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INHERITING THE WIND: THE SUPREME COURT AND CAPITAL PUNISHMENT IN THE 1990s

FRANKLIN E. ZIMRING*

THIS paper attempts to set a context for a discussion of the U.S. Supreme Court and capital punishment in the 1990s. I hope to survey a number of the political and legal developments of the 1980s that will have a significant impact on the character of the Court's involvement with capital punishment in the future. The plan of this Article is to march from the general to the specific, addressing in this order: 1) the status of capital punishment in the community of nations in the early 1990s; 2) recent U.S. trends in death sentences, death row populations, and executions; and 3) the institutional pressures associated with the Court's prominent role in capital cases and the execution process.

The justification for this broad survey is my belief that all of the aspects listed above are important parts of the environment of capital punishment that both define the Court's work and determine the influence of this Court's pronouncements on American society and criminal justice. My conclusion after peeking at the multiple layers of influence on the Court is that the tensions and conflicts about the death penalty are not likely to abate in the United States or the Supreme Court during the 1990s. Because of the Court's doctrinal statements during the past decade, the stalemate pattern of high death sentence rates but very few executions outside traditional high execution states is unlikely to continue during the 1990s. Instead, there may be an increase in executions in the coming decade that would be a significant break with the first fifteen years after *Gregg v. Georgia*.¹ But the increase in executions will not reduce the conflict about the death penalty in the country or the Court. The roots of the conflict about executions in the United States are deeper than the federal court pronouncements that the Supreme Court has sought to reverse. Pressure toward a broader execution policy in the United States will generate both resistance and ambivalence. The courts are likely to remain a

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1. 428 U.S. 153 (1976).

focal point for public unease. Having sown the seeds for either large increases in executions or some other institutional actors taking responsibility for avoiding executions, the U.S. Supreme Court is unlikely to achieve the distance from executions and death penalty policy that has been its primary institutional ambition for more than a decade.

I. INTERNATIONAL TRENDS

My survey of the 1990s will start with the good news: The trend toward abolition of capital punishment continued during the 1980s and gained both force and generality toward the end of that decade. The end of the death penalty was achieved by the early 1980s in the European Economic Community countries and abolition also was accomplished in most of the major nations of the British Commonwealth.² Efforts to restore capital punishment in the United Kingdom and Canada were decisively defeated.³ No western nation reintroduced the death penalty in the decade.⁴ By the count of Amnesty International, during the 1980s eighteen nations abolished capital punishment for all crimes and four abolished capital punishment for ordinary crimes only.⁵ Of the twenty-two abolitions, sixteen occurred in the second half of the decade.⁶

The upheavals in Eastern Europe and South Africa have been followed by strong pressure away from the death penalty. Formal abolition of the death penalty has occurred in Romania, Hungary, and Czechoslovakia.⁷ The former German Democratic Republic, which had abolished its death penalty in 1987, merged into an abolitionist union.⁸ Political movements toward abolition are found almost everywhere in the former Communist sphere when democratic reforms take hold, including the Soviet Union before its breakup.⁹ In South Africa,

2. Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries*, ACT 50/01/92, Feb. 1992 (Table 1).

3. The United Kingdom House of Commons defeated, by a vote of 362-245, a motion to make terrorism a capital offense. See Jon Nordheimer, *Commons Defeats a Move to Bring Back Hanging*, N.Y. TIMES, July 14, 1983, at A6. The Canadian Parliament defeated, by a vote of 148-127, a motion to restore capital punishment. See *Canada's Parliament Rejects Move to Restore Executions*, N.Y. TIMES, July 1, 1987, at A7.

