Review Essay

Why Do You Think They Call It CAPITAL Punishment? Reading the Killing State

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Austin Sarat, *When the State Kills: Capital Punishment and the American Condition.* Princeton, NJ: Princeton Univ. Press, 2001. xii + 324 pages.

Introduction: The Death Penalty and Socio-Legal Scholarship

Austin Sarat is widely known for work on cause lawyering, divorce lawyers, and white collar crime, and for influential arguments on behalf of integrating humanities topics and methods into empirical studies of law and society. Sarat is not, however, particularly known as a death penalty scholar, an intensive subfield of socio-legal studies that has been dominated by scholars wholly captured by the compelling nature of the subject.[1] A reader of Sarat's bibliography would have to go back to 1976 when Sarat, as a young political scientist, published research coauthored with an equally junior psychologist, Neil Vidmar, on how public opinion on the death penalty was affected by targeted education on particular aspects of the death penalty including empirical studies doubting its deterrent effects, and on other information designed to raise concerns about the justice of capital punishment (Sarat & Vidmar 1976). In terms of both its methodology and the logic of its inquiry, *When the State Kills* could hardly differ more from the Sarat and Vidmar study. Between the two, one can mark significant shifts in both the enterprise of socio-

[1] This is perhaps an exaggeration. Most of the scholars I have in mind publish on other topics but are generally serial publishers when it comes to the death penalty. Examples include Hugo Bedau, William Bowers, Phoebe Ellsworth, Samuel Gross, and Roger Hood.

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legal studies and the place of capital punishment in American political culture.

The 1976 study of public opinion on the death penalty reflected its time in two ways. First, the authors exemplified the flow of young social scientists trained in empirical methods (especially survey research) at the best university social science centers into legal studies via foundation grants and access to prestigious law schools. Theirs was the promise of research that was simultaneously about conjectural policy issues and fundamental questions of social order (Garth & Sterling 1998). It is hard to think of a question that more powerfully presented the hopes and fears of this largely liberal, reform-oriented cohort than the subject of the death penalty and in particular Justice Marshall's provocative claim in *Furman v. Georgia* (1972) that only if Americans were truly confronted with the racism and arbitrariness of the death penalty in America could their continued assent (if it was indeed forthcoming) indicate that the death penalty was still acceptable in terms of the 8th Amendment's evolving standards of human decency. This is because whether or not a punishment is cruel and unusual depends, not on whether its mere mention "shocks the conscience and sense of justice of the people," but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable. (*Furman v. Georgia* 1972:361).

Second, the study reflected a sense that American public opinion on the death penalty was fluid and in transition. The young socio-legal scholars drew a random sample of subjects living conveniently in the town where one of them taught (not a particularly representative place, to be sure) on their views regarding different aspects of the death penalty. During the course of the interview, subjects were shown short essays containing critical information about the death penalty as unfair, error prone, and discriminatory. Sarat and Vidmar's results offered at best partial support for Marshall's hypothesis. Knowledge about the empirical failures of the death penalty—that is, its lack of deterrent value, only moved those most marginally supportive of the death penalty to begin with. New information about the unfairness of the death penalty led respondents to view the death penalty as less fair overall but, disturbingly, did not erode their general support for it. Despite the rapid pace of legal changes and the fact that a slight majority had opposed the death penalty in the late 1960s, by 1976 public opinion had already swung decidedly in favor of the death penalty and showed little likelihood of shifting through new information(Banner 2002:275). Franklin Zimring and Gordon Hawkins in their influential study of the death penalty (1986) captured the moment when support for the death penalty had hardened even in the face of growing evidence of unsolvable problems in its administration.

The work behind *When the State Kills* began in the mid-1990s and reflects a very different moment. Popular support for the death penalty in America was at or near its 20th-century high point between 1994 and 1996. In fall 1996, President Bill Clinton was re-elected with a solid majority in a campaign where he stressed his support for expanding the use of the federal death penalty. In addition, no lack of evidence existed that the death penalty was both capricious or racist. Randall Dale Adams was sentenced to death in Texas for the murder of a police officer which he almost certainly did not commit, a story that was popularized in a widely seen 1988 documentary movie by Errol Morris titled *The Thin Blue Line*. And the Supreme Court in 1986, hardly bothering to consider a state-of-the-art piece of social science research (Baldus, Pulaski & Woodworth, 1983), held in *McCleskey v. Georgia* (1986) that even if killers of whites were statistically much more likely to get the death penalty than similar killers of blacks, that did not constitute a violation of either the Equal Protection Clause or the 8th Amendment in the absence of proof of discriminatory intent by decision makers in a particular case.

Not yet foreseen by Justice Marshall, or his social science interlocutors, was the extent to which the death penalty would become central to the relationship between political leaders and subjects in ways that shaped both. The death penalty has long been recognized by political scientists as one of those issues that clearly and cleanly locates Americans in contemporary political space (Ellsworth & Gross 1994). If I know where I stand on the death penalty, I can readily determine where I stand in relation to other voters and political leaders. Less widely noted is the degree to which the death penalty has helped condense a range of mentalities (rage, pain, empathy) and a range of discourses (vengeance, risk, redemption) into an idealized citizen, whom we might call the crime victim subject. This subject, in turn, has come to be the preferred interlocutor for political representation (Scheingold 1991; Simon 1997; Garland 2001). Even when they are talking about transportation, or taxes, political leaders in the United States have increasingly come to address a subject whose emotional core, capacities, and needs are those of the crime victim, and the capital murder victim in particular.

This crime victim subject, raised to its "capital" form in the death penalty setting, is hardly neutral to the fate of different political subjects and their needs. By claiming the language of justice in a powerful way, the capital crime victim subject undermines the claims of other kinds of victims and the articulation of other kinds of needs. Much as the "death-qualified" juror is likely to bring a range of attitudes to court that will prejudice the case in respects legally independent of the death penalty decision, the political subjectivity evoked in narratives of crime victims shapes

the whole character of American government today.[2] Rage and demands for punitive justice for specific murder victims are in. The needs of father-headed, white suburban families and their children are treated as prime cases of the public interest. The needs of women-headed families, minorities, and the poor are defined a illegitimate special interests. .

The rise of the victim as an idealized political subject was not apparent in the mid-1970s. The Marshall hypothesis presumed a death penalty weakened by rapidly decreasing use during the 1960s. Even after it was resurrected by *Gregg v. Georgia* (1976), the future of the penalty seemed uncertain. Perhaps it was a vestige of the American past soon to naturally fade away, like the Confederate flag over state buildings in the South, or the practice of naming sports teams after American Indian tribes. Instead, the death penalty has metastasized in American political culture, inscribing itself in the more general model of political subjectivity. By the 1980s, opponents had largely given up direct efforts at abolition in favor of chipping away at how the death penalty system was managed, such as the method of execution, the execution of the retarded and juvenile, and most recently the problem of innocent people on death row. .

Below the fluctuating surface of public opinion and the rhetoric of political campaigns, the death penalty has increasingly embedded itself in the way political institutions conceive of themselves and their relationship to their subjects. While the centrality of the death penalty to public opinion and to campaign rhetoric has varied and will in the future, the influence of the death penalty on the way public policy is made may be more enduring. It is this new terrain that Sarat explores in *When the State Kills*. The separate chapters map what Sarat calls the "cultural lives" of the post-*Furman* American death penalty, i.e., how it is represented, known, and acted upon. Here we find the Supreme Court sorting out the place of victim pain in the knowledge that the jury must be given access to in producing the truth of the death penalty. Here are the narratives of prosecutors and defense lawyers as they try to weave two deaths together, the murder of the victim and the possible state killing of the defendant. Here is the question of whether executions can be made painless and whether the general citizenry should view them. These battles are distant from the fundamental struggles of the 1970s over whether the death penalty should exist. They reflect the intertwining of the death penalty with the nature of political authority more broadly.

[2] Jurors are questioned as to their preparedness to impose the death penalty in the appropriate case and are excluded for cause if they are not. Because death penalty opponents may also be more likely to evaluate the state's case skeptically, their exclusion gives the prosecutor a major trial (and therefore plea bargaining) advantage simply by announcing the intent to seek the death penalty in a statutorily eligible case.

