

COMMENTS ON ZIMRING AND HAWKINS'S *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA*

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INTRODUCTION

Analysis of public policy is usually strengthened by utilizing a number of different vantage points from which to view public policy alternatives. A new perspective on criminal enforcement issues may provide a better understanding of why some people choose to engage in criminal activities, and this insight may lead to better ways of protecting the public from crime.

As someone who helps shape policy in the criminal justice system, I am always interested in learning more about the problems we face. Any new set of statistics or new perspective for analyzing criminal justice data may help unlock the pattern underlying thousands of individual decisions to commit crime. We are assisted in better understanding an intractable problem by examining it from as many angles as possible.

My role in today's symposium is apparently to provide the real-world, non-academic response to Zimring and Hawkins's *Crime Is Not the Problem: Lethal Violence in America*.¹ To the extent that academic work on crime is written to influence the way policymakers and law enforcement officials operate, I am the prototypical audience.²

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1. FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* (1997).

2. As Attorney General, I take an active role in personally dealing with criminal justice issues. I am a Class 2 peace officer, and I chair the Peace Officer Standards and Training Board that licenses and oversees training for all of Colorado's law enforcement officers. My staff advises the Department of Corrections, the State Patrol, and the Colorado Bureau of Investigation. We handle most of the state's criminal appeals. Through the special prosecutions unit and the state grand jury, we deal with complex, multijurisdictional, and financial crimes. My capital crimes unit assists district attorneys in prosecuting death penalty trials.

In my role as policymaker on criminal justice issues, I propose legislation to Colorado's General Assembly. Through a number of individual pieces of legislation, we have shortened by about half the expected time from sentencing to execution in death penalty cases, while still providing full protection of constitutional rights. My

Most of the criminal policy materials I routinely see fall into one of two categories. First are the raw statistics with little or no analysis, like Bureau of Criminal Justice Statistics³ or Colorado Bureau of Investigation reports,⁴ or the studies that try to trace a particular possible causative factor and its effect on crime.⁵ Using these types of statistical studies, I as a policymaker examine the data to learn what strategies are actually working and to gain a perspective on whether day-to-day perceptions within the criminal justice system are correct.

The second type of criminal justice writings are those that advocate a specific policy outcome. Some have a bumper-sticker clarity: "three strikes and you're out" or "don't tolerate violence against women." Many other writings of this type, however, provide a fully developed and documented rationale for their policy prescriptions. These are the materials to which policymakers often turn in searching for solutions to specific weaknesses in the law enforcement arena.

Zimring and Hawkins's work falls into a third category. The authors provide a great deal of data, followed by several chapters of discussion and analysis. The first portion of their book provides many fascinating statistics. Their international comparisons are especially engrossing. While we have long known that the United States is more prone to crime than other developed nations, there have been few in-depth analysis of the particular differences between nations.

In the latter portion of the book, however, a reader is left with considerable uncertainty about the changes in the criminal

key legislative proposals have also included enhanced protection of victims and a prohibition on juvenile possession of handguns. I am a member of the Council on Crime in America, headed by former Drug Czar and Secretary of Education Bill Bennett and by former United States Attorney General Griffin Bell, as well as a member of the National Association of Attorneys General Criminal Law Committee.

3. See, e.g., U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF CRIMINAL JUSTICE STATISTICS, SURVEY OF STATE PRISON INMATES (1991) [hereinafter STATE PRISON INMATES].

4. See, e.g., COLORADO BUREAU OF INVESTIGATION, CRIME IN COLORADO (1991).

5. See, e.g., Lee N. Robins, *Sturdy Childhood Predictors of Adult Outcomes: Replications from Longitudinal Studies*, in STRESS AND MENTAL DISORDER 219 (James E. Barrett et al. eds., 1979) [hereinafter *Sturdy Childhood Predictors*]; Lee N. Robins et al., *Arrests and Delinquency in Two Generations: A Study of Black Urban Families and Their Children*, J. OF CHILD PSYCHOL. & PSYCHIATRY 125, 130-33 (1975).

justice system that the authors think would emerge if we fully absorbed their views. Even as to those reforms that we can glean from their presentation, they do not go to the next step and describe how their views might be implemented. Instead, their policy prescriptions are vague and ambiguous. This makes response somewhat more difficult in a symposium setting like this, and it also lessens the direct impact that this book can have in the world of policy implementation.

