Constitutional Issues

THE DEATH PENALTY

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The Death Penalty

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Publisher's Preface

According to many political observers, the enduring legacy of the Reagan-Bush presidencies may not be any legislation enacted or other political initiatives effected. Rather, the long-lasting accomplishment of the Reagan-Bush presidencies may be that between the two presidents they appointed five Supreme Court justices: O'Connor, Scalia, Kennedy, Souter, and Thomas, who will significantly affect the course of constitutional law for the coming decades.

This observation is a reflection of the U.S. Supreme Court's influence in the political, social, and economic life of the country—an influence that has never been greater than during the past 50 years. The court's influence is evident in its ground-breaking *Brown v. Board of Education* decision, which ushered in the civil rights movement, the reapportionment cases that have restructured our political system, as well as the court's many rulings on such controversial issues as abortion, search and seizure, and prayer in the schools.

The debate over the death penalty once again thrusts the court into the role of national arbiter on a highly charged public issue. *The Death Penalty* by Professor Mark Tushnet, a recognized authority on the Supreme Court, examines the way the Court has dealt with the death penalty. Professor Tushnet considers his book an introduction to the main questions surrounding capital punishment in constitutional law. Along those lines, he has chosen to discuss those enduring issues—the role of juries in capital sentencing, race discrimination and others—that he feels "will play the most part in discussions of the death penalty and the Constitution over the next decade."

Professor Tushnet expresses the hope that his book will be useful to readers who are not lawyers and enlighten people about the many questions and issues raised by the constitutional debate over capital punishment.

Professor Mark Tushnet is associate dean of the Georgetown Law Center. He is a graduate of Yale Law School and served as a law clerk to Supreme Court Justice Thurgood Marshall.

The first book in the Constitutional Issues series is *Freedom of the Press,* by Professor Bernard Schwartz.

Harold Steinberg
Series Publisher

Author's Preface

My aim in this book is to offer readers an introduction to the main questions about the death penalty in constitutional law. The focus is on *the Constitution*—what the Constitution has to say about the death penalty—not on whether capital punishment is a wise or unwise policy (although understanding some aspects of what the Constitution has to say requires information about some of the policy arguments about capital punishment). And the introduction is *not* comprehensive. Each year the Supreme Court considers a number of death penalty cases; most of them involve technical matters or details of the death penalty statute in a particular case, and nonspecialists need not understand these technical matters to be in a position to think for themselves about the Constitution and capital punishment. Instead of seeking to be all-inclusive, I have chosen those enduring issues—the role of juries in capital sentencing, race discrimination, and others—that will play the most part in discussions of the death penalty and the Constitution over the next decade. Finally, I hope that this book will be useful to readers who are not lawyers. Lawyers might want to refine the arguments I describe, to define their contours more precisely, but I have presented the arguments as I have because the lawyers' distinctions would make the arguments more complicated without adding much to what nonlawyers need to understand about the constitutional issues surrounding the death penalty.

Capital punishment is a highly charged policy issue, and although I have tried to present information as neutrally as I can, I think it worthwhile to indicate my position at the outset so that readers can assess my presentation in light of my predispositions. On the most fundamental issue—is capital punishment justified?—I am quite ambivalent. The cases that trouble me the most are these: A man hires someone to kill his wife so he can marry someone else without losing insurance benefits or paying alimony; a man kidnaps, tortures, and murders a number of women. I find it difficult to believe that the death penalty is an inappropriate punishment here, and sometimes I think that it is an entirely appropriate punishment. Responding to this side of my ambivalence, I have included short descriptions of the crimes underlying most of the cases I discuss so readers can understand what the criminals in the cases really did.

Yet the experience with the death penalty in the United States, both before and after 1976, convinces me that it is impossible to devise a system of administering the death penalty in which those

and only those who truly deserve the death penalty actually receive it. In addition, although I believe that retribution is a proper basis for punishment, real systems of capital punishment appear to mobilize vengeful sentiments that are quite troubling and unrelated to retribution. In short, I find unpersuasive the general arguments against the death penalty but am persuaded by more particularized arguments that, for a number of unrelated reasons, we cannot create a death penalty system consistent with the arguments supporting capital punishment.