4. Amnesty International, *supra* note 2 (Tbl. 1).

5. Amnesty International, *supra* note 2 (Tbls. 1 & 2).

6. Amnesty International, *supra* note 2 (Tbls. 1 & 2).

7. Amnesty International, *supra* note 2 (Tbl. 1).

8. Amnesty International, *supra* note 2 (Tbl. 1, note ***).

9. The Soviet government reported to a United Nations survey that executions were "a temporary and exceptional measure . . . temporarily applied pending [their] complete abolition" in 1987. See Roger Hood, *The Death Penalty in International Perspective*, (Amnesty International), Dec. 11, 1991, at 5.

which averaged well over 100 executions a year in the late 1970s and early 1980s, executions were suspended in 1990 and a law reform process that could point toward abolition has begun.¹⁰

The move toward abolition in many Eastern European countries has been abrupt, without much evidence of the incremental and gradual steps many western nations have experienced. The short time between the collapse of predecessor regimes and abolition suggests that rejection of the death penalty is part of the discrediting of the preceding regimes more than a modeling of the new government on particular western models. In Romania, shooting the previous dictator and then abolishing the death penalty seem two ways of rejecting his regime in much the same way that Germany and Italy moved away from capital punishment shortly after the second world war while the major Allied powers retained the death penalty for decades thereafter.¹¹

The enthusiasm for abolition in Eastern Europe seems a demonstration that the movement away from executions is seen principally as a limit on government power. The association between nonexecution policy and government respect for human rights on other fronts

is not, of course, fortuitous. Both nonexecution and human rights policy are derived from the same conception of the proper relationship between citizen and government in the political and social order. That conception involves a negative constraint on government regarding its use of individuals as a means to political ends.¹²

It is precisely that "negative constraint on government" that makes the end of executions an early agenda item for democratization in Eastern Europe and the Soviet Union. The Eastern European developments since 1989 provide a time-series demonstration of the link between abolition and other human rights to confirm the cross-sectional evidence that had been used to support the theory in earlier scholarship.

As Eastern Europe was joining Western Europe in policies of non-execution, execution as an instrument of state power has become almost exclusively a Third World phenomenon practiced with

10. See Jan H. van Rooyen, *Toward a New Post-Apartheid South Africa: With or Without the Death Sentence?* 20 FLA. ST. U. L. REV. (forthcoming 1993).

11. Amnesty International, *supra* note 2 (Tbl. 1), dating abolition by the Federal Republic of Germany in 1949 and by Italy in 1947 (for ordinary crimes); France did not abolish until 1981. The two-step English process took place in 1965 and 1970. FRANKLIN ZIMRING AND GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 12 (1986) (English data).

12. ZIMRING AND HAWKINS, *supra* note 11, at 23.

enthusiasm only in Moslem states, in China, and parts of Africa.¹³ In the industrial West, only the United States has executions. This isolation of the United States among its peers is more pronounced in the 1990s than ever before.

II. THE UNITED STATES IN THE 1980s

To classify the United States as a nation with capital punishment in the 1980s would be inaccurate and misleading. The United States federal government has not conducted an execution since 1963 and in all likelihood will not have one until the twenty-first century.¹⁴ The fifty state governments are divided into three categories, with about one-fourth of the states having no death penalty, another fourth maintaining a death penalty on the statute books and conducting at least one execution during the decade, and half having a capital punishment statute on the books but conducting no executions since the 1960s.¹⁵

Throughout the 1980s, the United States was a place where death sentences were not uncommon in a majority of states but only thirteen states executed anyone.¹⁶ The resulting buildup of death row populations through the decade is shown in Figure 1, which compares executions in the United States by year with the January 1 death row population for that year and the number of death sentences.

The visually striking element of this graphic is of substantive importance: It is difficult to fit execution trends and death row populations on the same chart. Figure 1 shows new death sentences averaging above 250 per year throughout the 1980s while the execution total increased from one in 1981 to twenty-one in 1984, then stabilized at about twenty per year for the second half of the decade. The result is that death row populations expanded inexorably from fewer than 600 at the beginning of 1980 to 2,250 by December 1989.