The authors apparently try to rise above the specific details of changes in programs and statutes by grappling with the big picture. As the title of the book suggests, they place considerable emphasis on differentiating between lethal violence and crime in general. This differentiation is certainly legitimate in many respects. Violent crime is, after all, the primary concern of citizens in supporting anti-crime efforts. Fear of random violence is what motivates the political system to devote resources to keeping hard-core criminals off the streets. Whether a particular criminal justice strategy is valuable can credibly be evaluated using this as one criterion. In ordinary usage, violent crime would be viewed as the most severe and disturbing manifestation of the same phenomena as nonviolent crime.

The central policy point that can be derived from *Crime Is Not the Problem*,⁶ that the criminal justice system should focus most of its resources on violent crime, is hardly revolutionary. Most resources are, in fact, already focused in that way. For example, Colorado statutes specifically identify crimes of violence,⁷ and require that judges generally impose more stringent sentences.⁸

6. ZIMRING & HAWKINS, *supra* note 1.

7. Colorado's law has been on the books since 1976, so this is not a new development. See COLO. REV. STAT. § 16-11-309(2)(a)(I) (1997).

8. Colorado defines a crime of violence as, *inter alia*, one in which the defendant "used, or possessed and threatened the use of, a deadly weapon; or caused serious bodily injury or death to any other person except another participant." COLO. REV. STAT. § 16-11-309(2)(a)(I). This definition applies to the following crimes: murder, first or second degree assault, kidnaping, sexual assault, aggravated robbery, first degree arson, first degree burglary, escape, or criminal extortion. See COLO. REV. STAT. § 16-11-309(2)(a)(II). In sentencing a defendant for a crime of violence, the judge must impose a term of incarceration of "at least the midpoint in the presumptive range" for that crime. COLO. REV. STAT. § 16-11-309(1)(a) (1997). In other words, the defendant cannot receive the shortest possible sentence for that category of felony. Thus, while a violent crime and a non-violent crime might both be level five felonies, the law contemplates that the violent criminal would be sentenced to spend more time behind bars.

Zimring and Hawkins, however, attempt to elevate this common-sense, unexamined assumption to a philosophical and ideological plane. They strive to bring about a shift in the world-view of criminal policy analysts. Although their inquiry is an interesting and thought-provoking one, in the end I am not convinced that lethal violence can be so uniquely separated from the rest of aberrant behavior.

The basic question posed by Zimring and Hawkins is the extent to which the criminal justice system should devote resources to violent crime prevention and punishment, to the exclusion of punishing other types of crime.⁹ There are reasons why the approach advocated by the authors should not be carried too far.¹⁰

I would characterize my two main points as follows. First, from a practical implementation standpoint, I challenge the assumption that devoting resources to an overwhelming emphasis on violence is an effective strategy. The weight of current evidence shows that strong anti-crime measures covering both violent and nonviolent crime seem to be the most effective.¹¹

Second, on a more philosophical level, it is important to retain the moral component of the criminal justice system. Although there are clearly societal factors that correlate with a tendency to commit crime, our criminal justice system should be grounded on a firm ethical basis and a recognition of the individual human decisions to commit crime. Although we can attempt to prevent crime in the short run by dealing with superficial loss-prevention measures, in the long run the messages sent by the criminal justice system to the rest of social behavior are far too important to ignore.

9. See ZIMRING & HAWKINS, *supra* note 1, Part III.

10. I hasten to add that I am not labeling the authors as advocating extremist policy outcomes. It is difficult to say how far they would go in focusing on lethal violence to the exclusion of other crime in the absence of specific policy proposals.

11. See, e.g., GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996); WESLEY G. SKOGAN & SUSAN M. HARTNETT, *COMMUNITY POLICING, CHICAGO STYLE* (1997).

