

# THE FALLACY OF EXECUTING TERRORISTS

*By Pearl Pandya\**

## I. INTRODUCTION

“The story of Marathon Monday 2013 should not be defined by the actions or beliefs of the defendant, but by the resiliency of the human spirit and the rallying cries of this great city.”<sup>1</sup> With these impassioned words, Bill and Denise Richard, who lost their 8-year-old son Martin in the Boston bombings on April 15, 2013, requested the Department of Justice to drop the death penalty charges against Dzhokhar Tsarnaev.<sup>2</sup> Their plea echoed the opinions of 61% of voters in the city of Boston, who favored life imprisonment without parole, as revealed by the last survey conducted before the verdict.<sup>3</sup> However, after an emotional and highly publicized trial conducted under federal law, on June 24, 2015 the jury sentenced Mr. Tsarnaev to death for six of 17 capital counts.<sup>4</sup> All six charges related to Mr. Tsarnaev’s planting of a pressure-cooker bomb, categorized as a weapon of mass destruction, on Boylston Street.<sup>5</sup> Nevertheless, closure evaded the victims as the defendant’s attorneys appealed his death sentence, arguing that publicity and outrage implicated the objectivity of the jurors, thus making it impossible for Mr. Tsarnaev to receive a fair trial in Boston.<sup>6</sup>

The Tsarnaev case marks the first success for prosecutors seeking capital

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1. Bill Richard & Denise Richard, *To End the Anguish, Drop the Death Penalty*, BOSTON GLOBE (Apr. 16, 2015), <https://www.bostonglobe.com/metro/2015/04/16/end-anguish-drop-death-penalty/ocQLejp8H2vesDavItHIEN/story.html>.

2. *See id.*

3. Asma Khalid, *Death Penalty for Tsarnaev Increasingly Unpopular, WBUR Poll Finds*, WBUR (Apr. 16, 2015), <http://www.wbur.org/news/2015/04/16/tsarnaev-death->.

4. *United States v. Tsarnaev*, No. 1:13 CR 10200-001-GAO, 2015 WL 3945832, at \*2 (D. Mass. June 24, 2015).

5. *See id.*

6. *See* Frank McGurty, *Tsarnaev Lawyers File Appeal of Boston Marathon Bombing Conviction*, REUTERS (Jan. 29, 2016, 11:36 AM), <http://www.reuters.com/article/us-boston-blast-trial-idUSKCN0V71Z7>.

punishment in a federal terrorism case since 9/11.<sup>7</sup> Statistics reveal that only one federal terrorism defendant, Timothy McVeigh—the Oklahoma City bomber, has been executed since 1993 despite prosecutors having sought the death penalty for an accused terrorist at least 14 times.<sup>8</sup> Despite its alarming impact on the national psyche, two-thirds of terrorism cases are resolved by plea bargains.<sup>9</sup> This is indicative of the difficulties inherent in imposing capital punishment under federal terrorism law owing to the distinctive characteristics of terrorism.

The death penalty has found a place in American statute books since the establishment of the British colonies.<sup>10</sup> However, the focus on institutionalized bias against African-Americans in the criminal justice system, as reflected by the unfair imposition of capital punishment, spurred activism in favor of abolition during the civil rights era.<sup>11</sup> This culminated in the Supreme Court holding the then-existing system of the death penalty to be arbitrary and in violation of the Eighth Amendment prohibition against cruel and unusual punishment in *Furman v. Georgia* (1972).<sup>12</sup> The moratorium was short-lived, and the Supreme Court reinstated the death penalty, albeit with checks to curb arbitrariness, in 1976 through its decision in *Gregg v. Georgia*.<sup>13</sup> Nevertheless, while the death penalty was initially imposed for a wide gamut of crimes, ranging from idolatry and witchcraft to man-stealing and manslaughter,<sup>14</sup> its use has now been restricted mostly to crimes that involve killing.<sup>15</sup> The Supreme Court has also since prohibited the execution of mentally retarded persons,<sup>16</sup> and juveniles who were under the age of 18 when the crime was committed.<sup>17</sup> The primary reasons for the retention of the death penalty, as elucidated in the *Gregg* decision, are retribution and deterrence.<sup>18</sup> According to the retributory rationale, the severity of the crime and the affront to humanity that it proffers, makes capital punishment an appropriate sanction and reflects the society's moral outrage.<sup>19</sup> The utilitarian justification for the death penalty

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7. Katharine Seelye, *Dzhokhar Tsarnaev Given Death Penalty in Boston Marathon Bombing*, N.Y. TIMES, May 15, 2015, at A1.

8. See Eli Hager, *America Hates Terrorists But We Don't Execute Them, A Short History*, THE MARSHALL PROJECT (Jan. 27, 2015, 3:42 PM), <https://www.themarshallproject.org/2015/01/27/america-hates-terrorists>.

9. See *id.*

10. See ROBERT BOHN, DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES 2 (1999).

11. See Michael McCann & David Johnson, *Rocked but Still Rolling*, in THE ROAD TO ABOLITION? THE FUTURE OF CAPITAL PUNISHMENT IN THE UNITED STATES 149 (Charles J. Ogletree, Jr. & Austin Sarat ed., 2009).

12. See *Furman v. Georgia*, 408 U.S. 238, 305 (1972).

13. See *Gregg v. Georgia*, 428 U.S. 153, 200–08 (1976).

14. See THE DEATH PENALTY IN AMERICA 7 (Hugo Bedau ed., 3d ed. 1982).

15. See *Kennedy v. Louisiana*, 554 U.S. 407, 420–22 (2008); see also *Coker v. Georgia*, 433 U.S. 584, 597–99 (1977) (holding the imposition of capital punishment for rape not resulting in death to be unconstitutional).

16. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

17. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

18. See *Gregg*, 428 U.S. at 183–87.

19. See *id.*

is the significant deterrent value that it is supposed to have on potential murderers and a decrease in the rate of recidivism.<sup>20</sup>

Terrorism is a unique offense, inimitable in the destruction it engenders and the reactions it elicits. The brazenness displayed by terrorists while causing widespread havoc provokes powerful feelings of retribution and reprisal. Simultaneously, it also instigates a need to distinguish the civilized world from their barbarism, signifying the triumph of peace over hatred. Furthermore, while acts of terrorism are universally condemned, the legal provisions on terrorism at the international level remain ambiguous. Shrouded in such political and passionate complexities is the issue of sentencing terrorists to death.