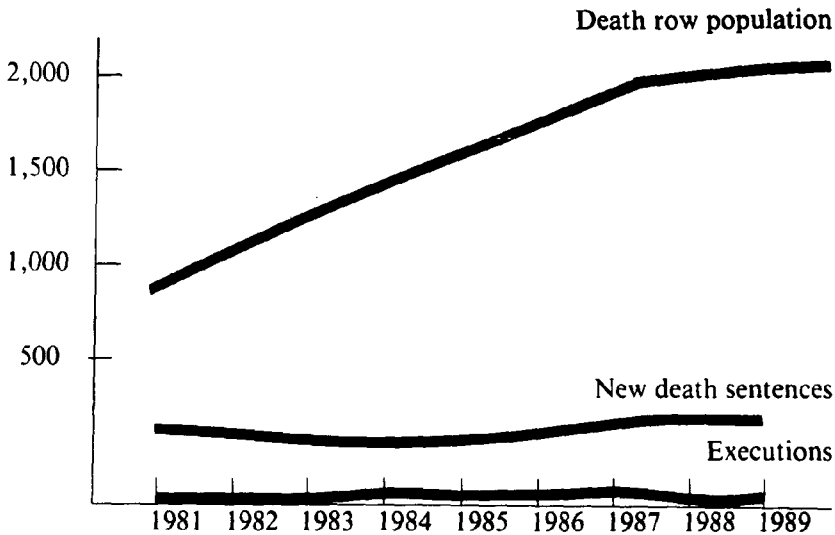
13. Amnesty International, *supra* note 2 (Tbl. 4).

14. Franklin Zimring, *Drug Death Penalty: A Federal Tantrum*, N.Y. TIMES, Sept. 16, 1988, at A35.

15. Franklin Zimring, *Ambivalence in State Capital Punishment Policy: An Empirical Sounding*, 18 N.Y.U. REV. L. & SOC. CHANGE 729, 730 (1990).

16. Alabama, Florida, Georgia, Indiana, Louisiana, Mississippi, Missouri, Nevada, North Carolina, South Carolina, Texas, Utah, and Virginia. *Id.* at 733 n.7.

Figure 1. *Executions, New Death Sentences, and Death Row Population in the United States in the 1980s*



Source, Death Row Population and Executions: DEATH ROW U.S.A. (NAACP Def. & Legal Educ. Fund, New York, N.Y.), Apr. 24, 1991; Source, New Death Sentences: BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., CAPITAL PUNISHMENT 1990.

Three aspects of the trend comparison between executions and death row populations are noteworthy. First, the number of executions in the United States rose quickly in the early 1980s but leveled off for the rest of the decade. Because the death row population kept growing, the rate of execution measured against the total population at risk fell during the late 1980s from its 1984 peak of just under two percent. The average number of executions during 1984-86 was nineteen, compared with the eighteen per year average during 1987-89. But this seemingly flat total comprised 1.2% of the average year-end death row population in the earlier years and only 0.8% of the year-end average in the later years.¹⁷

Second, the huge growth in death row populations that took place in the 1980s was not a product of an upward trend in death sentences. There was about a three percent expansion in death sentences, from 245 in 1981 to 251 in 1989, but each year's rate of death sentences was

17. The year-end death row average for 1984-86 was 1,586 and for 1987-89 was 2,119. DEATH ROW U.S.A. (NAACP Def. & Legal Educ. Fund, New York, N.Y.), Apr. 24, 1991.

more than ten times its rate of executions. Unless major changes in sentencing, execution, or commutation policies come on line, the death row population could exceed 5,000 in the next decade.

The third notable fact about trends in death row populations and executions is that the volume of executions has not responded in any obvious way to variations in death row population during the 1980s. If and when the rate of execution responds to fluctuations in the population at risk, execution numbers will constantly increase until the number of executions and other removals from death row equals or exceeds the rate of new death sentences, currently slightly fewer than 300 per year.

