THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT

FRANKLIN E. ZIMRING

The Contradictions of American Capital Punishment

Franklin E. Zimring

OXFORD
UNIVERSITY PRESS
2003

OXFORD
UNIVERSITY PRESS

Oxford New York
Auckland Bangkok Buenos Aires Cape Town Chennai
Dar es Salaam Delhi Hong Kong Istanbul Karachi Kolkata
Kuala Lumpur Madrid Melbourne Mexico City Mumbai Nairobi
São Paulo Shanghai Taipei Tokyo Toronto

Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016

www.oup.com

Oxford is a registered trademark of Oxford University Press

Library of Congress Cataloging-in-Publication Data
Zimring, Franklin E.
The contradictions of American capital punishment /
by Franklin E. Zimring.
p. cm. — (Studies in crime and public policy)
Includes bibliographical references and index.
ISBN 0-19-515236-0
Capital punishment—United States.
I. Title. II. Series.
HV8699.U5 Z563 2003
364.33'0973—dc21
2002012490

1 3 5 7 9 8 6 4 2
Printed in the United States of America
on acid-free paper

Preface

CAPITAL PUNISHMENT in the United States is an issue of great moral, political, legal, and practical importance. But the practice of executions in the United States in the early years of the twenty-first century is one other thing: It is a puzzle.

Why does the United States execute when every other developed Western nation has ceased to use the taking of life as a legal punishment? What elements of American history and culture create an affinity for state executions? What is the most likely future of the death penalty in the United States?

This book is my effort to resolve the puzzle of American capital punishment, 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.

My explanation revolves around three distinctive interpretations of capital punishment as an American phenomenon. I show that some of the same pressures that have led to the condemnation of the death penalty in Europe have produced instead its reinvention in the United States. The proponents of capital punishment have engineered a symbolic transformation over the last two decades. We now tell ourselves that an executing government is acting in the interest of victims and communities rather than in a display of governmental power and dominance. The net effect of this recent change is that the United States and the rest of the Western world are further apart on the death penalty than ever before, and in

more disagreement over capital punishment than over any other important political question.

But why do Americans reinvent what other developed nations abolish? The origins of our current against-the-grain death penalty policy can be found in the earlier history of nongovernmental violence that was present in many parts of the United States but particularly rampant in the South. Where nostalgia still exists for vigilante values, citizens are prone to identify with executions as a community process rather than as the activity of a distant and self-interested government. This identification with punishment may lead citizens to be less worried about even lethal punishments by government than they are about other governmental powers.

But there is a powerful contradiction in American culture because our fear of government and due process tradition is also strong, as powerful a tradition of distrust as that found anywhere in the world. So we distrust government power, yet allow its maximum use. That contradiction is why executions generate ambivalence and conflict. The prospect of not being able to execute makes citizens angry, while executions themselves make some of the same citizens worry about arbitrary and erroneous government power. The American ambivalence about executions is a product of contradictory impulses about limits on governmental power.

The last section of this book documents the pattern of increasing conflict about executions in the United States a quarter-century after the U.S. Supreme Court allowed their reintroduction in 1976. The contradiction between due process values and the demand for executions grows more problematic with every new year. The United States suffers domestic ambivalence about executions and is beset by a community of developed nations that regards executions as moral depravity. There is a defensive quality to the justifications our politicians put forth in support of killing as criminal punishment. And there is no strong sense in current affairs that those who support executions occupy any moral high ground in the debate over capital punishment.

There are indications that the end game for the death penalty in the United States has begun. Escalating domestic conflict and international hostility together guarantee that the execution of criminals will not become a routine activity of American government. Tomorrow's elections and next week's judicial appointments can bring the end of the death penalty in the United States ten years closer or push it further away. But it will take abrupt and regressive changes in both American political development and in the interdependence of developed nations to rescue American executioners from the permanent retirement that is now a generation overdue.

