



## **The Killing State: Capital Punishment in Law, Politics and Culture**

Austin Sarat (ed.)

*Oxford University Press, Oxford, 1999, 263pp.*

*ISBN: 0 1951 4602 6.*

*Contemporary Political Theory* (2003) **2**, 255–257. doi: 10.1057/palgrave.cpt.9300048

The papers in this collection represent an important and wide-ranging cross-section of current debate about the death penalty. Coming from the varied perspectives of moral and political philosophy, legal theory, cultural criticism and what might be called political anthropology, the approaches taken range from mainstream to Nietzschean to deconstructionist. Neither is the collection univocally against the death penalty. These essays would make fruitful reading for anyone interested in the death penalty, state violence or the role of punishment in our societies more generally.

This collection appears during a period in which the use of the death penalty in the USA has been markedly revived, and many of the writers here seek to explain and deplore this fact. One theme that recurs through a number of the papers is the apparently increasing willingness of the American Supreme Court to sacrifice due process in order to secure an execution, bringing to an end a process of appeals on dubious legal grounds. In Anthony G. Amsterdam's words, these decisions 'forsake fairness, orderly procedure, intelligence and judicial efficiency for no stated reason and no rational purpose' (148). Such apparently irrational behaviour needs an explanation. A number of the writers find it in the need of the nation-state, under threat from so many angles, to exert its sovereignty in this most absolute way. Regardless of the threat to its sovereignty posed by multinational corporations and the widely perceived problem of its legitimacy, the nation-state still holds the awesome power of life or death over us, its citizens. Thus in his introduction, Austin Sarat argues that in such a state of affairs, the death penalty comes to have a crucial political weight: 'If the sovereignty of the people is to be genuine, it has to mimic the sovereign power and prerogatives of the monarchical forms it displaced and about whose sovereignty there could be few doubts' (5).

The connection between democracy and violence is a theme taken up in one of the many striking essays in this volume, Anne Norton's 'After the Terror: Mortality, Equality, Fraternity'. Quoting Nietzsche to the effect that violence does not merely destroy but establishes, she looks at the role of violence in the establishment of democratic regimes, both in the English and French revolutions (focusing particularly on the use of the death penalty) and in the Algerian war of liberation. Drawing on Fanon, she has some interesting things



to say about the seemingly necessary but unpalatable fact that those engaged in a war of liberation be prepared to do things that they themselves take to be awful and which scar their lives.

Julie M. Taylor explores another aspect of the ‘killing state’ — though one in which repression is a leftover from a dictatorial regime rather than an essential part of democracy — in a piece on the role of the police in Argentina in dealing out informal justice (or simply killing at will). This police power derives, Taylor says, from the war of the *Procesco* dictatorial regime against its political opponents. Here state violence is not the awesome and necessarily rare expulsion of a recalcitrant member of society from the catalogue of the living, but rather the power of life and death in the hands of a brutal and now more or less autonomous police force. Taylor brings out the way in which the ‘imaginary of violence’ of this state of affairs haunts the inhabitants of present-day Argentina.

Some of the papers oppose, not just the death penalty, but in Nietzschean style, the whole culture of responsibility that underlies our legal system and its punitive power. William E. Connolly gives an account of the development of the concept of the will and its intertwining with the project of making human beings accountable. He then goes on to look at how the debate between those who defend freedom of the will (or take it for granted as a metaphysical given) and those who are sceptical of it plays out as part of the wider ‘cultural war’ in the USA between liberals and conservatives. This includes a discussion of the film *Dead Man Walking*, a topic shared with Austin Sarat’s contribution to this collection. Rather more carefully, Jennifer L. Culbert draws out and criticises the presuppositions of the idea of the ‘normal’ person in criminal law. Her argument, not just that the notion of the rational, autonomous agent is a dubious one on which to found a legal system, but also that defining the nature of the action performed by any agent is always a somewhat arbitrary, *post hoc* construction, is worth consideration by anyone interested in conceptions of agency in the law.

In a similar vein Peter Fitzpatrick argues against the death penalty from a Derridean standpoint, invoking the essential indeterminacy of legal standards. His key point is that the death penalty involves a finality that is in fundamental contradiction with the point that there is ‘always more to do’ to decide whether the defendant ought to live or die. If legal judgement can never be final how can we justify inflicting a punishment that is irrevocable in the way the sentence of death is?

From a more analytical philosophical perspective, Hugo Adam Bedau draws out some of the difficulties of finding a moral philosophical basis for total opposition to the death penalty. Rejecting such grounds as the right to life, utility and the view that the death penalty is a ‘cruel and unusual’ punishment, he concludes with the rather flimsy-sounding claim that, although punishment



---

is a valid social objective (or furthers such objectives), the death penalty is (*pace* J.S. Mill) more severe, less remediable and more violent than the alternatives, and is anyway ‘never necessary to achieve valid social objectives’ because the alternatives are sufficient. Don’t expect fireworks, but this is a thoughtful essay that reads like a summary of work developed in more detail elsewhere.

In all, this a useful collection that will interest those working on many different aspects of state violence.

Christopher Bennett  
University of Sheffield.