I would like to thank Margaret O'Herron and L. Michael Seidman for their helpful comments on a draft of this book and Harold Steinberg for prodding me to get it written.

Contents

1

The Death Penalty in Constitutional Law

The Death Penalty Today

In the 1990s, candidates for election from the presidency on down find it essential to declare their support for the death penalty—even, as with the presidency, where the position has almost nothing to do with enforcing laws against murder. Nearly every murder (and almost all murders that threaten the public generally) is a crime under *state* law; federal death penalty laws deal with a handful of murders associated with the drug traffic and with assassinations, an even smaller handful of murders. The last execution for violating a federal law occurred in 1963—nearly a decade before the Supreme Court temporarily held the death penalty unconstitutional.

Candidates' vocal support for the death penalty is a striking change from the situation a generation ago. From the late 1960s to 1972, public support for the death penalty gradually declined. In 1972 the Supreme Court held that capital punishment, as it then existed, was unconstitutional. Legislatures responded by reenacting new death penalty statutes, and the Supreme Court allowed them to reinstitute capital punishment in 1976. In January 1977, Gary Gilmore became the first person executed after the Court's temporary invalidation of capital punishment.

In the decade and a half since Gilmore's execution, over 2,500 people have been sentenced to death. In a typical recent year, about 270 new death sentences were imposed. However, only 157 criminals had actually been executed between 1976 and the end of 1991 because the Court's 1976 decision left many questions open. Resolving those questions, and the ordinary questions that arise in any criminal case, takes time. By 1990, though, the Court had rejected essentially all of the challenges to the death penalty that might have substantially reduced the number of people on death row: It allowed states to execute young offenders and mentally retarded offenders, and it rejected the claim that the new death penalty statutes discriminated against African-Americans. The number of executions per year continues to be small, but in the next few years, the rate at which

executions are carried out is sure to increase: The Supreme Court and Congress have communicated their impatience at delays in executing condemned prisoners and have removed many of the legal obstacles that slowed the pace of executions in the 1980s.

Why is the death penalty a *constitutional* question? Of course whether we have capital punishment is something legislatures and the public can debate, but what does the Constitution have to do with our discussion?

Why the Death Penalty?

To understand how the Constitution deals with capital punishment, we have to understand why legislatures have the death penalty in the first place and to understand the purposes of punishing people for their crimes.

There is a traditional list of reasons for criminal punishment, though the details vary. One of the traditional reasons, rehabilitation—putting the criminal in a situation that results in his becoming a better person, no longer a threat to society—is obviously irrelevant to discussion of the death penalty: A person who has been executed cannot be rehabilitated.

(Sometimes people suggest that capital punishment is justified as a less costly punishment than imprisonment. It is not clear that that would be a good argument for taking someone's life. Also, it almost certainly is not true: The efforts devoted to capital cases are extraordinarily expensive when compared to the efforts in noncapital cases. When the costs of litigating over the death penalty are added in, the costs of maintaining people on death row for years are greater than the costs of ordinary imprisonment, so the total cost for death row prisoners—even taking into account the fact that they will eventually be executed—is probably greater than the total cost of life imprisonment for the same group.)

A second reason for punishment, incapacitation—preventing each criminal from continuing to commit crime—is almost as irrelevant. Prison sentences incapacitate and so do executions, in a sense: Just as a prisoner cannot commit crimes against the general public while in prison, so an executed criminal will never commit such crimes again.

But thinking about the death penalty as incapacitation is more complicated than that. We have to compare the incapacitative effect of a death sentence to the incapacitative effect of alternative sentences. In particular, we need to know whether a criminal imprisoned for life will commit crimes (which an executed criminal cannot).

And since we know that a criminal is not going to be executed the moment after the sentence is handed down, we have to know whether a life prisoner will commit crimes after the period of appeal has run out: Life prisoners and those with death sentences have a chance to appeal, and the death penalty incapacitates more only if a prisoner serving a life term commits a crime after the period for appealing has ended.