Acknowledgments

THIS VENTURE needed and received help from a staggering variety of people. Dedi Felman of Oxford University Press served as the agent provocateur of this project. Financial support came from the Boalt Hall Fund and the Criminal Justice Research Program of the Earl Warren Legal Institute. The principal research assistants were Monica Swanson and Tom Clifford. Amanda Packel, the Young Scholar in the Institute during 2002, helped to rehabilitate the book's references and edit the text. Toni Mendicino supervised the preparation of the manuscript. As the project encountered different needs in subfields of social science, I benefited from the wisdom of many colleagues. Robert Kagan and Jack Citron were guides to the political science of trust in government. Phoebe Ellsworth, Sam Gross, Merrill Shanks, David Sheaves, Tom Smith, Lois Timms-Ferrara, and Patricia Vanderwald provided help in the many adventures I had with survey research. Lawrence Friedman, Mark Leff, Harry Scheiber, and Tony Freyer provided historical guidance.

Several colleagues provided critical readings of the entire manuscript: Dedi Felman, Lawrence Friedman, David Garland, Sam Kamin, Deborah Leff, Mark Leff, and Robert Weisberg all read versions of the book and each provided important help in its improvement. Cristina de Maglie, José Luis Díez Ripollés, Jeffrey Fagan, Roger Hood, David Johnson, Michael Laurence, James Liebman, Norval Morris, and Eric Prokosch read and reacted to pieces of the manuscript as it was being written.

Contents

I

DIVERGENT TRENDS

THIS INTRODUCTORY SECTION tells the story of the profound changes in perception and policy that have created the conflict between the United States and the rest of the developed West on the question of capital punishment. Chapter 1 provides a short description of recent activity in the United States, producing a snapshot of policies and the policy conflicts about capital punishment at the turn of the twenty-first century. Chapter 2 provides a longer account of the changes in death penalty policy in Europe over the period since the end of World War II. An important part of the current difference in outlook between Europe and the United States results from dramatic changes in the European view of the death penalty that have emerged only since the 1980s. How and why did capital punishment become a human rights question? Why do our friends and neighbors in the developed West now regard American capital punishment as fundamentally uncivilized? What can the recent history in Europe tell us about the potential for change in the United States?

Chapter 3 profiles the changing imagery of the death penalty since 1980 in the United States, searching for clues to explain why the policies in the United States differ by examining the way in which Americans talk to each other about the death penalty. Of particular importance in this search for explanations of current U.S. policy is the shift in images of executions from a governmental act to a service program for homicide survivors, a degovernmentalization of the execution that has been the most dramatic change in the popular imagery of capital punishment. The changes documented in Chapter 3 provide a basis for speculating about what differences in culture, temperament, and history make this new image of capital punishment in the United States more acceptable to public opinion.

1

The Peculiar Present of American Capital Punishment

THE UNITED STATES GOVERNMENT was about to make history in the spring of 2001, and it looked like a public relations bonanza for capital punishment. The pending execution of Timothy McVeigh seemed like an ideal case to launch a program of lethal injections as criminal punishment by the national government of the United States. The McVeigh case combined a terrible crime with a defiantly guilty defendant and none of the problems of discrimination and uncertainty that bedevil most executions. McVeigh had detonated the bomb that killed 168 occupants of the Oklahoma City Federal Building in 1995. The defendant had planned to kill hundreds of people he did not know to express his anger at the U.S. government's behavior two years before in Waco, Texas. He was adequately defended at trial by a team of competent lawyers, at a cost to government that exceeded 100 times what states such as Texas and Virginia pay for defense services in death cases. McVeigh had publicly acknowledged his guilt and moved up the date of his execution by abandoning legal appeals, thus providing a grateful federal government with a mass murderer of women and children for the first federal execution since 1963. Even better, this defendant was not retarded and was not a member of a disadvantaged minority.

By May 2001 there had been more than 700 executions since the U.S. Supreme Court allowed the death penalty back on American soil, but no other condemned criminal had presented credentials of this caliber for a feel-good execution, for a triumphant reaffirmation that government killing can be a good thing. There was unprecedented media attention not only

throughout the United States but around the world. Perhaps executing the monster of Oklahoma City might even silence some of our foreign critics?

But then things started going wrong. Four days prior to McVeigh's scheduled execution date in May, the Federal Bureau of Investigation announced that it had just discovered several thousand pages of investigative documents of the kind that the government had promised to give to the defense before trial. An embarrassed Attorney General of the United States postponed the execution on his own initiative from May 17 to June 11, to give the defense lawyers time to review the newly discovered material. The media reported that this three and a half week delay created an overwhelming sense of anticlimax for the victims' families (whose psychological well-being was supposed to be a major reason for the execution) as well as for the media and the public. When the McVeigh defense team requested a longer delay in the execution to allow more review of the mishandled documents, the government refused to cooperate because there was no doubt of the condemned man's guilt. But why then the original delay in a case where the defendant had confessed in out-of-court statements? Why put the victims through one more emotional roller-coaster ride? The rescheduled lethal injection occurred on June 11, 2001. Ambivalence and a sense of anticlimax had infected even this exemplary execution.