It is also tempting to read into the shift from Sarat's original interest in the Marshall hypothesis to *When the State Kills* a narrative of methodological shift from the reformist optimism of survey research to the more pessimistic hermeneutic circles of interpretation.[3] It will be troubling for some that this selection seems to highlight the margins of the death penalty while ignoring some major institutional actors, governors, legislatures, and courts. Political scientists in particular, Sarat's own original discipline, may criticize the way political institutions are depicted (or not depicted here). We see lawyers' closing arguments and the arguments of members of the Supreme Court regarding victim impact evidence but not a systematic analysis of the operation of the power to kill in any one state or nationally.

But the inquiry of *When the State Kills* reflects the nature of the subject it explores and the questions it asks rather than a methodological agenda. Consider the recent reports produced by socio-legal scholars based at Columbia University that have used multiple regression analysis of large databases of court decisions to document the prevalence and distribution of serious error in the death penalty since its resumption (Liebman et al. 2000, 2002). Perhaps more than any study in a generation, the Columbia studies have demonstrated the potential for classic social science techniques to intervene in public discourse even under severe conditions of postmodernity. By making death penalty error visible, and by making its links to a market for capital sentences driven by racism and the failures of law enforcement, the Columbia study has visibly eroded the strict opposition between victim and murderer, those for whom the law must speak, and those whom the law must silence.

The variables that Liebman et al. identify as strongly correlated with error in the death penalty do not fit into the classic social determinacy model. It is not the race of the offender, the race of the victim, or the prejudices of prosecutors and or jurors that seem to be at work. Instead it is a set of variables that points to the political, the institutional, and the discursive. Race is important, but in terms of the minority percentage of the population. The proximity of the white homicide rate to that of minorities is important. The degree of electoral influence over prosecutors and judges is important. States that rate highly in each of these variables independently have dramatically more judicially discovered errors in capital sentencing than those that rate at the low end. In short, the picture the Columbia study begins to paint of error in the death penalty is a picture of states where capital punishment has become a crucial medium for articulating claims of political authority and popular representa-

[3] Sarat has been critical of the policy focus of earlier law and society work (his own included) (Sarat & Silbey 1988), has criticized the science paradigm within social science and law, and has promoted engagement between socio-legal scholars and the humanities.

tion. This is precisely the political context that Sarat's analysis in *When the State Kills* begins to address.

Indeed, the focus on films about capital punishment, the implications of lifting the prohibition on television coverage of executions, and the like reflect Sarat's considerable engagement as a social scientist with the humanities and with the methods of cultural reading, ideology critique, and narrative analysis. But the choice of what to cover here is not an arbitrary search through the ephemeral so much as an increasingly essential search for the way the death penalty is represented to, and the way it represents an American public cut off from direct knowledge of this penalty and yet deeply invested in its social meaning. Studies of the death penalty and political institutions tend to hold constant the nature of both the penal enterprise and the political subject. Sarat's current study of the death penalty is premised on the way that the death penalty helps constitute the power to punish and the nature of political authority and subjectivity.

This does not mean that the more conventional political drama of governors, legislatures, and courts has ceased to be relevant to the American death penalty; far from it. For all of the reasons sketched above, the death penalty has become more relevant to the conventional battle for power. Rather than employing the conservative political science analysis of American political institutions to analyze the death penalty, we need to move through the death penalty to a new understanding of political institutions. After developing Sarat's account of the contemporary death penalty in somewhat greater detail, this review takes up this challenge in a preliminary way by drawing on Sarat's account to analyze the role of the death penalty in the separation of powers in state government today. As this review was being completed in January 2003, Florida voters overwhelmingly approved a ballot proposal this fall that seeks to amend the Florida Constitution to place the death penalty in the constitution and to diminish the power of the Florida Supreme Court to hold penal actions unconstitutional as cruel or unusual. The amendment, proposed by the unanimous vote of the Florida Legislature, represents only the most recent move in an increasingly bitter struggle between the Florida Supreme Court, the Florida legislature, and the Florida governor.

When the State Kills

The thirty years since *Furman v. Georgia* (1972) have not been easy ones for the state as an institution. The optimism that postwar Americans brought to efforts by government to reform criminal offenders turned into a sarcastic pessimism. Sarat's analysis of the death penalty begins with this theme of a weakened state whose basic competencies are under question. At a time when

citizens are skeptical that government activism is appropriate or effective, the death penalty provides one arena in which the state can redeem itself by taking action with clear and popular results (Sarat 2001:18).

The death penalty in other times may have functioned to showcase the surplus power of monarchical states built on military capacity as bodies were literally hacked apart in dramatic public displays of the sovereign's rage (Foucault 1977). In the contemporary United States, however, the death penalty seems intended mainly to disprove the myth that the state can do nothing. It is in this sense that Sarat writes, in one of his few affirmative statements about the productivity of the death penalty, "[c]apital punishment may be necessary to demonstrate that sovereignty can reside in the people" (Sarat 2001:17). Three major themes of political discourse in the state that kills, *victims, vengeance,* and *pain,* are all rooted in this problem of power and incapacity.

Victims as the Idealized Political Subject

The state that kills makes the crime victim its special favorite of the law. It is the victim who must finally speak in the capital sentencing process. It is the victim whose demands the death penalty is ultimately a response to. Sarat describes the victim as "the symbolic heart of modern legality" (2001:35), a term that goes deliberately beyond the context of the capital trial to describe the kind of legal subject more generally that is now tied up with the fate of the death penalty. It is not hard to imagine why the crime victim, and the capital crime victim especially, has become central to the struggle to control and reform the state. The historical version of this story is well known.[4] The high tide of the social liberal state coincided with a dramatic increase in violent crime during the 1960s. The specter of being shot to death in a robbery on a city street terrified America, especially that sector of swing voters without strong partisan commitments that has determined most of the often close Presidential elections since 1960. This crime wave coincided with a time and in a place that deeply delegitimized the policies of the Kennedy and Johnson administrations as they struggled to put in place a post–New Deal vision of domestic governance. As crime in the midst of affluence became a stinging rebuke to the Great Society, a popular concept at the time, the death penalty began its ascent as a signal indicator of the will to govern in democratic societies.

[4] Political scientists Ben Wattenberg and Richard Scammons laid this case out in 1969 in their influential book *The Real Majority* (Scammons & Wattenberg 1969). More critical accounts include Cronin, Cronin, & Milakovich 1981, Scheingold 1984, and Garland 2001.

Murder is not inherently the enemy of faith in the governmental claims of state and private authorities. Often death binds citizens to states. The injury and death of soldiers in war were among the first provocations for the state to become involved in the government of ordinary life for the widows and survivors. Managing death better from the point of view of families through mechanisms like workers' compensation, widely available life insurance, and later Social Security played a critical role in deradicalizing the American working class in the 20th century. High murder rates in the 1920s and 1930s may have undermined confidence in state and local governments, but they actually fueled demands for greater federal government intervention, pushing conservative Herbert Hoover to appoint an expert commission to study the national crime problem. The resurgence of high murder rates thirty years later, in the 1960s, was seen from the beginning as a rebuke to the federal government. The federal government's role in aggregate criminal law enforcement remained tiny in the 1960s compared to what it has come to be since the 1990s.

Yet murder condemned the federal government because it was located in a specific if imaginary social space—the urban ghetto, and the urban downtown streets—where middle-class office workers, shoppers, and tourists could encounter ghetto underclass with little police protection. These spaces, the ghetto and the downtown, had already become the prime targets of domestic spending increases in 1960s, urbanists of the era would write of "federal cities." The Civil Rights Act of 1964 had also put the federal government squarely on the side of desegregating housing, employment, and schools. Large numbers of swing voters in the North clearly began to associate desegregation in all these fields with increasing exposure to crime, leading to large-scale desertions of the Democratic Party in every Presidential election between 1972 and 1992. Bill Clinton, the first Democrat in a generation to win these voters, was also the first to openly abandon any strong federal preference for desegregation as a social policy and to warmly embrace the death penalty.[5]

Beginning in the late 1960s, federally sponsored research made the victim of crime visible to government as never before. Until 1967, the only official federal statistics on crime were the FBI's "uniform crime reports," an aggregation of crimes reported to the police and collected from cooperating police departments around the nation. As part of President Johnson's initiative to study the crime problem in 1965, social scientists were contracted to collect data from residents interviewed in a randomly chosen and scientifically designed sample of the U.S. population

[5] The election of Jimmy Carter in 1976 on this account was an aberration caused by Watergate.

concerning crimes that the interview subjects and their households had experienced in the past year. The results entered public discourse with the publication of the report of the President's Commission on Crime and Law Enforcement in 1967 and became an annual product of government-sponsored research starting in 1971. Since then, the victim as a subject of government concern has become a ubiquitous feature of federal legislation woven into laws reforming welfare, immigration, and many other areas. Most recently, states have begun to adopt "victim rights" in statutory and constitutional form that provide for some rights of notice and hearing in the criminal process. Likewise, many other sites of governance, such as schools, universities, and businesses, have under federal pressure begun to take account of the crime victim in their internal procedures. None of this, to be sure, means that the victim is exactly empowered, but rather that the victim has become a critical locus of the pathways along which those who govern are enabled to know and act on their subjects.

