

THE DEATH PENALTY

A DEBATE

PRO

Ernest van den Haag

CON

John P. Conrad

FOREWORD BY
ARTHUR J. GOLDBERG

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Foreword

From 1965 until 1980, there was a virtual moratorium on executions for capital offenses in the United States. This was due primarily to protracted legal proceedings challenging the death penalty on constitutional grounds.

After much *Sturm und Drang*, the Supreme Court of the United States, by a divided vote, finally decided that "the death penalty does not invariably violate the Cruel and Unusual Punishment Clause of the Eighth Amendment."

The Court's decisions, however, do not moot the controversy about the death penalty or render this excellent book irrelevant.

The ball is now in the court of the Legislature and the Executive. Legislatures, federal and state, can impose or abolish the death penalty, within the guidelines prescribed by the Supreme Court. A Chief Executive can commute a death sentence. And even the Supreme Court can change its mind, as it has done on many occasions and did, with respect to various aspects of the death penalty itself, during the moratorium period.

Also, the people can change their minds. Some time ago, a majority, according to reliable polls, favored abolition. Today, a substantial majority favors imposition of the death penalty. The pendulum can swing again, as it has done in the past.

More importantly, the death penalty involves moral as well as legal questions. The law may temporarily decide but the ultimate resolution of this issue, in my opinion, will rest on moral rather than purely legal considerations. Law and morality often are in tandem, but not always or invariably.

There are now about one thousand persons convicted of capital crimes on death row and the number is steadily increasing.

Despite the green light by the Supreme Court, there have only been a handful of executions. After all, an execution is the supreme and final sanction. It is a testimonial to human compassion that all involved on a governmental level recoil from its imposition.

Under the given circumstances, this book in the format of a debate,

pro and con, about the death penalty is timely. And it is most interesting and informative, dealing, as it does, with all aspects of this grave problem.

I know of no other book or article which treats the subject so comprehensively and with such erudition.

During my tenure on the Supreme Court, I read many briefs concerning the death penalty by distinguished lawyers. Many of these briefs cannot hold a candle to this book, written by two non-lawyer scholars. Even in treating the constitutional issues, the opposing views in the debate are presented with keen analysis frequently lacking in the writings and arguments of members of the Bar.

I personally am opposed to the death penalty and believe with Camus that we should take the “great civilizing step” of abolishing it.

But, although I have not changed my mind, I learned much from both of the participants in the debate, Professors van den Haag and Conrad.

This book is must reading for all concerned, pro and con, with the death penalty.

I commend this dialogue as an outstanding example of a dialogue on a subject of transcendent importance—a dialogue conducted with the scholarship, civility, and passion which this debated issue fully warrants.

Arthur J. Goldberg

Preface

This is a debate about capital punishment, an issue that is not likely to fade from public attention in the foreseeable future. Most Americans have made up their minds one way or another. So have we, adversaries with decided and unshaken views. Perhaps one or the other of us may draw some uncommitted readers to his side. Perhaps we may even shake the convictions of a few who have thought themselves settled on their positions as to the death penalty. Our intent, however, is to reach the thoughtful citizen who is concerned about the condition of criminal justice—its effectiveness, its humanness, and its fairness. We hope to help readers to think more clearly about at least one of the many issues in criminal justice.

To understand what we hope to accomplish in this debate, the reader should know its genesis. At a seminar in New York in the summer of 1980, Conrad (the abolitionist) met Linda Regan, who was to become our editor. In discussing common interests in the problems of criminal justice, Regan enquired about the feasibility of a book on capital punishment. Conrad replied that everything that could be said about capital punishment had been said—over and over again. It was improbable that new facts or arguments would be discovered to justify the publication of yet another book.

Reflecting on this conversation on the airplane going home to California, Conrad noted that although there was a plethora of books and articles that take stands on the death penalty, two coherent sets of opposing views have never been presented within the covers of one book. A debate might clarify the discourse, which suffers from exaggerations, misconceptions, and sentimentality to such an extent that rational consideration of the issues is hopelessly obscured. He suggested to Regan that a debate between himself and van den Haag might be of value in adding to the rigor of thought about punishment in general and capital punishment in particular. Van den Haag is famous in criminal justice circles for his unflinching adherence to the position that the death penalty must be retained in the criminal justice armory. Conrad, on the other hand, firmly holds to the position that capital punishment accomplishes no useful purpose that cannot be achieved by extended

incarceration. Both of us were prepared to argue from these positions with vigor and at length—as we think will be evident in this book.

On enquiry, Regan found that van den Haag was willing. Vague rules of engagement were agreed upon in a meeting in San Francisco, where both of us happened to be in the fall of 1980. We agreed that the rigid structure of a college debate would be inappropriate. No proposition for an affirmative and a negative; no simplification of the many issues revolving around capital punishment in the United States. Instead of using the single-issue structure so familiar in sporting debates, we would try to debate all the significant issues, arguing their significance from the different viewpoints we were to occupy.

