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BOOK REVIEW

FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY.

Reviewed by David M. O'Brien**

On May 25, 1979, John Arthur Spenkelink died in a Florida state prison electric chair. The execution was the first in twelve years to put a condemned to death against his will. Gary Mark Gilmore voluntarily faced a Utah firing squad less than two years earlier. Spenkelink's death, like Gilmore's, will pass from public spectacle, overshadowed by an increasing number of executions and certainly renewed debate over capital punishment. Nonetheless, his death demands that we rethink the morality and constitutionality of capital punishment. Indeed, shortly before his execution, Spenkelink told a priest: "Man is what he chooses to be; he chooses that for himself." Not without irony, Spenkelink expressed a popular sentiment and political ideal of much of liberal America. Yet, in any polity, even in liberal America, freedom is not unconditional and liberty does not guarantee an individual unqualified non-interference with or immunity for his or her actions. To give an appropriate example, an individual may be free to put another to death but not be at liberty to do so. Spenkelink's execution thus prompts reflection regarding the conditions and legitimacy of imposing the death penalty. Such reflection reveals the need to consider the permissibility of capital punishment in terms basic to the equal liberties of all citizens and the collective life of the polity. Walter Berns' recent volume on capital punishment serves effectively as a touchstone for such consideration.

The death penalty has been infrequently, although not always reluctantly, carried out in America. This fact reflects public sensitivity to the seriousness and tragedy of the punishment, as well as growing opposition to public executions. Furthermore, the utility of capital punishment as a deterrent is widely debated. Preoccupation with the deterrence question is rooted in the proclivity to understand the feasibility of ideals such as "equal justice under the law" in terms of empirical propositions about plea-bargaining practices, sentencing procedures, criminal recidivism patterns and the like. Consequently, the fundamental normative issues posed by capital punishment are often clouded by the prevailing concern with policy assessments and utilitarian calculations of the efficiency of different crime control techniques. Unfortunately, while neglecting the fundamental moral and political issues of capital punishment, social scientists have also been unable to attain general agreement on the deterrence question.

Mr. Berns provides an eloquent and thoughtful defense of the morality of capital punishment. The real issue, as Mr. Berns puts it, "is whether justice

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permits or even requires the death penalty." The death penalty, he argues, is compatible with the principle of "just deserts" or that "the wicked deserve to be punished." Capital punishment is justifiable on a theory of retributive justice precisely because it expresses a public passion—anger—and that passion is essential to the moral and political order of any polity.

Anger or moral indignation is related to retributive justice in two ways. On the one hand the human passion of anger recognizes that only men have the capacity to act as moral agents. Recognition of, and respect for, human dignity requires that individuals be held responsible for their actions and morally and legally culpable for their wrongdoings. Punishment, unlike rehabilitation or treatment, recognizes the moral worth of individuals by holding them responsible for their actions. On the other hand, public anger which accompanies heinous crimes derives from the mutual respect of individuals necessary to any moral community. Public anger expresses the moral pulse of a polity, and thereby registers the claim of the community as a whole to seek retribution for assaults on the public order. In this regard, capital punishment differs only in the degree, not in the kind, of punishment inflicted upon individuals for their culpability. Yet, because capital punishment by its very finality differs in kind from other forms of punishment, only public indignation over and condemnation of particularly outrageous and wantonly vile crimes justifies the imposition of the death sentence. Thus, Mr. Berns concludes, "while the death penalty should not be seen as cruel, by the same token it should be seen as unusual, not in the techniques employed when carrying it out, but in the frequency with which it is carried out."

In challenging liberal conceptions of social justice, Mr. Berns takes an unconventional and hence controversial position. By returning to an older notion of justice, his book promises to inform, freshen and invigorate future debates over the permissibility of capital punishment. Mr. Berns, however, is not solely concerned with giving a moral defense for capital punishment. Indeed, perhaps his major contribution is not his defense of the death penalty, but his demonstration that opposition to the death penalty at once derives from basic tenets of liberalism. Capital punishment abolitionists such as former United States Attorney General Ramsey Clark, who have argued that punishment *per se* is a crime, are treated by Mr. Berns as interlocutors in a great debate which began with the liberalism born of the seventeenth-century revolt against the church-state.

Liberalism, for Mr. Berns, promotes opposition to capital punishment in two fundamental ways. First, liberalism constitutes a celebration of political pluralism by subordinating morality and religion to the private sector.