A Matter of Timing

One accident of timing occasioned by the delay in Timothy McVeigh's execution concerned the travel schedule of the new U.S. President George W. Bush, whose first presidential tour of Europe began on June 13, 2001. The president's policy agenda on this trip would not add to his popularity in any of the capitals he visited: He was announcing that the United States would proceed with its own missile defense system despite objections on the continent, and he still opposed the Kyoto Treaty to control global warming that was supported by every major government in Europe. So demonstrations in the streets of London and Stockholm could be expected during the Bush tour. But the leading complaint on placards and in the streets in June 2001 was not global warming or missile defense or any other item on Mr. Bush's international agenda. It was capital punishment in the United States. And executions in America were condemned not only by street demonstrators but by the European governmental leadership. It was a matter of unfortunate timing that an American president was touring Europe that June, just after the American national government conducted its first execution in thirty-eight years.

For most European critics, however, the problem created by the execution of Timothy McVeigh was that it happened not in the wrong month but in the wrong century. By 2001, the United States and the developed

nations of Europe and the former Commonwealth nations were further apart on the question of state executions than on any other issue. What the Council of Europe regarded as an option that should be forbidden to any civilized nation was the official policy of the national government of the United States and thirty-eight of its fifty states.

As we see below, the huge gulf that separates the United States and other Western nations at the turn of the twenty-first century is of very recent origin. Up until the 1970s, emerging policy trends toward capital punishment seemed similar throughout the developed world, and the United States did not seem out of step with the general trend. In the quarter-century after 1975, however, policy in both the United States and the rest of the developed West has been changing rapidly and in opposite directions.

The Singular American Present

At the beginning of the twenty-first century, the position of the United States on the law and practice of capital punishment is singular. Alone among the Western democracies, state governments in the United States authorize and conduct executions as criminal punishment and show no clear indication of a willingness to stop doing so. Alone among nations with strong traditions of due process in criminal procedure, criminal justice systems in the United States attempt to merge a system of extensive procedures and review with execution as a legal outcome. It has been an impossible task. The result has been a frustrating and lengthy process that combines all of the disadvantages of procedural regularity with unprincipled and arbitrary outcomes.

For much of the modern era, policy trends in the United States did not contradict the drift toward abolition in other developed nations. During the first half of the period after World War II, executions in the United States declined in much the same pattern found after World War II in Europe and the British Commonwealth and profiled in Chapter 2. Figure 1.1 profiles executions over time in the United States by year, combining execution totals from all states conducting them into a national aggregate. Between 1950 and 1965, executions steadily diminished from over a hundred a year to under ten.

By 1967, federal courts had imposed a prohibition on execution so that a series of challenges to the principles and procedures of capital punishment could be decided. The nationwide judicial moratorium on executions would last a decade. During the 1970s, the U.S. Supreme Court would first tiptoe to the brink of judicial abolition of capital punishment in 1972—when *Furman v. Georgia* invalidated all death penalty statutes that were then in effect—and then pull back, allowing states to administer somewhat more structured

regimes of capital punishment in a series of decisions issued in 1976: *Gregg v. Georgia*, *Roberts v. Louisiana*, *Proffitt v. Florida*, and *Jurek v. Texas*.

All of the divergent elements of American policy that are evident in current international comparisons are based on changes in policy in the United States that have occurred since those 1976 Supreme Court decisions. While the rest of the Western world has been creating and attempting to enforce nonexecution as a human rights orthodoxy, the policy of the national government in the United States has shifted to the toleration of capital punishment by the states, and a series of capital crimes have been added by the federal Congress for the limited jurisdiction of the federal government. The result of these shifts in policy is reflected in the trends in the number of executions by year since 1977 displayed on the right-hand side of Figure 1.1.

Change or Regression?

