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Punishment Society 2008; 10; 103

DOI: 10.1177/1462474507087194

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Law, society, and capital punishment in Asia

FRANKLIN E. ZIMRING AND DAVID T. JOHNSON

University of California Berkeley, USA and University of Hawaii, USA

Abstract

Students of capital punishment need to study Asia, the site of at least 85 percent and as many as 95 percent of the world's executions. This article explores the varieties of Asian capital punishment in two complementary ways. Cross-sectionally, the impression of uniformity that comes from classifying 95 percent of the population of Asia as living in executing states breaks down when closer attention is paid to the character of capital punishment policy within retentionist nations. Temporally, the general trajectory of capital punishment in the Asian region seems downward (though generalizations about patterns in this part of the world are undermined by significant data problems). Asia is also a useful territory for testing the generality of theories of capital punishment based on European experience. Looking forward, Japan and South Korea, two developed nations in Asia that still retain the death penalty, may indicate what other Asian nations are likely to do as they develop. Ultimately, Asia either will become a major staging area for world-wide abolition or the campaign against capital punishment will fail to achieve global status.

Key Words

abolition • Asia • comparative criminology • death penalty • executions

INTRODUCTION

There are several reasons why students of capital punishment policy in the 21st century need to study Asia. There is the size and political variety of Asia, a vast continent with nearly 60 percent of the planet's human population and a great variety of political systems and policies toward capital punishment. Every death penalty policy to be found on earth can be found in Asia, including some policies not found elsewhere. There is the extraordinary pace of political, economic, and social change in Asia, including changes in death penalty law and practice. From a law and society standpoint, the nations of developed Asia are also as far removed from European culture and influence as any group of moderately developed nations can be in 2008. Hence, this is an important place to test the limits of European human rights perspectives on non-neighboring

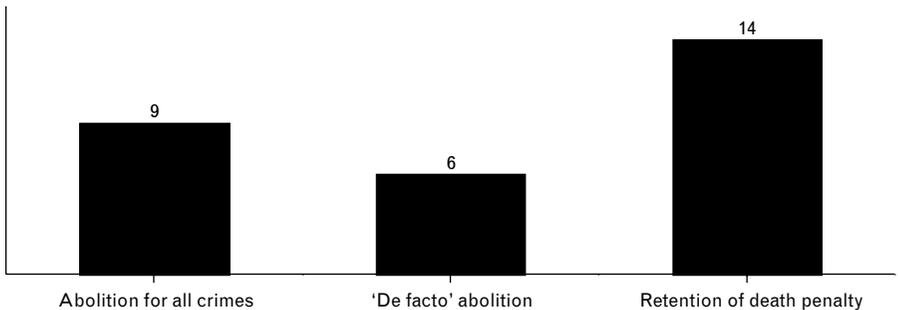
political environments, and a good place to test the generality of theories of change in death penalty policy derived from western experiences. It is also an environment in which induction from detailed case studies could generate new insights about the circumstances of change in death penalty policy.

While these theoretical matters are important, there is also a compelling practical reason to put Asia at the center of death penalty concerns. In recent years, Asia has been the site of at least 85 percent and as many as 95 percent of the world's executions. This region is thus important to students of capital punishment for the same reason Hawaii is of interest to volcanologists: it is where the action is. Looking forward, Asia will either become a major staging area for world-wide abolition or the campaign against capital punishment will fail to achieve global status.

VARIETIES OF CAPITAL PUNISHMENT IN ASIA: A CROSS-SECTIONAL APPROACH

Figure 1 uses the capital punishment categories employed by Amnesty International to depict some of the variety in death penalty policy among governments in Asia.

The 29 Asian jurisdictions (Hong Kong and Macao are reported separately in this listing) divide into 14 with both legal retention of the death penalty and some recent executions, and 15 with either formal abolition or 'de facto' abolition status (more than 10 years without execution). However, this almost 50–50 split does not reflect the actual balance of policy because all of the major population centers in Asia remain



•Figure 1 Current status of the death penalty in 29 Asian jurisdictions

Notes:

- (1) The jurisdictions in each category are as follows. *Abolition for all crimes*: Hong Kong (abolished in 1993), Macao, Australia (1985), New Zealand (1989), Bhutan (2004), Cambodia (1989), East Timor (1999), Nepal (1997), and the Philippines (2006). *'De facto' abolition*: Brunei Darussalam (last execution in 1957), Laos (1989), Maldives (1952), Myanmar (1989), Papua New Guinea (1950), and Sri Lanka (1976). *Retention*: China, Japan, Mongolia, North Korea, South Korea, Taiwan, Bangladesh, Pakistan, Indonesia, Malaysia, Singapore, Thailand, Vietnam, and India.
- (2) Although the 'Special Autonomous Regions' of Hong Kong and Macao do not have the death penalty, offenders can be executed in China through the process of 'rendition' (Hood, 2002: 95).