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2. *Id.* at 186, 147.
3. *Id.* at 40, 153-56.
4. *Id.* at 183.
5. *Los Angeles Times*, Apr. 12, 1977, §I, at 5, col. 5, Ramsey Clark also served as one of Spenkelink's attorneys.
tenet of liberalism, embodied in the first amendment, relegates moral and
religious truth to matters of mere opinion, invites relativism and skepticism,
and renders political authority and the rule of law dependent only upon
citizens’ fear of the sovereign and the force of sanctions. In the liberal state,
legislators address the prudent concerns of the bad-man rather than the
ethical dilemmas of the confused man. Law regulates rather than educates,
citizens are obedient if unaware of their obligations, and punishment only
serves to deter. Retribution thus appears irrelevant and deterrence all im-
portant.

Furthermore, liberalism has been progressive and reformist, particularly
with respect to penology.\textsuperscript{7} The spirit of reform flourished in America not only
because liberalism denies what it can not command — namely, faith and al-
legiance — but also because it substitutes science for faith and public morality.
Liberal nineteenth-century reformers, still infused with an Enlightenment belief
in science and its possible application to the moral faculties of man, established
tenants in order to rehabilitate offenders by requiring that they do
penance.\textsuperscript{8} In the twentieth century, reformers embraced the new science of
psychology. A progressive economy permitted the individualization of punish-
ment \textit{qua} treatment, as well as further refinements of the kinds of rehabilita-
tion available to criminal offenders. Progressive penology thus replaced the
idea of retribution with that of contrition and, in turn, contrition with that of
rehabilitation and treatment. Nevertheless, penal reform has been an abys-
mal failure, as exemplified by Attica prison.\textsuperscript{9} Liberal penal reform, Mr. Berns
argues, was mistaken and misguided in its unquestioned acceptance of and
exaggerated expectations for social science solutions to the problem of crime.
Moreover, penitentiaries are incapable of providing either repentance or re-
habilitation precisely because liberalism subordinates morality and religion to
the private sector.

In debating liberal reform, Mr. Berns emerges as a defender of common
sense against the use of social science by those who argue that the death penalty
represents an irrational zeal for inflicting punishment. He argues that “the
ordinary American is still capable of being morally indignant at the sight of
crime and criminals”\textsuperscript{10} and that this explains in part why thirty-five states en-
acted legislation providing for capital punishment after the Supreme Court’s
1972 per curiam decision in \textit{Furman v. Georgia}.\textsuperscript{11}

Mr. Berns’ arguments for retributive justice also provide an explanation for
the Burger Court’s rulings that have upheld the constitutionality of the death
penalty. That Court, upon reviewing several of the capital punishment statutes
enacted after \textit{Furman}, declared that the death penalty is not unconstitutional
\textit{per se} under the eighth amendment’s ban against “cruel and unusual punish-
ments.” Seven members of the Court upheld statutes which limited judicial and

\begin{enumerate}
\item \textsuperscript{7} W. Berns, \textit{supra} note 1, at 41-82.
\item \textsuperscript{8} See \textit{generally} Gustave de Beaumont & Alexis de Toqueville, \textit{On the Penitentiary
\item \textsuperscript{9} W. Berns, \textit{supra} note 1, at 63, 71, 79.
\item \textsuperscript{10} \textit{Id.} at 149.
\item \textsuperscript{11} 408 U.S. 238 (1972).
\end{enumerate}
jury discretion by specifying the aggravating and mitigating circumstances that must be considered when imposing a death sentence.\textsuperscript{12} In contrast, a mere majority voided statutes imposing automatic or mandatory death sentences for certain crimes.\textsuperscript{13} The Court subsequently held that the severity of capital punishment requires decision under the facts of each case; therefore, while statutes must sharply define the aggravating circumstances for which the death penalty may be imposed, statutes may not limit the range of mitigating circumstances that may be considered by a judge or jury.\textsuperscript{14} The import of these recent decisions coincides with Mr. Berns’ argument that implementation of death sentences should be infrequent and unusual.

The dispensing of capital punishment in an infrequent and unusual fashion presents fundamental difficulties. Retributive justice may be viewed as taking two forms, strong and weak. In the strong form, retributive justice demands rigorous and almost mechanical application of the principle that the wicked must be punished. Accordingly, a schedule of punishments, ranging in degree of severity and in proportion to the gravity of the offense, might be devised and rigorously imposed. Unless other moral or political considerations establish some threshold for the severity of punishment, mandatory death sentences for certain crimes, such as first-degree murder, would be not only justifiable but required.

