

Daredevil and the Death Penalty

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I. INTRODUCTION

What can the recent movie, *Daredevil: The Man Without Fear*, teach us about the death penalty?¹ *Daredevil* the movie is based on the well-known Marvel comic series. For the comic-book-challenged among you, I begin with a synopsis of this marvelous story, which takes Daredevil from a vigilante determined to cleanse evil from the face of the Earth (or at least from New York City) to a man unwilling to kill even the most murderous of thugs.

But what exactly is a “vigilante”? A whirlwind review of the history of vigilante violence in America reveals that vigilantism, properly understood, involves the use of violence on behalf of the local community when it perceives itself no longer to be adequately protected by the state. Vigilantism is thus generally *extra-legal*.

Yet why do Americans, who otherwise fear the abuse of government power, embrace the state’s ultimate power of imposing the death penalty? Relying primarily on recent social science literature showing that the actual imposition of the death penalty is highest in states who applaud vigilante values, I conclude that American juries have strangely come to see their role as vigilante-like—protecting the community from outsiders who assail it in the face of an ineffectual state—rather than as the imposition of state violence. A richer understanding of the meaning of the *Daredevil* vigilante story shows why the subtle message of movies

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¹ The summary here of *Daredevil*’s tale is drawn largely from my memory and interpretation of this movie. A more detailed, but slightly different, version of this story can be found in GREG COX & MARK STEPHEN JOHNSON, *DAREDEVIL* (2003). Because this essay is but a glorified film review, I have kept footnotes to a minimum. I draw heavily, however, on the following sources: RAY ABRAHAMS, *VIGILANT CITIZENS, VIGILANTISM AND THE STATE* (1998); Andrew E. Taslitz, *Mob Violence and Vigilantism*, in *THE OXFORD COMPANION TO AMERICAN LAW* 564 (Kermit L. Hall ed., 2002); CHRISTOPHER WALDREP, *THE MANY FACES OF JUDGE LYNCH: EXTRALEGAL VIOLENCE AND PUNISHMENT IN AMERICA* (2002); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003); FRANKLIN ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* (2003).

like *Daredevil* can perhaps be an effective part of a strategy for bringing about the death penalty's own demise.²

II. THE MAN WITHOUT FEAR

A. *How the Blind Can See*

Matt Murdock, a redheaded kid growing up in the notorious slum of Hell's Kitchen, is the son of Jack Murdock, an ex-prizefighter known as "The Devil." Though vehemently denying it when confronted by his son, Jack is an enforcer collecting debts for a local mob boss rather than the warehouse-worker that he now claims to be. When Matt one day comes by the warehouse unannounced, he catches his aging father brutally beating a deadbeat. Matt flees on his bicycle, crashing into a container of radioactive waste that splashes his eyes.

Although Matt's accident blinds him, it opens up his other perceptions in startling ways. All Matt's other senses are dramatically enhanced. For example, he can hear conversations in apartments blocks away and feel the letters in ordinary newsprint. Moreover, Matt has developed a new sense—a radar sense—using high-pitched sounds to "see" what surrounds him. Matt's overall heightened awareness of his body makes him swift, agile, and somehow enormously strong. Matt is also a human lie-detector who can tell by the sound of a person's heartbeat and the scent of his sweat whether that person speaks truly or falsely.

Jack, overcome with grief at what happened to his son, decides to go straight and return to boxing. Jack "The Devil" wins fight after fight, snubbing the mob in the process, and becoming for Matt a symbol of redemption and of the little man's power against evil.

But one day, Jack learns that his wins were engineered by the mob after all. When he refuses to throw a fight, Jack is murdered by a mysterious goon, Wilson Fisk, who later rises to become the "Kingpin of Crime" in New York City. Neither Fisk nor his superiors are ever brought to justice. The police did not help Matt's dad, so Matt vows to cleanse the city of the mob.

B. *Justice Is Blind*

Flash forward, ten to fifteen years later. Matt is now a criminal defense lawyer, but a financially strapped one, for Matt represents only the near-poor, and, of them, only the innocent. Because of his extraordinary powers, Matt unerringly knows who is guilty and who is not. By day, he battles for right in the criminal justice system. But that system too often still fails, as it did when he was a kid. The guilty sometimes walk.

So by night Matt becomes "Daredevil, The Man Without Fear"—a red-leather-jumpsuit-wearing, masked avenger. Two small horns protrude from his red mask,

² DAREDEVIL (Fox Home Entertainment 2003).

and he carries a “billy-club,” two distinctive red sticks joined by an extendable rope, the sticks serving as nunchucks, the rope as a lifeline as he speeds across Manhattan rooftops. Where the state fails to bring justice because of corruption, politics, turf battles, or incompetence, Daredevil brings righteous retribution. But his retribution is mostly local. He is primarily the defender of Hell’s Kitchen. He speaks in its name.

And he speaks with fists, with clubs, with pain. He is brutal, bringing blood, broken limbs, mutilation, even death, to the evil hordes who oppose him. The state, of course, brands him a criminal, for it can sanction no competition over its own power to decide what uses of violence are legitimate. But Daredevil resists the state, for it has lost its right to allegiance. Daredevil serves the people, the community of Hell’s Kitchen, and it is only to that community that he will be answerable. He does what is impossible because he knows no fear. And we love him for it.

C. Skepticism, Pain, and Redemption

Several events, however, shake Daredevil’s confidence in his mission. First, while he is pummeling a drunken father who had viciously beaten his young daughter, the daughter screams in terror. She begs Daredevil to stop. Matt is genuinely surprised at her entreaties. He thinks her dad is getting only what he deserves. He responds, “Don’t be afraid. I’m one of the good guys.” The daughter is unimpressed. Daredevil, troubled, leaves, pondering whether he may unknowingly have crossed over the line separating good from evil.