We have been engaged in the exchange of position statements, rebuttals, and rejoinders ever since. Progress was interrupted on several occasions by competing obligations that kept us away from the battle, sometimes for extended periods, but neither of us lost enthusiasm for the combat in which we have been engaged. Each of us hopes to prevail in the minds of our readers, though not to convince the other. Each of us hopes that at least we will sharpen thought about the death penalty regardless of our readers' convictions.

Our rules are simple. We have written basic chapters that outline the various elements of our positions. Responses to these chapters lead to rejoinders and more responses, all carried to the point where there is nothing further to say, and the issue must go to the reader. Our intent has been to present logically and empirically buttressed arguments leading to a rational resolution in the minds of reasonable readers.

We solemnly covenanted to abstain from *ad hominem* stratagems. At the outset we agreed that this debate would be conducted with civility and respect for each other's integrity. We have dealt out sharp blows, but the basic context is amicable. We part as friends, perhaps to resume battle on another day and about other issues.

The reader is warned that although we have meticulously documented our sources in the footnotes, neither of us intended to offer an exhaustive bibliography. Other writers—e.g., Hugo Adam Bedau, among others¹—have performed that service. Those who want to know what others have thought and written will have to look elsewhere; we have cited our references only when we needed them to support a point we wished to make. Neither of us pretends to have read the whole of the enormous literature on this subject. We confront each other as gladiators equipped with the weapons of scholarship, not as encyclopedists or cataloguers. If we succeed in stimulating the reader to look further for facts and arguments, we will have achieved

one of our lesser aims. Our main objective, however, is the furtherance of responsible discourse on a topic that is too often clouded by error, sentimentality, exaggeration, and various forms of obscurantism and prejudice—on both sides of the issue.

Ernest van den Haag

John P. Conrad

Note

1. Hugo Adam Bedau, *The Death Penalty in America*, 3rd ed. (New York and Oxford: Oxford University Press, 1982), pp. 383–406.

Acknowledgments

Knowing that I was engaged in writing a book about an unpleasant subject, many friends extended their sympathy, their understanding of my need for more than the ordinary amount of solitude, and their assurances that they would read the book once it became available in bookstores and libraries. When requested, other friends read some of my salvos against my doughty opponent and made suggestions to increase their firepower. Among them were Henry Schwarzschild, of the American Civil Liberties Union; Egon Bittner, of Brandeis University; Frank Fair, of Sam Houston State University; and Floyd Feeney, of the University of California at Davis. I am particularly grateful to Brian Forst and Hans Zeisel for their discussion of the faults in Isaac Ehrlich's statistical contention that each execution saves seven or eight innocent lives. Sarah Dike, until the summer of 1982 the editor of *Crime and Delinquency*, provided materials that I could not easily obtain from my usual library sources. My colleagues at the Criminal Justice Center of the Sam Houston State University listened attentively to my chapter, "The Retributivist's Case against Capital Punishment," as a colloquium lecture, and some helpful suggestions emerged. While I profited from these and many other discussions, all the mistakes and failures of grace and erudition belong to me alone.

No one could ask for a more graciously persistent editor than Linda Regan, at whose suggestion this book had its beginning. Gently candid with her criticism, she pointed out gaps in my arguments and thereby augmented their cogency. She was patient and understanding with delays and procrastinations, and appropriately pleased when chapters arrived on time. Her encouragement has been an indispensable ingredient to the completion of this book. I have only myself to thank for all the typing of first, second, and third drafts and the emendations of apparently completed statements; I am also responsible for all the typographical errors that I hope will be caught before this volume reaches the public. Finally, I must thank my wife, Charlotte Conrad, for her forbearance during an endless test of her good humor.

John P. Conrad

Nobody assisted me in writing my part of this book. I am delighted though to acknowledge my debt to my mother who bore me and bore with me. I am grateful also to my assistant Lois A. Aiello for her diligent help in research and typing, and for bearing with me.

Ernest van den Haag

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INTRODUCTION

Before the Killing Stopped

JOHN P. CONRAD

When I started work at San Quentin in 1947, I was employed as a psychiatric social worker in the prison hospital. The Chief Psychiatrist, my immediate superior, had a wide variety of assignments for me, but one on which he set great store was the preparation of psychiatric social histories of the men who were admitted to Condemned Row. They had to be seen as soon as possible after their arrival—"while they were still labile," as the Chief liked to explain. By that he meant that they would be responsive to my inquiries and not influenced by the other condemned men, by their lawyers (of whom the Chief had a low opinion), or by their families. As soon as the newly admitted condemned man had had a physical examination, I was to make haste to the Row and conduct my interview.