For a long time the victim was kept from the center of the death penalty. Although the victim figured prominently in political defenses of the death penalty starting immediately after *Furman v. Georgia* (1972), the victim was kept from figuring too prominently in the penalty phase of the trial leading up to the choice of death or life for those convicted of a capital-eligible murder. In Chapter 2 of *When the State Kills*, Sarat examines the Supreme Court's turnaround on the issue during the late 1980s. In *Booth v. Maryland* (1987), a narrow majority struck down a Maryland law permitting "victim impact" testimony from relatives and other people close to the victim, to talk about the victim and the impact of the death on their lives. A few years later, in *Payne v. Tennessee* (1991), a five to four majority the other way upheld a similar law. The shift reflected not just the changing personnel of the Court in the 1980s but perhaps also the increasing presence of the victim as an idealized subject of governance generally and justice as well.

All in all, the victim as subject of governance shifts expectations in a direction that actually reduces demands on government and helps address the state weakness that Sarat introduces in Chapter 1 as a critical dimension to support for the death penalty. Unlike criminals, victims, the loved ones of victims, and potential victims, welcome government and intervention and in many cases willingly make themselves available in an effort to address their insecurity. Moreover, unlike the high threshold of success that modernist penology set itself by promising to rehabilitate the criminal, victim-centered criminal justice sets its ambitions lower, much lower. Rather than promising to end crime, the victim-centered state promises to fight fear of crime, share what it knows about certain categories of offenders the public fears the most (such as sex offenders), and maintain moral soli-

darity with the victim by sharing its disdain of criminals. The death penalty offers perhaps the best example of how a weak state promises less in order to succeed more, in promising to help bring emotional closure to victims through the ultimate abolition of the criminal.

Vengeance as Governance

The Supreme Court's rapid reversal on victim impact testimony is analyzed by Sarat as a pivotal moment in the effort that began with *Furman* to maintain a boundary between the notions of retribution and vengeance. Retribution has long been sanctified as a proper motive of punishment by the modern states, while vengeance has been abolished in a move deeply connected to the rise of the modern state. The rise of vengeance-taking as an important function of the death penalty is also linked to the theme of a weak or dysfunctional state. Vengeance, of course, operates as an important circuit of nonstate governance in many societies at many times. In the genealogy of modern liberal societies, it occupies a special place as what must be supplanted and superseded by the organized political state and its justice. The doctrine of retribution, espoused by many of the most original thinkers of liberalism, Kant among them, was devoted to elaborating this distinction between personal subjective vengeance and the objective nature of retribution. Chapter 2 of *When the State Kills* is devoted to elaborating and exposing this project as hopelessly fragmented. Sarat focuses on the Supreme Court's rapid shift in the late 1980s on the question of victim testimony and the 8th Amendment as a limit to the increasing populism of criminal punishment. In its effort to rationalize the practice of the death penalty after *Furman v. Georgia* (1972), the Supreme Court found itself, in a way, carrying the burden of the whole, long, drawn-out effort to define retribution as a role for public justice distinct from private vengeance by its objectivity and its self-limiting qualities. In accepting victim impact testimony in the capital sentencing process in *Payne v. Tennessee* (1991), the Court largely abandoned that effort, and embraced vengeance under the reassuring guise of populist punitiveness (Feeley & Simon 1995:168).

What is striking today is the reemergence of vengeance not as a sudden regression to a prehistory of the modern liberal state but as a new twist to its advanced form as a pastoral or service state devoted to the well-being of its subjects. It is not the vengeance of the affronted sovereign that demands the flow of lethal injection to condemned inmates. Execution is becoming something like a funeral, a highly ritualized and publicly regulated practice designed to deliver a certain kind of emotional experience and comfort to those bereaved by a death (only here an

additional death is required). Victim experience now provides a necessary and sufficient explanation for justice, including capital justice. In its postmodern role as a facilitator of emotional healing, vengeance is neither dangerous to the state nor much capable of failure. If even a few of the several hundred victims who got to see Timothy McVeigh die in Terre Haute, Indiana, say that they now feel better or sleep better, then the state has succeeded in achieving success, something that persistently eluded earlier modernist claims to rehabilitate.[6]

Pain

If vengeance were the only concern when the state kills, it would be difficult to understand how the avoidance of pain in the execution process would become a central concern. The fact that it has been is further evidence for the distinct features of the late 20th–century killing state that Sarat explores. The rise of the lethal injection as a nearly universal execution method in the United States reflects, at least in part, the surprising consensus of most state legislatures (and, to a lesser degree, courts) that inmates should die as painless a death as possible at the hands of the state. Even those legislators who have defended more traditional and problematic killing devices, such as the electric chair, insist on the capacity of the death penalty to deal death quickly even as it inspires greater fear.

In Sarat's work, the success of lethal injection reflects the importance of maintaining as wide a margin as possible between the violence of state killing and the violence of aggravated murder that it addresses. If this mitigates against the most satisfying vengeance rituals (at least as those existed in the past), it also pays heed to the centrality of victimization. Only by excluding any possibility of seeing the executed prisoner as a victim can the death penalty appeal to a public largely moved by victim experiences. In contrast, traditional scaffold executions prior to the 19th century were often accompanied with deliberate violence to the person of the condemned, intending very much to make them look like a victim.

As Sarat shows, the effort of courts to address the cruelty of killing in terms of pain has established constitutional mandates that all but assure governmental success at compliance. Executions do not have to be painless to be constitutional. Even lethal injection involves often painful and mutilating efforts to establish

[6] The experience of victims as a source of "truth" for criminal justice is widely appreciated. In a recent report on NPR (June 11, 2002), an Oklahoma City "survivor" read excerpts from her diary that included the information that witnessing McVeigh's execution had "lifted a dark cloud from above me." While the narrative was framed solely as a "diary" and thus a subjective viewpoint, no other voice was present to challenge the impression that McVeigh's execution needed no other justification now that we knew that at least one victim felt better.

a line into a vein or artery in the arms of a long-time intravenous drug user. Executions need only be as painless as they can be while taking life.

Resurrection: The Death Penalty and the Revival of State Government

Murder turns out to be good for states (as opposed to the federal government). The violent taking of life by another is a classic issue of state law, and the taking of the murderer's life by the state has also long been a quintessential symbol of state power. Indeed, one could almost describe an inverse relationship between the rise of the federal government in the 20th century, which began in the 1930s, and the decline of support for the death penalty, which also began in the 1930s, and then the decline in the prestige of the federal government beginning in the 1970s just as support for the death penalty again began to go up. It is almost as if when Bill Clinton stood up in January 1995 to say, "The era of Big Government is over," he might have gone on to say, "and the era of the Death Penalty has begun."

In the late 1960s, public policy experts openly debated whether the states were worth preserving at all as significant political entities rather than as limited administrative mechanisms. Many of the Great Society programs were deliberately aimed at the great urban areas in ways that bypassed state administration while official demographics defined social problems outside the jurisdictional boundaries of the states (e.g., standard statistical metropolitan areas). Although the "war on crime" and its successor crime initiatives have often been advanced by political forces rhetorically hostile to federal power (and supportive of "states' rights"), for the most part it has continued the pattern of earlier and explicitly pro-federal New Deal programs (and its successors, such as the Great Society) of integrating state government with federal power.[7] However, in one specific area, capital murder, states have enjoyed a monopoly that ended only with the creation of a new federal death penalty with sweeping jurisdictional authority in 1994.

In a certain sense, the death penalty allowed a limited "resurrection"[8] of the old state governments before the constitutional transformation we know as the New Deal (Ackerman 1998). The emergence of the idea, beginning around 1968, that murder was one of the most profound problems posed to citizens by contemporary society automatically moved policy onto grounds much more favorable to state government. Murder, like most other se-

[7] Thus federal crime statutes have followed the earlier pattern in using federal funding to impose federal norms of governance on state governmental units.