Sources: Hood (1989, 1996, 2002); Amnesty International (2006a); Hands Off Cain (2007).

retentionist (see Figure 1, note 1). Indeed, about 95 percent of all citizens in Asia reside in jurisdictions that continue to use the death penalty.

But the impression of uniformity that comes from classifying 95 percent of the population of Asia as living in executing states breaks down when closer attention is paid to the character of policy. Consider death penalty policy in the two most populous nations – India and China. Both are ‘retentionist’ in the Amnesty sense, and neither provides precise or transparent statistics on execution activity. Still, best estimates suggest that India, with a population of 1.1 billion, has been averaging less than 10 executions per year, a rate per million persons less than 1/30th that of the United States in 1999 (Clifford, 2004; Batra, 2007). China, by contrast, with 1.3 billion in population, has carried out at least 2000 and maybe more than 10,000 executions per year in recent years, a rate of execution per million (at the high end of the Chinese estimate) that is about 1000 times that of India (Zhang, 2005; *South China Morning Post*, 2006; Lu and Miethe, 2007: 73). A 1000-to-1 difference in execution rate is a difference in degree so vast that it is also a difference in kind.

Rates of execution are not the only dramatic differences to be found among Asian nations lumped in the retentionist category, for many such nations have gone long periods of time without execution. Among populous countries with discretionary non-execution interludes one can count Japan (1989–92), South Korea (1998–present), the Philippines (1994–8 and 2001–6), Thailand (1987–95), Indonesia (1949–73 and 1996–2000), Malaysia (1969–80 and 1997–2000), and Bangladesh (1989–92 and 1998–2001). Thus, almost half of all retentionist nations in Asia have experienced execution moratoria. Both the suspension of executions (as in South Korea) and a sharp reduction in execution volume (as in Taiwan) are sometimes intended as a transitional stage on the road to outright abolition (Cho and Liao, both this issue). In China, too, some scholars advocate a ‘kill less and kill carefully’ policy as the first step on the road to ultimate abolition (Chen, 2005, 2006: 430; Zhang, 2005: 4, 10).

At the highest levels of execution in Asia, by contrast, we find retentionist nations that rely on capital punishment for crime control, and a level of usage long absent from nations in the developed West. China and Singapore carry out executions so often that there are some categories of crime where execution is a frequently used criminal sanction rather than a 1 in 1000 penalty of chiefly symbolic importance. Some China-watchers argue that execution is a cost-effective alternative to protracted imprisonment (Macbean and Li, 2003: 40).¹ There is arguably more of a contrast between nations such as these that use execution to practical effect and low-use countries such as Japan, India, and Indonesia than there are between states with death penalties in their statute books and those without.

While nations with large Islamic populations are in the retentionist category in Asia as they are in the Middle East, they are concentrated at the low-execution-rate end of that category. In fact, several Asian nations with large Islamic populations have recently gone long periods without execution, including Indonesia, Malaysia, and Bangladesh. Most of these low-execution nations with substantial Islamic populations have governments with secular rather than religious orientations, but the tiny nation of Brunei Darussalam combines an Islamic theocratic regime with no death penalty. Moreover, within Asia, a high concentration of Islamic population is *not* found in those nations with the highest levels of execution.

Most of the completely abolitionist states in Asia are not plausible candidates to predict the motivation and method of abolition in other Asian nations, largely because of their close historical connections to European culture and governmental influence. Abolitions in Australia, New Zealand, Hong Kong, and Macao were closely linked to English and Portuguese governmental initiatives. By contrast, the patterns of de facto abolition and the long pauses in execution in several larger and more autonomous Asian nations seem more appropriate models of discourse and method for other Asian nations. If so, then Taiwan may be a better model for future debates in mainland China and Thailand than Hong Kong, and the moratoria on executions in South Korea and Sri Lanka may be better models for stepping away from the death penalty in Asia than the stories of Australia, New Zealand, and Macao. This is encouraging news for abolitionists because the Taiwan and South Korea developments are not only recent, they also suggest that capital punishment can be de-emphasized independent of direct European influence (Liao, 2001; Cho, 2004).