Recognizing the special nature of terrorism offenses and the diplomatic nuances that permeate the prosecution of terrorists, this essay presents a case against the imposition of capital punishment on terrorist offenders. Part I of the essay presents a brief analysis of the domestic law on terrorism and expounds the intricacies that differentiate a terrorism offense from an ordinary homicide, with a focus on the death penalty law. Part II submits the moral shortcomings intrinsic in the judicial execution of terrorists by rebutting the retribution and denunciation theories advocating for death penalty. Part III sets forth the legal complications that result from executing terrorists with regard to the Sixth and Eighth Amendments. Part IV enumerates the rational arguments against capital punishment in the terrorism context owing to its ineffectiveness as a deterrent and its inimical impact on international cooperation.

## II. DOMESTIC LAW

### *A. Death Penalty Law on Terrorism Offenses*

The law on terrorism in the U.S. reflects the multifaceted considerations that are associated with the prosecution of a terrorism act. Recognizing the inadequacy of state resources in dealing with acts that have international connections and implications, §2338 of the U.S. Code grants exclusive jurisdiction to the district courts over an action brought under Chapter 113B.<sup>21</sup> §2331 of this Chapter defines international terrorism as an action that is

“violent or dangerous to human life. . .that is a violation of the criminal laws of the United States or of any State, if the act appears to be intended to: intimidate or coerce a civilian population; influence the policy of a government by intimidation or coercion; or, to affect the conduct of a government by mass destruction, assassination or kidnapping; and occurred primarily outside the territorial jurisdiction of the United States, or transcended national boundaries in terms of the means by which it was accomplished, the persons it appeared intended to intimidate or coerce, or the locale in which the

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20. *See id.*

21. 18 U.S.C. § 2338 (2012).

perpetrators operated or sought asylum.”<sup>22</sup>

Title VIII of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, enacted in the aftermath of 9/11 and the 2001 Anthrax attacks, broadened the list of offenses included within this definition.<sup>23</sup> Pursuant to the Federal Death Penalty Act of 1994, which established constitutional provisions for the imposition of death penalty for terrorist homicides,<sup>24</sup> and §2332b of the U.S. Code,<sup>25</sup> any killing resulting from conduct that violates this section is punishable by death.

Meanwhile, domestic terrorism does not exist as a separate, substantive crime under federal law. Rather, domestic terrorism offenses are prosecuted as elements of ordinary crimes. Though the PATRIOT Act redefined terrorism to include domestic crimes intended to affect the conduct of a government by mass destruction, assassination, or kidnapping,<sup>26</sup> its primary impact is for investigative purposes.<sup>27</sup> The Attorney General’s Guidelines for Domestic FBI Operations authorize the FBI to conduct “enterprise investigations” for the purpose of establishing the factual basis that reasonably indicates a group has or intends to commit an act of “domestic terrorism as defined in 18 U.S.C. § 2331(5) involving a violation of federal criminal law.”<sup>28</sup> Thus, apart from the statutory offenses listed in § 2332 (g)(5)(b) that constitute the federal crime of terrorism, all other acts resulting in death are prosecuted as ordinary murder under the laws of the state in which they take place. Certain states also allow the death penalty for offenses such as aircraft hijacking and treason, which were traditionally perceived to be acts of terrorism, even if the conduct does not result in death.<sup>29</sup> However, the Supreme Court in *Kennedy v. Louisiana* precluded the use of the death penalty for offenses against persons not resulting in death.<sup>30</sup> Following this decision, the essay argues that despite terrorism being listed as an offense against the state, as opposed to an offense against a person,<sup>31</sup> the employment of the death penalty for non-homicidal crimes would be in violation of the Eighth Amendment prohibition against excessive punishment. The sanctity of human life compels that the dire

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22. 18 U.S.C. § 2331 (2012).

23. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 § 808, 18 U.S.C. § 2332b(g)(5)(A)–(B) (2012).

24. See Violent Crime Control and Law Enforcement Act of 1994 §§ 60001–26, 18 U.S.C. §§ 3591–98 (1994) (enacting the Federal Death Penalty Act of 1994).

25. 18 U.S.C. § 2332b(c)(1) (2012).

26. *Id.*; 18 U.S.C. § 2331(5) (2012).

27. Susan Hennessey, *The Good Reason to Not Charge All Terrorists With Terrorism*, LAWFARE (Dec. 5, 2015, 11:34 AM), <https://www.lawfareblog.com/good-reasons-not-charge-all-terrorists-terrorism>.

28. *The Attorney General’s Guidelines for Domestic FBI Operations*, DEP’T OF JUST. 23 (Aug. 27, 2016), <https://www.justice.gov/sites/default/files/ag/legacy/2008/10/03/guidelines.pdp>; see also Hennessey, *supra* note 27.

29. See GA. CODE ANN. § 16-5-44 (2012); GA. CODE ANN. § 16-11-1 (2007); LA. STAT. ANN §14:113 (2014).

30. See *Kennedy v. Louisiana*, 554 U.S. 407, 420–22 (2008).

31. See *id.* at 437.

institutional damage caused by an act of terrorism be rectified through measures that do not involve the taking of the defendant's life.

Thus, the notable aspect of U.S. law on terrorism is the worldwide jurisdiction exercised by the U.S. over foreign nationals who have committed crimes against U.S. interests or against U.S. citizens.<sup>32</sup> These nationals can be put to trial and sentenced to death in domestic courts, even if death penalty has been abolished in the home country of the foreign national.<sup>33</sup> Also noteworthy is the broad interpretation accorded to conduct that 'transcends national boundaries' pursuant to 18 U.S.C. § 2332(b). There is no requirement of actual contact or command from foreign terrorist organizations. Rather, an act by a domestic extremist, who is inspired by the ideology of a foreign terrorist organization, satisfies the factual requirements of the offense.<sup>34</sup> Trial under federal terrorism cases also engenders procedural restrictions, including a ban on second or successive habeas corpus petitions by defendants.<sup>35</sup> Substantively, grounds for successful habeas corpus petitions are limited to when the convictions were contrary to "clearly established federal law" or an "unreasonable determination of the facts in light of the evidence."<sup>36</sup> These provisions were included to curb endless appeals and increase the likelihood of execution by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, a statutory response to the 1993 World Trade Center bombing and the 1995 Oklahoma City bombing.<sup>37</sup> AEDPA has been criticized as being misguided for its elevation of the desire for finality and comity over the constitutional rights of criminal defendants.<sup>38</sup> In light of the high reversible rate found in capital cases,<sup>39</sup> and the emphasis placed on review by superior

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32. Norman Greene et al., *Capital Punishment In The Age Of Terrorism*, CATH. U. L. REV. 187, 191 (2002).