Very few states actively participated in the execution business during the 1980s, creating one major restraint on executions during that time. Only a third of the jurisdictions with death penalties executed anyone during the decade, and the concentration of executions among a very few Southern states persisted throughout the decade. Between 1977 and 1985, thirty-six of fifty executions, or seventy-two percent of the total, took place in four states: Texas, Florida, Georgia, and Louisiana.¹⁸ From 1986 through the end of 1989, fifty of the seventy executions that occurred, just over seventy percent, were in the same four states.¹⁹ When four jurisdictions out of fifty execute three times as many persons as all other jurisdictions combined, executions cannot yet be considered a national policy. This hyperconcentration would also appear to be an unstable situation.

One of the most remarkable elements of the death penalty history of the late 1980s was the drop in new states conducting executions. From 1981 through 1985, nine states conducted their first execution.²⁰ By contrast, from 1985 through 1990, only two of the twenty-five states with death penalties but no prior executions joined the execution roster.²¹

One other significant feature of the capital punishment policies of the 1980s was the extent to which the states that began to execute in that decade were a self-selected sample of jurisdictions with long histories of high levels of executions. Of the thirteen states that started executions before 1990,²² ten were also among the twelve states with

18. *Id.* at 175-77.

19. *Id.* at 177-78.

20. ZIMRING AND HAWKINS, *supra* note 11, at 129 (Tbl. 7-1).

21. Zimring, *supra* note 15, at 732 (Tbl. 1).

22. Alabama, Florida, Georgia, Indiana, Louisiana, Mississippi, Missouri, Nevada, North Carolina, South Carolina, Texas, Utah, and Virginia. Zimring, *supra* note 15, at 734 (Tbl. 2).

the highest per capita rate of executions in the 1950s,²³ the last decade during which state execution behavior was substantially free of federal court control. The odds against this kind of recent selection occurring by chance are less than one in 22,000.²⁴ Thus, those states that were historically strongly inclined toward execution were most likely to have carried out an execution during the decade despite the intervention of federal courts. This suggests that local climate in the twenty-three death penalty states that did not execute in the 1980s contributed in some important way to this result.²⁵ While the primary restraint on execution in the United States during the 1980s was the federal court system, the pattern of executions also suggests that complete restraint occurred most often in those jurisdictions with some historic ambivalence about capital punishment.

Nonexecution in twenty-three of thirty-six capital punishment states during the 1980s occurred because of a complex interaction between federal law and procedures and local conditions. The national government was also surely a restraint in the most execution-prone states. Texas, for example, had the largest number of executions in the United States during the decade, but its 1990 death row was, nonetheless, ten times the number of its executions during the 1980s.²⁶

A variety of processes not well understood leveled off the growth in execution and the spread of execution to new states from the mid-1980s on. As can be seen in the next section, however, the rulings of the U.S. Supreme Court during this period were not directed at restraining executions.

III. THE SUPREME COURT IN THE 1980S

Most of the opinions issued by the U.S. Supreme Court in death penalty cases during the 1980s fit surprisingly well into a global summary statement: Most of the justices have been trying to make the Court a less important institution in the regulation of capital punishment and to make capital cases a less conspicuous and less important part of the Court's workload.

The effort to disengage the Court from capital punishment work has raised issues of both substance and procedure and has involved

23. Alabama, Florida, Georgia, Louisiana, Mississippi, Nevada, South Carolina, Texas, Utah, and Virginia. Zimring, *supra* note 15, at 738 (Tbl. 3).

24. Zimring, *supra* note 15, at 736-37.

25. Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Kentucky, Maryland, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Washington, and Wyoming. Zimring, *supra* note 15, at 734.