When prosecutors ask for the death sentence, they sometimes tell jurors to think about the possibility that a prisoner could escape or that a life sentence might be commuted. The Supreme Court upheld an instruction telling the jury that a life sentence without the possibility of parole might be commuted by the governor to a life sentence *with* the possibility of parole.[1] This instruction, the Court said, did not refer to an event that was so unlikely to occur as to distort the jury's deliberations; rather, it brought to the jury's attention a fact that had some bearing on the possibility that the defendant would pose a danger to society in the future. People can escape from death row too, and death sentences can be commuted.

Still, so long as a prisoner is alive, there is some risk that he will commit a new crime, either in prison or after an escape. In that sense, a death sentence incapacitates more than a life sentence does. Yet although there is some additional risk, by every indicator that additional risk is quite low. A number of studies—of prisoners whose death sentences were vacated when the Supreme Court first held the death penalty unconstitutional, for example—indicate that "prison homicides are not usually committed by persons serving sentences for capital murder and that such persons, whether in prison or on parole, pose no special threat to the safety of their fellow-men." Murders in prisons occur, of course, but not particularly by those convicted of capital murder; according to one study by sociologist Thorsten Sellin, "of the 91 known [prison] killers in 1964–65, only 15 were in prison for capital murder, compared with 28 robbers."[2] By the time appeals are over, criminals have aged, and violent crime is a young person's occupation. In short, we might prevent a small number of murders by executing *all* convicted murderers, and just about the same number if we executed any other group of felons. Few proponents of capital punishment defend either of those policies.

The two remaining purposes of punishment—retribution and deterrence—are far more important in thinking about the death penalty. The biblical phrase "an eye for an eye" captures the intuition underlying retribution. Pinning down that intuition, however, is harder than it initially seems.

The intuition has two forms. Retribution might mean vengeance, the discharge of hostile emotions against the criminal whose

actions caused the harm that, in turn, produced those emotions. Or in a more complicated way, retribution might mean restoring moral order. The criminal's actions disrupted the world's moral order, and something must be done to restore that order.

Each form has its own difficulties. People can understand what we mean by vengeance. Capital punishment might be a "safety valve" for vengeance: Without it, our vengeful feelings might be discharged lawlessly through vigilante justice. Yet on reflection, we frequently think that it is not a good thing to be vengeful: The emotions we have cannot be denied, but we think that we ought to deal with them in some other way than striking back at the person who caused them. (Again in biblical terms, "vengeance is mine, saith the Lord" usually is taken to mean that vengeance is for the Lord, not for humans.) If capital punishment is a society's expression of its collective anger, anger can too easily get out of hand, and the death penalty will be imposed on people who—even on the society's own retributivist terms—do not deserve it.

Also, it is one thing to feel anger immediately after a murder; many people, though, would find it troubling to discover that they were still feeling that same degree of anger throughout the criminal trial and up to the point of execution. They certainly would have some feelings about the wrongfulness of the murder, but "anger," in the ordinary sense, is unlikely to be one of them.[3] These feelings may make it just and necessary to punish criminals, but it is not clear that they—or at least the ones society ought to respond to—support capital punishment.

The other explanation of retribution, restoring the moral order, may seem too metaphorical: How would we know that the moral order had indeed been restored? Why, for example, isn't a life sentence for murder enough to restore the moral order? Also, every proponent of the death penalty agrees that some mistakes will happen. If the justification for capital punishment is deterrence, mistakes can be accepted as the necessary cost of doing a greater good—capital punishment may reduce the number of deaths by murder even if it causes some "unnecessary" deaths itself. But when retribution is at stake, mistakes are really serious: If we execute the wrong person, not only have we not "repaired" the moral order that the original crime disrupted, but we have ourselves disrupted the moral order again.