Second, Daredevil (as Matt Murdock) falls in love with a woman named Elektra, the wealthy heir of a father tainted by companionship with the Kingpin. Elektra shares, to Matt’s delight, his love and talent for violence. Matt has resisted love up until now, for love means having something life-giving to lose. Love brings fear. Matt indeed comes to know fear when, in his Daredevil persona, he fights a super-villain named Bullseye whom the Kingpin has sent to kill Elektra. Matt loses the first part of that fight and suffers serious injuries. Matt’s fear still lives, but now it is mingled with rage, grim determination, and soul-emptying heartache. He battles further, “accidentally” hospitalizing Bullseye, who falls several stories to the street during the fight. The audience is at this point uncertain whether that fall was actually Matt’s intended goal and whether Bullseye’s survival is, therefore, a grave disappointment for Matt.

Daredevil should himself be hospitalized at this point in the story. Instead, he drags his battered body to fight the man-mountain that is the Kingpin. In that process, the Kingpin unmasks Daredevil, recognizing him as Matt Murdock, the young lawyer who refused at an earlier time to work for someone of Wilson Fisk’s sordid reputation. The Kingpin is close to winning what may turn out to be Daredevil’s final fight. But Daredevil, reaching inside to find hidden strength, smashes a nearby water pipe that spews a rush of water which momentarily stuns the Kingpin. Each drop of water makes a distinct sound as it sprays the Kingpin,

greatly sharpening Daredevil's radar "vision" of his opponent. Daredevil fights with a new and awe-inspiring passion. The Kingpin is near death. A single further blow will kill him. The Kingpin threatens to reveal Daredevil's secret identity to the world, but Matt scoffs that no one will believe a story about a blind vigilante. The Kingpin acknowledges this, but he swears to bring Daredevil a slow, painful demise when the prison doors open, as they eventually will, to unleash the Kingpin once again on the city.

Still Daredevil will not kill. When the Kingpin asks why, the unmasked, jump-suited hero replies, "Because I'm one of the good guys." Daredevil has relearned fear, remorse, and humility. With their return, he retains more of Matt Murdock—the man who works for justice under the wing of the state—than before. The death sentence is not a punishment that Matt has the right to impose, and perhaps, we are left to wonder, no one does. The audience is ambivalent. Matt has endangered his life, his career, and his nightly mission by not killing the Kingpin when he had the chance. That is true bravery; for Matt feels, but overcomes, the fear of doing what he thinks is right. Many in the grumbling audience think, nevertheless, that Matt was foolish. The Kingpin is wealthy and powerful, and he will beat the rap or be given an insufficient sentence. That frightening, heartless blob, a smirking sphere of muscle and corruption, will haunt the world once again. For some in the audience, Daredevil has failed. This is not what vigilantes are supposed to do.

III. WHAT ARE VIGILANTES SUPPOSED TO DO?

A. *Murder by Community: Vigilantism and Lynching Defined*

The Daredevil character fits a long line of movie figures dubbed "vigilantes" by the media. The most famous such figure for my generation was the character played by Charles Bronson in the movie *Death Wish*, about a man seeking vengeance in New York City's subways by killing robbers after one killed his wife.³ But are Charles Bronson's character and Matt Murdock really "vigilantes"? Understanding what vigilantes do and how Americans feel about them versus how we feel about the state's use of violence more generally sheds light on the audience's ambivalence about Daredevil's decision to spare Kingpin's life. Whether we see that act as heroic or foolish in turn helps us to better understand America's love affair with the death penalty.

Mob violence and vigilantism share a common trait: the use of violence to impose social control or to achieve popular justice.⁴ These forms of violence

³ DEATH WISH (Paramount Studio 1974).

⁴ This discussion of vigilantism synthesizes a number of sources, including all the sources cited *supra* note 1, and ELIZA STEELWATER, *THE HANGMAN'S KNOT: LYNCHING, LEGAL EXECUTION, AND AMERICA'S STRUGGLE WITH THE DEATH PENALTY* (2003) and PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* (2002).

involve an appeal to shared notions of higher law when the law enacted by the state is seen as morally wrong, inadequate to the task, or nonexistent. Mobs are social groups having no decisionmaking structure who come together for political or economic reasons. They often form spontaneously, generally last only a brief time, and are united by a sense of shared interests and purposes. Vigilantism differs from mob violence in the degree to which it is an organized movement whose members take the law into their own hands. The late eighteenth century Stamp Act Riots, the Boston Tea Party, and Reconstruction lynch mobs are usually classified as mob actions, while the western committees organized to combat frontier violence and protect property—the thousands-strong San Francisco Vigilance Committee of 1865 being the most prominent example—are classified as the prototypical vigilante actions.

Nevertheless, the line between the two forms of violence can be hard to draw, and, for my purposes, such sharp distinctions are largely irrelevant. Thus one leading social scientist bucks the scholarly trend by defining lynchings—a particularly important American form of extra-legal violence—as vigilante justice, and a leading historian defines lynching as “murder endorsed by community.”⁵ This definition clarifies important qualities shared, albeit perhaps to varying degrees, by these different types of violence.

B. *Vigilante Violence as Popular Sovereignty*

Vigilante violence and lynching in particular are rooted in an ideology of popular sovereignty: the people or communities are the real sovereigns; whenever those to whom they have delegated authority fail, it is the people’s right to take back that authority into their own hands. This ideology is generally not anti-state, for “vigilantism commonly thrives on the idea that the state’s legitimacy at any point in time depends on its ability to provide citizens with the levels of law and order they demand.”⁶ Vigilantism is thus “often a vote of no confidence in state efficiency rather than in the concept of the state itself.”⁷ Vigilantes thus separate the state from the community, the former’s job being to protect the latter. The problem is in defining who belongs to the “community” and who speaks for it.

For most vigilantes, the “community” is a local one. Even in the locality, however, there are always some despised “others” outside the community. Indeed, the very justification offered for vigilante action is often the government’s failure to protect the community from those who are in its midst, but are not truly *of it*—those who would drain its life. Thus, in nineteenth century San Francisco, many

⁵ See ZIMRING, *supra* note 1, at 89–118 (criminologist defining lynchings as but one manifestation of “vigilante values”); WALDREP, *supra* note 1, at 7 (historian’s definition of “lynching”).