33. See, e.g., *United States v. Jordan*, 223 F.3d 676, 693–94 (7th Cir. 2000) (holding that the United States enjoyed jurisdiction to enforce its laws and retained personal jurisdiction over a foreigner who resided in this country when he committed the federal crime because of the Title 18 prohibition on attacks on federal facilities); see also *United States v. Rashed*, 234 F.3d 1280, 1281–82 (D.C. Cir. 2000) (stating that a foreign sovereign may prosecute a defendant for the same offense previously prosecuted for in a different jurisdiction), *cert. denied*, 533 U.S. 924 (2001).

34. See 18 U.S.C. § 2332b(g)(1) (2012); see also Hennessey, *supra* note 27.

35. Antiterrorism and Effective Death Penalty Act of 1996 § 106, 28 U.S.C. § 2244 (2012).

36. See *id.* § 104.

37. Antiterrorism and Effective Death Penalty Act of 1996 §§ 101, 106, 28 U.S.C. § 2244 (2012).

38. Stephen R. Reinhardt, *The Demise Of Habeas Corpus And The Rise Of Qualified Immunity: The Court's Ever Increasing Limitations On The Development And Enforcement Of Constitutional Rights And Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1224 (2015); see also James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 427 (2001) (criticizing the foreclosure of federal habeas corpus as a remedy for an ineffective death sentence).

39. See James S. Liebman, *A Broken System: Error Rates in Capital Cases 1973-1995*, COLUM. UNIV. SCH. L. (June 12, 2000), [http://www2.law.columbia.edu/instructionalservices/liebman/liebman\\_final.pdf](http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf). During the 23 years, the overall rate of prejudicial error in the American capital punishment system was 68%. After state courts threw out 47% of death sentences due to serious flaws, a later federal review found "serious error"- error undermining the reliability of the outcome- in 40% of the remaining sentences; see also Lincoln Caplan, *The*

courts as a check against arbitrariness and disproportionality,<sup>40</sup> it is submitted that such infringement of the defendant's rights is unfortunate.

***B. Differing Death Penalty Law Considerations between Terrorist Homicide and Ordinary First Degree Murder***

An act of terrorism, by virtue of being conducted in the public realm and being motivated by a political or social ideology, implicates two targets: (1) the victims who have been killed or injured; and (2) the larger state apparatus. As compared with an ordinary first-degree murder, the political impetus driving a terrorist attack and the public response that it engenders necessitate different considerations with regard to capital punishment jurisprudence.

Following *Furman v Georgia*, an arbitrary application of the death penalty, which “smacks of little more than a lottery system,” will not survive Eighth Amendment constitutional challenges.<sup>41</sup> Due to the severity and total irrevocability of death, *Furman* held that this penalty must not be “wantonly and freakishly imposed.”<sup>42</sup> However, owing to the dangers posed to the security of the nation state as an entity by a terrorist attack, in addition to the loss of life, its perpetrators can arguably be regarded as the worst murderers qualified to receive the most severe punishment in a jurisdiction that retains the death penalty. Thus, concerns of substantive arbitrariness and disproportionality in regard to the type of offense are muted in a case involving an act of terrorism, as opposed to an ordinary first-degree murder.

International acts of terrorism are further distinguished from ordinary murders because of their extraterritorial nature and definitional uncertainty. Repeated attempts by the United Nations to establish a universally accepted definition of terrorism have failed due to an ideological split between Member States and the perceived subjectivity of any such definition.<sup>43</sup> Security Council Resolution 1373, the leading declaration on international terrorism promulgated under strong pressure from the U.S. in the aftermath of 9/11,<sup>44</sup> gives only a general description of acts that constitute terrorism without purporting to define terrorism itself.<sup>45</sup> In the absence of an international

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*Destruction of Defendant's Rights*, THE NEW YORKER (June 21, 2015) <http://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights> (discussing the effect of AEDPA on the reversal rate).

40. See *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (Stewart J. on the review function of the Georgia State Supreme Court).

41. See *Furman v. Georgia*, 408 U.S. 238, 293 (1972).

42. See *id.* at 310.

43. See Sudha Setty, *What's In A Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT'L L. 1, 11 (2011); see also Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending War Along the Afghanistan-Pakistan Frontier*, 36 BROOK. J. INT'L L. 1, 10–15 (2010) (describing the connection between the history of the relationship between colonialism and public international law and the perceptions of lesser legitimacy accorded to post-colonial countries in international law rule-making).

44. See Setty, *supra* note 43, at 11.

45. S.C. Res. 1373 (Sept. 28, 2001).

consensus, Member States have formulated domestic definitions of terrorism that are catered towards their national needs.<sup>46</sup> The various nuances of foreign policy and diplomacy, as well as international cooperation in regard to intelligence sharing, generate an additional layer of political considerations in cases of international terrorism.

### III. MORAL SHORTCOMINGS

Terrorism is an offense unparalleled in its atrocity. The death penalty is a state-sanctioned punishment unparalleled in its severity. This essay argues that using death as a means to avenge death or to express a society's condemnation over death generates a moral quagmire that cannot be reconciled with the ethos of a democratic society.

#### A. Retribution

"A means to balance the scale" was the phrase used by Kant to validate the prominence of retribution as a legitimate penal purpose.<sup>47</sup> With its foundations in the Principle of Equality, retribution restores equilibrium on the scale of justice by giving the criminal his just deserts.<sup>48</sup> Despite misgivings about retribution constituting a "tolerable aspiration for a government in a free society,"<sup>49</sup> it has developed as one of the primary justifications for retaining the death penalty- manifesting the punishment as congruent with the prohibition against cruel and unusual punishment.<sup>50</sup> An act of murder, with its utter contempt for human life, is said to elicit the natural instinct for retaliation in kind in the strongest measure. Through a controlled imposition of a capital sentence by the state, conscribed by the rule of law, the death penalty allegedly guards against the disintegration of the society into one defined by "self-help, vigilante justice, and lynch law."<sup>51</sup> Retribution demands that there be culpability before punishment, proportionality in punishment, and an objective sovereign imposing the punishment.<sup>52</sup> This essay argues that notwithstanding the repugnance of a terrorist attack, the contentious nature of the definition of a terrorist, the absence of neutrality as regards the sentencing state, and the idea

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46. See Setty, *supra* note 43, at 9.