[8] Stuart Banner uses this arresting metaphor in his recent and insightful history of the American death penalty (Banner 2002:267).

rious crimes, is primarily a state matter. The federal government punishes murder but only in the limited cases where it occurs on a federal installation or in the course of another federal crime. Likewise, the death penalty, as a response to murder, provided a traditional form of state authority with little real competition at the federal level. While there had been famous federal executions, like the Rosenbergs, most Americans in the 1950s associated the death penalty with California's gas chamber in San Quentin or New York's electric chair at Sing Sing.

When popular enthusiasm for the death penalty began to rise again, the states were in a unique position to produce executions. Indeed, although the federal government's turn to crime with the Safe Streets Act of 1968 preceded substantial hardening of penal laws in most states, it was not until the 1990s that a federal death penalty was returned and not until June 11, 2001, that a federal prisoner was executed, after more than 300 inmates had already met their death in state execution chambers. Despite the rise in the homicide rate during the 1950s and 1960s, popular support for the death penalty continued to decline until it reached minority levels at the end of the 1960s. This tendency, probably driven by concerns about racial discrimination in the use of the death penalty, was overtaken by a counter-trend of rising concern about violent crime. By the time the U.S. Supreme Court acted to strike down all existing death penalty statutes in 1972, the lines had crossed and support for the death penalty was on the rise. Wiping out more than 600 death sentences, the Court's decision engendered a deep backlash against the Court and accelerated the already strong political sentiment behind an aggressive response to violent crime. Because state laws in that era often resulted in noncapital murders being paroled, *Furman* seemed to promise even more killers on the street at a time when the homicide rate was still escalating.

While *Miranda v. Arizona* (1966) and *Mapp v. Ohio* (1961) are better known examples of the Supreme Court expanding the rights of criminal defendants at the expense of state power, *Furman* offered a unique opportunity for states to respond by drafting new capital statutes that could meet the standards for the constitutionally acceptable death penalty that the multiple-opinion majority in the case hinted at. Few other decisions of the Supreme Court have ever received a more rapid legislative response. This was not the futile rebuke of the southern states after *Brown v. Board of Education* (1954). Instead, the new statutes followed closely the hints in various *Furman* concurrences as to what might make a constitutional death penalty. Clear note was taken of the insistence that steps be taken to limit the discretion of the decision maker and narrow the range of killers vulnerable to the

death penalty.[9] By 1976, thirty-five states had enacted death penalty statutes, and hundreds of individuals had already been sentenced to death.

Where it has been adopted, in 37 states since *Furman v. Georgia* (1972), the death penalty has been nothing short of a political holy grail. More than any other aspect of the crime issue, the death penalty has posed the question of the legislature's loyalty to the crime victim as an idealized political subject. It is not just a question of adopting a death penalty once and for all. The backlash against the Supreme Court after *Furman* became, by its own logic, a rally for state power in a very specific sense. By responding rapidly and forcefully to reassert the states' power to kill murderers, the state legislatures created a new representative bond with voters, one consecrated above all in the act of adopting the death penalty. Indeed, what is striking about states after *Furman* is not that they have enacted death penalty laws, (what should puzzle us is that any remain outside the consensus) but that they have enacted them over and over. Although this churning has allowed new occasions for judicial review and thus delay in the actual execution of the death penalty, it permits the death penalty to reappear again and again on the agenda of legislatures. A frequent vehicle is the addition of some new category of murder to the capital statute. Known typically as "aggravating factors," these bits of legislative language offer legislatures ample opportunity to recognize the victimization potential of specific constituencies, older people, women, and minorities among others (Simon & Spaulding 1998). Whatever else it represents, the death penalty in the states over the last three decades has provided the single most satisfying lawmaking act available to legislatures. Another popular approach is procedural legislation designed to speed up the appeals process by denying condemned prisoners successive reviews. These are often the most appealing vehicles of all for lawmakers, since they do not even require them to choose among victim classes, but they can instead strike a blow for all victims and potential victims.

The enthusiasm of many states to adopt death penalties, and the enthusiasm of many counties to hand out death sentences, has not as of this writing led to the flood of executions that opponents have feared since the early 1980s. The major reason for this has been error discovered and remedied by the judicial system (Liebman et al. 2000, 2002). One of the strongest findings of the first Columbia study (Liebman et al. 2000) was that error

[9] The current Court's most vociferous critic of *Furman,* Justice Scalia, is most critical of the federal imposition of devices intended to limit the jury's discretion. The resulting hybrid is now so constitutionally objectionable on 6th Amendment grounds that Justice Scalia conceded that he was compelled against his own settled preference for finality in the death penalty to unsettle a great many capital sentences with his concurrence in *Ring v. Arizona* (2002).

rates were not declining over time as one might have expected. Typically, courts reversing death sentences are addressing errors either in the trial or sometimes in the statute itself. In either event, the slow production of executions might constitute another example of legislative failure, the intractable problem of the welfare state and its would-be successors, the policy dilemma of having to promise much while delivering predictably little (Feeley & Sarat 1980). Yet in the new logic of representation created by the contemporary death penalty, the very frustration of the public's desire for the death penalty empowers legislatures.

In many states, crime issues and the death penalty in particular have altered the separation of powers, generating powerful antagonisms between legislatures and the courts and moving the voters to the extreme measure of amending their constitutions to limit the protection of rights under the state constitution. In 1978, for example, California voters adopted a constitutional amendment authorizing the death penalty in defiance of the California Supreme Court, which had recently held California's death penalty unconstitutional. The legislative leader who led the fight for the death penalty bill that the court struck down, George Deukmejian, won the first of two terms in the governor's office during the same electoral cycle. He went on to lead a successful electoral battle to remove most of the liberal majority on the California Supreme Court in one of the most politicized judicial elections in the 20th century.

When the Sunshine State Kills: Executions and State Government in Florida

Florida, the first state to reenact the death penalty after *Furman v. Georgia* (1972) and the first to execute a nonvolunteer (John Spinkelink in 1979), exemplifies the political conditions that have made the death penalty so valuable to political leaders and so capricious as a penalty. It is a state with perhaps the most diverse population in the country, with large numbers of foreign-born residents drawn from the Caribbean and Mexico as well as Central and South America, plus native-born internal immigrants from all over the United States. The virtual tie between George W. Bush and Al Gore in the 2000 presidential election is reflective of how evenly divided the state is politically, with even Democrats and Republicans internally composed of very different groups. It is an environment in which there has been no sustained political consensus on what state government should do other than to keep taxes low and punish crime severely.

In an era when we demand that government be both scrupulously fair and deeply personal in its response to our individual and collective traumas, governing on behalf of crime victims is a safe stance for political leaders of virtually any political leaning.

In an era when state failure is easily made visible and widely expected in any event, vengeance-seeking and protecting the public from monstrous criminals offers a rare spectacle of success. The death penalty, even a death penalty that is mostly delayed, has been a remarkably successful form of political action for politicians. For example, it took almost a decade for Florida to execute the sexually sadistic serial killer Ted Bundy, but throughout that decade the spectacle of the shackled monster in the hands of the state that was intent on killing him turned out to be a positive image for the public and one traded on by many politicians.[10] But as the Florida example further shows, these powerful dynamics can also undermine the actual practice of the death penalty. They render the political leadership incapable of making the sorts of reforms that would be necessary in the long run to modernize the death penalty enough for it to survive indefinitely as a rational state practice.

The impact of the Supreme Court decision was felt in Florida as powerfully as anywhere. The leaders of the solidly Democratic legislature immediately proposed to Governor Reuben Askew (1971–1982) that he call the legislature into special session to draft a new capital sentencing law and restore the death penalty. Askew, a liberal on race issues, scheduled the session for December 1972 and signed the law, which the legislature adopted, making Florida the first state to reenact the death penalty after *Furman*.[11] Askew's successor, Bob Graham, another progressive Democrat, made staunch support for the death penalty against numerous serious court challenges in the 1970s his trademark. As the governor in office during Florida's first executions, Graham was able to benefit personally from the use of the electric chair and its only partially metaphoric evocation of state power coming back to life after years of paralysis. Voters credited Graham with having the personal toughness to overcome resistance to executions from lawyers and the courts, and that popular support provided considerable influence in the Florida legislature. David Von Drehle, who covered state politics for the *Miami Herald* and wrote a book about Florida's death penalty, argues that "in a very real sense, [Graham's] stance on the death penalty enabled him to govern effectively" (Von Drehle 1995:269).

