Michigan Law Review

Volume 81 | Issue 4

1983

The Death Penalty in America

Michigan Law Review

THE DEATH PENALTY IN AMERICA (Third Edition). By *Hugo Adam Bedau*. New York: Oxford University Press. 1982. Pp. xiii, 424. $29.95.

During the sixteen years since Hugo Adam Bedau published his second edition of *The Death Penalty in America*,[1] the Supreme Court has handed down its most important decisions on the issue of capital punishment. First, in the landmark 1972 case of *Furman v. Georgia*,[2] a majority of the Court held that the eighth and fourteenth amendments forbid the application of death penalty statutes that leave jurors with undirected discretion in sentencing.[3] Four years later, in *Gregg v. Georgia*,[4] the Justices clarified *Furman* and upheld the constitutionality of statutes that carefully guide both judges and juries in imposing the death penalty rationally and according to uniform standards. These cases are merely the tip of the iceberg. Recent opinions in *Witherspoon v. Illinois*,[5] *Woodson v. North Carolina*,[6] and *Coker v. Georgia*[7] have spoken to such important matters as death-scrupled jurors, mandatory death penalties, and capital punishment for rape.

In light of this Supreme Court activity and the accompanying spate of scholarly commentary on the subject, it comes as no surprise that Professor Bedau has once again revised and updated his authoritative study. At first glance, *The Death Penalty in America* appears to be a cyclopedia of data and opinion on capital punishment. Unlike the typical anthology in which the essays stand largely apart, related by little more than their common subject matter, however, this anthology is much more than the sum of its parts. Each selection and group of selections is part of a grand scheme, and the hand of Bedau is evident throughout.

In his preface, Bedau reiterates the cautionary (and understated) passage from an earlier edition, " 'that the idea of this book was not conceived in dispassionate scholarly curiosity' " (p. viii). Although he has "tried to walk a narrow line between misrepresenting [his] own abolitionist convictions and allowing them to interfere with the presentation and evaluation of evidence and the views of others" (p. vii), Bedau is unmistakably an advo-

1. THE DEATH PENALTY IN AMERICA (H. Bedau rev. ed. 1967).

2. 408 U.S. 238 (1972).

3. *Furman* was a 5-4 per curiam decision with each Justice writing a separate opinion; consequently, the Court failed to establish a uniform standard for death penalty statutes. Accordingly, in the wake of *Furman*, states enacted two types of death penalty statutes — those providing for mandatory capital punishment and those guiding judges and jury discretion.

4. 428 U.S. 153 (1976). The same day the Court decided *Gregg*, it handed down similar verdicts in Proffitt v. Florida, 428 U.S. 242 (1976), and Jurek v. Texas, 428 U.S. 262 (1976).

5. 391 U.S. 510 (1968) (capital defendants may not be tried by juries that exclude jurors with scruples against capital punishment).

6. 428 U.S. 280 (1976) (holding mandatory death penalty statutes unconstitutional). *See also* Roberts v. Louisiana, 428 U.S. 325 (1976) (holding mandatory death penalty statutes for murdering police officers unconstitutional).

7. 433 U.S. 485 (1977) (holding that the death penalty is excessive punishment for rape).

cate, and *The Death Penalty in America* is a systematic and persuasive presentation of the issues from the abolitionist perspective.[8]

Bedau's inclinations are evident in the first chapter, "Background and Developments." His historical perspective is premised on the belief that nearly "every reduction in the use of penal execution" is attributable to the ongoing efforts of abolitionists (p. 3). Moreover, Bedau concludes that the death penalty is "an anachronism, a vestigial survivor of an era when the possibilities of incarcerative or rehabilitative penology were hardly imagined, and equal respect for all persons convicted of crimes was a requirement unknown to our constitutional law" (p. 28). The resurgence of capital punishment in the United States today,[9] however, belies this notion that the evolution of sentencing guidelines and procedural safeguards signals a trend toward abolition, rather than refinement of the penalty. Indeed, the progression from *Furman* to *Gregg* also raises doubt as to the contemporary relevance of Bedau's historical argument.[10]

Like chapter one, chapter two presents a background of sorts — a comprehensive survey of data covering "three categories of basic legal and social facts" (p. 29), including capital punishment statutes, crime statistics, and sentencing and execution figures. Constituted almost exclusively of charts and tables, this section exemplifies the prominence of empirics in formulating and assessing policy arguments.[11]

In chapter three, "American Attitudes Toward the Death Penalty," Bedau starts putting this body of data to practical use. He acknowledges in the first sentence of his Introduction to the chapter that "[s]ince the late 1960s, according to every available measure, the American public has professed support for capital punishment by a majority of more than two to one" (p. 65). The selections that follow largely attempt to reconcile these attitudes with the abolitionist position. Thus, Bedau states that the "Mar-

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8. For a comprehensive bibliography of Bedau's writings on capital punishment, see pp. 387-88.

9. Other states seem anxious to get in step. Two weeks after Brooks was executed, Massachusetts became the 38th state with a death penalty on the books, and Oregon seems likely to become the 39th, 20 years after capital punishment was abolished there by popular vote.