I. THE EFFECTIVENESS OF COMPREHENSIVE CRIME PREVENTION STRATEGIES

The most dramatic development of recent years in criminal justice is the decline in crime rates caused by incarcerating more criminals. There are few examples of social legislation in any field where a change in policy has brought a positive result so quickly.

Zimring and Hawkins view recent efforts to crack down on crime as sweeping the net too broadly, and consequently netting many who have committed minor, nonviolent crimes. The reality is far different.

First, the base from which we started toughening sentences was appallingly lax. In 1988, violent criminals served only forty-three percent of their sentences.¹² "On average, murderers released from state prisons in 1992 served only 5.9 years."¹³ As pointed out in the 1996 report of the Council on Crime in America, "The justice system imprisons barely one criminal for every 100 violent crimes. Over one-half of convicted violent felons are not even sentenced to prison."¹⁴

Second, the common misconception that prisons house many nonviolent individuals has been repeatedly disproven. The reality is that most inmates are violent or repeat offenders:¹⁵ "Since 1974, over 90% of all state prisoners have been violent offenders or recidivists."¹⁶ Even repeat offenders often have a violent crime in their background; they may show up for record keeping purposes as nonviolent simply because their most recent crime is nonviolent, while preceding crimes have been violent.¹⁷

12. See COUNCIL ON CRIME IN AMERICA, *THE STATE OF VIOLENT CRIME IN AMERICA* 35-36 & tbl.16 (Electronic ed. 1996) (visited Apr. 13, 1998) <<http://legal.firn.edu/documents/crime/council.html>>. This figure has not changed that dramatically in light of tougher sentences. In 1992, this figure increased to 48%. See *id.* It then decreased to 47% in 1994. See BUREAU OF JUSTICE STATISTICS, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 476 tbl.5.58 (1996).

13. COUNCIL ON CRIME IN AMERICA, *supra* note 12, at ii.

14. *Id.* at i.

15. See generally STATE PRISON INMATES, *supra* note 3. This is overwhelmingly true for state prisons. Federal prisons have a much larger proportion of drug offenders, and thus a larger percentage who have not committed violent crimes. See generally *id.*

16. COUNCIL ON CRIME IN AMERICA, *supra* note 12, at ii.

17. See Anne Morrison Piehl & John J. DiIulio, Jr., "Does Prison Pay?" *Revisited*, BROOKLYN REV., Winter 1995, at 22.

Sentencing policies that keep violent and repeat criminals behind bars contribute mightily to reductions in crime. The empirical evidence has become clear. Imprisonment and rising rates of incarceration have proven to be responsible for large reductions in criminal behaviors.¹⁸

The approach of toughening sentences to the point where serious offenders are kept off the streets works because there are not an unlimited number of people who will commit violent crimes. Once those who are prone to lawlessness are behind bars, the rest of society can live in greater safety. Locking up those individuals who have shown their lawless tendencies by committing violent crimes is the best way of focusing resources.

Even if prison does not rehabilitate criminals into decent people, and even if the fear of prison does not deter a young gang member from participating in a drive-by shooting, it still prevents crimes that prisoners would commit if they were free. Or, as this principle has been reduced to shorthand, "A thug in prison can't shoot your sister."¹⁹

The New York experience, where "zero tolerance policing" successfully caused a dramatic drop in violent crime, is the most thought-provoking outgrowth of recent trends to toughen law enforcement policies.²⁰ Why should enforcing laws against loitering and graffiti lead to a decrease in violent crime? By cracking down on minor crime, the police created an overall less crime-prone atmosphere. An atmosphere of social stability is proving more conducive to crime prevention than one where everything short of near-lethal violence is tolerated.²¹

Juvenile crime is an area where the Zimring and Hawkins emphasis on lethal violence seems to point in the wrong policy direction. Juvenile offenders do not usually start with serious crimes. They tend to commit minor crimes and then gradually escalate to more and more dangerous behavior. The juvenile

18. *See id.* (citing studies that estimate that "tripling the prison population from 1975 to 1989 reduced reported and unreported violent crime by 10-15 percent below what it would otherwise have been, thereby preventing a conservatively estimated 390,000 murders, rapes, robberies, and aggravated assaults in 1989 alone").