In succeeding years, Graham pioneered the use of the warrant procedure under Florida law to flaunt his gubernatorial prowess over death without carrying out any executions. Florida law gives the governor plenary authority to set the timing of exe-

[10] Ironically, Bob Martinez, who had the seeming good fortune of being in office when Bundy's court appeals ran out and he was finally electrocuted, lost his bid for reelection although he campaigned openly on having slain Bundy.

[11] As political scientist John Culver (1999) notes, some states seem to have adopted death penalty laws that legislators can predict will result in relatively few death sentences and that thus serve mainly as symbolic acts.

cution by signing a so-called death warrant. Graham used this power to keep a steady flow of execution dramas underway despite the fact that remaining court tests would inevitably prevent any immediate carrying out of the sentence. Bolstered by his stand on the death penalty, Graham was able to defy the dominant political trend toward conservatives and toward Republicans in southern states during the 1970s, 1980s, and 1990s. Graham won several statewide races, two for governor and three since for the U.S. Senate, most of them against conservative Republicans and with strong national support.[12]

With its diverse populations and highly competitive elections, Florida gives politicians few safe grounds to compete without the risk of alienating one voter group or another. Fear of crime is one of the strongest consensus concerns in Florida, and unremitting toughness on crime, reflected in the death penalty, has been a field in which escalating policies were unlikely to turn away voters. These conditions lend themselves to what James Liebman (Liebman 2000) calls the overproduction of death. At the top, this means that the governor and legislature have strong incentives (bordering on compulsions) to create new death penalty laws in order to repeat the satisfaction of having created a death penalty. This constantly expands the reach of the death penalty even though the original objective of post-*Furman* statutes was to narrow the range of murderers exposed to capital punishment. At the operations level, this means that police and prosecutors have strong incentives to produce death penalties. Five Florida counties rank among the top fifteen in the nation for seeking the death penalty (Liebman et al. 2002). To accomplish this requires a work culture in which homicide detectives and major crimes prosecutors understand perfectly clearly the value of seeking the death penalty and of obtaining the kind of evidence and admissions that will take a case to that level. One explanation for Flor-

[12] An unfolding situation today in Florida indicates how enduring this formation has been. Conservative Republican Jeb Bush has recently begun using the warrant power in the same way as his liberal Democratic predecessor. Facing a potentially volatile reelection campaign, and frustrated in earlier efforts to structurally reform the death penalty to make it more like that of Texas, Bush signed death warrants against two Florida prisoners whose cases involved claims substantially strengthened by the recent decision of the Supreme Court in *Ring v. Arizona* (2002). The cases are two of the oldest on Florida's death row—both inmates have spent more than twenty years on the row. It was clear that both the Florida Supreme Court and the U.S. Supreme Court would need to review the cases prior to execution. Governor Bush signed a death warrant immediately, and when the Florida Supreme Court stayed the execution, the state filed an appeal to the U.S. Supreme Court so clearly without legal foundation that normal litigants would have faced possible sanctions for frivolous pleadings. The statements from the governor's office have stressed only the lengthy years of delay for the victims now further denied. The warrants, although certain not to result in a killing, have offered the governor an extraordinary platform to signal his loyalty to the death penalty, remind voters that his prime objective is to deliver justice to victims, and point to the Florida Supreme Court as the source of frustration. The fact that both prisoners have already served as many years in prison as are served by murderers in many parts of the world and now face a death penalty on top of that is not even one of the issues in the discussion.

ida's high rate of judicially discovered error in the death penalty is that police and prosecutors respond to these incentives by pushing marginal cases into capital sentencing. Once committed to capital charges, both police and prosecutors are exposed to further incentives to rely on forms of evidence (snitch testimony, junk science, confessions of questionable validity) that are significant risk factors, which produce wrongful convictions. Both tendencies combine to create a flow of cases whose size and frequency of questionable elements generate legal complexity and ultimately delay.

One might assume that a delay in time would undermine the authority of a state that valorizes its power to kill but is often frustrated in killing. Indeed, one of the first initiatives of Governor Jeb Bush after his election in 1998 was to push through a reform of the death penalty law aimed at moving toward a Texas-style model of achieving relatively quick executions by streamlining state resistance to the legal requirements of the death penalty. In a complicated law ultimately invalidated in large part by the Florida Supreme Court, Bush sped up the system by having state-based collateral appeals procedures (those that may permit new factual consideration if the original fact-finding can be shown to be defective) go forward while the conviction and death sentence remain on direct appeal.

But while supporting quicker executions has been good politics for the governor, it is not clear that failing to speed them up has hurt him. Indeed, death penalty delay has become part of the circuit of identification that connects state government and voters in the killing state. It is this logic that can best explain why in 2002, Florida voters decided to adopt a legislative proposal to amend the state constitution to place the death penalty explicitly in the Florida constitution and to further restrain the state supreme court by binding its interpretation of Florida's equivalent of the 8th Amendment to that of the U.S. Supreme Court.

The legislative proposal was first placed on the ballot in 1998 under the title "a measure to preserve the death penalty," and it won a large majority. The purpose of the amendment actually had nothing to do within the preservation of the death penalty, which was in any event not in issue. The goal was to prevent the Florida Supreme Court, perceived by the legislature as soft on crime, from holding the electric chair to be an unconstitutional means of execution. In fact, the Florida Supreme Court has never come close to finding the death penalty unconstitutional under the state constitution. Indeed, while it has often reversed a large percentage of the death sentences handed down in a year, it has always done so based on procedural errors rather than fundamental challenges to the death penalty. Ironically, the challenge to the amendment was already pending when the Florida Supreme Court rejected the argument that the electric chair was

cruel and unusual on the merits.[13] In the abstract, it is difficult to see why the legislature would have any interest in preserving the electric chair. At a time when most of the country had already switched to lethal injection, Florida's electric chair continued to generate horrifying errors. The execution of Jesse Tafero in 1990 apparently went awry because of the use of synthetic sponge in place of the natural sea sponge that had been used between the electric nodes and the prisoner's head. The synthetic sponges did a poor job conducting the electricity, absorbing much of the heat themselves. Foot-high flames burst from Tafero's head mask as the execution began, and it took three cycles of electricity to effectively kill the prisoner (Von Drehle 1995:409). In 1997 the execution of Pedro Medina also produced flames from the head and the smell of searing human flesh washing over observers (Sarat 2001:61). Finally, in 1998 the execution of Allen "Tiny" Davis resulted in considerable bleeding from Davis's nose and evidence of pain caused by the confinement of the leather face mask around the overweight prisoner's head. The photos ended up being appended to the dissenting opinion in *Provenzano v. Moore* (1999) by Justice Shaw of the Florida Supreme Court, who likened them to evidence that Florida had tortured Davis to death.

While newspaper editorials across the state and bureaucrats within the Florida Department of Corrections vocally supported switching to lethal injection, the Florida legislature proposed switching the text of the Florida Constitution to preserve the electric chair. The existing text of the constitution and every Florida Constitution since statehood[14] describes a right to be free of "cruel or unusual punishment." This phrasing is distinct from the similar wording of the 8th Amendment, the prohibition of "cruel and unusual" punishment, and has been interpreted by the Florida Supreme Court to provide stronger protection to individuals.[15] The joint resolution proposed to change that wording to reflect the federal language, and explicitly to tie the Florida Supreme Court to the decisions of the U.S. Supreme Court. In addition, the resolution included language that would, for the first time, put the death penalty in the U.S. Constitution apparently beyond any reach by the Florida Supreme Court:

[13] The majority opinion, according to Sarat's analysis, followed the pattern of other courts in "textualizing" the pain of the body and presuming to be able to read beneath the visible suffering of the body an incapacity to feel pain (Sarat 2001:78).

[14] "Florida's Cruel or Unusual Punishment Clause was adopted in 1838 by the Founding Fathers at the first constitutional convention in Port St. Joe." *Armstrong v. Harris,* 773 So.2d 7, 17 (2000).

[15] The analysis is illustrated by the familiar Venn diagrams of school days. Draw one circle to represent all cruel punishments. Draw an intersecting circle to represent all unusual punishments. Cruel or unusual is a set represented by all the space within the lines of either circle. Cruel and unusual is a set represented by only the space in the intersection of the two circles.