⁶ ABRAHAMS, *supra* note 1, at 4.

⁷ *Id.*

residents believed that “vagabonds and thieves controlled the elections.”⁸ Vigilante action was needed to wrest control from and punish these “very bad men.”⁹ In response to challenges to the legality of violence not sanctioned by formal law, orator William Durr told cheering San Franciscans that “while Americans owe their Constitution reverence and obedience, ‘the right to revolutionize is reserved to us.’”¹⁰ Durr insisted that the people retained “the privilege of so regulating our *local* affairs that our lives and property will be made safe through the correct administration of the law under the Constitution.”¹¹

Similarly, in the Bleeding Kansas of the mid-1850s, free-soilers and proslavery forces battled each other over who *was* the community. Until that question was settled, there could be no viable, legitimate government. Each side took the position, of course, that the other side was not really of, and thus did not speak for, the true community.¹² Violence was therefore justified; abolitionist John Brown expressed glee at the murders he and his son committed in justice’s name,¹³ while proslavers declared that “until we make laws, we are HIGHER-law men. We go in for hanging thieves of *all* kinds.”¹⁴

Perhaps most resonant with modern concerns was the rise of the Ku Klux Klan during Reconstruction. Republicans agreed that the People should rule, but defined “the People” as national in scope and including the newly-freed slaves. The Klan, however, defined the community narrowly as the *local* white, Democratic community, one free from carpetbaggers and scalawags.¹⁵ As historian Christopher Waldrep explains when discussing the situation in Kansas, “Lynchers always claimed to represent the People and crafted rhetoric to advance their claims.”¹⁶

⁸ *Id.*

⁹ *Id.*

¹⁰ WALDREP, *supra* note 1, at 57.

¹¹ *Id.* (emphasis added).

¹² ABRAHAMS, *supra* note 1, at 62–63. For a more detailed summary of the context in which pro- and anti-slavery forces battled in the antebellum Kansas of the mid-1850s, see Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283 (2000).

¹³ See LOUIS A. DECARO, JR., “FIRE FROM THE MIDST OF YOU”: A RELIGIOUS LIFE OF JOHN BROWN, JR. 216–36 (2002) (tracing John Brown’s deeds and thoughts over the struggle in Bleeding Kansas and historians’ disputes over what were Brown’s true actions and responsibility); MERRILL D. PETERSON, JOHN BROWN: THE LEGEND REVISITED 5–6 (2003) (“[A]t a place on Pottawatomie Creek, [Brown] presided over the murder of five slave-state settlers.”).

¹⁴ WALDREP, *supra* note 1, at 62 (quoting *Atchison (Kansas) Squatter Sovereign*, Mar. 13, 1855).

¹⁵ See *id.* at 67–84.

¹⁶ *Id.* at 63 (discussing Kansas lynchings).

C. *Co-opting the Frontier*

Vigilante action often takes place on the frontiers of the state. But these spatial frontiers are not limited to the old West or the early South; they extend to any geographic area outside the direct or full control of the state. In modern times, certain inner city neighborhoods fit that description. The failure of the state to protect its citizens equally may lead frontiersmen and women, old or new, to trust their local values over those of the broader society, as represented by agents of the state. When those agents attempt to reassert state control—for example, by suddenly introducing especially aggressive policing—the agents may be resisted, perceived as passive or active friends of “the enemy.”¹⁷

Vigilante action can be a kind of rebellion by the weak against the strong, a further oppression by the strong against the weak, or one sort masked as the other. But it is the romantic image of vigilantes protecting the most vulnerable among us that accounts for the continuing appeal of vigilantism in the modern imagination. The state, however, cannot long tolerate any form of vigilantism before jealousy of lost power sets in. Yet the sometimes powerful, popular appeal of vigilantism means that the state does better in its competition with the horde by co-opting it rather than destroying it. As one commentator explains:

At the end of the nineteenth century, white authorities complicated the meaning of lynching, working to drive lynching indoors by making the criminal justice system more efficient, capable of delivering punishment so swiftly that no “lynching” need occur. One governor proposed placing judges on call, to be summoned immediately to crime scenes for faster trials and quicker executions. The states made rape a capital crime, giving juries the power to put rape defendants to death. In other words, all-white, all-male juries got to pick which rapists lived and which ones died. This was supposed to forestall “lynching” by substituting the power of the state for the mob. It blurred the line between lynching and execution.¹⁸

This tension between due process and what we might call “state vigilantism”—the bringing of private vigilantism into the public house, the co-opting of popular rage—turns out to be helpful in explaining both our love affair with the death penalty and our moral evaluation of Daredevil’s sparing of the Kingpin’s life.

¹⁷ ABRAHAMS, *supra* note 1, at 25.

¹⁸ WALDREP, *supra* note 1, at 152.

IV. STATE VIGILANTISM

The American embrace of the death penalty seems hard to square with Americans' historical distrust of government power.¹⁹ The American Revolution was itself largely about limiting such power, and a strong, modern, probably dominant, strand of American political thinking derides the "welfare state" and "big government power." The structure of the Constitution, with its emphasis on federalism, the separation of powers, and a strong Bill of Rights highly protective of individual liberty, is designed to check government power. Americans seem to fear government more than most, perhaps all, other industrialized nations. Yet Americans overwhelmingly support the death penalty at a time when European nations and most of the industrialized world condemn the death penalty as a barbaric leftover from a less-civilized past, a blatant violation of human rights.²⁰ What explains this American exceptionalism?

A. *Vigilante Values*

Criminologist Franklin Zimring suggests in a recent book that a plausible explanation for this puzzle is a fairly simple one: Americans have stronger indicators of a continuing zeal for vigilante values than do Europeans, and Americans understand the imposition of the death penalty to be more about vigilantism than state power. Indeed, where vigilante values are highest in the United States, so are executions.

