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For Capital Punishment

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FOR CAPITAL PUNISHMENT.* BY *Walter Berns*. New York: Basic Books. 1979. Pp. vii, 214. \$10.95.

We have heard talk of justice. Is there anybody who knows what justice is? No one on earth can measure out justice. Can you look at any man and say what he deserves — whether he deserves hanging by the neck until dead or life in prison or thirty days in prison or a medal? The human mind is blind to all who seek to look in at it and to most of us that look out from it. Justice is something that man knows little about. He may know something about charity and understanding and mercy, and he should cling to these as far as he can.¹

Walter Berns rejects this indictment of man's ability to judge his fellow man. Indeed, he bases his modern defense of capital punishment on the need for justice. The persuasiveness of that defense may thus depend on whether it convinces us that a coherent, satisfying structure of justice exists — a structure that can administer the ultimate sanction justly. His effort is lucidly presented, and is an important, if unconvincing, addition to the literature.

For Capital Punishment sidesteps many of the traditional arguments regarding the death penalty. For example, Berns concedes that religion provides little guidance. A battle waged with biblical passages would provide no clear victor. Furthermore, he summarily dismisses the claim that the death penalty is cruel and unusual, citing its acceptance by the framers of the Constitution and a majority of modern Americans.² Finally, he refuses to engage in a war of statistics on the effectiveness of the death penalty as a deterrent to crime. Berns does not believe that there has been convincing evidence on either side, and he therefore does not base his argument on capital punishment's deterrent effect. But if deterrence cannot justify capital punishment, then the penalty would seem to be nothing but an act of vengeance. Yet Berns takes his stand on precisely that foundation; he argues that revenge, or what he calls righteous indignation, is a proper motive for capital punishment.

Berns begins his unique argument by tracing the widespread rejection of retribution to its roots, the social contract theory of the eighteenth century. This theory, springing from centuries of intense

* This book review was prepared by an Editor of the *Michigan Law Review*.—Ed.

1. C. DARROW, *Is Capital Punishment a Wise Policy? Debate with Judge Talley*, in *ATTORNEY FOR THE DAMNED* 95 (A. Weinberg ed. 1957).

2. Berns cites various polls taken in the United States which show a popular majority for capital punishment. The most recent, taken in California in 1975, shows 74% in favor. In addition, Berns points to a Canadian study which demonstrated that even after 14 years without a single execution 80% of the population still favored the death penalty. Similarly, when capital punishment was abolished in Great Britain, 79% of the people were against or unsure of such action. See pp. 36-38.

religious persecution in Europe, espoused freedom from laws that condemned people for their beliefs. These theorists viewed man as amoral, believing his primary motivation to be self-interest. They assumed that each person's self-interest would clash with the interests of others, resulting in constant warfare. Therefore, they found a society of laws necessary to free members from fear of each other. In such a system, only acts that harmed others would be criminal, for the law's only goal was a peaceful society. Crimes were not morally wrong; they were merely failures to control one's self-interest. The purpose of the law was not to condemn and punish criminals but to convince them that it is in their self-interest to refrain from committing crimes by threatening them with punishment. Thus deterrence — not retribution — was the goal. The social contract theorists argued that deterrence should be accomplished by the least severe punishment necessary. They rejected traditional forms of bodily punishment and proposed imprisonment as the most humane and effective deterrent, thereby paving the way for the abolition of the death penalty.

Berns claims that our modern attitudes toward crime and punishment have evolved from this philosophy. We have continued to reject anger and retribution as responses to crime, but we have also gone beyond the social contract theorists by making rehabilitation the ultimate goal of the criminal justice system. This new emphasis on rehabilitation has garnered even stronger support for the abolition of capital punishment, for one cannot rehabilitate a dead criminal.

Berns attacks the rejection² of retribution in two ways. First, he argues that modern reforms have failed to accomplish either of their avowed purposes. Citing several studies (pp. 66-72), he argues that we have never found a successful method of rehabilitating criminals. Furthermore, says Berns, our attempts at rehabilitation have undermined our ability to deter crime. In fact, Berns argues, our present system has little or no deterrent effect because only an extremely small percentage of criminals ever face incarceration.³

Berns's second attack is more basic. He contends that the spirit of reform which has spawned the fight against capital punishment has confused our attitudes toward the criminal law. The deterrence and rehabilitation objectives of punishment concentrate on the criminal, not on the crime or its victim. With concern for deterring and rehabilitating criminals has come indifference to the effects of crime. According to Berns, the reform movement can only result in "a world without dignity, without morality, and indifferent to how we live [; a world] that may not impose the sentence of death on anyone — or, for that matter, punish anyone in any manner — or ask any

3. According to Berns's calculations, "98.3% of the serious crimes go unpunished." P. 112.

patriot to die for it" (p. 163). The question Berns poses "is whether we can live in such a country or in such a world" (p. 163).