47. See Immanuel Kant, *The Metaphysics of Morals* (Part II, "The Science of Right"), in PRACTICAL PHILOSOPHY 473 (M. Gregor trans., 1996).

48. See *id.*

49. See *Furman v. Georgia*, 408 U.S. 238, 293 (1972).

50. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (quoting Denning L.J., MR, before the British Royal Commission on Capital punishment, "in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them.").

51. See *Furman*, 408 U.S. at 308.

52. See, e.g., David J. Karp, *Causation in the Model Penal Code*, 78 COLUM. L. REV. 1249, 1257-58 (1978) (arguing that retribution focuses on the culpability of the offender, while retaliation focuses on the quantum of harm); see also Thomas E. Robins, *Retribution, The Evolving Standard Of Decency, And Methods Of Execution: The Inevitable Collision In Eighth Amendment Jurisprudence*, 119 PENN. ST. L. REV. 885, 890 (2015).

of terrorism itself as a retributive act are reasons for exercising caution when delivering the strictest punishment to a mentally cognizant terrorist.

An act of terrorism is undisputedly condemnable owing to its wanton disregard for the sanctity of human life. While there is universal consensus on the wrongfulness of indiscriminate violence, which is not an act of war, against ordinary citizens to further political aims, the issue of the punishment that such a crime deserves remains contentious.<sup>53</sup> Numerous instances in history have demonstrated that one man's terrorist is another man's freedom fighter.<sup>54</sup> The absence of an international law definition on terrorism is illustrative of its politically divisive nature.<sup>55</sup> Though the United States is among the minority of nations that still retains the death penalty, its domestic law on terrorism has an international reach.<sup>56</sup> Therefore, without a global socio-political agreement on either the moral culpability of a terrorist or the proportionality of execution as a punishment for terrorist attacks, a death sentence imposed in America is unprincipled. When administered under such circumstances, the death penalty serves only as a means of societal retaliation without consideration of the dichotomous morality as regards the defendant, which is an essential component of retributive justice.

The proposition that the state should be capable and competent to determine who 'deserves' death is an integral aspect of the theory of retributive justice. This essay does not dispute the legal capabilities of the state machinery in defining the appropriate punishment. Instead, it argues that the ideological nature of a terrorist attack implicates the required neutrality of the state, thus disputing its moral standing to direct the retributive instincts of the society. Camus' skepticism about any government being sufficiently innocent or intuitive to merit an infallible power to kill<sup>57</sup> is strengthened due to the politicization that necessarily ensues after a terrorist attack. Moreover, since the state itself is a victim and the target of a terrorist attack, using its own legal institutions to adjudicate on the death penalty is a form of self-help and vigilante justice. The finality of death necessitates that the decision to impose death be decided by an objective party; if not, the sentencing decision is

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53. See Setty, *supra* note 43, at 11; see also Antonio Cassese, *Terrorism as an International Crime*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 213–14 (Andrea Bianchi ed., 2004) (elaborating the difficulties in reaching a universal consensus on the contours of a definition of terrorism due to the moral relativism involved in the process, owing to which terrorism can be described only certain discrete acts).

54. See, e.g., Benjamin Netanyahu, *Defining Terrorism*, in TERRORISM: HOW THE WEST CAN WIN 8 (Netanyahu ed., 1986) (differentiating Zionist revolutionaries from Palestinians who target civilians); see Michael Lawless, *Terrorism: An International Crime*, 63 INT'L J. 139, 151 (2007) (distinguishing between legitimate non-conventional actors, variously described as revolutionaries, freedom fighters, etc., and illegitimate non-conventional actors); see also Alex J. Bellamy, *Is The War on Terror Just?*, 19 INT'L REL. 275, 284 (2005) (stating political motivation gives legitimacy to freedom fighters). But see Charles Krauthammer, Editorial, *The Ball's Still in Arafat's Court*, WASH. POST, Nov. 18 1988, at A23.

55. See Setty, *supra* note 43, at 9.

56. See Greene, *supra* note 32, at 191.

57. See Albert Camus, *Reflections on the Guillotine*, in RESISTANCE, REBELLION, AND DEATH 225–26 (Justin O'Brien trans., 1974).



morally flawed.

Further weakening the argument that retribution justifies the death penalty is the view that terrorism is a method of retribution.<sup>58</sup> Without examining the appropriateness of their views, it is presented that terrorists perceive ordinary citizens to be collectively responsible for the acts of their governments.<sup>59</sup> When framed in this manner, terrorism develops into a means of exacting punishment on a political community that the terrorist believes is collectively responsible for grievous wrongs that certain members of that community may have committed.<sup>60</sup> Thus, if terrorism itself is viewed as a means of balancing the scales, then using capital punishment to equalize the scale of justice seems counter-intuitive and generates an endless cycle. Therefore, the lack of consensus on what constitutes terrorism coupled with the controversy surrounding the objectivity of the sentencing state due to the political nature of terrorism implicates the legitimacy of any retributory analysis justifying the death penalty. Due to the numerous moral ambiguities caused by retaining state sponsored execution to avenge death, terrorism offenses must not comprise capital crimes.

## **B. Denunciation**

With its foundations in Emile Durkheim's society-centered approach towards punishment,<sup>61</sup> the denunciation theory proposes that punishment serves a twofold purpose of being an indicator of the society's condemnation for the relative seriousness of the crime and a tool for reaffirming the values violated by these crimes.<sup>62</sup> Under such an approach, utilitarian concerns with regard to future deterrent effect are not an important factor in determining penalties.<sup>63</sup> This theory resonated in Justice Stewart's opinion for the majority in *Gregg v. Georgia*, wherein he said that retaining the death penalty for extreme cases was an expression of the community's belief that certain crimes

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58. See Mark R. Reiff, *Terrorism, Retribution, and Collective Responsibility*, 34 SOC. THEORY & PRAC. 209, 210 (2008) (stating that foot soldiers, ideologues, and operational leaders of various terrorist movements are partly motivated by a desire for retribution).

59. See, e.g., *id.* at 210 (noting how Islamic militants hold the West responsible for corrupting Islamic communities and enabling brutal, repressive regimes in their own countries); 'Osama bin Laden' Tape Threatens France, THE GUARDIAN (Oct. 28, 2010), [http://www.theguardian.com/](http://www.theguardian.com/world/2010/oct/28/osama-bin-laden-tape-france)

[world/2010/oct/28/osama-bin-laden-tape-france](http://www.theguardian.com/world/2010/oct/28/osama-bin-laden-tape-france) (mentioning the retributive motives discernible in various statements by Osama bin Laden); see also MOHAMMED HAFEZ, SUICIDE BOMBERS IN IRAQ 44-45, 142-45, 217-18 (2007) (noting that individual suicide bombers often express retributive motives); Audrey Gillan, *Bin Laden Appears on Video to Threaten US*, THE GUARDIAN (Oct. 8, 2001), <http://www.theguardian.com/world/2001/oct/08/afghanistan.terrorism>.