For example, in the years after *Gregg v. Georgia's*²¹ imposition of certain procedural safeguards as a prerequisite to cranking up the death machine, more than "four out of five executions took place in the capital punishment confederacy, which means that the ratio of Southern to non-Southern executions has been four to one."²² The states of the Old Confederacy accounted for the vast majority of lynchings in the twentieth century, while there was no such vigilante system at

¹⁹ On American fear of government power and belief in limited government, as well as contrary impulses in American history, see MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* (2003); GARRY WILLS, *A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT* (1999).

²⁰ See ZIMRING, *supra* note 1, at 16–41 (comparing American and European attitudes toward the death penalty).

²¹ See *Gregg v. Georgia*, 428 U.S. 153, 153 (1976).

²² ZIMRING, *supra* note 1, at 77. Other writers have noted the connection between "Southern" values and the death penalty. See, e.g., WALDREP, *supra* note 1, at 6–11 (suggesting that the American embrace of extra-legal violence has been especially strong in the South and linking that embrace to modern attitudes toward the death penalty). However, I focus primarily on Zimring's work because he has produced the most thorough and persuasive social science establishing this connection and fused it with historical and comparative analyses in a single book in a way that no other author has accomplished. In a real sense, this essay is also a review of Zimring's book, or perhaps more of a song of praise, a duet sung by the law professor (me) and the superhero (Daredevil) to the criminologist (Zimring).

work in the American Northeast.²³ Half of the states with the lowest lynching rates have no modern death penalty,²⁴ and all but two of the states with the lowest lynching rates are at the “bottom end of the distribution of modern executions,” while “[t]hose states that had the most extensive lynching histories in the past now execute without exception and collectively dominate the nation’s execution totals.”²⁵

Zimring also examined modern indicators of “vigilante values,” values showing a distrust of government’s ability to do the right thing for the community, especially concerning protection from predators. Thus, he examined individual survey data concerning whether respondents viewed the word “vigilante” favorably, and whether they believed that individual acts of shooting a criminal aggressor are sometimes justified. The South stands out with the most positive responses to these questions; simply put, Southerners view vigilantes as good and individual assaults on criminals as wise.²⁶ Likewise, Zimring suggested that in a high “vigilante values” state, there should be a greater percentage of killings in defense against criminals by citizens relative to such killings by police because the police represent the state. Again, he found that “[t]he South is the only region where citizens account for a larger number of lethal incidents than police.”²⁷

Zimring further found that those states executing the most offenders are also substantially less likely to have average or high tax rates than do states that have had few or no executions, a fact that likely reflects a greater distrust of government.²⁸ Importantly, there are also strong indicators that distrust of *local* government, at least concerning the death penalty, is particularly strong in the states with the highest number of executions.²⁹

Vigilante values are embraced to some degree, however, in all regions of the United States. Those values are simply the strongest where the most executions take place. Support for the death penalty *in principle* does not vary in relation to vigilante-worship, nor is Zimring arguing that death-penalty verdicts necessarily so vary. Rather, his data suggests that *actual executions* are strongly correlated with the modern strength of vigilante values.

²³ ZIMRING, *supra* note 1, at 92.

²⁴ *See id.* at 97.

²⁵ *Id.* at 96.

²⁶ *See id.* at 102–03.

²⁷ *Id.* at 107.

²⁸ *See id.* at 113–14.

²⁹ *See id.* at 112–13:

To the extent that toleration of taxes is a good measure of trust in government, the states that execute the most are substantially less likely than average to trust the very levels of government that conduct executions. What may bridge the gap between distrust of government and acceptance of execution is the feeling among the populace that executions are a community rather than government function.

B. *Due Process Values*

Zimring is not saying that fairness is irrelevant to Southerners. To the contrary, all Americans embrace due process values as a way to restrain governmental abuses. But the relative degree of a commitment to due process values versus a commitment to vigilante values accounts for differences in execution rates. Americans are conflicted about the death penalty, and that conflict can be resolved in surprising ways. The obsession with due process—what Zimring calls the “due process mindset”³⁰—distrusts government not for its weakness, corruption, and wastefulness, but for its strength and efficiency. The due process thinker fears governments exercising power arbitrarily, falsely accusing citizens, and punishing the innocent. The Leviathan’s arrogance can lead it to make mistakes.³¹ Accordingly, the due process mindset deliberately looks for ways to slow or block the government’s use of violence. Death being the ultimate and irreversible punishment, due process thinkers will exhaust every avenue, slowing or halting executions and raising their costs. The expense to get it right is worth it because even a criminal defendant “is viewed as a member of the community and a citizen.”³²

The vigilante attitude, by contrast, sees delay and expense in killing as a thorough waste of time:

The vigilante mindset assumes that the offender can be identified without legal procedures, while the due process mindset assumes there is substantial difficulty in sorting out the guilty from the innocent. Behind that contrast lies another: The criminal offender is an outsider in the vigilante imagination, not a genuine member of the community. No wonder he is so easy to identify.³³

As readers should expect by now, Zimring finds due process protections, and thus substantial and costly delays, to be significantly higher in those states with the lowest rates of actual execution. Of course, in all states defendants have ultimate recourse to the federal system. But precisely because the federal system is the last step in the process, it is also the most visible step, and Southerners hold it and its allegedly nonsensical usurpation of local prerogative as the primary cause of expensive delays.³⁴

³⁰ *Id.* at 122.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *See id.* at 78–80.

C. *Juror Vigilantes*

This still leaves open the question of how Southerners can view the state's killing a human being as more the community's conduct than the government's. One possible explanation, though not one limited to the South, is that the death sentence is one of the few times that the jury, rather than the judge, imposes sentence. In the vast majority of states, juries decide guilt, but judges decide punishment, *except where death is at issue*. (The primary exceptions, interestingly, are a few states in the South and its borders that still rely on jury sentencing in some non-capital cases.) There is probably something very personal, as a juror, in being the one who decides that another shall die. I say "the one" because each juror has this power; a single "no" vote saves a life (at least in most jurisdictions). Furthermore, the jury is understood to be the community's voice, so it *feels like* the community itself, rather than the state, is doing the killing.