19. Professor John DiIulio of Princeton calls this the Ben Wattenberg principle, after the noted syndicated columnist. *See* John DiIulio, *Arresting Ideas: Tougher Law Enforcement Is Driving Down Urban Crime*, POL'Y REV, Fall 1995, at 14.

20. *See, e.g.*, KELLING & COLES, *supra* note 11.

21. *See id.*

justice system has, in the past, made the mistake of treating initial minor crimes in such a forgiving way that children received the inadvertent message that crime did not have consequences. Young offenders would be involved in numerous crimes before ever receiving any meaningful intervention or punishment, and they would come to view the justice system as a joke. It is in response to this phenomenon that many states toughened their juvenile systems in the past few years.

Investing resources to deal effectively with something as minor as juvenile shoplifting would certainly be classified as diverting resources from dealing directly with violent crime. Yet, this may be one of the most beneficial strategies for preventing violent crime in the long run. It is important that resources be devoted to an entire continuum of services and programs, including punishment, for juvenile offenses that may not rise to the level of violence.

II. MORALITY'S KEY ROLE IN CRIMINAL JUSTICE AND CRIME PREVENTION

One of the main duties of government in a free society is to provide public safety—to defend the innocent and law-abiding against those who use force and fraud to harm their fellow citizens. Underlying the legal and the governmental system is a moral fabric of society. This fabric is woven through a process of socialization that takes place largely within families and other direct personal interactions. Government's role is not to create this moral fabric, but it should take care not to rip it apart.

In a legal system built upon a moral basis,²² as ours historically has been, individual accountability for actions is a key criteria for allocating blame and punishment. To a certain extent, Zimring and Hawkins depart from this approach. They try to deal with violence on a societal basis rather than on an individual basis. One might almost say that the authors seek a value-free way of analyzing crime—focusing on the end result or the instrumentality rather than the motivations or thought processes that went into the violent act.

22. By moral, I mean an ethical sense of right and wrong, not necessarily based upon religion.

I reach this conclusion about how to characterize *Crime Is Not the Problem* based upon the way the authors treat several issues.²³ First, is their strong emphasis on gun control.²⁴

A. *Gun Control*

Zimring and Hawkins build an elaborate case to justify gun control based on the idea that the criminal justice system should prevent those behaviors most likely to lead to violence. The authors repeatedly imply that gun control is one of the main ways to prevent lethal violence.

Guns are undeniably a major factor in violent crime, but this should be a consideration in public policy analysis and not something that unquestionably leads to a particular conclusion. For better or for worse, America is a nation with a cultural bias toward firearms. Most firearm owners are law-abiding citizens. Even in modern America, much of gun ownership is based upon the uses that made guns so pervasive in the American frontier. Rural Coloradoans frequently carry guns in anticipation of marauding coyotes or coiled rattlesnakes. Presumably, rural areas, even with lots of guns, have more social cohesion and sense of shared moral values than urban areas—and these values prevent significant violence even in the presence of firearms.

In an urban setting, most people would sympathize with the self-defense motivations behind gun ownership of a convenience store owner in a high-crime neighborhood or a woman threatened by a stalker. Neither of them can rely upon police protection to arrive in a timely manner, no matter how good a police department might be.

A subset of *Crime Is Not the Problem's* gun-control discussion is even more revealing of the authors' mind-set.²⁵ They explore the possibility of further restricting a victim's right to use weapons in self-defense as a potential experiment to determine how far changes in law can go in altering public attitudes.²⁶ The authors imply that they would support repealing laws that allow homeowners to use deadly force in protecting their homes from

23. ZIMRING & HAWKINS, *supra* note 1.

24. *See, e.g., id.* at 106-24.

25. ZIMRING & HAWKINS, *supra* note 1.

26. *See id.* at 167-68.

burglary or other criminal intrusion.²⁷ It is not clear whether the authors' statements that these laws could be repealed as a "social experiment" represent a serious proposal.²⁸

Although there need to be appropriate restrictions on "make my day" laws to prevent their abuse,²⁹ it is not logical to view someone who uses a firearm in self-defense as deserving the same treatment as someone who initiates violence. Surely, our laws should be based on a sense of justice rather than upon experimentation to determine how to manipulate the attitudes of citizens.