> The death penalty is an authorized punishment for capital crimes designated by the Legislature. The prohibition against cruel or unusual punishment and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment in the Eight Amendment.[16]

The resolution was adopted by the required majority (indeed unanimously) by the legislature on May 5, 1998.[17] The resolution was then forwarded to Florida's Secretary of State, Katherine Harris, who designated it "Amendment No. 2" for the November 3, 1998, general election. Some weeks before the election, a group of citizens represented by the Florida Justice Institute, a civil rights–oriented public interest firm, filed a petition of mandamus challenging Amendment 2 on the validity and accuracy of the ballot title and summary to be submitted to the voters. A complex set of legal maneuvers followed in which the Secretary of State vigorously sought to prevent a court from ruling on the substance of the ballot challenge.[18] The net result was that the petition was dismissed without prejudice and Amendment 2 was submitted to Florida's voters, who approved it by a wide margin.

A week after the election, the petitioners renewed their efforts in a legal battle that ended up in the Florida Supreme Court, which considered it for more than a year before striking it down.[19] The petitioners argued that the title, "Preservation of the Death Penalty," and the ballot summary were defective on several grounds, including that "they give the false impression that the death penalty is in danger of being abolished and needs to be 'preserved'" (*Armstrong v. Harris* 2000:10). In a 4-3 split decision issued only months before the Florida presidential election controversy, the Florida Supreme Court in *Armstrong v. Harris* (2000) held that the ballot title and summary were inaccurate and misleading. The sharply worded opinions clashed mainly on the appropriateness of close judicial review of an amendment enacted unanimously by the legislature and adopted by the voters by a wide margin. The dissenters, siding with Secretary of State Harris, argued that the court should defer to the will of the voters as expressed in the election and that the petitioners should

16 H.J.Res. 3505, Regular Session (Fla. 1998).

17 Florida permits constitutional amendments in two ways: (1) by legislative resolution submitted to voters at the next general state election and which must pass with three-fifths of the membership of each house of the legislature and then by a majority of the voters, or (2) constitutional amendments may be proposed directly by the citizens through ballot initiative or by special revision commissions.

18 Not only did the rapid-fire battle across several layers of Florida courts anticipate much of the presidential election challenge in November 2000, but the final results of the Florida Supreme Court's review of Amendment 2, one that greatly angered the Republican leaders of the legislature, directly played into the Presidential drama.

19 *Armstrong v. Harris* 2000, 16.

have raised their challenge earlier.[20] The majority were equally adamant that the results of an election could not cure a defect that went to the very ability of the voters to manifest their will. The Florida legislature was still beginning its angry reaction to this decision when the Florida election scandal broke.

While the decision in *Armstrong v. Harris* (2000) turned on technical issues of amendment construction (and not at all on the substantial issue of the death penalty), it presents the killing state at a revealing point where its capacity to represent democratic will and exercise the power to kill are joined. Under the statutory framework for ballot initiatives in Florida, the actual text of Amendment 2 did not appear on the ballot. Instead the proponents, here the Florida legislature, provided a text with what the statute calls "the substance of the amendment," and required by the statute not to exceed 75 words, and a title, not to exceed 15 words, "by which the measure is commonly referred to."[21]

This is how Amendment 2 appeared to Florida voters on the November 1998 ballot:

> No. 2
>
> Constitutional Amendment
>
> Article 1, Section 17
>
> (Legislative)
>
> BALLOT TITLE: PRESERVATION OF THE DEATH PENALTY; UNITED STATES SUPREME COURT INTERPRETATION OF CRUEL AND UNUSUAL PUNISHMENT
>
> BALLOT SUMMARY: Proposing an amendment to Section 17, of Article I of the State Constitution preserving the death penalty, and permitting any execution method unless prohibited by the Federal Constitution. Requires construction of the prohibition against cruel and/or unusual punishment to conform to the United States Supreme Court interpretation of the Eighth amendment. Prohibits reduction of a death sentence based on invalidity of execution method, and provides for continued force of sentence. Provides for retroactive applicability.

The *Armstrong* majority held that the ballot title and summary were defective in a number of ways. First, the summary made it seem as if the amendment was creating a right for Floridians when, in the view of the court, it was narrowing one. Citing crucial doctrinal language in earlier cases, Justice Shaw described this as "flying under false colors." The title and summary mis-

[20] Undisclosed by any of the opinions was that the petition would have been filed weeks earlier if a major law firm had not pulled out of representing the petitioners after considering the consequences of facing down the legislature and the very popular new governor, Jeb Bush, on an issue such as the death penalty. The task fell to the Florida Justice Institute to pull together a brief at the last minute.

[21] Florida statute.

stated the actual legal effect of the amendment, namely, to nullify the "cruel or unusual punishment" clause.

Second, the text implied that while the main purpose of the amendment was to "preserve the death penalty," the ballot language dramatically misstated the effect of the amendment in two respects. It implied first that the death penalty was in danger of being abolished if not "preserved," a yes vote presumably being necessary to save it. Second, while having nothing to do with preserving the death penalty, it would, in fact, alter the rights of Floridians with respect to all other possible penalties as well. This amounted to "hiding the ball" from voters and robbed the authors (here the Florida legislature) of their claim to represent a majority of the voters in amending the state constitution.

The dissenters angrily criticized the majority for placing themselves in the position of the voters (precisely what the legislature was trying to accomplish). This position was taken up and carried further by individual legislative leaders who discussed the need to dramatically alter the composition of the court either through adding new positions or creating a new "death court" to review capital punishment exclusively. Either solution would permit the incumbent governor (current Jeb Bush) to appoint an effective majority on the death penalty. Thus in the aftermath of *Armstrong* and in the period leading up to the November 2000 presidential election controversy in Florida, the legislature and the state's supreme court had openly accused one another of engaging in a fundamental betrayal of the representational process over the subject of the death penalty.

In the 2001 legislative session, the Florida legislature responded by adopting a new version of Amendment 2, which was adopted by the voters in the general Florida election in November 2002. Ironically, the issue that motivated Amendment 2, protecting the electric chair, has completely dropped out of the picture. Florida voters were asked to repeat once again the endorsement of their right to have their legislators authorize the death penalty.

The defense of the electric chair itself suggests the representational logic of the death penalty that Sarat sketches, grounded in vengeance and a certain kind of privileged victim subject. Although not supported by a majority of Floridians or even a majority of death penalty advocates, the chair was beloved by a minority of the most extreme advocates of vengeance as justice in the victim advocacy community and elsewhere. In embracing the electric chair, Florida legislators found a way to show that their support for victims was uncompromised by any concern for even the nature of the execution process. They followed Sarat's logic of representing the victim to the full extent of repudiating the humanity of the executed victim altogether. Representing the people as victims through the death penalty, then, means em-

powering the most extremely damaged minority to define the values of the political community. Like the Confederate flag in several Southern states, the electric chair in Florida has become a loyalty test among legislators.

Thus while a majority of citizens have claimed to support the death penalty as a yes or no proposition, a whole structure of representation around the death penalty now places the unanimous legislature on the side of an extremist minority. In its new life in the post-resurrected killing state, the Florida legislature best represents its victim subjects when being figuratively victimized by the Florida Supreme Court. Rather than a reflection of sovereign power, the electric chair has become for its true believers an actual victim, threatened by the Florida Supreme Court and then sacrificed by its legislature, which is willing to deny it if necessary to preserve the smooth functioning of the death penalty.[22]

Amendment 2, and its substitute, proposed to place the death penalty into the state constitution for the first time in thehistory of Florida. As a narrative about institutions of government, the language identified the Florida Supreme Court as a real danger to the death penalty. Even the efforts of the legislature to authorize the penalty for murder might be stripped away by a court in the thrall of so-called liberal legal elites. Only a constitutional amendment can preserve the death penalty against so weak a link in state power. This narrative might have made some sense in a state such as California, where a liberal state high court had in recent memory found the death penalty unconstitutional under the state constitution even before the U.S. Supreme Court's decision in *Furman v. Georgia* (1972), but in fact the Florida Supreme Court had never hinted that the death penalty might be unconstitutional under Florida's Constitution.