But Zimring puts greater emphasis on the way that the modern death system seeks to personalize a death trial as a struggle between the offender and the victim's family.³⁵ This struggle is portrayed as one in which the community champions the cause of its most vulnerable, reaffirming the victim's family's status as valued community members. In effect, "the penalty phase is remade into what sociologists call a 'status competition' between the offender (whose claims to sympathy and understanding are the subject of his penalty phase presentation) and those who were directly or derivatively injured by the crime."³⁶

Victims are, therefore, permitted, even encouraged, to attend the executions. Victim Impact Statements, based largely on interviews with the surviving family, are taken.³⁷ These may emphasize that the victims were "butchered like animals," describing survivors' fear, sleeplessness, pain, and anger. Even more powerful can be victim testimony at the penalty phase, described in this way by Chief Justice Rehnquist in one leading case:

The State presented the testimony of Charisse's mother, Mary Zvolanek. When asked how Nicholas [her grandchild] had been affected by the murders of his mother and sister, she responded: "He cries for his mom. He doesn't seem to understand why she

³⁵ See *id.* at 54–55. One author has recently made a strong case for having juries decide all criminal sentences precisely because it democratizes the criminal justice system. See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311 (2003). Jury involvement in capital cases has, however, contributed to the expression of vigilante values; although the non-capital cases of which Iontcheva writes may arguably involve a different dynamic than the capital ones, the death juries' experiences should give us pause. Cf. *id.* at 314 & n.16 (Only six states—Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia, primarily states high in vigilante values—currently employ jury sentencing in non-capital cases.)

³⁶ See ZIMRING, *supra* note 1, at 55.

³⁷ *Id.* at 53. On the effect of such impact statements on juries and American culture, see Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996).

doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, 'Grandmama, do you miss my Lacie?' And I tell him yes. He says, 'I'm worried about my Lacie.'"³⁸

In the face of such agonizing victim cries and of press and prosecutorial calls for "closure" for the family, it is hard to view the failure to impose the death sentence as anything but community expulsion of the survivors from the People's ranks. Although this personalization happens in death trials throughout the United States, it makes it particularly easy for those already living in vigilante-values-embracing localities to accept the death sentence as the community's choice and not that of the lumbering Behemoth we call the state.³⁹

V. CONCLUSION: GIVING THE DEVIL HIS DUE

Now we are in a position to understand the audience's discomfort with Daredevil's choice not to kill the Kingpin. Daredevil is a true vigilante, not a Charles Bronson clone. Although Daredevil acts alone—unlike the infamous vigilantes of American history—he does so on behalf of the *local* community. He defends the state; indeed he is, as a lawyer, partly the state's tool. But he befriends only a state that does its job well. When the state fails, he intervenes, and, like the vigilantes of old, he sees no need for a trial, for he can unerringly separate the guilty from the innocent. He acts where the People cannot, and he speaks in their name. Moreover, because the community that he defends is one of the powerless and the outcasts, we as the audience cheer him on.

Yet Daredevil, in his guise as lawyer Matt Murdock, also enthusiastically embraces due process values. Of course, criminal defense lawyers play by the rules—that is, the laws—crafted by the state, serving as "officers of the court."⁴⁰ But defense lawyers challenge the state too, acting as zealous adversaries who press the state to uphold its noblest ideals of fairness and who monitor its abuses.⁴¹ Defense lawyers test the state's evidence in a quest to raise skepticism about whether its belief that it has the right man is justified. The Daredevil/Matt Murdock duality reflects the tension in the American character between vigilante values and due process values.

In the certainty that "he deserved it," Daredevil beat an abusive father until The Man Without Fear recognized that he himself had frightened the child whom

³⁸ *Payne v. Tennessee*, 501 U.S. 808, 814–15 (1991) (citations omitted).

³⁹ See ZIMRING, *supra* note 1, at 58–63, 146, 176, 198 (on "closure").

⁴⁰ See generally Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar To Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781 (1996).

⁴¹ See Andrew E. Taslitz, *Criminal Law Practice*, in OXFORD COMPANION TO AMERICAN LAW 187 (Kermit Hall ed., 2002).

he sought to protect. The little girl did not share Daredevil's conviction that brutally beating her dad was a well-earned punishment. From seeing her fear, Daredevil learned the wisdom of doubt, the grace of humility.⁴² Traditional Jewish law prohibits a jury from imposing a death sentence where the verdict is unanimous, for fear that where there is no doubt, there is no serious deliberative judgment.⁴³ This same lesson was taught to Daredevil by a child's terrified eyes.

Daredevil felt his own fear when his lady love, Elektra, suffered, then died. Elektra was no saint. She was raised by a wealthy, corrupt man; she was taught to use violence when necessary; and she was quick to anger and vengeance.⁴⁴ None of that justified her death. Daredevil's pain at her loss did not harden his heart, but softened it. His fear of loss taught him empathy, and empathy makes it hard to enjoy another's pain.⁴⁵ This combination of humility and empathy stanching Daredevil's bloodlust. He could not kill the Kingpin, but only bring him to true justice, turning him over to the police for trial. Due process values prevailed, as symbolized by the Kingpin ripping off Daredevil's horned mask. Unmasked, the superhero is no longer a devil, an angry vigilante, but the sober lawyer, Matt Murdock, committed to fairness even in the face of his own private horror.