26. Zimring, *supra* note 15, at 731 (Fig. 2).

Chief Justice Rehnquist and former Justice Powell in extrajudicial lobbying to reduce the press of capital punishment cases on the Court. As early as 1983, an analysis of the Court's work was appropriately titled *Deregulating Death*,²⁷ and both the force behind this campaign and the divisiveness of these cases for the justices increased after mid-decade. Many of the holdings in the 1980s illustrate the irregularities the Court was willing to tolerate in the name of federalism. These irregularities included execution of the retarded²⁸ and upholding death sentences despite statistical evidence of racial disproportion in death sentences.²⁹ But the most noteworthy departure from usual Court decorum—and the clearest window into the majority's motivations—came in the sustained attack on habeas corpus as a mechanism to keep capital cases continually before the federal courts and ultimately the Supreme Court. Strong pressure was exerted to reduce the occasions on which substantive constitutional challenges could be heard by federal courts in capital cases in the report of the Powell Commission in 1989,³⁰ in Chief Justice Rehnquist's lobbying,³¹ and finally in the Court's decision in *McCleskey v. Zant*.³²

The problems with repetitive raising of issues already litigated in state or federal courts have been variously described as abuse of the writ, excessive delay in execution as a frustration of justice, or the subversion of the system by manipulative lawyers.³³ At one level, the debate about habeas corpus can be seen as a power struggle between capital defendants and the justices for control of federal court dockets. In this sense, it is the potential of multiple habeas procedures to take agenda-setting power out of the hands of the Supreme Court Justices that particularly bothers the opponents of multiple habeas. In fact, defendants do not have the power by themselves to set a compulsory agenda for the U.S. Supreme Court. But sympathetic hearings given to condemned prisoners by federal district courts can be a chronic problem for a Supreme Court that wishes to downplay the place of death cases in its workload.

If too many death cases are viewed as the overriding problem, an obvious solution would be a set of substantive principles and jurisdic-

27. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.

28. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

29. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

30. Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, *Report on Habeas Corpus in Capital Cases*, 45 CRIM. L. REP. (BNA) 3239 (1989) [hereinafter Powell Commission].

31. See, e.g., *Text of Chief Justice William Rehnquist's remarks to ABA*, reprinted in CHI. DAILY L. BULL., Feb. 14, 1989, at 2.

32. 111 S. Ct. 1454 (1991).

33. See, e.g., *Text of Chief Justice William Rehnquist's remarks, supra* note 31.

tional limits that restrict the discretion of lower federal courts. If norms of nonintervention can be imposed on the federal courts, nonintervention can become the neutral principle that obliges the Supreme Court to avoid efforts to restrain executions. Once such norms have the force of law, perhaps the public will see that the Supreme Court Justices cannot intervene: Their hands are tied. This will, of course, require short memories about the fact that the justices, after lobbying for outside restriction for years, finally fashioned the nonintervention knot themselves.

Why this appetite to avoid decisionmaking responsibilities in death cases? I do not think that enthusiasm for executions can explain the Court majority mustered in *McCleskey*. Some justices may have a substantive pro-capital punishment bias, but Justice White, for example, voted with the majority in *McCleskey*³⁴ after providing the fifth vote against death in *Furman v. Georgia*.³⁵ Nor would I classify Justice O'Connor's performance in death cases as bloodthirsty. And Justice Powell, in the Powell Commission report, seemed more concerned with the political vulnerability of federal courts than by a paucity of executions.³⁶

A key to the broad support for jurisdictional limits on capital cases is not direct concern about federalism but the self-protective intention to insulate the federal courts from the hostility and damage that active involvement in capital cases has generated. In this view, the federal courts' role as the visible mechanism for stopping executions in the United States for twenty-five years has contributed to public hostility toward courts in general and the federal courts in particular.

The wish behind restructuring capital case jurisdiction is that less intense involvement of the federal courts would ease the pressure on the deliberate processes of the Supreme Court and diminish the extent to which the Court is blamed for the delays and frustrations that accompany capital cases. The larger the perceptual distance between executions and the Court, the better for the Court's internal workings and public relations.

While the wish to distance the Court from the execution process is only a subtext in *McCleskey*, there is a more palpable aspect of this desire in the Chief Justice's statements and the justification for procedural change put forward by the Powell Commission. Chief Justice Rehnquist, in his 1989 midyear State of the Judiciary address to the American Bar Association, said:

34. 481 U.S. 279 (1987).