Conclusion: The Cultural Contradictions of the Victim State

One of the most curious features of the killing state, with its victims and its vengeance, is its ambiguous relationship to the role of the sovereign as hero. Sarat argues that part of the compulsion of the death penalty for democratic political systems is to show precisely that they can exercise the kind of sovereignty that once belonged to kings but do so democratically. Colonial society was frequently treated to solemn rituals of state vengeance on

[22] The legislature has provided for lethal injection or the electric chair as options for execution. This may preserve the chair in a special category of volunteer punishments that the occasional inmate with a wish to stir attention might elect. The Supreme Court has made clear that where an option is open, it will not find execution by even a dubious method to be cruel and unusual.

a robber or burglar (Banner 2002). If all felonies were in some respects assaults upon the body of the king, the king was no ordinary victim, and the death penalty was a ritual above all of unbreakable strength demonstrated in the most compelling way imaginable. Historians have described a variety of ways in which political elites have used the death penalty as a showplace of power as well as mercy in order to establish a local and visible credibility to their rule (Hay 1975).

But while the death penalty remains quite important to the political elite in the contemporary United States, this face of strength is rarely shown in either political discourse or popular culture. Rather than a spectacle in which the superpower of the state and its agents are shown off, the contemporary American death penalty has often been one in which the central drama is whether it will happen at all, and if so, whether competently. The older contest between a violent felon and a violent executioner has been replaced by a sometimes decades-long battle within the machinery of a bureaucratic executioner.

This is perhaps why Sarat is so drawn to the problem of how the death penalty is represented in popular culture as well as to the question of its being televised. He recognizes that the representability of the current regime is one of its vulnerabilities. Contemporary executions are neither openly public events, such as a trial, nor totally internal bureaucratic events, such as the disciplining of a prisoner inside a state prison. They involve prison staff and officials but also press, witnesses for the condemned prisoner, and witnesses for the victims. At the execution of Timothy McVeigh (which took place after the publication of *When the State Kills* but which is anticipated at the very beginning of the book), victims in the hundreds watched through a closed-circuit video transmission to an auditorium in Oklahoma. The public portrayal of execution itself, as witnessed by official witnesses and as represented in movies, concentrates on the surgical-like setting of lethal injection chambers. It is ironic that scaffold executions of the 18th century and earlier often resembled the crude surgeries of their day, which were naturally greatly feared and associated with imminent death. Today, when we associate surgery with relatively controlled pain and often successful medical intervention, the metaphoric link between the two has become inverted, with the relative comfort of surgery now warranting a painless death.

As Sarat suggests, this framing does important work in differentiating the typically more violent and painful deaths of the murdered victims. More difficult to discern is what more positive picture of the killing sovereign this tableau communicates. This difficulty seems to me to be the draw for Sarat in staking out one of the strongest and most contested positions he takes in the book (other than the deep and inspired opposition to the death

penalty itself that radiates throughout the entire book): his view that executions ought to be televised. Chapter 7 of Sarat's book is a critique of an argument raised by cultural critic Wendy Lesser that executions should not be televised (Lesser 1993). Lesser develops her own argument against televising on (among other grounds) the fear that it will lead to banalizing state killing. Sarat argues for television on the grounds that challenging the death penalty on its inability to represent itself in a way that satisfies all its mandates: victims, vengeance, and no more pain than necessary. How people will respond to this dissatisfaction is unpredictable, but Sarat is led by a strong feeling that exposing the killing state to the representation of executions might prove an opening in its political armor. In his critique, Sarat seems oddly unconcerned with the substantive question of whether seeing the executions would normalize state killing or portray it as morally unacceptable. Instead it is the very unsatisfying nature of the killing state's portrayal of itself in the execution that Sarat wants to put into greater play by televising executions. It is not, as he acknowledges, as if the television will put back into play the kind of immediate potential for an execution to produce rebellion at the scene, but "it would provide one way of contesting the bureaucratic cover-up" (Sarat 2001:207). Some may find the lethal injection on the screen an unsatisfying act of revenge, while others will see it as a throwback—a bit like spittoons on the Senate floor but even more grotesque. Nonetheless, both kinds of viewers will have the opportunity to see how they are being represented as sovereign.

Perhaps the most stunning contemporary representation of the sovereign subject in the execution process occurs in the film *Dead Man Walking*. Near the end of the movie, the audience is looking through the window into the execution chamber where Mathew Poncelet (the fictional prisoner played by Sean Penn) is dying. It is presumably the window through which the victims' families, or the family of the condemned man, or official witnesses, view the execution. Suddenly, the reflection of the movie's fictional victims, two young friends, Mathew and Hope, appears on the window (Sarat 2001:234). Is it a reflection of the witness looking into the death chamber? Are we, the public audience, standing in the witness's place? Is it a picture of the victims as the real presence in the punishment room itself, taking authorship over the state killing being done in their name?

Sarat ultimately criticizes *Dead Man Walking,* and other recent movies about the death penalty, for their commitment to a "conservative cultural politics" of representing the death penalty as a punishment responding to a particular crime (Sarat 2001:242–43). But in this respect, these films reflect the centrality of the victim to the very sovereign heart of capital punish-

ment, in which the state takes vengeance for that victim, which Sarat highlights as central to the contemporary killing state.

The behavior of Florida's elected officials, especially its legislature and governor, reflects the high cost that being a killing state exacts on the capacity of these institutions to function as effective democratic ones at a time when many major 20th-century state institutions, ranging from health care to state universities and professional schools to foster care for abandoned and neglected children, the court, the legislature, and the governor, spend an extraordinary amount of their collective time on the death penalty. What sustains this is the link between the victim subject and the state that takes vengeance for him or her. The cycle of death penalty lawmaking, with its self-destructive churning of precedent, is sustainable because the death penalty has become both a synecdoche of the killing state itself and a metaphor for the victim. The deep truth of the ballot title to Amendment 2 (which the state's lawyers could not argue) is that the legislature is invested in the idea of the death penalty as a victim of a whole range of desirable enemies, including selfish killers, "elite liberal" lawyers, and especially, courts distanced from the concerns of "ordinary citizens."

By this logic, the Florida Supreme Court could no better have fed the power of this repetitive compulsion than by striking down Amendment 2. Indeed, within this logic even the ordinary course of judicial appeals is an instrument for multiplying the victimization experience of a single homicide. Under the accepted discourse of state governments such as Florida's, anything that delays an execution or throws open the finality of a death sentence is a blow to the victims and a betrayal by the courts. In the name of giving them a unique form of state healing, the family members of murder victims in capital cases are singled out to serve as unique victims of what they themselves describe as repeated assaults by the murderer in the form of temporarily successful appeals or petitions for stays of execution. The battles over Amendment 2 and the political dance around the problem of executing the innocent replay this by now familiar circuit of knowledge and power in the killing state, but in a way that permits the death penalty–supporting majority of Florida voters to imagine themselves being victimized by their own government.

Ironically, the Florida death penalty now threatens to victimize the public in a much different way. As the Columbia studies have shown, states such as Florida persist in high levels of judicially discovered error in the death penalty despite decades of practice. This error level has recently begun to stir some skeptical review of the death penalty as new DNA techniques have permitted a growing list of prisoners on death rows and serving long prison terms in maximum-security prisons to prove their innocence and gain their freedom.

The most striking result to emerge from the wrongful conviction problem thus far is in Illinois, where a series of exonerations moved the pro-death-penalty governor to order a moratorium on execution in 1999. In May 2002, a commission appointed by the governor and the Illinois legislature issued a report calling for a vast restructuring not just of the death penalty but also of criminal procedure and suggested that short of that, the death penalty should be abolished (indeed, a slight majority voted that abolition would be the soundest response). In January 2003, Governor Ryan emptied Illinois' death row, commuting the sentences of 167 inmates to life in prison. He exonerated another four prisoners due to the tortuous conditions of their confessions.

In many other states, however, governors and legislatures are refusing to act, even in the face of poll numbers reflecting voter concern about the issue (even among death penalty supporters). Florida's political leaders have epitomized this approach. The Columbia researchers (Liebman et al. 2002) found that errors in the death penalty occur where the death penalty is overused in response to a political culture infused with a racialized obsession with homicide that pervades virtually all political offices from the governor to the sheriff. In such states, and Florida is a prime example, police and prosecutors respond to the incentives to produce death sentences by pushing marginal cases, those not so aggravated by statutory standards, or those where the evidence is weak. It is in such circumstances that the state turns to high-risk techniques to win and protect a death sentence. If the evidence is weak, find a jailhouse snitch, fail to turn over exculpatory evidence to the defense, rely on junk forensic science. Beset by these problems, Florida now leads the nation in exonerated death row inmates, with twenty-two having had charges dismissed on which they were sentenced to death.

