

# Michigan Law Review

---

Volume 82 | Issue 4

---

1984

## Capital Punishment: Criminal Law and Social Evolution

Michigan Law Review

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Criminal Law Commons](#), and the [Legal History Commons](#)

---

### Recommended Citation

Michigan Law Review, *Capital Punishment: Criminal Law and Social Evolution*, 82 MICH. L. REV. 1124 (1984).

Available at: <https://repository.law.umich.edu/mlr/vol82/iss4/60>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

CAPITAL PUNISHMENT: CRIMINAL LAW AND SOCIAL EVOLUTION.  
By Jan Gorecki. New York: Columbia University Press. 1983. Pp.  
x, 195. \$26.

Jan Gorecki is a sociologist who approaches the field of criminal law with a penchant for big ideas. In 1979, Gorecki wrote *A Theory of Criminal Justice*,<sup>1</sup> a small but ambitious book that interprets punishment of criminals as a method of “persuasive instrumental learning” (*i.e.*, moral education) the primary purpose of which is to teach not the criminal but the rest of society. Gorecki’s new and equally ambitious essay, *Capital Punishment*, draws on the theoretical base of his previous work as well as on a whirlwind survey of world history to evaluate the place of capital punishment in America’s criminal law. Gorecki’s conclusion is that capital punishment is destined for the graveyard. There is, however, a major caveat to this conclusion: until our criminal justice system makes punishment for crime more certain, the demise of capital punishment may be delayed.

Though Gorecki is obviously opposed to capital punishment, he frames his essay in analytical rather than moralistic terms. Brief summaries of the cultural and legal histories of Athens, Rome, and modern Europe are used to support the thesis that “social evolution brings a tendency toward decreasing severity of criminal punishments” (p. 31).<sup>2</sup> As evolution progresses, moral aversion to wrongdoing “replaces fear as the main stimulus against harmful behavior” (p. 75), so that harsh penalties become superfluous. Being superfluous, “harshness is perceived as infliction of unnecessary suffering by a group of people who have increasingly learned not to harm others” (p. 76).

Harshness is in fact harmful from the legal point of view, according to Gorecki, because it destroys the law’s “persuasive moral power” (p. 76).<sup>3</sup> Furthermore, “[s]eeing inequitable punishment may free incensed observers from self-censure of their own actions,

---

1. J. GORECKI, A THEORY OF CRIMINAL JUSTICE (1979) [hereinafter cited as CRIMINAL JUSTICE].

2. Evolution, for Gorecki, is indicated by three simultaneous developments: advancement and dissemination of knowledge, development and widening appreciation of the arts, and increasing socialization of the populace, as expressed in avoidance of destructive and aggressive behavior and adoption of socially useful behavior patterns. Pp. 33-34.

3. A primary purpose of the law, Gorecki believes, is to “educate men in society by transforming legal prohibitions into moral norms.” CRIMINAL JUSTICE, *supra* note 1, at 4. “The direct addressee is the criminal himself, but . . . [i]t is the indirect addressee — the society at large — that constitutes the proper audience for moral education through criminal sanctions.” *Id.* at 22. For the system to work, punishment must be certain and must be perceived as just. *Id.* at 22-23. If these prerequisites are met, Gorecki believes, the members of society “acquire moral experiences by process of vicarious learning — observation of criminals being punished for their crimes.” *Id.* at 22.

rather than prompting compliance, and thus increase transgressive behavior" (p. 76).<sup>4</sup> This counterproductivity is not likely to go unnoticed if the society allows free expression. "The more democratic the progressing society, the better the chance that the idea of reducing the severity [of punishment] will win the minds and hearts of the population and thus force the lawmakers to comply" (p. 78).

Ten years ago the death penalty seemed to be on the way out in the United States, a trend consistent with Gorecki's evolutionary model. In *Furman v. Georgia*,<sup>5</sup> the Supreme Court declared that the death penalty as imposed under the laws of Georgia and Texas constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. The Court was hardly of one mind (nine opinions were written), but it was at least clear that the death penalty would be subject to strict scrutiny in the future.

Four years after *Furman*, in *Gregg v. Georgia*,<sup>6</sup> the Court held that capital punishment is constitutional provided that the law imposing it sets forth sufficiently clear guidelines and procedures to minimize capriciousness in sentencing. Gorecki, who sees *Gregg* as a step in the counter-evolutionary direction, believes it to be the product of a shift in public opinion that favors harsher punishments in general and capital punishment in particular (pp. 105-13).

The villain behind *Gregg*, Gorecki contends, is our ineffective criminal justice system, which he lambasted in *A Theory of Criminal Justice*. A rising crime rate, which Gorecki attributes at least in part to uncertainty of punishment and loss of respect for the law (pp. 100-05), has produced a reaction of fear and anger. Gorecki does not condemn these emotions (p. 107), but believes that they have led our nation to focus on "the irrelevant themes of punitive harshness and capital punishment rather than the more important issues of certainty and justice" (p. 120).