60. See MARK R. REIFF, PUNISHMENT, COMPENSATION, AND LAW: A THEORY OF ENFORCEABILITY 120 (Cambridge University Press 2005); see also Reiff, *supra* note 58, at 210.

61. See EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 108-09 (George Simpson trans., 1933); see also EMILE DURKHEIM, DURKHEIM AND THE LAW 61-63 (Steven Lukes & Andrew Scull eds., 1983).

62. See Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment* 65 TUL. L. REV. 299, 331 (1990).

63. See *id.*

were “so grievous an affront to humanity that the only adequate response may be the penalty of death.”<sup>64</sup> This essay argues against an application of the denunciation theory due to its insidious impact on the society and its irrelevance in maintaining social cohesion in the context of retaining the death penalty for terrorism offenses.

Terrorism, owing to its contempt for life and law, is antithetical to the very notions of democracy and pluralism that a civilized society aspires to embody. Using death as a response to terrorism impedes the endeavor to attain these ideals by prioritizing vengeance over compassion. It has been argued that punishment not only heals a broken community but also reconstructs that community.<sup>65</sup> Death penalty, as a punishment for terrorism, would employ the same means to reconstruct the community that the terrorist used to break it, thus inscribing within the community values similar to the ones that the terrorist espoused. Beccaria opposed capital punishment for its brutalizing effect on the society.<sup>66</sup> This essay argues that sparing the life of the terrorist will help restore the values of dignity and humanity that terrorism obliterates, hence healing a society that has already been brutalized by the savagery of terrorism. Moreover, redeeming itself through an approach antipodal to the terrorist’s is the strongest denunciation that a society can proffer against terrorism.

The denunciation theory also supposes that a failure to punish in proportion to the outrageousness of the crime would result in a “breakdown of social solidarity.”<sup>67</sup> Thus, denunciation serves to maintain social cohesion by reaffirming societal values and uniting all law-abiding members of the society.<sup>68</sup> This essay argues that by targeting the society as a whole, a terrorist attack instinctively triggers solidarity amongst the society, thus weakening the rationalization behind the denunciation theory. Moreover, when an attacked society unites against the terrorist’s outlook by severely punishing him, but not killing him, the reinvigorated bonds of societal cohesion definitively rebuke the values that the terrorist had tried to propagate and reaffirm the society’s “moral consciousness.”<sup>69</sup> Therefore, abolishing the death penalty for terrorists preserves the morality in the rebuilding of a broken society by channeling the bonds of social solidarity in a constructive manner, while adjudging democracy as the ‘moral victor’ in the fight against terrorism. Conversely, while retaining the death penalty for terrorists does express the society’s moral outrage, its brutalizing effect has long-term detrimental effects on the community’s moral

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64. See *Gregg v. Georgia*, 428 U.S. 153, 184 (1976).

65. See Anthony F. Lang Jr., *The Politics of Punishing Terrorists*, 24 ETHICS & INT’L AFF. 3, 4 (2010).

66. See CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 70 (Richard Bellamy ed., Richard Davies trans. 1995) (illustrating how the death penalty provides an example of savagery to men).

67. See EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 108 (George Simpson trans., 1933).

68. See Rychlak, *supra* note 62, at 332.

69. See DURKHEIM, *supra* note 67, at 108 (asserting that without punishment, the collective moral consciousness could not be preserved).

consciousness and poses a threat to the very essence of a civilized society.

#### IV. LEGAL SHORTCOMINGS

The irrevocability of death necessitates absolute satisfaction of all substantive and procedural safeguards before a death sentence is imposed. However, the emotive publicity generated after a terrorist attack and the inherent political concerns implicate the defendant's Sixth Amendment right to an impartial jury, the Fourteenth Amendment right to a fair trial, and the Eighth Amendment right to an individualized hearing. This essay argues that the inevitable contemplation of extra-judicial factors, such as those necessitated by the political nature of terrorism and involuntarily engendered by widespread media publicity of terrorist attacks, cannot be reconciled with strict constitutional requirements and renders the judicial execution of terrorists unprincipled.

##### *A. Right to An Impartial Jury and Fair Trial*

The availability of trial by an impartial jury has long been recognized as a keystone of the criminal justice system. The rationale behind an impartial jury is that the verdict reached in a case must be based solely on the evidence presented at trial without being influenced by any factors that originated outside the court.<sup>70</sup> Thus, jurors must not harbor any preconceived notions regarding guilt or innocence that would preclude an impartial assessment of the facts.<sup>71</sup> The jury's role is especially important in the context of a capital trial, wherein the jury's function as a link between contemporary community values and the penal system is a useful indicium for reflecting the "evolving standards of decency that mark the progress of a maturing society."<sup>72</sup> The continued imposition of death sentences by an impartial jury has been construed as bestowing moral legitimacy on the capital punishment system and makes it compatible with the Eighth Amendment.<sup>73</sup> This essay, however, argues that the vast publicity garnered by a terrorist attack renders the selection of an impartial jury impossible, thus weakening the moral justifications for retaining the death penalty in the case of a terrorist defendant.

The advent of modern means of communication has made widespread dissemination of information expeditious. While this inevitably affects all high profile crimes, prominent media coverage of a terrorist attack raises additional difficulties in ensuring impartiality. First, the occurrence of such attacks in public places makes it relatable to a wider demographic, transcending geographic proximity and increasing the difficulty in conscribing the affected jury pool. Secondly, the explicitly political nature of such acts elicits, in large

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70. See *Irvin v. Dowd*, 366 U.S. 717, 721–29 (1961).

71. See *id.*

72. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

73. See *Gregg v. Georgia*, 428 U.S. 153, 181 (1976).

or small measure, political responses from the populace and affects their ability to restrict deliberations to purely juridical matters. There is a possibility of jurors being swayed by sociopolitical passions and perceiving the civic duty of jury service as a conduit for individual contribution in the fight against terrorism. Thirdly, the common practice of terrorist organizations using the media as a tool for celebrating and claiming responsibility for an attack has an effect of provoking the society.

