

THE DEATH
PENALTY

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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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