This, then, is the source of the audience's discomfort at Matt Murdock's show of mercy toward the mountainous Kingpin: the whole point of the movie up until this moment has been to make us celebrate Murdock's vigilante justice. Yet just when he can deliver the *coup de grace*, he hesitates, pulls back, and then repents. Either he is a renegade who has ceased to speak for a merciless community—thus a violent brute, but no longer a vigilante—or he has rejected the absolute wisdom of vigilante values. If the latter is true, then if we continue to identify with Daredevil, we too must reject the most extreme aspects of vigilantism. Of course, Daredevil will continue to fight villains on our behalf, so he is a vigilante still. But he no longer will take his vigilantism so far. Neither should we. The audience must thus choose to expel Daredevil as an unwanted outsider—something hard to do after two hours of sharing his struggle—or to embrace him as, in part, an

⁴² See Andrew E. Taslitz, *The Inadequacies of Civil Society: Law's Complementary Role in Regulating Harmful Speech*, 1 MARGINS: MD. INTERDISC. PUB. ON RACE, RELIGION, GENDER & CLASS 305, 341 (2001) (discussing humility and retributivism).

⁴³ See ALAN M. DERSHOWITZ, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE 329 (2002) ("I recall vividly a class in Talmud in which I learned that a Jewish Sanhedrin (religious court) that had imposed the death penalty by a unanimous vote could not carry out the sentence, since unanimity meant that the accused did not have a zealous advocate presenting his arguments within the tribunal.").

⁴⁴ Elektra's father had long been a perhaps reluctant partner, but a partner nevertheless, of the Kingpin of Crime. The Kingpin killed the father when he asked that his interests with the Kingpin be bought out and their relationship severed. Elektra's father long knew of the dangerous world into which he brought his daughter, having trained her from young childhood in the martial arts.

⁴⁵ See Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1, 47–57 (1998) (discussing the role of empathy in jury deliberations).

apostle of life. Most audience members will choose life, but reluctantly, with discomfort and confusion.

Why, however, did I need to mention *Daredevil* at all? Why not focus this essay solely on the history and current state of American vigilantism? In part, as a comic-book lover, I think that *Daredevil*'s story told alone, apart from being placed in the context of "real-life" history and social science, can teach these same lessons, though reality helps to strengthen the argument. More important is that historians and empiricists studying vigilantism will not ordinarily be in the public's eye. But many millions of Americans saw *Daredevil* in the movie theatres, and millions more will see it on DVD. *Daredevil* reaches the souls of everyday Americans, and more movies with similar goals can grant us the humility we, as a society, should seek.

Or perhaps such movies reach only *my* soul, which is in many ways still that of a twelve-year-old child. Most viewers, after all, will likely not share my passion for comic books as a serious form of art and will rush to see blockbuster special effects flicks primarily for the action, rather than to discern the films' "deeper meaning." Nevertheless, I think it likely that many viewers will at least be touched by some subconscious understanding of the movie's message. As media criminologist Ray Surette has explained, "in large industrialized nations with hundreds of millions of people, cultural change without media involvement does not occur. The media simultaneously change, react to, and reflect culture and society—in the process making available explanatory frameworks to perceive and understand issues like crime."⁴⁶ Indeed, a veritable cottage industry of academics has arisen exploring the ways in which media help to shape criminal justice politics and policies at both the conscious and subconscious levels.⁴⁷

Superheroes play a particularly important role in American attitudes toward crime, drawing on and helping to mold an "American monomyth," a fundamental set of interconnecting narratives embodying powerful American values.⁴⁸ Professors Robert Jewett and John Shelton Lawrence explain:

⁴⁶ RAY SURETTE, *MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES II* (2d ed. 1998).

⁴⁷ See generally ROBERT ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* (2000); ELAYNE RAPPING, *LAW AND JUSTICE AS SEEN ON TV* (2003); ALEXANDER TESIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* (2002); NATIONAL RESEARCH COUNCIL, *VIOLENCE AGAINST WOMEN* 63–64 (1996).

⁴⁸ ROBERT JEWETT & JOHN LAWRENCE, *CAPTAIN AMERICA AND THE CRUSADE AGAINST EVIL: THE DILEMMA OF ZEALOUS NATIONALISM* 28–29 (2003) (defining the American superhero "monomyth") [hereinafter JEWETT & LAWRENCE, *CAPTAIN AMERICA*]; ROBERT JEWETT & JOHN LAWRENCE, *THE MYTH OF THE AMERICAN SUPERHERO* (2002) (book-length treatment of this "monomyth"); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 429–33 (1996) (defining "myth" and exploring its cognitive and cultural implications).

When we look at the pulp literature, films, television, and video games that receive the steady attention of most American minds, we must also recognize that they are thereby forming a cultural matrix for action. The superhero tales amount to a kind of mythic induction into the cultural values of America. A citizen's brief interludes at church, synagogue, or mosque are far less likely to impart a significant vision of how to cope with the world's conflicts. But as the artistic creators of popular entertainment respond to current events with mythic scenarios, they help to shape the public sense of what is appropriate in confronting the crises of national and international life.⁴⁹

The American superhero monomyth, these authors further explain, "embodies the vigilante tradition, in which redeemer figures who often wore the white robes of the Book of Revelation rid the community of its ostensible enemies."⁵⁰

There are two modern strands of the American superhero monomyth. One strand is represented by author Frank Miller's re-visioning of the older *Batman* into *The Dark Knight*,⁵¹ an aging mass of still muscle-rippling vengeance, mercilessly torturing and killing the unrighteous who stand in his way. Marvel comics' *The Punisher*, a story soon to be retold in a film version, fits a similar mold in which the superhero does justice thoroughly unconstrained by the state or by compassion for evildoers.⁵²

A second strand is represented by the Lone Ranger, a former Texas Ranger who takes on a mask to avenge the killers of his fellow Rangers.⁵³ Yet, "[h]is violence is qualified by elaborate restraints: he never kills or even seriously hurts anybody, even though he often shoots them; and though he has left official law enforcement himself, he always hands the subdued evildoers over to the authorities."⁵⁴ The Lone Ranger's modern incarnation is Superman, a less vengeful, more powerful immigrant to the American community (albeit from planet Krypton), who nevertheless uses extra-legal violence to cleanse his adopted home, whose own justice institutions are not up to the job. Yet, "Superman is conservative about challenging the community's failing institutions. Like the Lone Ranger, he always delivers the evildoers to the police rather than killing them or dishing out his own punishment."⁵⁵

⁴⁹ JEWETT & LAWRENCE, CAPTAIN AMERICA, *supra* note 48, at 28.