The risk of prejudice posed by these practical influences is exacerbated due to inadequate procedural safeguards. In *Mu'Min v. Virginia*, the Supreme Court held that the Sixth Amendment right to an impartial jury and the Fourteenth Amendment right to due process of law did not require questioning jurors about their specific knowledge of pretrial publicity surrounding a case and called for deference to the trial judge's determinations about impartiality.<sup>74</sup> Though the Court in *Mu'Min* recognized the benefit of comprehensively ascertaining juror impartiality by questioning the juror about the specific content of any news report, it found such questions were only required by the Constitution if a failure to ask them would make the trial fundamentally unfair.<sup>75</sup> The accuracy of a trial judge's assessment of juror impartiality without content questioning in a substantially publicized case remains contentious.<sup>76</sup> This was recognized in *Turner v. Murray*, a case concerning racial bias, wherein the Court emphasized that absent specific questioning with respect to the source of potential biases, a juror's self-assessment of impartiality would not satisfy the defendant's constitutional rights.<sup>77</sup> However, this holding has not been applied to cases of pretrial publicity, thus resulting in terrorist defendants remaining vulnerable to a biased jury.

In contrast to cases of racial or ethnic bias, where the existence of bias is easily discernible by the jurors themselves, there is a greater threat of jurors being unconsciously prejudiced in highly publicized cases.<sup>78</sup> This possibility of less-consciously held biases in the context of pretrial publicity was recognized by Justice Clark, who when writing for the majority in *Irvin v. Dowd*, stated that "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man."<sup>79</sup> In the absence of specific content questioning, latent biases run the risk of going undetected due to the inherent subjectivity regarding the definition of a bias that arises from media coverage. Since an opinion with respect to a set of facts formed on the basis of media reports does not carry the same societal stigma that is attached to racial or ethnic bias, certain jurors may consider themselves completely impartial.<sup>80</sup> This increases

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74. See *Mu'Min v. Virginia*, 500 U.S. 415 (1991).

75. See *id.* at 425–26.

76. Sophia R. Friedman, *Sixth Amendment – The Right to an Impartial Jury: How Extensive Must Voir Dire Questioning Be?*, 82 J. CRIM. L. & CRIMINOLOGY 920, 940 (1992).

77. *Turner v. Murray*, 476 U.S. 28, 36 (1986).

78. See Friedman, *supra* note 76, at 944.

79. See *Irvin v. Dowd*, 366 U.S. 717, 727 (1961).

80. See Friedman, *supra* note 76, at 944.

the likelihood of obtaining misleading responses from the jurors to the question of their ability to remain impartial.<sup>81</sup>

Tsarnaev's attorneys have cited the impossibility of a fair trial in the city where the attacks took place as grounds for a Sixth Amendment appeal.<sup>82</sup> A similar demand for a change in venue was recognized by the Supreme Court in *Irvin* to uphold the defendant's Fourteenth Amendment right of a free trial after the case had received significant adverse pretrial publicity.<sup>83</sup> The Court asserted that since the defendant's life was at stake, it was imperative that the trial be conducted in an atmosphere undisturbed by a huge wave of public passion.<sup>84</sup> However, owing to the delocalized and ubiquitous nature of public response to acts of terror, this essay argues that impartiality cannot be guaranteed merely by changing venues. The impracticality of finding a panel of jurors completely unexposed to publicity unavoidably results in the subjugation of a defendant's right to be convicted solely on the basis of facts presented in court. The public nature of terrorist acts and the extensive media coverage of the same have an inevitable outcome of prejudicing the jurors. Shorn of its moral underpinnings due to a partial jury, terrorist defendants must be exempted from the finality of a death sentence.

### ***B. Right to an Individualized Hearing***

A mandatory death sentence for a particular category of homicidal offenses was one of the legislative responses enacted to ensure that the imposition of the death penalty sufficiently limited the risk of arbitrariness so as to survive the *Furman* holding.<sup>85</sup> However, acknowledging that the fundamental respect for human dignity formed the core of the Eighth Amendment, the Supreme Court in *Woodson v. North Carolina* invalidated this mandatory sentencing system.<sup>86</sup> Owing to the finality of death, the Court held an individualized hearing to form a "constitutionally indispensable" part of the capital sentencing procedure.<sup>87</sup> Thus, the Constitution requires a particularized consideration of all relevant aspects of the character and record of each convicted defendant before administering a sentence of death.<sup>88</sup>

This emphasis on individualization does not, however, embrace all the relevant aspects of a convicted terrorist's character. This is because terrorists, by definition, act in furtherance of a particular social or political aim.<sup>89</sup> Thus, any analysis of a terrorist's record and character will be incomplete without a deliberation of the ideological motivations that may have impacted his record

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81. *See id.*

82. *See* McGurty, *supra* note 6. *But see* United States v. Tsarnaev, 157 F. Supp. 3d. 57,61–63 (2016) (stating that change of venue would not serve any purpose due to the extensive national and international coverage of the bombing).

83. *See* Irvin, 366 U.S. at 728–29.

84. *Id.* at 728.

85. *See* Gregg v. Georgia, 428 U.S. 153, 180 (1976).

86. *See* Woodson v. North Carolina, 428 U.S. 280, 304–06 (1976).

87. *See id.* at 304.

88. *See id.* at 303.

89. *See* 28 C.F.R. § 0.85(l) (1969); *see also* 22 U.S.C. § 2656f (d)(2) (2012).

and character. This essay does not argue that a terrorist's ideology constitutes as a relevant mitigator; instead, it argues that such an ideology's impact on a terrorist faces the risk of being depreciated due to the obvious atrocity of the attack. Moreover, not only is there no rational method of determining the scope of such factors, but they also introduce a variety of complex political issues into the juridical arena, transcending the routine gamut of matters considered by the courts and the jury in a capital sentencing trial. While the Eighth and Fourteenth Amendments have been interpreted to entail a broad concept of constitutionally relevant mitigators to reflect the "diverse frailties of humankind,"<sup>90</sup> their application in a case involving an act of terrorism does not encompass the diverse frailties of politics and terrorism.

The intricacies of international politics necessarily render a non-arbitrary administration of the death penalty in a terrorism case and the constitutional indispensability of considering all the relevant characteristics of a defendant mutually exclusive. The emphasis on an individualized hearing in *Lockett v. Ohio* was intended to develop a "system of capital punishment that is both consistent and principled but also humane and sensible to the uniqueness of the individual."<sup>91</sup> Because of the irreconcilability between imperative political and constitutional considerations, prudence dictates that terrorism offenses should be excluded from the scope of this system to retain its consistency and ingrained respect for humanity.