Gorecki's solution, far easier to describe than to implement, is to restructure our criminal justice system to make punishment more certain and the administration of law more just (pp. 116-17). *Capital Punishment* reiterates certain of the themes of *A Theory of Criminal Justice*: for example, Gorecki once again raises the point that plea bargaining introduces an undesirable element of arbitrariness into the way that punishment is administered (pp. 103-05). To get a better idea of the magnitude of the changes Gorecki has in mind, however, an interested reader would be well advised to consult *A Theory of Criminal Justice* in its entirety. Suffice to say that Gorecki's proposals are sweeping: police, prosecutorial and judicial discretion

---

4. P. 76 (quoting Bandura, *Analysis of Modeling Processes*, in *PSYCHOLOGICAL MODELING* 51 (A. Bandura ed. 1971)).

5. 408 U.S. 238 (1972).

6. 428 U.S. 153 (1976).

should be curtailed,<sup>7</sup> the *Miranda* rule scrapped,<sup>8</sup> and many laws rewritten or removed from the books.<sup>9</sup>

Although Gorecki would no doubt prefer to be grouped among “proponents of realistic legal change rather than [among] utopians in the Stoic style” (p. 121), there is more than a touch of optimism in his evaluation of the potential efficacy of the law as a means of moral education. This is the scenario he envisions:

Granted that the reform of criminal justice stipulated here occurs, what is the future of the death penalty? The reform will bring us closer to the state where a just punishment follows every crime committed. This will, in turn, bring, through the process of persuasive instrumental learning, a sweeping decline in criminal behavior. With crime under control, the anger and the fear of crime that pervade this society will disappear. The anger and fear absent, the tendency toward declining harshness of criminal punishments, then unopposed, will start working again. This cannot but bring about a new growth of the abolitionist sentiment . . . . [P. 121].

One does not have to deny the value of certainty and evenhandedness in punishment to wonder whether instituting even the best of legal systems in this country would, of itself, produce a “sweeping decline in criminal behavior” (not to mention the difficulty of agreeing on what *is* the best system and implementing a plan). Gorecki offers very little indeed in the way of empirical data to support his view of the law’s potential impact as moral teacher. His review of history is not convincing evidence because, as he concedes, “it is impossible *ex post facto* to trace motivations preventing wrongdoing” (p. 75). All that remains is the weak conclusion that “the limited information we have is not in the least inconsistent with the idea of criminal law’s reinforcing morality” (p. 75).

Gorecki’s thesis does not stand or fall entirely on the basis of his theory of the law as moral educator. What remains, however, seems less than novel. It is not surprising to be told that western society has tended to abandon harsher forms of corporal punishment (*e.g.*, torture), at least in times of social stability and with respect to classes considered equal by those exercising the power of punishment. The predictive value of such an observation is limited, however. First, one must assume (or hope), as Gorecki does, “that this society does not face cultural decline in any predictable future” (p. 115). Second, one must assume that the desire to spare criminals unnecessary pain will prove stronger and more persistent than the desire to express outrage through the use of capital punishment. History does not undermine this second assumption, but neither does it prove the as-

---

7. CRIMINAL JUSTICE, *supra* note 1, at 44-62, 103-09.

8. *Id.* at 81-89, 118-26.

9. *Id.* at 33-43, 95-101.

sumption with the certainty that talk about an evolutionary trend would indicate.<sup>10</sup>

*Capital Punishment* does not contribute greatly to the already voluminous discussion of the death penalty. Much of the book simply recapitulates, often verbatim, the ideas of *A Theory of Criminal Justice*. What remains is the notion of an evolutionary trend toward milder punishment, which is of questionable value as a predictive tool. It is doubtful that the reader will learn more than he knew to begin with: that the future of capital punishment in this country is uncertain.

---

10. Though Gorecki at one point treats harshness as counterproductive, p. 76, he later concedes that

[f]rom the standpoint of the effectiveness of criminal justice, this widely demanded severity [in the United States today] is harmless, and so are, in particular, capital convictions and executions for a heinous crime. They are harmless for two reasons: first, and obviously so, they do not contribute to uncertainty of punishments, and second, by being widely demanded, they are not perceived as unjust. On the other hand, they do not seem useful either.

P. 119. If one de-emphasizes moral arguments against capital punishment, as Gorecki does, and simply takes the stance of predicting its future, the neutral status of the death penalty in efficiency terms may be offset by the fact that it satisfies the desires of a considerable part of society for justice or revenge. These desires may persist indefinitely in a more powerful form than the belief of other members of society that deliberately taking life is morally wrong. It does not necessarily follow that because Western culture has tended to eschew physical cruelty, it will eventually come to find any form of inflicting death unacceptable. One might conclude, for example, as van den Haag does, that the reason for rejecting physical cruelty is because "[c]orporal punishment is now perceived as debasing sexual exploitation." E. VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 204 (1975). The same may never be true of "sanitized" forms of capital punishment, particularly as the technology of killing with drugs develops.

---