1995, in some cases for human rights reasons and in some cases for straight pecuniary reasons.

Russia and the Ukraine have been out of the business of executing, or at least telling us about it, since about 1999. The Amnesty International survey each year, and this may be unfair, places the United States fourth, with about seventy-five executions a year. We're down from ninety-eight. But that was when Iraq was a player. And they counted Iran.

And then all by itself in first place is China, where 5,000 to 10,000 per year is quite possible. China, whatever else they're doing, is using capital punishment as a crime control mechanism. There are some other South Asian countries that may be doing some of that. No developed country in the world is doing that, or has for quite some time. And, in fact, putting aside 1925 to about 1945, capital punishment hasn't been important in developed countries in the twentieth century.

Europe, which abolished capital punishment after World War II, has a special reason to resent state killings. There were two regimes in Europe and Eastern Europe, Germany and the Soviet Union, which executed in the millions. And one of the utterly remarkable facts of Great Britain's Royal Commission Report of 1953 was its inattention to the Nazi and Soviet atrocities. All of the countries that lost World War II abolished capital punishment almost instantly—Austria; Germany by Constitution in 1949; Italy. There, they first had to hang the dictator, and then they abolished capital punishment.

But the British didn't even mention the Nazi and Soviet experiments. It was a subtext in my view, but nowhere in the

text. The funny thing that went on in that worldwide abolition, with Europe in the lead, was that during the period of time that the death penalty was on the books in Western Europe, abolition was a terribly parochial issue. They were debating deterrence, crime control, and “does life in prison mean life?” You’ve heard all this stuff before. The last European country to abolish was France in 1981. Then, boom, the subject changes.

By 1983 the so-called Sixth Protocol passes, and all of a sudden capital punishment is about human rights and limitations of government and human dignity. Now, one of two things is true: either the Europeans have schizophrenia and it’s well timed, or else there was a subtext to what went on between 1949 and 1981. It’s not polite to say, if you’re the Royal Commission on Capital Punishment in Great Britain, “Geez, we are doing just what the Nazis did.” That’s not a good way of making friends in the Conservative Party, I guess. All the Royal Commission said about the Nazis, in 700 pages, is in a 150-page review of ways of being executed, because hanging was getting a bad reputation. And that’s what the British used. But the Royal Commission said, “Oh, everything else is just as bad as hanging, just look at the bad reputation of lethal gas after what the Germans did. You know, if you’re going to keep executing, you might as well hang folks.”

You said the federal Congress adds a death penalty every three or four years. In fact, *Gregg v. Georgia* [428 U.S. 153 (1976)], was decided in 1976. We didn’t have a valid death penalty on the books in the federal government for anything at all until 1988. And we didn’t have the fifty or so capital crimes until 1994 and 1995.

So, in fact, while Congress has been a cheering section for state capital punishment, there are, I think, only twenty-six people on death row federally in the United States. There are 3,600 on death row totally. We’ve had four federal executions. The answer to the trivia question is, the second one was a man named Juan Garza. And I don’t look for a lot more.

LEIPOLD

So would you say that the federal government’s regime has the same level of political comfort on the death penalty that Governor Romney might have if the legislature would buy into this report?

ZIMRING

With one exception. My law school classmate is the current Attorney General of the United States. I don’t think the President of the United States cares how many people are executed anywhere. But John Ashcroft has been leading the Justice Department during an amazing period of time, when he has been really trying to democratize death in the federal system.

You see, the first federal death penalty was a peculiar law. The “drug death penalty” of 1988 was passed because New York’s Republican Senator D’Amato was getting upset, because Democratic governors kept vetoing state death penalties in New York. So Al D’Amato passed a federal death penalty for drug cases. Now, that’s where one drug kingpin kills somebody, usually another drug operative. Hardly the sort of thing that a Victims’ Rights Amendment would start the national government out with! But he figured it would drum up business in New York, which after all was the drug use capital of the United States.

But what it did instead was drum up business in Texas and Alabama and Oklahoma. And, in fact, what the Justice Department was doing prior to the current administration was only using the federal death penalty in environments that were politically welcoming of it, where it was also redundant.

That is not the Ashcroft Plan. He really believes in the death penalty. And the last I read, the federal government had lost in penalty trials fourteen of its last sixteen death cases. Gosh, this is an interesting country.