## V. RATIONAL SHORTCOMINGS

Regardless of the legal and moral controversies regarding sentencing terrorists to death, there are no rational justifications to impose capital punishment on terrorists because it neither deters terrorism nor fosters cooperation in counter-terrorism operations. Instead, the American attitude on capital punishment significantly weakens the global fight against terrorism.

### A. Deterrence

Fulfilling the pragmatic objectives of penalization, the legal system "apportions penalties in accordance with the gravity of the crime to achieve deterrence in proportion to that gravity."<sup>92</sup> The death penalty, due to its status as the most severe penalty, is said to have the maximum deterrent effect for future crimes.<sup>93</sup> Thus, despite inconclusive empirical evidence to substantiate such claims, deterrence has emerged as the principle utilitarian justification for

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90. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that the sentencer, in all but the rarest kind of capital case, should not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offence that the defendant may proffer as a basis for a sentence less than death); see also *Woodson*, 428 U.S. at 304.

91. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (referring to *Lockett*, 438 U.S. 586).

92. See Ernest van den Haag, *In Defense of the Death Penalty: A Practical and Moral Analysis*, in *THE DEATH PENALTY IN AMERICA* 323, 326 (Hugo Bedau ed., 1982).

93. See *id.*

the retention of the death penalty in the Supreme Court's analyses.<sup>94</sup> Notwithstanding evidential concerns with regard to the death penalty's deterrent value in homicide cases,<sup>95</sup> its application in terrorism cases is particularly fallacious. Because of the ideologically driven nature of terrorist attacks and the prevalence of foot soldiers, the death penalty fails to serve penal purposes more effectively than a less severe punishment.

As evidenced by the trail of blood and tears left in the aftermath of an attack and the macabre propaganda videos distributed thereafter, political terrorists are not perturbed by destruction. Driven by an untrammelled desire to vindicate their ideology, not only do they cease to fear death but they also glorify it. Thus, execution is a futile threat for a terrorist who places ideological supremacy over the sanctity of human life.<sup>96</sup> Additionally, the prolonged process of judicial execution runs the risk of glamorizing a ghastly act of terrorism into a piece of heroism, making martyrs out of radicals. Far from being a deterrent, the publicized martyrdom of terrorists serves as a rallying point for terrorist organizations,<sup>97</sup> providing them with a reason for reprisal and eliciting a spur in recruitment.<sup>98</sup> This was acknowledged by Judge Brinkema, presiding over the trial of Zacarias Moussaoui for his involvement in the 9/11 attacks, when she stated that the verdict of life imprisonment without parole rendered by the jury would deprive Moussaoui of "martyrdom in a great big bang of glory," instead consigning him to "die with a whimper."<sup>99</sup> Furthermore, while it is rational to presume that the high levels of premeditation involved in a terrorist attack enhance the deterrent value of capital punishment, it is submitted that the importance of premeditation is diminished, as terrorists are motivated more by passion than by reason, thus precluding the desired consequence.

Terrorist organizations are hierarchical structures with a demarcation between 'foot soldiers' who execute the actual attack and the leadership that

94. See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

95. See, e.g., Raymond Bonner & Ford Fessenden, *Absence of Executions: A Special Report: States With No Death Penalty Share Lower Homicide Rates*, N.Y. TIMES (Sept. 22, 2000), <http://www.nytimes.com/2000/09/22/us/absence-executions-special-report-states-with-no-death-penalty-share-lower.html> (finding in a survey conducted over a 20 year period that for each year, the average homicide rate of the death penalty states was higher than the average homicide rate of the non-death penalty states, from 48% to 101% higher).

96. See Thomas Michael McDonnell, *The Death Penalty: An Obstacle to the "War Against Terrorism"?*, 37 VAND. J. TRANSNAT'L L. 353, 401-10 (2004).

97. DIRECTORATE GEN. OF THE COUNCIL OF HUMAN RIGHTS & LEGAL AFFAIRS, DEATH IS NOT JUSTICE: THE COUNCIL OF EUROPE AND THE DEATH PENALTY 19 (2010).

98. See, e.g., McDonnell, *supra* note 96, at 399-406 (giving examples of retaliatory strikes after the execution of Aimal Kasi for shooting at the CIA Headquarters and the murder of nine Pakistani police officials after a death sentence was imposed on Omar Sheikh for killing Daniel Pearl).

99. Leonie Brinkema, Judge, Fed. District Ct. of E. Va., *U.S. v. Zacarias Moussaoui* Hearing (May 4, 2006); see BRUCE HOFFMAN, *INSIDE TERRORISM* 32 (2006) (commenting that terrorism was theatre); see, e.g., Jane Perlez, *Court Decides to Sentence Bali Bomber to Death*, N.Y. TIMES, Aug. 8, 2003, at A8 (stating that upon hearing the verdict, the defendant reacted by beaming with his both hands giving the thumbs up as if he had just won an academy award).

conceives and plans the attack.<sup>100</sup> Thus, the closer one is to the actual business of murdering civilians, the more likely one will be a very low-ranking member of the organization.<sup>101</sup> The fanatical individuals who carry out suicide bombings or other types of attack supposedly constitute only a small part of the terrorist organization.<sup>102</sup> Therefore, executing foot soldiers neither has a direct impact on the masterminds of a terrorist attack nor does it cripple the labor strength of a terrorist organization. Moreover, foot soldiers usually live in dire financial conditions before enlisting in terrorist organizations and are partially motivated by the monetary benefits promised to their families upon successful implementation of the attack.<sup>103</sup> Thus, the death penalty's deterrent impact on foot soldiers themselves is, at best, limited owing to the financial and psychological rewards that are procured by their families after their death. Therefore, because of the ideological motivation of terrorists and the hierarchical structure of terrorist organizations, the death penalty does not act as a greater deterrent than the less severe punishment of lifelong imprisonment for terrorism offenses. Rather, the information gained from terrorists during incarceration can be an asset in counter-terrorism operations.

