



THE LAWYER'S BOOKSHELF

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REVIEWED BY ROBERT BLECKER

When the State Kills: Capital Punishment and the American Condition

By Austin Sarat. Princeton University Press, Princeton, N.J. 314 pages. \$29.95.

Readers' reactions to Austin Sarat's deep and dogged attack on the death penalty must be affected by their own deeply held convictions on this enduring controversy. Let me state mine upfront: I am a retributivist advocate of capital punishment — I believe that We, the People, or "the State" as Mr. Sarat chooses to disembody us, not only have the right but also the responsibility to kill all but *only* those murderers who deserve to die. Many of us retributivists will bristle at Mr. Sarat's series of thoughtful, passionate and well-written abolitionist attacks on an institution we hold fundamentally moral and commanded by a true concern for human dignity.

The introduction — "If Timothy McVeigh Doesn't Deserve to Die, Who Does?" — a good overview and summary of the whole, led me to suspect what further reading confirmed: This book is not so much a single argument, as it is a collection of essays, all except the introduction already published in one form or another. Yet, Mr. Sarat's "new Abolitionism" as he calls it, pervades the whole: We should "condemn state killing for what it does to, not for, America." Neither today's leading concern — that innocent people are being executed (mentioned in passing and with little citation) nor the moral conviction that no murderer deserves to die, ultimately fuels Mr. Sarat's argument. His new abolitionism is selfish: A legal process that leads us intentionally, deliberately and unnecessarily to put to death a fellow human being, necessarily deforms us culturally. Pragmatism lurks beneath Mr. Sarat's passion, eloquence and exhortation: He would shift our focus from what we do to the killer to what we do to ourselves by killing him.

Every chapter of *When the State Kills: Capital Punishment and the American Condition* uses the case of Timothy McVeigh, the Oklahoma City bomber who will almost certainly be executed next week. For Mr. Sarat, the death penalty process wrongly and unfairly allows victims to play a role in the killer's fate while that same process often obscures the killer as victim too. When Mr. Sarat attacks U.S. Supreme Court case law allowing juries to hear victim impact statements before deciding life or death, as a sudden, aberrational, irrational triumph of constitutional "vengeance," he simply misreads or overlooks earlier Supreme Court jurisprudence that had pointed the same way.

Worse, at first he obscures the profound difference between illegitimate revenge and retribution, its constitutional cousin. Later in the essay, the author does contrast them, drawing on the work of political philosopher Robert Nozick: Retribution is detached and impersonal, strictly a function of reason and rules, whose proportionality derives in no way from any personal connection between the injured party and the state. Revenge, on the other hand, "involves a particular tone, pleasure, in the suffering of another"; retribution involves no such "emotional tone." According to Mr. Sarat, victim impact statements confound that distinction: the victims' personal suffering becomes a component of the jury's supposedly impersonal decision on life or death. "[H]earing the voice of the victim personalizes death sentencing in just the way revenge personalizes all punishment."

But Mr. Sarat makes no mention of retribution's other leading strain. "It is highly desirable that criminals should be hated," declared James Fitzjames Stephen, the great 19th-century English retributivist and historian of criminal law, "and that punishments should be so contrived as to give expression to that hatred." Many — perhaps most — retributivists, and increasingly abolitionists, today feel the same way: Emotion and passion are — and belong — at the heart of the law. But not Mr. Sarat.

In "To See or Not to See," the author explores the question of the moment: Should executions be publicly televised and how should we feel as we watch Mr. McVeigh die? Mr. Sarat "suggest(s) that the survival of capital punishment in America depends, in part, on its relative invisibility."

If it were witnessed, he contends, the death penalty would be abolished. Having witnessed a lethal injection myself, I too believe that public support for this method depends on its invisibility: If the public witnessed it, they might well abolish lethal injection and substitute not torture, but a quick and painful death. Oddly, Mr. Sarat fears that after exposure to TV executions "we would not take it personally." This, from a thoughtful critic who attacks victim impact statements, revenge and even retribution as too emotional and too personal — while he supports emotional defense appeals to the jury to spare the murderer. Mr. Sarat simply has not come to terms with the role of emotion and passion in the law.

Still, there is much common ground between us, especially Mr. Sarat's concern that no one in the process seems to take responsibility for killing the condemned. And when it comes to televising executions, the book's author states it elegantly: "What was public is now private. What was high drama has been reduced to a matter of mundane technique. ... [F]erocity gives way to bureaucracy. ... The exclusion of the public means the exclusion of the court of last resort." Mr. McVeigh's execution should be publicly televised.

Yes, I would watch Timothy McVeigh die. Gladly. I would remember and feel terribly sad for the pain and suffering of his victims, despise his callous, wanton depravity, hate him as he takes his last breath and feel satisfaction that he is being put to death justly, if too gently. "What does it tell us about the condition of America," Mr. Sarat asks, "that we seek to kill but yet to kill gently?"

In sum, for committed retributivist supporters of the death penalty, this collection of essays provides well-reasoned and far-reaching arguments, waiting to be exploded and highly unlikely to change our views. For committed abolitionists, when the state kills provides additional support for beliefs already held, offering a deep, graceful and unrelenting attack upon the death penalty as culturally brutalizing.

What effect will these essays have upon the "undecideds," suspended in agony between supporting and opposing the death penalty? I don't know, but I suspect this book will be of interest long after the current controversy over the death penalty has shifted, once again. And like executions themselves, Mr. Sarat's cultural arguments deserve to be witnessed by the public. They should be read, appreciated, qualified, amplified — and ultimately refuted.

Robert Blecker is a New York Law School professor, whose book, *Who Deserves to Die*, will be published by Basic Books next year.