> The national death-row population today is 1,137. That is 200 more than a year ago, twice as many as in 1979, and larger, moreover, than ever before.

Anderson, *An Eye for an Eye*, TIME, Jan 24, 1983, at 28.

10. *Furman*, in holding unconstitutional death penalty statutes that provide for undirected discretion in sentencing, left open the possibility that capital punishment inherently violates the eighth amendment. In fact, Justices Brennan and Marshall, in their separate concurrences, found the death penalty unconstitutional per se. *See* Furman v. Georgia, 408 U.S. 238, 305, 359 (1972).

Gregg, Woodson and the like, therefore, must be viewed as instances of "fine-tuning" rather than as steps toward abolition. *See* notes 4, 6 *supra* and accompanying text.

11. According to Bedau's grand scheme:

> the reader will be presented first with the incontrovertible data drawn largely from government sources and opinion polls; then progressively more evaluative studies of controversies over deterrence and the administration of criminal justice will be reviewed; this is followed by an examination of how the Supreme Court has viewed the constitutionality of the death penalty; and only after all this are the forthright partisans on both sides allowed to plead their case.

P. vi.

shall hypothesis"[12] — that the public is uninformed about the death penalty and would not support it were this ignorance remedied — "has been tested and confirmed" (p. 66). He cites Sarat and Vidmar's 1976 article[13] as support for this proposition; however, the slightly earlier report by Vidmar and Ellsworth, reprinted in this chapter, is much more cautious and equivocal on the point (pp. 80-83). Moreover, whereas Bedau takes great pains to undermine the significance of public support for capital punishment (pp. 66-68), Vidmar and Ellsworth counter that general expressions of opposition to capital punishment are similarly vulnerable to questioning directed at specific, unsavory circumstances (pp. 83-84).

Chapter four addresses the question of deterrence. As Bedau notes, no issue in the death penalty debate has been "more hotly contested" (p. 93). Once again, his abolitionist advocacy is evident in the selection of articles in this chapter. The most controversial group of studies in this area is that of economist Isaac Ehrlich, the first investigator to report a finding that the imposition of the death penalty measurably reduced the incidence of homicide.[14] Although the three selections in the chapter by Gibbs; Zeisel; and Klein, Forst, and Filatov are preoccupied in whole or in part with refuting Ehrlich's methodology and data, Bedau, perhaps somewhat unfairly, chose not to reprint either Ehrlich's initial report or his various defenses of it.[15]

The remaining articles in the chapter examine deterrence in specific circumstances — prison murder, recidivism, and terrorism. Thornton's article on "Terrorism and the Death Penalty" is perhaps the least satisfactory of the volume. In response to a *New York Times* column suggesting that capital punishment be imposed upon convicted terrorists, Thornton isolates an unusual example of deterrence as a prime motive of the proposed penalty. Specifically, he posits that executing captured terrorists makes it less likely that other like-minded terrorists will try to effect their comrades' release by taking hostages (p. 181). From that point of departure, the article's speculations on the reactions and motivations of terrorists "smell of the lamp" and verge on absurdity.

Chapter five concerns the fallibility of administering the death penalty. Described by Charles Black, Jr. as "processual" problems, vagaries in the administration of the death penalty intrude in a number of ways — through racism, capriciousness, ineffectiveness of counsel, and errors in fact-finding. The chapter is highlighted by perhaps the best selection in the book, Ram-

12. *See* Furman v. Georgia, 408 U.S. 238, 360-69 (1972) (Marshall, J., concurring).

13. Sarat & Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 471. The authors reported that "when exposed to information about capital punishment, . . . a substantial proportion of the subjects altered their opinions toward it." *Id.* at 195. Their evaluation of this result, however, was much less conclusory than that ascribed to it by Bedau. They merely suggested caution in accepting generalized statements concerning public opinion in support of the death penalty, *id.* at 195, 196, not that informed public opinion would necessarily shift to the abolitionist position.

14. His findings were reported initially in Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975). A full bibliography of Ehrlich's work in this area appears in the references at the end of *The Death Penalty in America*. P. 392.

15. It is not intended to suggest that the critiques of Ehrlich's findings are unpersuasive; rather, the point is that all the selections included in the chapter represent the abolitionist view.

sey Clark's "Spenkelink's Last Appeal," a sobering account of the events immediately preceding the execution of John Spenkelink. This account demonstrates that, despite the impression created that six years of appeals are inordinately protective of a condemned prisoner's rights,[16] the judicial system is still capable of throwing due process to the winds. Bedau cautions in his Preface that, because of space limitations and publication in previous editions, case histories were omitted from this volume. It is indeed fortunate, however, that the story of "Spenkelink's Last Appeal" was included, for it is at least as persuasive as the clearest tables, most meticulous data, or best reasoned hypotheses presented elsewhere in the book.