VARIETIES OF CAPITAL PUNISHMENT IN ASIA: A TEMPORAL APPROACH

In the previous section, the primary method of organizing data on Asia was cross-sectional, and that analysis showed that Asia has a higher incidence of death sentences and executions than do other regions of the world. For abolitionists, the patterns over time are more encouraging (though the data on trends over time are not good), because for Asian nations without strong ties to western democracies, most of the visible reductions in executions have been quite recent, as have most of the publicly reported discussions of abolition. Indeed, nine of the eleven known cases of suspended executions for multi-year periods in Asia's retentionist jurisdictions occurred after 1987 (see earlier), and of the six de facto abolitionist nations in Asia, only Laos and Myanmar² (both of which suspended in 1989) are on the Asian mainland (see Figure 1, note 1).

Of course, one reason the known cases of suspension are clustered in the recent past is the poor quality of information on executions over time in much if not most of Asia. What we do not know about trends in execution over time in China could fill more than one book (Macbean and Li, 2003: 32; Ho, 2005: 274; Zhang, 2005: 2), and temporal data are not much better for some other countries in South and Southeast Asia (Hood, 2002: 43). It is quite possible that executions have increased over time in the People's Republic of China, and if they have, then the world-wide volume of executions may not have decreased. But it is also possible that executions have declined over time in China. We do not know, and if other researchers do they apparently have not written about it.

Long-term trends in other major Asian nations can be identified, and the volume of execution is down in most of them, including Japan, South Korea, Taiwan, the Philippines, Indonesia, India, and probably Pakistan, Bangladesh, and Malaysia. Yet students of policy who demand reliable footnotes would not be happy with the factual evidence supporting some of these suppositions.

While the general trajectory of Asian executions seems downward, recent history also shows many reversals of death penalty policy. Most of the suspensions of execution mentioned earlier in this section were followed by resummptions. In the Philippines, what

looked like a prelude to a second abolition – a five-year pause from the reintroduction of capital punishment in 1994 through 1998 – was followed by six executions in 1999 and one more in 2000 (Tagayuna, 2004: 16).³ In western nations, the resumption of executions was uncommon after long suspensions (Zimring and Hawkins, 1986: 3; Zimring, 2003: 17), but this may not be as true in Asia. And our generalizations about patterns in this part of the world are undermined by data problems of epic proportions. Good historical accounts of death penalty practice in Asia may be difficult to construct, but they are no less necessary for that reason.

JAPAN AS A LEADING INDICATOR?

The more developed economic and political systems in the East Asian region have been clustered at the low end of execution volume, yet the most developed nation in the region – Japan – is one of only two fully developed nations in the world to remain in the retentionist category. The Japanese experience is important in two respects – as a potential counter-example to the general expectation that fully developed democracies do abolish the death penalty, and as a potential leading indicator that Asian nations might not shed the death penalty as a rite of passage into full development. Another possibility is that Japan could simply be taking longer to make the conventional journey to abolition (as David Garland has argued may be the case for the United States; see Garland, 2005: 355). In any event, Japan halted executions in November 1989 (at the height of its economic boom), and it resumed executing in March 1993 after a 40-month moratorium in which four successive Ministers of Justice refused to sign death warrants. The third of those Ministers (Megumu Sato) was a Buddhist priest who said executions violated his belief in the sanctity of life (Johnson, 2005: 268).⁴ At present, public sentiment in Japan remains strongly supportive of a death penalty for murder, but executions remain secret and sporadic (an average of four executions per year for the last decade; see Johnson, 2005, 2006).