35. 408 U.S. 238 (1972).

36. See Powell Commission, *supra* note 30.

In the case of Ted Bundy, the so-called "serial killer" executed in Florida last month, the Supreme Court of the United States received three separate applications for a stay on the day before the date scheduled for execution.

....

All three of these actions were being prosecuted in these courts simultaneously on the day before the execution of a prisoner who had been on death row for nine years. Surely it would be a bold person to say that this system could not be improved.³⁷

The Powell Commission underscored this concern by isolating "last-minute litigation" as a substantial separate concern involved in capital cases. Its report stated that "[i]n most cases, successive petitions are meritless, and we believe many are filed at the eleventh hour seeking nothing more than delay."³⁸ The system the Commission wishes to put in place is one where "[t]he merits of capital cases should be reviewed carefully and deliberately, and not under time pressure. This should be true both during state and federal collateral review. *But once this review has occurred, absent extraordinary circumstances there should be no further last-minute litigation.*"³⁹

Why is this "last-minute litigation" a problem for the Powell Commission? As long as lawyers for the condemned are a conspicuous presence just prior to execution, there is an intimate link in the public mind (and in the perception of many Court personnel) between the Court and the execution process. This intimate linkage creates a no-win public relations dilemma. If executions are halted, the Court is frustrating the operation of other governmental activities. If executions proceed, blood is on the hands of the justices. And so the solution desired by the Powell Commission is some mechanism that would eliminate the dilemma of "last-minute litigation."

As a matter of literal fact, it is difficult to imagine how the incentive for last-minute litigation could be totally removed from a system of capital punishment in which condemned prisoners are represented by counsel because last-minute appeals are frequently the only ray of hope available at that point in time. Yet this is the clear wish reflected by the Powell Commission, as well as in the Chief Justice's specific indictment of eleventh-hour appeals,⁴⁰ and in the majority opinion of *McCleskey v. Zant*.⁴¹

37. See, e.g., *Text of Chief Justice William Rehnquist's remarks, supra* note 31, at 5.

38. Powell Commission, *supra* note 30, at 3240.

39. Powell Commission, *supra* note 30, at 3240 (emphasis added).

40. See, e.g., *Text of Chief Justice William Rehnquist's remarks, supra* note 31.

41. 111 S. Ct. 1454 (1991).

The disengagement with capital punishment that many on the Supreme Court now seek is a return to the conditions that existed in the United States before 1960. Before the large-scale intervention of federal courts, the important controls over execution policy were at the state level.⁴² That is where a condemned offender's last hope of clemency or postponement resided. The popular culture remembers accurately when the movies of the 1930s through the 1950s began the execution scene with the announcement that the governor had turned down a petition for clemency. In that version of American government, it could be said that the micro-management of the number of executions in the United States and their timing was not the business of the United States Supreme Court. One corollary to this perception was that the executions that did occur were rarely regarded as the moral responsibility of Supreme Court justices.

IV. THE PROSPECT FOR DISENGAGEMENT

Will the Supreme Court work itself free of the perceived responsibility for execution policy in the United States during the 1990s? My doubts that this goal can be achieved in this decade (or later) grow from the substantial problems associated with reversing historical processes. Moreover, I expect that events in the 1990s will conspire against the Supreme Court's quiet withdrawal from the business of regulating executions.

The first major obstacle to disengagement is the general difficulty of undoing history. The current American cliché on the subject is that it is difficult to get the toothpaste back into the tube. For three decades, federal courts have been intimately involved in the regulation of capital punishment, and this has changed both public perceptions and the expectations of a number of important constituencies including lawyers, governors, and federal judges. Executive clemency all but disappeared in the United States in the era of hands-on federal court involvement.⁴³ Extensive involvement in individual death penalty cases has come to be expected of and by federal courts. This new tradition has rendered cutbacks in federal habeas corpus a contentious issue, even in a Congress anxious to append more than fifty new death penalties to the federal criminal code.⁴⁴ So there is a substantial amount of toothpaste to squeeze back into the tube before the recent history of federal court involvement in capital cases can be nullified.