Zimring and Hawkins also minimize one major practical inconsistency in implementing the policies that the authors presumably advocate: enforcing gun control would overpower the criminal justice system with huge numbers of people whose crime is not commission of violent acts, but rather the mere possession of a contraband item. Even generally law-abiding citizens might think twice before surrendering their guns to the authorities. To force compliance, at least initially, would require investigative

27. *See id.* at 160-61, 167-69.

28. *See id.* at 167, stating:

There is one possible change in the legal standard for what constitutes the justifiable use of deadly force that would have a major influence on the educative and moralizing force of criminal law A restriction of the privilege to use deadly force to circumstances where death or bodily injury are at risk would quickly test the criminal law's capacity to alter citizen behavior. Such a change is unlikely, but not impossible.

Id.; *cf. id.* stating:

One reason why further restrictions on the use of deadly force are not likely is a long tradition of public approval for violent citizen self-defense against property felons. The very attitudes that make the public educational role of criminal law of substantial significance also greatly diminish the likelihood that further restriction on the use of deadly force would command a legislative majority. When acts defined as criminal are not widely regarded as wrong, credible and effective law enforcement is difficult to maintain and irregular enforcement undermines the educational and moralizing influence of the criminal sanction. So the use of that sanction as what Professor Andenaes called "a moral eye opener" is most difficult to achieve in those settings where its contribution to crime prevention would be most productive.

Id. at 169 (citing JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 116 (1974)).

29. *See, e.g.,* COLO. REV. STAT. § 18-1-704.5 (1997). Colorado's "make my day law" has engendered vigorous debate. Prosecutors have frequently criticized the law because it can be abused by those seeking to hide crimes based upon other motivations. The concern is that, for example, a drug dealer could invite a rival to his home, kill the rival in a thoroughly premeditated way, and then claim that the rival broke into his home seeking to commit a crime. The circumstantial evidence may make it difficult to determine whether the killing was justified by self defense or was motivated by less honorable reasons. Despite this concern, however, the law enjoys considerable support among legislators and the public.

and enforcement resources equal to or greater than those devoted to the current war on drugs.

I question whether lethal violence would best be prevented by launching law enforcement on the equivalent of a nationwide house-to-house search for guns. A better approach is to make punishment vastly more severe for the use of firearms in commission of crimes.³⁰ I justify this approach, not on the idea that people necessarily will be deterred by the knowledge of a more severe punishment if they use firearms, but primarily on the fact that violence-prone criminals who use lethal weapons will be kept off the streets for a longer period of time.

B. Breakdown of Families

The second issue upon which I differ from Zimring and Hawkins by placing more emphasis on individual ethics is the importance of family structure in preventing criminality. I view moral socialization as a key determinant of whether a given individual or a given culture will be violent, and socialization takes place primarily within families. Surprisingly, in their extensive inquiry into violent crime, the authors do not even mention family structure as a variable.

Specifically, the authors devote a chapter to "New Perspectives on African-American Violence."³¹ The authors discuss some possible causes for the wide difference between black and white crime rates. The authors note that "a major element in the explanation of the larger concentration of violence among African-Americans is the fact that they more often reside in cities where violent crime rates are high generally."³²

This would indeed seem to be a substantial factor. But in raising and examining an issue such as racial differences in violent behavior, it is interesting that the authors never mention another factor that bears tremendously on why so many young blacks become embroiled in violence. This factor is the breakdown of the black family. Children of any race who grow up

30. Although I am not persuaded that broad-based gun control is a worthwhile idea, I do support prohibiting possession of firearms by juveniles. *Cf.* COLO. REV. STAT. § 18-12-108.5 (1997). The law is justified in protecting children from themselves. They do not have the judgment to carry guns except in unique situations.

31. ZIMRING & HAWKINS, *supra* note 1, at 73-89.

32. *Id.* at 83.

without one of their parents are far more likely to become juvenile delinquents.³³ The racial difference is explainable largely by the fact that a higher proportion of black children live in single-parent families. We can, of course, attempt to inquire further into what historical, economic, and social factors cause black families to disintegrate more often than other families,³⁴ but if we are searching for effective solutions rather than slow-motion historical analysis, we should focus on how to restore family life for youngsters at risk. We should examine the way in which we, as a society, develop individuals with the moral fiber to make positive individual decisions.