The cluster of next-most-developed economies in Asia includes South Korea, Taiwan, Singapore, and Thailand. South Korea and Taiwan have both exhibited sharp changes in the political sentiments of voters and in the character of government. In contrast, Japan⁵ and Singapore have been continuously governed by a single ruling party of the right for decades, while in Thailand, former Prime Minister Thaksin Shinawatra led a right-leaning government from 2001 until a coup in 2006. The announced intentions of the governments in Taiwan and South Korea are to facilitate the end of capital punishment within a few years. Neither Japan nor Singapore has made similar pronouncements, and Singapore openly supports execution for drug crimes, not just for homicide (Oehlers and Tarulevich, 2005: 302), as do other Southeast Asian nations such as Indonesia, Malaysia, Vietnam, and Thailand. And in Thailand, former Prime Minister Shinawatra made public appeals for offenders to receive the death penalty, sometimes with success (The Press Association, 2006; Thani, 2006). This contrast in policies may have more to do with the continuous power of a right-center government in Japan and authoritarian rule in Singapore than any shared sensibility about the death penalty in prosperous Asian nations. Certainly the earlier governments of the right in South Korea and Taiwan showed no anti-death penalty sentiments. Indeed, the first South Korean president to suspend executions (Kim Dae Jung, in 1998) and the current abolitionist

leader in South Korea's National Assembly (Yoo Ihn Tae) were both under sentence of death in prior regimes (Bae, 2005: 310).

With economic growth spread across large segments of Asia, the pace of social change and some political shifting is likely to stay high in the coming decade. These fast-moving events will provide opportunities to observe further shifts over time. Potential milestones in development of death penalty policy in the near future will abound. Will South Korea and Taiwan continue on course to suspend and then end execution? If the ruling party changes from long-term right-wing orientation in Japan or Singapore, will death penalty policy change as well? And what political and death penalty policy shifts will come with further growth in nations such as Thailand, Malaysia, Indonesia, and India?

One further puzzle about development over time in many parts of Asia concerns the pace of change of death penalty policy. In Europe, changes in death penalty policy picked up speed with every decade after 1950, so that transitions to abolition in individual countries were faster in the 1970s and 1980s than in the 1960s, and the number of countries changing policy also accelerated over time. By the 1990s, when Central Europe and the former Soviet Union were areas of transition, European organization helped speed up the process in a manner that is unlikely to be repeated in Asia in the foreseeable future. There will not soon be a central directorate for death penalty abolition in Asia as there was in Central Europe (Zimring, 2003: 35). Yet even without this type of coordination, cross-national efforts within Asia and the pace of political change could increase the speed of policy reconsideration. In either event, it has not happened yet.

EAST ASIA AS A TEST OF EUROPEAN THEORY

The previous sections of this article discussed Asian experience and prospects in a relatively a-theoretical way, and the focus on recent developments in death penalty policy was used to anticipate possible future trajectories of capital punishment in Asia. But there is another respect in which Asian experience can serve to educate observers about the causes and consequences of change in death penalty policy. In the era after the Second World War, the major events leading to abolition were concentrated in the developed nations of Western Europe and in those other nations where European influence was substantial. Similarly, the wave of abolition of the death penalty between 1945 and 1981 was centered in Europe and in the most developed parts of the British Commonwealth. The extraordinary movement away from capital punishment after the fall of the Iron Curtain in Central and Eastern Europe was often a result of Western European political ideas, organizational requirements, and financial pressures (Zimring, 2003: 35).

The history of change in capital punishment policy during the six decades after the end of the Second World War has generated a series of generalizations about how, where, and for how long changes in death penalty policy occur (Zimring and Hawkins, 1986; Tsujimoto and Tsujimoto, 1993; Hood, 2001, 2002; Jacobs and Carmichael, 2002; Simon and Blaskovich, 2002; Steiker, 2002; Whitman, 2003; Zimring, 2003; Anckar, 2004; Greenberg and West, 2004; Hodgkinson and Schabas, 2004; Garland, 2005; Miethe et al., 2005; Neumayer, 2005; Sarat and Boulanger, 2005; Wang, 2005; Suzuki,

2007). As long as these theories are only tested in western settings and in settings dominated by Western European influence, the generality of the theories cannot be established. Economic development (Anckar, 2004: 45) and democratic values (Greenberg and West, 2004: 72) appear to be associated with movements toward abolition of the death penalty, but is that a world-wide trend or is it restricted to the areas of European influence where it has already been observed? Similarly, the European and Commonwealth experience is that once the death penalty is abolished, it remains abolished even if the political factions that produced the change lose political power (Zimring and Hawkins, 1986: 3). Will that prediction be realized in the non-European context of Asia?⁶