The objective was to gain a full account of the prisoner's family, his mental and emotional history, and such information as I could obtain about his criminal activities. I was also responsible for initiating correspondence with his family, with his employers, and with anyone else who seemed likely to tell us anything significant. After I was through with him, the clinical psychologist took his turn and administered the usual battery of tests: the Wechsler-Bellevue for an estimate of intelligence, the Bender-Gestalt for clues to brain damage or other neurological disorder, and the Rorschach and the Thematic Apperception Test to plumb the emotional depths. There might then be further physical examinations, based on what the psychologist and I had discovered. ("What's the point of this?" I heard one consultant ask in the presence of the man he was about to examine. "This guy's health problems are going to disappear soon enough.") Lastly, there was the climactic examination for which all else was preparation. A team of three psychiatrists went together to the Row for an examination in which a determination of legal sanity, by the criteria of the McNaughtan rule, would be

made. Although several of the men seen during my time in the hospital were close to psychotic, none were so far out of touch with reality that they qualified as legally insane under the strict rule of *McNaughtan's Case*. There was one man whose condition on the day before his scheduled execution was so obviously psychotic that he had to be transferred to the State Hospital for the Criminally Insane. He never recovered sufficiently to be returned to San Quentin for execution.

All this elaborate scrutiny was for the benefit of the Governor in considering the exercise of executive clemency. I always explained my mission in terms of the Governor's need to know as much as possible about the men he was to consider for reprieve or commutation. However, condemned men were free to reject the ministrations that we proposed to lavish on them, and a number chose not to be interviewed. One such was Caryl Chessman, later to achieve international renown as an author, a resourceful litigator, and a *cause célèbre*. He was scornful of the Chief Psychiatrist, for whom he had worked as an inmate-clerk during a previous commitment, and whose professional attainments did not impress him. He impatiently dismissed my proposal that I should interview him, pointing out that his old file contained all the information about his mental condition that the Governor could possibly need.

Most prisoners readily agreed to be interviewed. Their manner usually suggested that they were grasping at any straw of hope that came in sight. Although some were diffident about discussing their offenses, most of them disregarded their lawyers' advice to say nothing about their immediate legal situation. I had no need to press them on the subject of the charge against them; the one set of information about these men that was complete on arrival was a full statement of the offense, including all the versions known to the probation officer who wrote the preliminary report.

My interviews with condemned men were always conducted on the Row. There was no question of bringing a man down the elevator from the North Block security unit to the yard and then across the yard to the hospital for the convenience of the psychiatric staff. The Row was in the upper reaches of the North Block, accessible only by elevator. Usually I interviewed my subjects in the disciplinary hearing room, a dirty, unswept place adjoining the isolation cellblock as well as the Row. The furniture was ancient, unrepaired, and hand-me-down, as though to impress the prisoners with their unimportance. Sometimes the hearing room was in use for disciplinary committee proceedings, and then I had to talk to my man in an empty cell. Once, when all the cells were full, the interview took place in an unused shower bath. The sergeant in charge of the Row did not consider my

discourse with condemned men a high-priority activity. Some correctional officers said it was a waste of time and pointed out that some of these fellows wouldn't mind taking me along with them.

The first man I interviewed was a young Chicano named Rodriguez. He had been convicted of raping and then killing a young woman in a small San Joaquin Valley town. He had arrived on the previous day, and he was agitated and nervous, anxious to convince me that the charge was false, that he had been somehow convicted on the evidence of a former girl friend who was angry after he had broken off with her.

"That bitch . . . that bitch—" He was choking with fury.

Then there was a loud voice from a cell nearby:

" . . . and you shall be taken to the gas chamber next *Friday* and there you shall *die!*"

Rodriguez's lips tightened, and he could not complete his denunciation of the vengeful young woman whom he had jilted. His Friday was far in the future—eventually it came—but there was indeed to be an execution on the impending Friday.

After I had sent Rodriguez back to his cell, the sergeant in charge of the Row explained the interruption:

"That was McMonigle. He bullies the rest of these poor bastards, and there's not a hell of a lot I can do about him. Nearly all these guys would like to have a chance at him, but I can't allow it, of course. But sometimes I wish I could turn my back."

Two of the men I interviewed insisted from first to last that they wanted to get it over with as soon as possible; they told me that if they could, they would waive the automatic appeal to the Supreme Court that was required by law in all death penalty cases. One was a middle-aged Indian who had killed his wife—he couldn't tell me why. He said he didn't deserve to live, and could see no reason why his execution should be delayed.