Berns's solution is the reacceptance of anger as a response to crime. He argues that anger is a proper response because crime does more than simply disrupt the orderly functioning of society; it inflicts personal injuries on individual victims and it violates the public trust that is vital to "moral human communities." Berns rejects the charge that anger is a selfish, brutal emotion, stating that it demonstrates our concern for crime victims. Furthermore, he asserts that a system based on anger and retribution acknowledges the criminal's humanity by recognizing his unique capacity to make moral choices.⁴

If we accept the responses of anger and retribution, our schedule of punishments must change. Since the purpose of punishment is to vindicate the victim and impress upon the criminal and the community the seriousness of the particular transgression, the punishment must fit the crime. Thus, for Berns, the most horrible crimes deserve the most terrible punishment: death. Moreover, the criminal law must command profound respect, and "the most powerful means we have to give it that dignity is to authorize it to impose the ultimate penalty" (p. 173). These reasons for the death penalty, however, militate against its widespread use, for it must be reserved for only the most heinous crimes. Therefore, while denying that capital punishment is cruel, Berns asserts that capital punishment should be unusual.

While Berns cannot be faulted for criticizing our present responses to crime, his critique is not always persuasive. One gets the feeling that he does little more than throw in the towel with his argument against rehabilitation. He argues that our failure to rehabilitate criminals demands a new approach, ignoring the fact that rehabilitation has been taken seriously for less than one hundred years while the death penalty he proposes was a failure for centuries. Secondly, Berns fails to answer one of the more potent arguments of the abolitionists: that the death penalty cannot be administered without caprice and mistake.⁵ If that argument is correct, there may be no persuasive response to the observation that capital punishment makes any mistakes in the judicial process permanent; an innocent

4. Berns is attempting to respond to Justice Brennan, who argues that the death penalty does not "comport with human dignity" because it treats men as objects to be discarded, and "even the vilest criminal remains a human being possessed of common human dignity." *Furman v. Georgia*, 408 U.S. 238, 273-74 (1972) (Brennan, J., concurring). In addition to his response that the penalty confers dignity by treating criminals as responsible moral beings, Berns expresses doubt that men such as James Earl Ray, Charles Manson, and Adolph Eichman are truly deserving of the same respect as men such as Martin Luther King and Abraham Lincoln.

5. See C. BLACK, *CAPITAL PUNISHMENT* (1974).

person, once executed, cannot be resurrected. Even more serious, however, is Berns's failure to answer the claims that the death penalty will be applied arbitrarily and discriminatorily. While he may be able to limit the use of capital punishment to the worst crimes, Berns makes no attempt to explain how it can be administered equally to rich and poor or to black and white. If he cannot overcome this problem, Berns's solution only serves to facilitate the "procession of the weak and the poor and the helpless . . . to our jails and our prisons and to their deaths."⁶

Finally, we should note that Berns's argument for capital punishment is not completely new. More than fifty years ago, Judge Alfred J. Talley took a similar position during a debate over the death penalty with Clarence Darrow: "The object of punishment of crime . . . must be vindicative — not vindicative in the sense of revengeful, but it must be imposed so that the law and its majesty and sanctity may be vindicated."⁷ Darrow's answer to the judge is as fitting and effective a response to *For Capital Punishment* as it was to his opponent:

If capital punishment would cure these dire evils that he tells us about, why in the world should there be any more killing? We have had it always. We have had it long enough. It should have been abolished long ago.

In the end, this question is simply one of the humane feelings against the brutal feelings. One who likes to see suffering, out of what he thinks is righteous indignation, or any other, will hold fast to capital punishment. One who has sympathy, imagination, kindness and understanding, will hate it and detest it as he hates and detests death.⁸

It is easy to throw up one's hands in frustration over the failures of the criminal law and to propose a tougher response. Berns's eloquent attack on the status quo appeals to that frustration. The value of his effort lies in the strength of his indictment and, ironically, in the weakness of his solution. Anger and retribution are not new responses to crime. Berns inadequately answers the critics of these responses, and he does not explain why the death penalty would be successful after years of failure. Of what benefit is delineating a problem without advising a solution? The persuasiveness of the attacks on both lenient and harsh systems of punishment suggests that Berns and the reformers he opposes are making a fundamental mistake. They assume that a properly administered criminal justice system can effectively treat crime. A criminal justice system cannot cure crime because it treats only the symptoms and not the causes of the problem. Berns's ease in criticizing the present system and difficulty in proposing an adequate alternative indicates that problems

6. C. DARROW, *supra* note 1, at 102.

7. *Id.* at 90.

8. *Id.* at 103.

are inherent in any criminal justice system. This message, even if unintended, makes his book well worth reading.