The dynamics of death penalty politics and policy in East and Southeast Asia provide the best opportunities for testing the generality of theories based on European experience and for generating new insights about the causes and consequences of change. Of course, we do not mean to suggest that Asian governments are uninfluenced by European diplomacy, ideas, or economic incentives. However, the major nations of East and Southeast Asia that have no recent colonial experience – China, Japan, South Korea, Thailand, Taiwan, the Philippines, and Indonesia – are as far removed from European influence as major nations can be in the 21st century. The decisions these nations will take on capital punishment will not be completely independent of European concepts and institutional pressures – that would require a counterfactual world – but this branch of the Asian experience will be semi-autonomous. In the foreseeable future, death penalty policy decisions in these places will be free of European control but not free of European influence, and that makes these nations an important laboratory for exploring the relationship between political developments and capital punishment policy.

To illustrate the type of inquiry we have in mind, we will discuss East and Southeast Asian data related to two Europe-based theories from the previous work of the elder author: the ‘left comes to power’ theory of the timing of abolition, and the ‘irreversibility’ of abolition even when public support for abolition is far from a majority. We also offer this evidence as an example of the ways in which Asian experience can be useful for developing comparative theories of capital punishment.

In Franklin Zimring’s recent book (Zimring, 2003), the relationship between the electoral fortunes of left-wing parties and the timing of abolition was summarized in a table relating the year in which the death penalty was legislatively ended to domestic political developments in seven European nations.

In Table 1, the dates and ‘precipitating circumstances’ of abolition suggest that the particular timing of abolition may not be much related to public attitudes toward the death penalty. Great Britain began its two-stage abolition in 1965, while France abolished the death penalty 16 years later. Was the French lag evidence of greater enthusiasm for the death penalty in France? An alternative view would emphasize the fact that the Labor Party came to power in Great Britain in 1964, while the long dominance of de Gaulle and the center-right in French national politics did not end until the socialist victory in 1980, after which Francois Mitterand swiftly led the march to abolition. As Zimring concluded, ‘The major contingencies that separate the English, Portuguese, Spanish, and French over a sixteen-year period are domestic political events that were not caused by the issue of capital punishment’ (2003: 22).

TABLE 1 The timing and precipitation of political circumstances of post-war abolition in Europe

NATION	DATE	PRECIPITATING CIRCUMSTANCE
Italy	1944	Fall of Mussolini
West Germany	1949	Constitution for new state
Austria	1950	Socialists join governing coalition
Great Britain	1965 ^a , 1969 ^b	Election of Labor government
Portugal	1976	Transition from Salazar regime
Spain	1978	Transition from Franco regime
France	1981	Election of Left government

^a Five-year suspension.

^b Permanent abolition.

Source: Zimring (2003: 23 – originally compiled from Amnesty International Reports).

Events in Asia over the past 25 years provide fewer changes in capital punishment policy, and less dramatic changes as well, but the well-defined developments that have occurred usually fit in periods of right-to-left or right-to-center transition. Two clear cases of this were the abolition of capital punishment in the Philippines following the end of the Marcos regime in 1986 (Tagayuna, 2004), and the still-in-effect South Korean moratorium that came after a left-of-center president (Kim Dae Jung) was elected in 1998 (Bae, 2005; Cho, this issue). In each case, the moratorium on execution was a matter of high visibility and long-lasting impact. The South Korean moratorium has lasted almost 10 years and may be leading toward abolition. In the Philippines, executions resumed under President Estrada in 1999 ($N = 6$) but stopped again after one more execution in January 2000. In Taiwan, the announcement of a plan to phase out capital punishment corresponded to a rise to power and the retention of the presidency by a liberal opposition party. There have been no obvious political transitions in Malaysia and Japan, while non-execution in Indonesia (1996–2000) came at the end of the Suharto regime, perhaps in anticipation of a political transition.

Because the list of pauses in execution discussed earlier reflects a more tentative policy step than legislation to cease executing or to abolish the death penalty, the provisional nature of the policy rather than an Asian capacity to more easily reverse the move away from capital punishment may explain the reversion to execution in places such as the Philippines and Thailand. Or not. Asian governments that abolished in the 1960s and 1970s maintained their abolitionist stance when right-wing governments replaced left-wing governments, as in New Zealand and Australia, although these were stable democracies with strong British influence. The capacity of Hong Kong and Macao to maintain their status as non-death penalty segments of the PRC is, at least so far, evidence of the perseverance of abolition once it is achieved. More evidence on the staying power of Asian steps toward abolition will accumulate in the future. South Korea seems to be the autonomous Asian nation furthest down the road toward abolishing capital punishment. If formal abolition happens there and is followed by an orderly transition to a government of the right, as seems likely in 2008, then it will become an important test of how quickly abolition gets institutionalized in East Asia.