⁵⁰ *Id.* at 29.

⁵¹ *See generally* FRANK MILLER, *BATMAN: THE DARK KNIGHT RETURNS* (1996).

⁵² *See generally* GARTH ENNIS & STEVE DILLON, *THE PUNISHER* (2002).

⁵³ *See* JEWETT & LAWRENCE, CAPTAIN AMERICA, *supra* note 48, at 31.

⁵⁴ *Id.*

⁵⁵ *Id.*

If these two strands of the American monomyth represent an inherent cultural struggle, a tension between *The Punisher* and *The Lone Ranger* in our national conscience, then Daredevil stands out because he embodies that tension symbolically in a single man and ultimately resolves it. He starts the movie as The Dark Knight, ending it as Superman, the embodiment of “truth, justice, and the American way.”⁵⁶ *Daredevil*, and movies like it, should thus appeal at least subconsciously to a struggle waging in most Americans’ psyches. I do not claim that such an appeal will “win” the death penalty debate for the abolitionists. But the sense of discomfort, of cognitive dissonance,⁵⁷ that movies like *Daredevil* can

⁵⁶ I used to hear that phrase at the end of the voiceover introduction to each episode of the *Superman* television series. It seemed, then, to me to embody a call to strength with compassion, punishment with restraint, principle over power (though my young mind might not have quite articulated it that way). The phrase still evokes those sensibilities for me, though I admit to a bit of hypocrisy in my own internal struggle between Superman’s call for measured justice and the green-skinned, hyper-strong Hulk’s bestial cry, “Hulk Smash!” See generally STAN LEE, *THE ESSENTIAL HULK VOLUME 2* (2003); Skippy Piner, *Hulk Smash!*, at <http://www.comicseek.com>.

⁵⁷ “Cognitive dissonance” refers to the discomfort that most people feel when they simultaneously hold two irreconcilable ideas. See LAUREN SLATER, *OPENING SKINNER’S BOX: GREAT PSYCHOLOGICAL EXPERIMENTS OF THE TWENTIETH CENTURY* 113, 116–17 (2004). Dissonance occurs when you recognize at some level that your behavior contradicts your core beliefs or when you are confronted with factual evidence inconsistent with such beliefs. See *id.* at 114–21. The resulting discomfort must be resolved. Some people do so by changing their professed beliefs or by revising their original beliefs to fairly account for the new factual evidence. See *id.* But many, perhaps most, people “will engage in the most amazing mental gymnastics, all to justify their hypocrisy.” *Id.* at 119 (emphasis in original).

Rephrased, many people will revise their core beliefs to justify (rather than change) their seemingly contradictory behavior. Likewise, they will find rationalizations to avoid giving up their core beliefs rather than accepting the implications of contrary proof. For example, a cult predicting a catastrophic flood that never happens rationalizes that their “little group sitting all night long had spread so much light that god saved the world from destruction.” *Id.* at 116. American POWs in the Korean War who accepted small bits of rice from their captors for writing anti-American essays similarly came sincerely to believe Communist dogma. Behavior inconsistent with patriotic bravery led the soldiers subconsciously to reason thus: “If you sell yourself for a piece of candy, or a single cigarette, or a scatter of rice, you had better come up with some convincing reason why you did this, lest you feel you are, just simply, a schmuck.” *Id.* at 118. Accordingly, the soldiers convinced themselves that they wrote the traitorous essays not in exchange for pitiful bribes but because they believed that the Communists were right.

It is not known why some people react to dissonance with serious introspection while others just rationalize. Yet even if only a small percentage of death penalty supporters so introspect, that is a step in the right direction toward building a critical mass of new abolitionists. Furthermore, logic suggests that repeatedly inflicting dissonance, that is, creating new dissonance from many sources to counter each new rationalization, will make rationalization more difficult. In *Daredevil*, the dissonance arises from the audience’s cheering on Daredevil as a hero precisely because he wreaks righteous vengeance on evil; yet he withholds the ultimate vengeance (death) from the corrupt mass of flesh who is most deserving of it: the Kingpin. And he does so expressly because he declares that “good guys,” heroes, just do not kill. The movie offers its own explanation of the dissonance: Daredevil’s original belief that evil persons must die was morally wrong. Even more, it was motivated by a rage and cold-heartedness inconsistent with American notions of fairness. The film thus counsels real introspection, confronting the audience with the hypocrisy of any other choice.

evoke, may over time “help to shape the public sense of what is appropriate”⁵⁸ in the realm of the death penalty, softening up the public, perhaps making it more willing to consider change, and recasting the understanding of the death sentence as an act of state violence rather than popular sovereignty. It is this last point in particular that may raise receptiveness at the conscious level to growing evidence that the death penalty too often represents an *abuse* of state power, ensnaring the innocent with the guilty, the good with the bad.

There is thus cause for optimism, because repeated public revelations fill the media about those on death row who were wrongly convicted of crimes they did not commit. A Broadway play, *The Exonerated*, tells their story, as does a best-selling Scott Turow novel, *Reversible Errors*.⁵⁹ A handful of empirical studies indicate that evidence of innocent persons being condemned undermines support for the death penalty, and does so more than any other abolitionist argument.⁶⁰ Challenges to the wisdom of retribution as justifying death or to the claim that the death penalty serves as a deterrent do little to change minds. But proof of innocence does a lot.⁶¹

Support for the death penalty is to some degree rooted in emotions resistant to logical change. That is where art, both high-brow and low-brow, enters. Films like *Daredevil* and novels like *Reversible Errors* can do much to unsettle frozen emotions.⁶² Tales of real-life suffering of the innocent-but-condemned can help

Moreover, empirical data suggest that people are able to overcome their own subconscious biases if they are both made aware of them and of the psychological reasons why they are reluctant to let them go. See generally JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (1997). By making viewers aware that their own needs for security, vengeance, and control may have much to do with their support of the death penalty, the rationalizers might be open to change. This last observation is all the more true because due process fairness notions are at the heart of the American sense of honor. See generally Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 *LAW & CONTEMP. PROBS.* 221, 264–98 (2003). There is no reason why that sense of honor—which is a powerful motivator in the American psyche, see *id.* at 264–98—should not prevail when its inconsistency with the death rage often motivating support for capital punishment becomes apparent. Under the right circumstances, cognitive dissonance can be a great thing, motivating reasoned re-evaluation of previously entrenched decisions rather than continued self-delusion.