By the year 2000 the volume of executions by American states had bounced back to levels quite close to those experienced during the early 1950s. The crude visual impression of Figure 1.1 is thus of an almost symmetrical policy pattern in the United States, with declines to zero in the first half of the postwar period and a return to a level of execution in the late 1990s quite close to the historical pattern of fifty years before. Was this just a return to the capital punishment policy of an earlier era?

There is a kernel of truth to the visual appearance of decline followed by return to a previous equilibrium, but the symmetrical national aggregate pattern over time since 1950 conveys two false impressions. In the first place, aggregate criminal execution levels for the United States as a whole

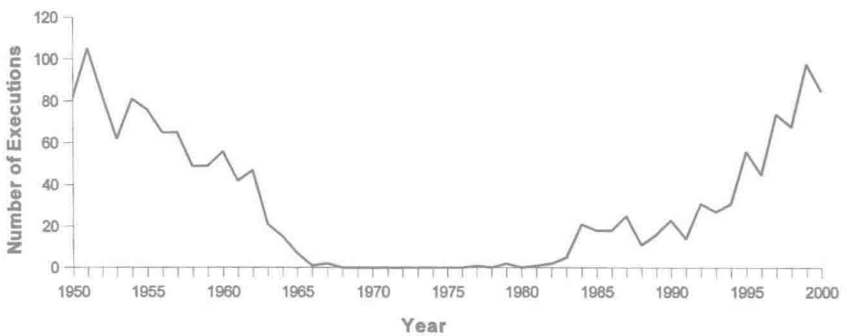

Figure 1.1. U.S. executions by year, 1950–2000. *Source*: U.S. Department of Justice, Bureau of Justice Statistics. Available at http://www.ojp.usdoj.gov/bjs.glance/tables/exetab.htm.

hide the enormous variations among regions and individual states that are one of the chief characteristics of American capital punishment. Twelve of the fifty United States provide no death penalty in their criminal statutes, and several other states have conducted no executions. South Dakota and New Hampshire are death penalty states that have executed no one in over half a century. The populous state of New Jersey legislated a death penalty in 1980 that has not produced an execution in its first two decades (Death Penalty Information Center 2002).

Several states in the American South are at the other extreme in the distribution of American executions. In the year 2000, for example, seventy-six of the eighty-five executions in the United States (89 percent of the total) were in the South, even though that region accounts for about one-third of the United States population and about 40 percent of the American states that authorize a death penalty. During the year 2000, two-thirds of all American executions were conducted in just three of the thirty-eight American states that authorize executions: Texas, Oklahoma, and Virginia. The state of Texas alone executes more people (forty in 2000) in an average year than had been executed in the quarter of a century after 1977 in the four most populous northern states that have experienced any executions: California (8), Pennsylvania (3), Illinois (12), and Ohio (1) (Death Penalty Information Center 2002).

With variations in death penalty policy within the United States that are enormous, there is no single "American pattern" to be represented in aggregate statistics. Appreciating the absence of a single national profile is the first step in understanding the causes and meanings of variation between the states.

A Different System

The second respect in which the similarity in numbers of executions between the 1950s and the late 1990s is misleading is that the capital punishment systems that produced these similar numbers of executions in the 1980s and 1990s had changed drastically from the systems that were functioning in the United States in the 1950s. The total population of condemned prisoners awaiting execution in the United States in 1953 was 131, compared with a total of sixty-two executions that year. The population on death row was thus about twice the annual total of executions. In the year 2000, by contrast, the eighty-five persons executed were drawn from a population of persons under sentence of death that exceeded 3500—more than forty condemned prisoners for every execution. Figure 1.2 shows the pattern for persons under death sentence and execution since 1953.

The current circumstances of capital punishment in the United States are distinguished from earlier eras by huge death row populations, very long delays between the sentence of death and the earliest that an execution might