In either version of retribution, the punishment we inflict has to fit the crime. That is why the death penalty appears particularly appropriate for murder: We take from the criminal just what the criminal took from the victim—life itself. Unfortunately, this notion of "fit" cannot be used throughout the punishment system. It is what

underlies the idea that we ought to cut off the hands of a thief, a punishment that appears disproportionate to most people in the United States today. And consider how difficult it is to work out retributive punishments of imprisonment: How many years in prison restore the moral equilibrium disrupted by a bank robbery? Yet once we have decided to develop a scale that reconciles disruption of the moral world with terms of years in prison, it is not obvious why murder somehow cannot fit on that scale. If we compared the disruption of the moral world caused by a bank robbery to that caused by murder, for example, we might conclude that whatever it is that leads us to think that twenty years in prison is enough punishment for bank robbery ought to lead us to think that a life sentence is enough punishment for murder.

As political theorist Walter Berns puts it in his argument for capital punishment, "A country that does not punish its grave offenses severely thereby indicates that it does not regard them as grave offenses." Yet while that is certainly true, Berns's conclusion—"if [the United States] may rightly honor its heroes, it may rightly execute the worst of its criminals"—does not follow.[4] The moral order would be restored, the nation could punish grave offenses severely, by imposing the greatest punishment available for the most serious crime, but that does not tell what the greatest punishment should be.

(A similar problem comes up with retribution understood as vengeance. Some crime victims may have extremely strong vengeful attitudes, but if most of us think those attitudes out of proportion to the crime, we will decide that a smaller penalty, or a shorter term of imprisonment, is all that is needed. Proportionality is important under this approach to retribution, and the problem of determining what is proportional again occurs.)

Deterrence is the final reason for punishment. Imprisonment deprives people of liberty, which most people want. By threatening people with imprisonment if they rob or murder, we can keep some of them from robbing or murdering. The point, of course, is not that punishment is a perfect deterrent; some people will rob or murder no matter what we threaten them with. Rather, punishment reduces the number of crimes because some people, who would rob or murder if they thought they would get away with it untouched, decide that, all things considered, it is not worth the risk of going to prison.

To think about capital punishment as a deterrent, we have to carefully sort out a number of questions. It is silly, for example, to frame the question as, "Does the threat of capital punishment *ever* deter crime?" The answer to that has to be yes. We can be sure that there would be less overtime parking if it was punished with death, even occasionally.

A better way to ask the question is, "How much *more* does the threat of the death penalty deter crime—particularly murder—than the threat of long terms of imprisonment?" Again, there is a side issue to get out of the way. Many death penalty opponents point out, correctly, that a substantial number of murders are not committed by people who have carefully thought about the risk of punishment: A robbery goes wrong, and the victim is killed; or a man beating his wife "goes too far" and she dies. Others are committed by people who believe that they will not be caught or executed; particularly if the rate of execution is low, potential murderers may underestimate their chances of being caught and executed. Death penalty opponents say, also correctly, that a substantial portion of these murders cannot be deterred by the threat of the death penalty.

Still, the death penalty might be a good deterrent for some other set of murders, like murders-for-hire, where the criminal is likely to think about the risk of punishment. If we could devise a death penalty system that sorted out the robberies that go wrong, where fear of a death sentence is unlikely to affect the criminal's behavior, from the murders-for-hire, where that fear is much more likely to have some effect, we could defend the system as a deterrent. (Even in the cases where killing is not part of the plan, the risk of the death penalty might make some difference: Robbers who know that murder during the course of a robbery may lead to a death sentence may decide to take knives rather than guns on the job, and then the chance that a killing will occur when the robbery goes wrong is smaller.)

In other words, the threat that a murderer will be executed is likely to deter in only a subset of all murders. If we try to find out whether the death penalty is a deterrent by examining the relation between executions and the murder rate, we are likely to find a relatively small deterrent effect. That is reinforced by the fact that a relatively small number of murderers are actually executed; the effect of those executions on the homicide rate is likely to be dwarfed by other factors.

Whether the death penalty deters more than life imprisonment is, at bottom, a question of fact. Scholars have tried to find out what the deterrent effect of the death penalty is.[5] They have used three types of studies. The least satisfactory examines murder rates in states before and after they adopt (or abolish) the death penalty. The problem here is that there is likely to be some connection between whatever it was that led the state to change its death penalty rules and the state's murder rate. Still, these studies tend to show that changing the rules has no effect one way or the other on the murder rate, which suggests that the death penalty does not add much deterrence.