The other man was a youth, not yet twenty, who had hacked his landlady to death with an ax, apparently on impulse. He had had a previous commitment to the California Youth Authority and was convinced that he could not manage a life sentence. He wanted me to understand that he wished no commutation of his sentence. All he wanted was the gas chamber, as soon as it could be opened to him.

Those two were exceptions. The others in my Condemned Row clientele were eager to escape the death to which they had been sentenced, and at any cost. The example of Caryl Chessman inspired many of them to emulation, though none managed to protract their stay on the Row to the length

that Chessman contrived. But several humbler men received commutations from the Governor and descended to the San Quentin yard, there to become members of the elite fraternity of lifers.

Most of the men whom I interviewed went to the gas chamber, always after a long stay for the Supreme Court review and any other legal maneuvers that their lawyers could arrange. When their time came, they usually went quietly and with a semblance of dignity. We could be grateful for that. The brisk, impersonal procedures scheduled for the last two days assumed a prisoner who was at peace with the world and resigned to his fate. His role required him to cooperate with the team of professional correctional officers assigned to the task of killing him.

I witnessed only one execution. Three years after my initiation at San Quentin I was transferred from the Psychiatric Department to the Reception-Guidance Center, and now I was under the supervision of an elderly psychiatrist, a clinician steeped in world-weariness. Noting one day that I had interviewed a great many condemned men at the time of their admission to the Row, he remarked that I ought to complete the cycle and witness "the ultimate in therapy." I am sure that he had nothing more in mind than to shock me, whom he saw as a naïve young idealist, with his sage realism. Nevertheless, I applied to the Warden's office for permission to witness the next execution. Readily granted. Warden Clinton Duffy was famous for his passionate opposition to capital punishment—the ceremony over which he was required by law to preside—and thought that all San Quentin employees should see the procedures for themselves. Perhaps he was a naïve old idealist, but he never yielded in his insistence that the death penalty was wrong under all circumstances.

I was signed on as an official witness. There were a dozen of us listed in compliance with the law that required each death to be observed, recorded, and duly certified to the court that passed sentence and to the Governor. Some were regulars; I had heard that there were several men who applied to be witnesses to each execution and that they were not denied. Some others might be law enforcement officers who had been involved in the apprehension of the murderer who was now to be executed.

On the appointed day, a colleague and I joined the ten other official witnesses. We assembled in the Warden's office, where we were reminded that our presence was necessary for the completion of this proceeding. The officer who briefed us went on to say that experience showed that not everyone was able to stay to the finish. If any of us should feel faint while in the observation room, he was to leave quietly. It was hoped that no one would complicate a difficult procedure by collapsing in the observers' area.

We marched silently out of the administration building, across the street to the visitors' gate, and down the South Block wall to the small building that housed the gas chamber. Some nonofficial observers had already gathered. There were reporters from the San Francisco press and a handful of newly employed guards, who had been instructed to stand on a bench at the rear of the room so that they could see over our heads. We, the official observers, were ranged immediately outside the glassed-in chamber. There was a rail that stretched under the window at waist level. Most of us grasped it.

Immediately after our arrival—that was the cue, I suppose—the door from the death-cell unit, the special pair of cells in which condemned men spent their last night, was opened, and one of the two young men to be killed was briskly led in by two guards. He was dressed in a white shirt and dark trousers; I knew that he wore no underwear because of the danger that the lethal gas might be trapped in a fold of clothing when his corpse was removed for delivery to an undertaker.

He was seated in one of the two steel chairs in the middle of the chamber. Deftly each of the attending guards grasped an arm and fastened it to the chair with a leather strap. Then his ankles were fastened. His shirt was then unbuttoned so that a stethoscope chest-piece could be taped to his ribs. Once that was done, the second man was brought in, and the same quick fastening procedures were carried out. Everything was done rapidly and as though rehearsed in a carefully prepared drill.

Both of the condemned men were black. The first was a small, nervous-looking fellow who smiled toward the Warden, as though in friendly farewell. He had waited for nearly two years for this day; the waiting was over. I read into the pitch of his head, the plaintive smile that I could see only in profile, the relief that I thought he must be feeling. Perhaps he was pleased with these moments at the center of attention. I suspected that our indefatigable chaplain had persuaded him to repent, and perhaps he believed that in a few moments he would be in the presence of his Savior, forgiven for the fearful crime for which he was now to die. Simple inferences from a tilt of the head and a slight smile. Who could say how near the mark they were? I hoped that my speculations were correct. To die without emotion, in mute stolidity, would be to lose one's humanity in advance of death. It would be to die like an animal being put to sleep. But who can say how a man should feel at the time and on the occasion of his officially scheduled death?

His crime partner was a large, dull-looking man, a few years older, much more muscular, and without expression as he was strapped into his chair. No hint of a last message to anyone, no notice taken of these spec-