One might expect pro-death-penalty legislatures to enact sweeping legislation aimed at restoring confidence that only the truly guilty could ever face execution. The only response thus far from the Florida legislature is the absolute least that the logic of the recent DNA exonerations would require: a law that permits certain prisoners to obtain DNA testing where biological evidence exists and where it might resolve a claim of innocence.[23] Florida's political leaders, however, cannot even bring themselves to enact a fully effective DNA law. Pressed by the statewide organization of prosecutors (whose membership has been badly embarrassed by DNA revelations), the legislature has adopted

[23] As Scheck, Neufield, and Dwyer (1999) have powerfully argued, the exonerations produced by DNA are flashlights shined into the basement of a criminal justice system with systemic incentives toward error. The cases where DNA has been found testable reveal situations where eyewitnesses have been wrong and police have coerced confessions or simply lied about statements alleged to have been made by the defendant, but there is no reason to believe that such errors and misconduct happen only where DNA is available.

two remarkable limits to the testing access it creates. First, it limits its access to two years from the signing of the law for prisoners whose convictions became final before the law. Given the many Florida prisoners not on death row who are not represented by counsel and may not even know of the law, many Florida observers fear that two years will prove insufficient. The law also takes the remarkable step of barring testing for prisoners who pled guilty. Only months before, the topic had been widely publicized when South Florida prosecutors announced that they would support freedom for a retarded prisoner who had spent twenty-two years in prison for another rape/murder case that a recent DNA showed was committed by the same serial killer responsible for the murder behind the Frank Lee Smith case. The case of Jerry Townsend revealed total disregard for actual guilt as police cajoled a retarded suspect into confessing to facts he clearly did not know enough about to adequately describe.

Further demands for reform or a moratorium have been met by total denial of any problem with the Florida death penalty. Governor Bush, who faced his third statewide race this year and won (he lost the first after overplaying his death penalty enthusiasm), has made public statements dismissing the Illinois precedent as irrelevant to Florida (even though the latter has nearly twice as many examples of death row prisoners whose convictions were reversed). A number of legislators, including Locke Burt, a conservative Republican who lost the 2002 primary race for attorney general, formed a Capital Case Commission to "study" the twenty-two cases listed by death penalty opponents. Their report dismissed the majority as merely technical problems, acknowledging only four as likely cases of actual innocence. When asked about improving legal protections for capital defendants, Locke Burt criticized death penalty opponents for whom "no amount of suffering by the victims" would be sufficient.

As with the electric chair, it is difficult to see in the abstract why the problem of wrongful conviction should generate resistance. Executing the wrong person is neither tough on crime nor exact justice. Here again, the peculiar constitution of the killing state is evident. First, the importance of the victim as the model citizen for whom state killing is the model form of state intervention means that innocence is a murky problem. Even where the prisoner on death row is innocent, the victims are still victims. Their loved one is still dead. Any procedures that raise any obstacle to executing the persons who have killed their loved one generate pain and anxiety. Second, death penalty abolitionists who oppose even the execution of the clearly guilty are pushing the cause of innocence. The struggle then is between real victims and a minority opposed to the death penalty. A moratorium on executions or a consideration of why Florida's criminal justice system results in so many wrongful convictions can only be, in

this logic, a victory for that minority and pain for victims and the majority that identify with them.

Perhaps more than anything, Florida's political leaders are signaling their institutional reliance on a system of overproducing death that has placed nearly 400 people on Florida's death row. Any substantial reform of Florida's law would produce a death penalty with only occasional candidates. Narrowing the applicability of the death penalty, a standard feature of reform recommendations, would deprive legislators and governors of the routine flow of capital lawmaking and executing opportunities that have become a critical part of business of governing in Florida. In the short run, this reflects the kind of democratic nightmare that haunts Sarat. One may hope that in the medium run it also reflects the unsustainability of the killing state. Perhaps those of us likewise discomfited can take some encouragement in the very degree to which the conduct of the political leadership on the death penalty is defined by virtually compulsive forces. There is in fact here vulnerability in the very inability to modernize the death penalty.

Note: *McCleskey v. Georgia* is also known as *McCleskey v. Kemp, Suprintendent, Georgia Diagnostic and Classification Center*, 481 U.S. 279 (1987).

References

Ackerman, Bruce (1998) "Transformations," Vol. 2, *We the People.* Cambridge: Harvard University Press.

Baldus, David C., Charles Pulaski, & George Woodworth (1983) "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," 74 *J. of Criminal Law and Criminology* 661.

Banner, Stuart (2002) *The Death Penalty: An American History.* Cambridge: Harvard University Press.

Cronin, Thomas E., Tania Z. Cronin, & Michael E. Milakovich (1981) *U.S. v. Crime in the Streets.* Bloomington: Indiana Univ. Press.

Culver, John H. (1999) "Capital Punishment Politics and Policies in the States, 1977–1997," 32 *Crime, Law & Social Change* 287, 292.

Feeley, Malcolm M., & Austin D. Sarat (1980) *The Policy Dilemma: Federal Crime Police and the Law Enforcement Assistance Administration, 1968-1978.* Minneapolis: Univ. of Minnesota Press.

Foucault, Michel (1977) *Discipline and Punish: The Birth of the Prison.* Translated by Alan Sheridan. New York: Pantheon.

Ellsworth, Phoebe, & Samuel Gross (1994) "Hardening of the Attitudes: Americans' Views on the Death Penalty," 50 *J. of Social Issues* 19–52.

Garland, David (2001) *The Culture of Control: Crime and Social Order in Contemporary Society.* Oxford: Oxford University Press.

Garth, Bryant, & Joyce Sterling (1998) "From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State," 32 *Law & Society Rev.* 409–72.

Hay, Douglas (1975) "Property, Authority, and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in 18th Century England,* eds. Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson, and Cal Winslow. New York: Pantheon.

Lesser, Wendy (1993) *Pictures at an Execution: An Inquiry into the Subject of Murder.* Cambridge: Harvard University Press.

Liebman, James S. (2000) "The Overproduction of Death," 100 *Col. L. Rev.* 2030-156.

Liebman, James, Jeffrey Fagan, Andrew Gelman, Valerie West, Garth Davies, & Alexander Kiss (2000) *A Broken System: Error Rates in Capital Cases, 1973-1995.* Columbia Law School report.

——— (2002) *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done about It.* Columbia Law School report.

Sarat, Austin (2001) *When the State Kills: Capital Punishment and the American Condition.* Princeton: Princeton Univ. Press.

Sarat, Austin, & Susan Silbey (1988) "The Pull of the Policy Audience," 10 *Law & Policy* 97–166.

Sarat, Austin, & Neil Vidmar (1976) "Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis," *Wisconsin Law Review* 171–97.

Scammons, Richard, & Benjamin J. Wattenberg (1969) *The Real Majority.* New York: Basic Books.

Scheck, Barry, Peter Neufield, & Jim Dwyer (2000) *Actual Innocence: When Justice Goes Wrong and How to Make It Right.* New York: Signet.

Scheingold, Stuart A. (1984) *The Politics of Law and Order: Street Crime and Public Policy.* New York: Longman.

——— (1991) *The Politics of Street Crime: Criminal Process and Cultural Obsession.* Philadelphia: Temple Univ. Press.

Simon, Jonathan (1997) "Ghosts of the Disciplinary Machine: Lee Harvey Oswald, Life-History, and the Truth of Crime," 10 Yale Journal of Law and the Humanities 75–113.

Simon, Jonathan, & Christina Spaulding (1999) "Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties," in A. Sarat, ed., *The Killing State: Capital Punishment in Law, Politics, and Culture.* Oxford: Oxford Univ. Press.

Von Drehle, David (1995) *Among the Lowest of the Dead: The Culture of Death Row.* New York: Times Books.

Zimring, Franklin E. & Gordon Hawkins (1986) *Capital Punishment and the American Agenda.* Cambridge: Cambridge Univ. Press.

Cases Cited

Armstrong v. Harris, 773 So.2d 7 (Florida Supreme Court 2000)

Booth v. Maryland, 482 U.S. 496 (1987)

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)

Furman v. Georgia, 408 U.S. 238 (1972)

Gregg v. Georgia, 428 U.S. 153 (1976)

Mapp v. Ohio, 367 U.S. 643 (1961)

Miranda v. Arizona, 384 U.S. 436 (1966)

Payne v. Tennessee, 501 U.S. 808 (1991)

Provenzano v. Moore, 744 So.2d 414 (1999)

Ring v. Arizona, 153 L.Ed.2d 556 (2002)

McCleskey v. Georgia, 481 U.S. 279 (1987).