Death penalty opponents have more substantial evidence from the second type of study, which examines murder rates in neighboring states, one with the death penalty and the other without it. Again, these studies show rather dramatically that murder rates in neighboring states did not differ very much. For example, they show that states with the death penalty had somewhat *higher* rates of killings of police officers than states without the death penalty.[6] These studies all lead to the conclusion that the death penalty had no discernible deterrent effect. Yet they are unlikely to be fully persuasive, because states with the death penalty are likely to be more violent in general than states without it; that may be why they have the death penalty after all.

Until 1975 these studies were essentially the only empirical examinations of the deterrent effect of the death penalty. Using a variety of techniques, none had shown a deterrent effect. Then economist Isaac Ehrlich published what is known as an "econometric" study of the death penalty. This study is a more formal and more general version of the "neighboring states" kind of study. The idea behind those studies is that neighboring states are probably pretty similar in terms of demographics, racial composition of the population, culture regarding violence, and the like. Econometric studies try to measure the elements that a neighboring-states study assumes to be the same.

Ehrlich compared national murder rates with national execution rates and controlled his results for a large number of demographic characteristics. He concluded that each execution deterred seven or eight murders. The economic assumptions behind Erhlich's study can be tested only by comparing its predictions with the actual results in a large number of cases. Because of the small number of executions recently, his statistics involved executions in the period ending in the 1960s.

Other economists and sociologists challenged Ehrlich's study.[7] They had several criticisms:

- Ehrlich relied on *national* murder and execution rates. That, however, obscures the effects of death penalty statutes, which work only in individual states. Suppose, for example, that the execution rate increased in Alabama and the murder rate declined in California. Ehrlich's model would lead you to think that the death penalty acted as a deterrent because it lumped together the decrease in California and the increase in Alabama. That cannot be right (unless you have a complicated theory about how potential murderers in California take national execution rates into account).

- Ehrlich's results were extremely sensitive to the fact that he included the years 1963–67 in his data base and to other more technical aspects of the economic model he developed. In the early 1960s, the rate of executions declined sharply and the murder rate also went up dramatically, though probably for reasons—including social disintegration and the wider availability of guns—unrelated to the decline in executions. A dramatic decline in executions—unless offset by an extraordinary drop in the murder rate—would inevitably support the conclusion that the death penalty deterred. In fact, when Ehrlich's model was applied to the data up to 1963, it showed no deterrent effect.

- Ehrlich omitted some arguably relevant variables, such as the availability of guns and emergency treatment. For example, if states without the death penalty have bad emergency services, it is going to look like the higher death rates occur because potential murderers are not deterred, when in fact the higher death rates occur because people who die from assaults would have lived if the emergency services had been better.

- Ehrlich compared the deterrent effect of the death penalty with the deterrent effect of the number of years in prison *actually served,* which declined during the 1960s. Perhaps, though, the policy choice really is between the death penalty and a substantial increase in the number of years murderers serve. (A response might be that the threat that murderers will actually serve true life terms—or even thirty-year terms—is not credible because potential murderers will not believe the threat. The same difficulty, of course, affects the death penalty itself: The fact that *some* murderers are executed may not be much of a deterrent if, as is true in the United States today, *very few* are.)

- Figuring out whether capital punishment deters has been complicated, in ways not yet reflected in these studies, by the Supreme Court's new death penalty rules. Under those rules, discussed in more detail in chapter three, states cannot punish *all* murders with death; they must narrow the class of murderers "eligible" for capital punishment. We do not have, and probably never will get, accurate measures of the "death-penalty-eligible murder" rate. If imposing the death penalty only on people who commit such murders deters *only* such murders, measuring deterrence by seeing what happens to the overall murder rate may show very small deterrent effects (because the death penalty has no deterrent impact on the larger class of "noneligible" murderers).