⁵⁸ JEWETT & LAWRENCE, *CAPTAIN AMERICA*, *supra* note 48, at 28.

⁵⁹ See SCOTT TUROW, *REVERSIBLE ERRORS* (2002).

⁶⁰ See generally Laurie Anne Whitt, Alan Clarke & Eric Lambert, *Innocence Matters: How Innocence Recasts the Death Penalty Debate*, 38 *CRIM. L. BULL.* 670 (2002) (summarizing the data). For a summary of the evidence on the causes of wrongful convictions, especially in death cases, see *BEYOND REPAIR?: AMERICA’S DEATH PENALTY* (Stephen P. Garvey ed., 2003) (discussing wrongful convictions and the death penalty); *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* (Saundra D. Westervelt & John A. Humphrey eds., 2001) (discussing wrongful convictions more generally).

⁶¹ See Whitt, Clarke & Lambert, *supra* note 60, at 691–95.

⁶² In general, media portrayals of crime and justice “appear to have most influence on people’s factual perceptions such as the amount of crime they believe to be occurring and have less direct influence on overall evaluations of social conditions or ideas about what should be done.” SURETTE, *supra* note 46, at 226. However, the danger of convicting the innocent is a “factual perception,” and

too, making those on death row seem more like the rest of us.⁶³ When supplemented with data showing that state murder of the innocent may be anything but rare, it becomes harder to see the death penalty as the work of an unerring, trustworthy, and righteous community. It is revealed for what it is: the ultimate act

recent research shows that it is one that helps to undercut support for the death penalty. See Whitt, Clarke & Lambert, *supra* note 60, at 691–95. Accordingly, appeals to innocence might do more to affect public attitudes toward criminal justice policy than is generally the case concerning media impacts on justice system behavior. Media can also have indirect impact on criminal justice policy by affecting more general mores; for example, images of proper gender roles can alter the probable outcomes at date rape trials. See generally Taslitz, *supra* note 48. *Daredevil*, and films like it, work so very well, I argue, precisely because of their subtle and subconscious emotional appeal, raising perhaps vague and ill-formed doubts about the fairness of the death penalty. When novels like Scott Turow's *Reversible Errors* overtly challenge the fairness of the death penalty, albeit from a different angle than *Daredevil* (for in *Daredevil* the criminals are in fact guilty), the audience should be more receptive to these challenges, more willing to take the "little step" of favoring abolition because of the risk of killing the innocent. But once that line is crossed—once abolition is consciously embraced on any ground—films like *Daredevil* may continue to do their work, perhaps even more effectively, setting the stage for a conscious willingness to reject death, even for the guilty.

⁶³ See Mark E. Olive, *Foreword* to MICHAEL MELLO, *DEATHWORK: DEFENDING THE CONDEMNED*, at x (2002):

The death row lives described in *Deathwork* reveal that, again, these individuals are exactly like you. They are not defined by—they *are not just*—the worst things that they have ever done. Are you? Mike shows the love and compassion these individuals have for one another and for their families, humanity blooming on death row the same way it blooms in your home. He shows how the clients genuinely fret over the lawyers' well-being, for goodness sake. And he shows the indominability of human spirit—poetry, humor, spirituality, and grace—in the face of sometimes virtually certain death.

Olive's statement may be overdone, for part of the problem in creating empathy for those sentenced to death row is that they are so often not like us in many ways, if "us" means the jurors and judges who decide their fate. Death row inmates are often poor, racial or ethnic minorities, with criminal records. Olive's statement would better be seen as capturing the strategic need to make the public see that there are nevertheless similarities, ones that may in some ways be more important than the differences.

of state violence, a power whose arbitrary exercise must be feared and whose presence can corrupt republican citizens' virtue and taint their very souls.⁶⁴

⁶⁴ See STEELWATER, *supra* note 4 (noting that history reveals that both the legal and extra-legal forms of the death penalty generally empower one social group at the expense of another, usually weaker, group). Austin Sarat optimistically argues for a "new abolitionism" condemning the death penalty not for what it does to the defendants but for what it does to American culture:

[S]tate killing contributes to some of the most dangerous features of contemporary America. Among them are the substitution of a politics of revenge and resentment for sustained attention to the social problems responsible for so much violence today; the use of crime to pit various social groups against one another and to generate political capital; what has been called an effort to "govern through crime"; the racializing of danger and, in so doing, the perpetuation of racial fear and antagonism; the erosion of basic legal protections and legal values in favor of short-term political expediency; the turning of state killing into an invisible, bureaucratic act, which can divorce citizens from the responsibility for the killing that the state does in their name.

AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* 30 (2001). Added to Sarat's list might be the amplification of our historical willingness to treat criminal defendants as a type, rather than unique individuals, and our obsession with defendant-degradation as essential to punishment, despite our rhetorical commitment to the very opposite values. See WHITMAN, *supra* note 1, at 3–67. I worry that Sarat's accurate observations will nevertheless lack public appeal for those unconverted to abolitionism, or at least to the many fervent defenders of the death penalty, while the innocence argument seems more likely in the short-run to support moratoria that may lead to effective abolition in practice. See Whitt, Clarke & Lambert, *supra* note 60, at 725–35 (making this argument).