Review of the Road to Abolition

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The two most important questions about the death penalty in the United States today are should we get rid of it and will we get rid of it? While he contributors to this important and interesting new book are unanimous that capital punishment should be abolished, opinions differ on whether abolition is likely to occur in the US any time soon, and if so, how.

If one wants to gain a deeper understanding of the effort to eliminate capital punishment in the U.S. over the last forty years, and what the future holds for this harsh feature of American exceptionalism, this stimulating book is the place to look. (The oddity of the U.S. stance on capital punishment is underscored in Bernard Harcourt’s summary of factors that *increase* the likelihood that a country will retain capital punishment: (1) lower economic development; (2) lower political voice and accountability; (3) lower political stability; (4) dominated by religions other than Christianity; (5) located in the Middle East, Asia, or the Caribbean regions; and (6) a recent history of extrajudicial killings. (p.81) What is the U.S. doing in this club?)

A broadly accurate gauge of American enthusiasm for the death penalty can be afforded by the murder rate of a few years earlier. When crime was high in the early 1930s, the death penalty was administered frequently. Falling crime induced by the end of Prohibition led to a sustained decline in executions. By 1972, the sharply rising crime
rate of the late 1960s had not yet triggered a renewed enthusiasm for capital punishment, although it was soon about to. The decision in *Furman v. Georgia* striking down all then-current death penalty regimes set the stage for a counter-attack by the proponents of capital punishment that was further re-energized when crime surged in the mid 1980s and early 1990s. The dramatic crime drop of the 1990s has finally impacted on the public consciousness enough that support for the death penalty is in decline as evidenced by public opinion polls, and fewer death sentences and executions. These developments have reignited hopes that abolition can be secured, as it already has in the entire European community and increasingly in many countries around the world (as well as through legislative repeal in New Jersey and New Mexico in recent years).

While the required brevity of this review prevents me from discussing each chapter, I will highlight a few. Michael Radelet illustrates how the academic literature has buoyed the case for abolition across a number of dimensions. The deterrence and cost savings arguments for the death penalty have been effectively rebutted, the problems of arbitrary and racially discriminatory implementation have been meticulously catalogued, and the risk of deadly error has been vividly illustrated by the large number of DNA exonerations of those on death row. With truth on the side of the abolitionists, Radelet believes, the days of the death penalty in the U.S. are numbered. The chapter is full of notable facts and insights. For example, if one includes the former slave state of Missouri, then “91 percent of the nonconsensual executions in the United States have been in the South” between 1972 and 2007 (“consensual” refers to those on death row who refuse to contest their execution; for example, the lone execution in Connecticut in the modern era came after Michael Ross’s decade of pleas to be executed were finally granted in 2005). And
another: “Since Furman, more than 125 inmates have been released from America’s
death rows because of doubts about their guilt.” (pp. 28-9.)

Bernard Harcourt also foresees the end of capital punishment, predicting its demise will
come before 2050 via a U.S. Supreme Court decision, as the legal maneuvers that slow
down the rate of execution “erode the political support necessary for capital punishment
to continue to function.” (p.91.) Although Michael McCann and David Johnson are
much more skeptical that the death penalty will be eliminated in the U.S., they do provide
a striking illustration of Harcourt’s predicted mechanism in action, noting that “in states
such as California, execution is the third leading cause of death for death-row inmates
(after suicide and natural causes).” (p. 164.) McCann and Johnson note that, at least in the
U.S., the disenchantment with capital punishment is not the product of a general trend
towards greater leniency in the criminal justice system: “As of 2005, almost 10 percent
of the nation’s prisoners—about 132,000 persons—were serving life sentences and 28
percent of them (37,000) had no chance of parole.” (p. 169.) Indeed, this massive rise of
sentences of life without parole has likely made the decline of the death penalty tolerable
to a populace that is far more harshly inclined towards its criminal element than one sees
in, say, Europe today, where the death penalty is unknown and criminal sentences are far
shorter and less widely invoked than in the U.S.

Carol Steiker and Jordan Steiker collaborate on a wonderfully rich discussion of three
phases in the evolution of federal death penalty law over the last 45 years. They begin
with the global challenge to the death penalty that culminated in the Furman decision,
which was followed by a period of consolidation and expansion in the application of the
death penalty. The final phase representing disenchantment with capital punishment is
deemed to have been triggered by Illinois Republican Governor George Ryan’s decision in 2000 to issue a moratorium and ultimately commute the death sentences of all 167 death row inmates when evidence suggested that as many as 13 death row inmates had been wrongfully convicted. The pain inflicted on the families of murder victims who were erroneously led to believe that prosecutors would bring the killers to justice via execution must have been wrenching when the innocence of the defendants was established. Looking back on some of these cases, it is hard to see how the prosecutors could have believed that the defendants were guilty, but all too often, once a prosecutor makes up his or her mind that they have the right man, the capacity to correctly evaluate exculpatory evidence is lost.

Within two years of the Illinois moratorium, the Supreme Court revisited and reversed its 1989 decision that had allowed the execution of those with mental retardation. In 2005, the Supreme Court returned to and again reversed yet another 1989 decision that had authorized the execution of juveniles. The logic of these two cases – that capital punishment cannot be lawfully imposed on those with traits (such as age or mental retardation) that diminish their moral culpability -- would seem to require extension to killers who are mentally ill. But who would be left for execution once the mentally ill were also culled from death row?

The Steikers correctly emphasize the importance of the Illinois moratorium and commutations in changing attitudes about capital punishment, but without the enormous crime drops of the 1990s, I doubt the anti-death penalty sentiment would have been as strong. Things have certainly changed: they note that in 1997 Massachusetts went from being one vote shy of re-enacting the death penalty after a particularly horrible child
murder to overwhelmingly defeating Governor Mitt Romney in 2005 as he pushed for his “foolproof” death penalty bill. When the Steikers tell us that in 2007 Italy illuminated the Roman Coliseum to celebrate both the U.N. resolution calling for a worldwide moratorium on the death penalty (over the opposition of countries such as China, Iran, and the U.S.) and the abolition of capital punishment by the state of New Jersey, one begins to sense that something momentous is occurring globally. As Harcourt notes, the annual rate at which countries of the world have banned capital punishment has grown from roughly one a year from 1965-1988 to about three a year in the ensuing decade. The worldwide trend is clearly against the use of the death penalty.

Part II of the book focuses on the challenge to lethal injection that was ultimately rejected in *Baze v. Rees* in 2008. The articles by Deborah Denno, Timothy Kaufman-Osborn, and Jurgen Martschukat illuminate the significance of this challenge in temporarily halting executions, but also in terms of its future implications and its relationship to the history of efforts to perfect the means of execution. The retentionist forces clearly recognized that this case posed a major threat to capital punishment, and from the moment the Supreme Court accepted the case on September 25, 2007, they only needed a few weeks to gin up a “study” that appeared in the *Wall Street Journal* on Nov. 2, 2007, claiming that each execution would save 74 lives! Sympathetic academics were found to strongly endorse this sham (and absurd) finding by two Pepperdine professors who had never written anything on the death penalty or any criminal justice topic before and who never published this study, except as a *Wall Street Journal* opinion piece. The result: the shamefully defective work was then cited in *Baze v. Rees* as evidence that the death penalty deters.
It will be interesting to see if the forces that garner political benefits from retaining the
death penalty can be overcome by 2050, leaving capital punishment, as Harcourt predicts,“to have the same status as torture within the larger international community: an outlier
practice, prohibited by international agreements and customary international law,
practiced illicitly by rogue nations, and defended only by a handful of conservative
academics seeking attention.”

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