All the evidence taken together makes it hard to be confident that capital punishment deters more than long prison terms do. Richard Lempert puts it even more strongly: "There is little reason to believe that the availability of capital punishment is—except possibly in certain rare circumstances—a substantial marginal deterrent. The empirical evidence is overwhelmingly to the contrary." For him, the evidence is "sufficiently strong and one-sided that we should approach the question of the morality of the death penalty with the assumption that capital punishment does not deter."[8]

Yet Ehrlich's study, for all its flaws, shifted the contours of the debate over the facts of deterrence. Even if his number of murders deterred was too high—and each execution deterred only two, one, or even less than one murder—Ehrlich provided some support for the commonsense judgment that the threat of the death penalty would have *some* deterrent effect.

If there is uncertainty about how much capital punishment deters, a pretty good argument supporting capital punishment becomes available. In the face of uncertainty, the question becomes, How do we allocate the risk? If the death penalty does not in fact deter, and we have the death penalty, we are going to execute some people needlessly—but, after all, they will have murdered someone else. And if the death penalty does deter but we abolish it, someone will murder another person who would not have died if there had been a death penalty (that is precisely what it means to say that the death penalty deters). The murder victim, killed because there is no death penalty, is entirely innocent; the executed murderer, killed because of the perhaps false belief that the death penalty deters, is not. That is a reason to say that, if we are uncertain about the death penalty's deterrent effect, we ought not abolish it.[9]

A similar argument introduces the constitutional dimensions of the death penalty debate. Suppose everyone agreed that mere vengeance was not a good reason for the death penalty and that no other retributive theory made sense. The case for the death penalty would then rest entirely on deterrence. And suppose further that many people, including legislators, believed that the death penalty was a deterrent. Finally, suppose that social scientists could show, with a high degree of confidence, that the death penalty did not deter. On these assumptions, it might make sense to allow courts to find the death penalty unconstitutional: It was not doing the only thing people agreed it should do—deter, and it was on the law books only because most people did not understand the facts. We could strengthen that argument by pointing out that judges are appointed for life and are therefore removed from the kinds of direct political influence to which legislators respond. A legislator might have to bend to her

constituents' false beliefs about the deterrent effect of the death penalty if she wanted to be reelected, but judges could assess the evidence in a detached and nonpolitical way.

That argument for letting judges find the death penalty unconstitutional breaks down, though, either if there is a decent retributive justification for the death penalty or if the evidence about the death penalty's deterrent effect is more ambiguous (and more consistent with voters' commonsense assessments). Does the Constitution support any other challenge to capital punishment?

The Eighth Amendment: No "Cruel and Unusual Punishments"

The Eighth Amendment to the Constitution says that "cruel and unusual punishments [shall not be] inflicted." The Eighth Amendment is part of the Bill of Rights, which begins with the words, "Congress shall make no law. . . " Since 1972 the Supreme Court has decided many death penalty cases, but they all involve capital punishment statutes adopted by *state* legislatures. The first words of the Bill of Rights suggest, though, that what follows, including the Eighth Amendment, limits only the national government, not state governments. How did the Supreme Court end up invoking the Eighth Amendment against state governments?

Second, how could the Eighth Amendment possibly make capital punishment unconstitutional? The Fifth Amendment was adopted at the same time that the Eighth Amendment was, and it refers to capital punishment twice: "No person shall be held to answer for a *capital*. . .crime, unless on a presentment or indictment of a Grand Jury;. . .nor be deprived of *life,* liberty, or property, without due process of law. . ." (emphases added). How could the same people who indicated in the Fifth Amendment that they accepted capital punishment have made it unconstitutional a few lines later?

"Incorporation" The answer to the first part of the question is easier than the answer to the second. In 1833 a clever lawyer tried to persuade the Supreme Court that the Bill of Rights—except for the First Amendment—limited the power of state governments. After all, the argument went, the First Amendment referred specifically to Congress, while the rest of the Bill of Rights spoke in more general terms: "nor shall cruel and unusual punishments be inflicted." The Supreme Court would have none of this, saying that the question was "of great importance, but not of much difficulty."[10] When the Constitution was adopted, many opponents feared that the new national government would be too powerful. The Constitution's sup-