CONCLUSION

There are two reasons why Asia, particularly the rapidly developing nations of East Asia, will play a central role in global death penalty policy developments over the first two decades of the 21st century. The first is a process of elimination: with internationally monitored commitments to non-execution in place in Western, Central, and Eastern Europe, the developing nations of Asia are one of the last major frontiers for domestic and international efforts to end executions (Johnson and Zimring, forthcoming). The second reason Asia is an important arena for understanding the dynamics of the death penalty in modern government is that the nations of the Pacific Rim are as culturally distinct and economically autonomous from Western European influence as any group of moderately industrialized nations can be. If the perspective of 'human rights' and 'limits on government power' extend throughout the Pacific region, it would appear to be a consequence of development on a global basis.

Finally, there are two competing paradigms to explain the larger variety and greater importance of state executions in contemporary Asia. The theory of *temporal lag* suggests there is no substantive 'Asian difference' in the way capital punishment policy is determined or discussed, it is just that Asia is a decade or two behind places of parallel economic and political development such as Central and Eastern Europe. This theory can be paraphrased 'today Turkey, tomorrow Thailand'. The competing perspective posits an 'Asian difference' in the *substantive importance of capital punishment* that conditions progress toward abolition in addition to its timing. The next few decades will provide the decisive evidence about which of these theories best predicts the future of capital punishment in Asia.

Notes

- 1 In the United States, 'the evidence clearly shows that capital punishment systems . . . are always more expensive than punishment systems without capital punishment because "super due process" is required in the former but not in the latter' (Bohm, 2003: 592).
- 2 De facto abolition in Myanmar (1989 to the present) shows that states that suspend judicial executions may still remain vigorous killing states (Hood, 2002: 45). The same can be said of Thailand (Fritsch, 2004), where police summarily killed more than 3000 suspected drug dealers in 2003, and the Philippines, where despite no executions from January 2000 until the second abolition in June 2006, extra-judicial killings occurred on a large scale and frequently involved members of the police and military (Amnesty International, 2006b). In India too, capital punishment occurs less frequently than do 'encounter killings' by the police (Eckert, 2005: 198).
- 3 There were no executions in the Philippines for 10 years before the first abolition in 1987, and there were no executions for 6 years before the second abolition occurred in 2006. Thus, in the 30 years between 1977 and 2006, judicial executions occurred only in 1999 and 2000 (Tagayuna, 2004).
- 4 Japan's moratorium ended in March 1993 when a new Minister of Justice (Masaharu Gotoda) signed death warrants authorizing the hanging of three men on death row. In his memoirs, Gotoda offered three reasons for signing the warrants: his duty as

Minister of Justice to 'protect law and order'; the thorough process of case review and consultation that officials in the Ministry of Justice engaged in before selecting persons for execution; and strong public support for the death penalty in Japan (Johnson, 2005: 268).

- 5 Japan's Liberal Democratic Party has ruled the country continuously since 1955 (sometimes in coalition with other political parties), except for a nine-month period in 1993 when internal rifts in the party led to a brief transfer of power (Curtis, 1999: 65).
- 6 The authors are aware that when it comes to predicting political developments, academic 'experts' have an unimpressive track record. Indeed, research on expert political judgment shows that humans who spend their lives studying the state of the world are often 'poorer forecasters than dart-throwing monkeys' (Menand, 2005: 98). Research also suggests that the better-known and more frequently quoted 'experts' are, the less reliable their guesses about the future are likely to be (Tetlock, 2005; Taleb, 2007).

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FRANKLIN E. ZIMRING is the William G. Simon Professor of Law and Wolfen Distinguished Scholar at the University of California at Berkeley's Boalt Hall School of Law. He is the author of *The contradictions of American capital punishment* (Oxford University Press, 2003).

DAVID T. JOHNSON is associate professor of Sociology at the University of Hawaii. He is the author of *The Japanese way of justice: Prosecuting crime in Japan* (Oxford University Press, 2002).