42. See ZIMRING AND HAWKINS, *supra* note 11, ch. 5.

43. See ZIMRING AND HAWKINS, *supra* note 11, ch. 5, at 101.

44. See Clifford Krauss, *After Senate Backs Bush and Blocks Anti-Crime Bill, Congress Goes Home*, N.Y. TIMES, Nov. 28, 1991, at D22.

Furthermore, conditions in the 1990s will be anything but favorable for such an outcome. The best case for successful federal court disengagement would be a combination of low levels of public involvement and high levels of judicial agreement with a nonintervention policy. But neither public apathy nor judicial solidarity appears on the horizon. Executions are still important news stories even in the few states that execute with some frequency. And a pending execution in a northern industrial state is a sure prescription for a media circus, creating conditions that exacerbate public ambivalence about capital punishment and focus attention on the institutions that hold power in the execution process. Increasing numbers of executions in states without strong capital punishment traditions can only increase the salience of the death penalty as a public issue in the 1990s. This is not a favorable environment for an institution of government that has been the most important actor in capital cases for twenty-five years to tiptoe off stage. Increasing public attention to executions in the United States is thus a barrier to disengagement of the courts.

So too is the absence of consensus in the federal judiciary in support of nonengagement policies. If almost all federal judges agreed with a hands-off policy, the absence of debate within the judicial branch would provide some apparent legitimacy to disengagement. Notwithstanding the almost complete conservative restaffing of the United States Supreme Court and the large number of conservative appointments to federal district and appellate courts, the potential for judicial disagreement on disengagement policy is substantial. The potential for disagreement on deregulating death begins at the top, with the United States Supreme Court.⁴⁵ During the 1980s, even as Reagan appointments to the Court accumulated and the appointees behaved in predictable fashion, the division of the Court in capital cases by most conventional measures increased. Notwithstanding the dissents of Justices Brennan and Marshall, the majorities that disposed of capital cases in the first half of the eighties were usually substantial.⁴⁶ In the latter part of the 1980s, however, the majority of all death cases were decided by five-to-four votes.⁴⁷ So a potential for division on the Supreme Court cannot be ignored even in an era of conservative hegemony.

In the federal district and circuit courts, an extraordinary potential for resistance to federal court disengagement can be found in the hun-

45. See, e.g., Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987).

46. Franklin E. Zimring and Michael Laurence, *Capital Punishment*, ENCYCLOPEDIA OF THE AM. CONST. (Leonard W. Levy ed., Supp. I 1992).

47. *Id.*

dreds of life-tenure judges who have participated in more extensive death case review and who are not happy at the prospect of allowing large numbers of executions. Indeed, federal district and circuit court judges were the most important restraint on the number of executions during the seven years after 1984 when the uptrend in executions was effectively halted.

An impression of disarray is necessarily communicated when life and death issues are decided by five-to-four majorities, and when whole judicial circuits split down the middle on death penalty cases.⁴⁸ The potential for division is significant even if a majority of circuits supports hands-off results because far more than a majority of the United States Supreme Court will be necessary to create conditions in which the public no longer views the Court as responsible for executions. As long as federal courts engage in extensive tugs of war in individual cases and as long as the role of the federal courts is actively debated within the judiciary, the high profile of the federal courts, and specifically of the U.S. Supreme Court, in capital cases will be an unavoidable fact of American political life. It will thus take extraordinary changes both in constitutional law and the composition of the federal courts before capital cases become anything but a chronic ailment for the federal judiciary.

48. See Dan Morain, *Harris Case Splits Appeals Court*, L.A. TIMES, Dec. 4, 1991, at A3.