The Death Penalty in America culminates in chapters seven and eight with, respectively, five essays supporting and five opposing capital punishment. Bedau's pique toward retentionists surfaces briefly here. He notes in a slightly disparaging tone that the "distinction" of having "devoted a whole book solely to arguing the case for executions" belongs to Walter Berns (p. 307), while, in contrast, he shows considerably more respect for a similar effort asserting the abolitionist position by Charles L. Black, Jr. (p. 343). In fact, the excerpt, "The Morality of Anger," from Berns' book, is by far the most eloquent and thought provoking of those on behalf of the death penalty. Berns suggests that capital punishment, by holding men responsible for the gravity of their acts, is an affirmation rather than a denial of their humanity. He does not deny the pain that imposition of the death penalty inflicts upon society itself. Rather, he characterizes it as a sacrifice that is ennobling, not dehumanizing, of society (pp. 334-41).

A comparison of articles by Ernest van den Haag supporting the death penalty and Anthony Amsterdam opposing it demonstrates that the logic of arguments based upon utilitarian issues such as deterrence will support either viewpoint. Thus, van den Haag argues that the irrevocability of the death of homicide victims justifies capital punishment until deterrence is positively disproved (pp. 325-26), while Amsterdam argues that the irrevocability of execution should place the burden of proof of deterrence on the retentionists (p. 349). Retentionists refute data demonstrating nondeterrence with anecdotal examples,[17] while abolitionists counter by citing to

16. Justice Rehnquist's dissent from denial of an emergency review of a stay of Spenkelink's execution is illustrative of this attitude:

> Justice Rehnquist wrote that his "difficulty undoubtedly stems from six years of litigation." He said continuing appeals could "result in a situation where States are powerless to carry out a death sentence"; he was also critical of the defense's new contention that Spenkelink had not had effective counsel. Justice Rehnquist found it hard to believe that the defendant had suddenly determined this after six years of trial: "Either he does not believe the claim himself or he had held the claim in reserve, an insurance policy of sorts, to spring on a Federal judge of his choice if all else fails."

Pp. 229-30. Clark's response to this charge is: ". . . Mr. Rehnquist decides issues of fact without the evidence when a man's life is at stake." P. 230.

17. The examples offered in the Senate Judiciary Report, reprinted in chapter seven, at pp. 312-14, are typical. The report seems to contradict itself, however, on the deterrence issue, for it later speaks of limiting capital punishment to "incorrigibly anti-social" individuals, "a minute class of extremely dangerous persons" (p. 315). Obviously, this "minute class" consists of individuals least likely to be deterred from violent acts by *any* punishment. *See also* Adler, *Death Specialists: Florida's Zealous Prosecutors*, AM. LAW., Sept. 1981, at 36 ("Five minutes into a conversation on capital punishment, Georgieff [George Georgieff, head of state attorney general's criminal appeals division] volunteers how he became convinced that the death pen-

homicides motivated by the *existence* of the death penalty *(e.g.*, Amsterdam at p. 357). Finally, while van den Haag contends that capricious application of the death sentence is a "sham argument" because abolitionists would oppose the death penalty even if this problem were overcome (p. 324), the same argument can be made by both sides with respect to all utilitarian issues.[18]

Berns' views seem more formidable because they go beyond utilitarian questions to the ultimate morality — the *rightness* or *wrongness* — of capital punishment. Since several essays in Bedau's earlier revised edition argue aspects of this most fundamental issue, it is unfortunate and somewhat disappointing that Bedau chose not to include any of these materials in the third edition.[19] Instead, Bedau has included in chapter six over fifty pages of edited opinions from the *Furman* line of capital punishment cases. While the cases lend an impression of comprehensiveness to the volume, they are readily available elsewhere and could have been summarized much more briefly. Moreover, the reader is unlikely to refer to Bedau's earlier edition, given the vast changes in empirical and legal standards since its publication in 1967. The space taken by chapter six, therefore, might better have been allotted to excerpts like those of Walter Berns or Sidney Hook, Jacques Barzun, and Israel Kazis from the earlier revised edition.

Despite these shortcomings, however, *The Death Penalty in America* is a valuable and impressive compilation and, in its collective force, a persuasive document for the abolition of capital punishment. Perhaps, sixteen years hence, changing circumstances and attitudes as well as new developments in case law and commentary will necessitate a fourth edition, but until then Professor Bedau's most recent work will serve nicely as both a reference and a primer on the death penalty.

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alty serves its intended purpose: 'I know it's a deterrent because many years ago I was having a spat, a physical fight, with one of my ex-wives, and I found myself choking her, and I saw her eyes start to pop out, and suddenly off to the left or the right I saw the electric chair. It deterred *me*.' ").

18. *See, e.g.*, Anderson, *supra* note 1, at 36 ("To diehard proponents of the death penalty, deterrence hardly matters anyway. Declares [William F.] Buckley: 'If it could be absolutely determined that there was no deterrent factor, I'd still be in favor of capital punishment.' ").

19. Because the revised edition was *pre-Furman* and much of the empirical data now available did not exist, the advocates in that volume devote somewhat more attention to the fundamental question of the morality of the death penalty.