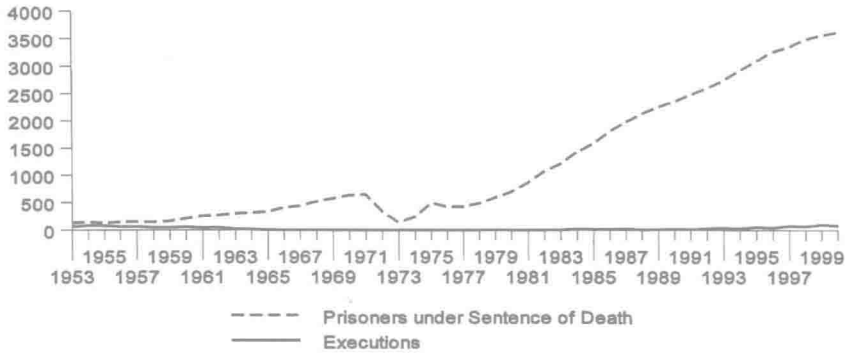

Figure 1.2. Prisoners under sentence of death and executions, by year, United States 1953–2000. *Source*: U.S. Department of Justice, Bureau of Justice Statistics, available at http://www.ojp.usdoj.gov/bjs/glance/tables/exetab.htm and http://www.ojp.usdoj.gov/bjs/glance/tables/drtab.htm.

occur, and a relatively small likelihood at current rates that a particular death sentence will lead to an execution.

The very high ratio of condemned prisoners to executions in many states—200 to 1 rather than the 40 to 1 in many northern jurisdictions—has meant that there is no longer a clear and proximate relationship between death sentences and executions. Being sentenced to death is, in most states north of the Mason-Dixon line, one modest step in a process that will produce a palpable risk of execution only after the passage of many years and several further legal contingencies. As later chapters of this book show, the variation between states in the risk that a death sentence will result in an execution is often vast.

The delay and uncertainty of the current system have produced anger and frustration. About seven in every ten death sentences are estimated to be invalidated by appellate review in the state or federal court (Liebman et al. 2000), but these aggregate figures again hide wide variation among American states. Some states reverse eight out of every ten death sentences on appeal, while other states affirm eight out of ten. And the current system of American capital punishment seems to be hated in equal measure by the opponents of capital punishment systems and by those who support execution but desire more certainty and less delay.

The Legal Framework

The laws and procedures that have produced the high rates of death sentences, the substantial delays, and the variations among states are the

product of substantive legal changes put into effect by the U.S. Supreme Court over the past thirty years. This federal constitutional framework is the product of two contrasting precedents of the 1970s and a long series of subsidiary high court decisions.

The U.S. Supreme Court first ruled in 1972 in *Furman v. Georgia* that state laws that delegated to the jury the choice between imprisonment and execution for specific crimes without any clear guidelines were unconstitutional as cruel and unusual punishment in violation of the Eighth Amendment (*Furman v. Georgia*). Four years later, the Supreme Court ruled that legislative standards that provided mandatory death penalties for some types of murder were also unconstitutional (*Roberts v. Louisiana*; *Woodson v. North Carolina*). But in *Gregg v. Georgia*, *Jurek v. Texas*, and *Proffitt v. Florida*, statutes that provided a series of aggravating circumstances in the commission of murders to be weighed by juries against mitigating factors were upheld by the Court as acceptable structures for guiding the jury to choose in individual cases between life and death. Aggravating factors that could allow the consideration of the death penalty included the commission of multiple homicides, homicide committed during other felonies, torture, and contract killings. Mitigating circumstances that could allow juries and judges to choose imprisonment rather than death included youth, mental and emotional disturbance, and other factors.

The result of this search for guided discretion was a patchwork of decisions in the 1970s and 1980s on a wide variety of topics in which some rules were clear and others decidedly vague. States were allowed substantial variations in the circumstances that they could select to aggravate and mitigate murders, but the ultimate standards were always matters of federal law, and the ultimate judgment was that of federal courts.

The problem with approving the results in both the 1972 decision of *Furman v. Georgia* and the 1976 approval of guided discretion in the *Gregg v. Georgia* decision is that there are no observable differences between outcomes in the "standardless" discretion disapproved of in *Furman* and the "guided discretion" upheld in *Gregg*. It is much easier to support the result in one case or the other than to approve of both, but both decisions remain precedent and jointly have determined the course of the constitutional law of capital punishment.

One result of the decisions in *Furman* and *Gregg* was that federal courts became the ultimate authority on what circumstances and procedures could be used by the states in death cases. Whereas the Supreme Court of the United States had only rarely reviewed state death sentences in the century before the *Furman* decision in 1972, the substantive law and procedure in state death cases became the most frequent business of that court in the two decades after 1976.

But death penalty jurisprudence was not a specialization that Supreme Court justices welcomed. Most of the justices who heard cases in the last quarter of the twentieth century disliked administering a detailed code of