### ***B. International Cooperation***

While the law on terrorism remains mired in uncertainty, terrorism itself has assumed a universal character by attacking the world's sense of safety and well being, uniting the world by its abhorrence, and requiring worldwide cooperation to eliminate it effectively. Recognizing the ubiquity of terrorism, Security Council Resolution 1363 required member states to work cooperatively with each other to share information and intelligence related to security issues, and report to the newly established Counter-Terrorism Committee, thus marking a landmark phase in the fight against terrorism.<sup>104</sup> However, the efficacy of this provision has been hindered by the continued administration of the death penalty by the United States, and by certain countries conditioning extradition and information sharing on assurances that the extradited nationals will not be sentenced to death.<sup>105</sup>

The problematic implications of America's death penalty law were visible even in the immediate aftermath of 9/11, an attack unprecedented in its severity and destruction. The French government, while cooperating in the trial

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100. See Uri Fisher, *Terrorism, Deterrence and American Values*, 3 HOMELAND SEC. AFF. 1, 4 (2007), <https://www.hsaj.org/articles/152>.

101. See *id.*

102. See *id.*

103. See *id.* at 15; see also Adam Dolnik, *Die and Let Die: Exploring Links between Suicide Terrorism and Terrorist Use of Chemical, Biological, Radiological, and Nuclear Weapons*, 26 STUD. IN CONFLICT AND TERRORISM 17, 29–30 (2003).

104. S.C. Res. 1373, ¶ 3 (a)–(e) (Sept. 28, 2001).

105. See Murali Jasti, *Extraditing Terrorists Hits A Death Penalty Kibosh*, 22 WIS. INT'L L.J. 163, 174–85 (2004) (comparing the United States' extradition treaties with Italy, Mexico, Canada, Germany, and Spain and concludes that in the specific context of terrorism, the U.S. would be well suited to become an abolitionist nation as the process of extraditing a criminal who is subject to death penalty is akin to walking into a political minefield).



proceedings, explicitly requested the United States to not seek the death penalty for its citizen Zacarias Moussaoui.<sup>106</sup> However, when the then Attorney General John Ashcroft proceeded to seek execution, the French administration halted cooperation and declared that it would no longer share information that could be used to sentence Moussaoui to death.<sup>107</sup> Similar refusal to share evidence was advanced by Germany.<sup>108</sup> This is concomitant with the policy of many European nations that will not extradite offenders to a nation that will subject them to the death penalty without assurances that such action will not be pursued.<sup>109</sup> Italy's government has taken a stance of not extraditing offenders to any retentionist country, irrespective of assurances to the contrary.<sup>110</sup> Thus, by retaining the death penalty, the United States faces intelligence obstacles in the capture and prosecution of terrorist suspects, thus jeopardizing national security. The European position has been interpreted as reflecting a fundamental shift in the global politics of death, with execution now being perceived to be as repugnant as slavery.<sup>111</sup> Since the fight against terrorism cannot be fought unilaterally, it is imperative that the United States shuns practices that are offensive to its closest allies to present a united front against the horrors of terrorism.

According to an instrumentalist approach towards the retention of the death penalty, the threat of death can serve as an effective tool to force suspected terrorists to reveal information about future attacks.<sup>112</sup> Regardless of the aforementioned futility of death threats aimed at ideological terrorists, the international movement towards abolition will also impede this instrumentalist approach. The European Court of Human Rights in *Soering v. United Kingdom*, held that the extradition of Soering to the state of Virginia would violate Article 3 of the European Convention on Human Rights (ECHR), which prohibits torture and inhumane or degrading treatment, due to the death-row phenomenon.<sup>113</sup> Therefore, the threat of death will be an inapplicable weapon if it obstructs the extradition of suspected terrorists from countries that have ratified the ECHR. Moreover, it is submitted that the instrumentalist

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106. Ben Fenton, *France Snubs U.S. Over Death Penalty in September 11 Investigation*, THE TELEGRAPH (Mar. 29, 2002 12:01 AM GMT), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1389232/France-snubs-US-over-death-penalty-in-September-11-investigation.html>.

107. *See id.*

108. *Germany Withholds Moussaoui Evidence*, BBC NEWS (Sept. 1, 2002 7:21 PM GMT), <http://news.bbc.co.uk/1/hi/world/europe/2229231.stm>.

109. *See Jasti, supra* note 105, at 174–81.

110. *See id.* at 175; *see also* *Venezia v. Ministero di Grazia E Giustizia*, Judgment No. 223.79, 91 AM. J. INT'L L. 727, 733 (1997).

111. *See* Bruce Shapiro, *Spurned for Our Death Penalty*, L.A. TIMES, Dec. 21, 2001, at B15.

112. *See, e.g.,* Dan Eggen & Brooke A. Masters, *U.S. Indicts Suspect in Sept. 11 Attacks; Action Formally Links Man to Al Qaeda, States Evidence Against Bin Laden*, WASH. POST, Dec. 12, 2001, at A01 (quoting one law enforcement official as declaring that “if the death penalty doesn't make him talk, nothing will”); *see also* ALAN DERSHOWITZ, *WHY TERRORISM WORKS* 142–43 (2002) (elaborating on the ‘ticking bomb scenario’).

113. *Soering v. United Kingdom*, No. 14038/88, Decision to Extradite, 161 Eur. Ct. H. R. (ser. A) 111 (July 7, 1989).

approach is a mere euphemism for advocating the use of torture to extract information. Not only is the use of torture an affront to the civilized society, the prohibition against torture constitutes a non-derogable, *jus cogens* norm of international law.<sup>114</sup> Additionally, the United States is a signatory to the Convention against Torture, which outlaws the infliction of extreme pain, whether physical or emotional.<sup>115</sup> Therefore, capital punishment has a counter-productive impact on combatting terrorism due to the international community's emphatic denunciation of the practice.

## VI. CONCLUSION

To paraphrase the Richards, the story of the fight against terrorism should not be defined by the polemical application of capital punishment but by the state's unqualified respect for human dignity. Shorn of both moral and rational justifications, and imposed with dubious fulfillment of constitutional protections, the death penalty functions as little more than a misguided political attempt aimed at satiating public anger and helplessness in the immediate aftermath of a terrorist attack. In the process, it alienates the United States from the democratic ethos embraced by its Western allies and abets the degeneration of the society into one consumed with the fear of death.

While terrorism is an egregious offense, it is an equally egregious mistake to succumb to the terrorists' desire of entrenching fear and vengeance as today's *zeitgeist*. It must be remembered that the long-term detrimental effects of a society built on revenge are as severe as the immediate consequences of a terrorist attack. Through its selection of punishment, the state must normatively reconstruct a society ravaged by violence to assiduously strive for peace. When faced with an enemy that chose death, the state must choose life.

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114. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T10, Judgment from Judges Ndebele Mwachande Mumba, Cassese, May, ¶ 134 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998).

115. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.