The lack of a two-parent family life does not excuse the individual decision to commit a crime, but trying to build a stronger base of families throughout our society is a function of "statecraft as soulcraft,"³⁵ utilizing public policy to encourage the development of moral individuals. This is an area where research should be done, and public and private action should be a priority.

C. Media Influence

Zimring and Hawkins reject the idea that media violence is a significant factor in influencing criminal behavior.³⁶ I am not convinced by their analysis because I believe that the relevant examination is a slightly different one than that covered by the authors. The question is not whether viewing a violent program has the immediate impact of causing children to commit violent acts. Lack of direct empirical evidence would be significant if the

33. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* 22, 26, & 29 (1987) (discussing the linkage between single-parent homes and violence).

34. A few years ago it appeared that black unwed birth rates were simply ahead of the curve; other races were on the same trend line. Recent trends have been encouraging: teenage pregnancies have been declining in the past few years among all races. See Child Trends, Inc., *Facts at a Glance* (visited May 27, 1998) <<http://www.childtrends.org/faag97.htm>>; see also United States Department of Health and Human Services, *Teen Birth Rates Down in All States* (visited May 27, 1998) <<http://www.cdc.gov/nchswww/releases/98news/98news/teenrel.htm>>. Hopefully the new trend may benefit children of all races. In any event, single-parent families are not simply a black social problem. See, e.g., WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* ch. 4 (1997) (discussing "fading inner city families").

35. GEORGE F. WILL, *STATECRAFT AS SOULCRAFT* (1983).

36. See ZIMRING & HAWKINS, *supra* note 1, at 126 ("But the basic framework of this inquiry stacks the deck against such media influences appearing to be significant proximate causes of high rates of homicide in the United States.").

question were simply whether person X was more likely to commit a crime after watching a violent movie.

The more relevant question is whether our media creates a feeling of values and social cohesion that disapproves of violence and that imparts a moral code. American entertainment media is, at best, a reflection of our society rather than a teacher of values. It presents the worst of our traits rather than the best.

Like family structure, the media's influence illustrates the importance of social structure and expectations as factors in determining the level of violence in society. Social cohesion is strengthened by shared values. The media can play a vital role in restoring a shared set of cultural values that would provide children with an internalized disapproval of crime, especially violent crime.

III. CONCLUSION

My approach to criminal justice starts from a vastly different worldview than that of Zimring and Hawkins, and thus leads to different policy prescriptions. In my view, citizens should have available to them the full range of behavioral choices. So long as they choose to act without harming others, they are entitled to a legal system that places the least restrictions on their behavior. When they violate that trust by engaging in violent or criminal activities, then, and only then, do they lose that freedom.

America has not always been in such a quandary about its attitudes toward crime. When Alexis de Toqueville visited America in the 1830s, the official reason for his tour was to study prisons.³⁷ He clearly came to understand the importance of local citizen responsibility in dealing with crime:

In America, the means available to the authorities for the discovery of crimes and arrest of criminals are few Nevertheless, I doubt whether in any other country crime so seldom escapes punishment During my stay in the United States I have seen the inhabitants of a county where a serious crime had been committed spontaneously forming committees with the object of catching the criminal and handing him over to the courts. In Europe, the criminal is a luckless man

37. See ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* xi (Phillips Bradley, ed., 1984).

fighting to save his head from the authorities. In America, he is an enemy of the human race and every human being is against him.³⁸

I fear that we have lost this sense of shared, law-abiding values that allowed us to respond as individuals working cooperatively against crime. To restore a sense of respect for law and for other human beings is a more difficult policy goal than simply banning handguns, but in the long run, I believe it is a far more worthy and effective goal.

38. William D. Eggers & John O'Leary, *The Beat Generation: Community Policing at Its Best*, POL'Y REV., Fall 1995, at 4 (quoting DE TOQUEVILLE, *supra* note 37, at 95).