Both Mr. Berns and a plurality of the Burger Court, however, oppose mandatory death sentences, not because the punishment is too cruel, but because retributive justice in the strong form appears too unfair. Mr. Berns states that “not all murderers deserve to be executed; not even all first-degree murderers deserve to be executed, because not all first-degree murderers are equally terrible.”\textsuperscript{15} Mr. Berns and a plurality of the Burger Court thus endorse what might be seen as the weak form of retributive justice, in which the principle of “just deserts” is not rigorously maintained. Imposition of the death penalty in one instance and not in another rests solely within the discretion of judges and juries. Deference to judicial and jury discretion in sentencing, Mr. Berns claims, “is not incompatible with retributive justice sentencing; on the contrary, retribution, unlike deterrence, precisely because it derives from moral sensibilities, recognizes the justice of mercy, the injustice of punishing the irresponsible, and limits the severity of punishment.”\textsuperscript{16} Mercy shown by judges and juries, however, qualifies \textit{ipsa dixit} the demands of retributive justice. Mr. Berns acknowledges and accepts the inevitability of capriciousness which attends his own version of retributive justice and the Burger Court’s rulings on capital punishment.

Ironically, prior to \textit{Furman} the Supreme Court held that due process was
not violated by the absence of standards for juries imposing the death penalty.\textsuperscript{17} In \textit{Furman}, however, a plurality found that the lack of standards resulted in both infrequent and arbitrary imposition of capital punishment, as well as discrimination against black criminal offenders.\textsuperscript{18} The Burger Court's recent rulings that states may confine jury discretion in sentencing only by delineating aggravating but not mitigating factors and Mr. Berns' arguments for a weak form of retributive justice legitimate discretionary injustice in the administration of capital punishment. As Mr. Justice Rehnquist observed, "the [Court's] new constitutional doctrine will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it."\textsuperscript{19}

Mr. Berns reasons that the cruel and unusual infliction of capital punishment actually satisfies the public passions of moral indignation, which justifies some form of retributive justice, and mercy, which qualifies the demands for retribution. Thus, his arguments for the morality of capital punishment have considerable appeal. However, in approving the weak form of retributive justice and the inevitability of discretionary justice, we abandon the vexatious problem in any liberal polity of maintaining the twin political ideals of liberty and equality. The weak form of retributive justice requires the acceptance of discretionary injustice for the sake of mercy. By permitting mercy to be shown to some first-degree murderers, justice in the sense of fairness may not be done to those first-degree murderers who must suffer the death penalty. Notwithstanding Mr. Berns' argument that "only a relatively few executions are required to enhance the dignity of the criminal law,"\textsuperscript{20} the public may justifiably become indignant at any capricious or arbitrary imposition of the death penalty.\textsuperscript{21}

The ideal of equal justice under the law and the possibility of caprice and mistake in capital punishment cannot be easily dismissed. Mr. Berns simply fails to appreciate the contemporary liberal's attachment to the political ideal of equality under the law. The prescription falters due to the author's diagnosis of liberalism in its more classical and libertarian mode. Liberalism's contemporary and more egalitarian manifestation is not addressed by Mr. Berns.\textsuperscript{22}

The problem of discretionary injustice in the administration of capital punishment, however, may be inevitable. In the criminal justice system discretionary injustice to individuals is possible on any number of occasions, ranging from arrest through sentencing. Plea-bargaining, appeals, and the possibility

\begin{footnotesize}
\begin{enumerate}
\item[18.] Furman v. Georgia, 408 U.S. 238 (1972).
\item[20.] W. Berns, supra note 1, at 183.
\item[21.] Spenkelink's execution once again gives pause for reflection upon the conditions and permissibility of capital punishment. Spenkelink had an accomplice, Frank Brumm, who participated in the shooting and hatcheting murder of Joseph Syzmankiewicz in a Tallahassee motel room. Frank Brumm, however, was acquitted by the same jury that recommended Spenkelink's death sentence. Spinkellink [sic] v. State, 313 So. 2d 666, 669 (Fla. 1975), cert. denied, 428 U.S. 911 (1976).
\end{enumerate}
\end{footnotesize}
of clemency or pardons increase the chances for discretionary injustice with respect to the equal treatment of all individuals. Furthermore, as Mr. Charles Black observes, there is a veritable paradox in the drafting of death penalty statutes which increases the possibility of mistake, capriciousness, and discretionary injustice.23 Mistakes and uncertainty increase with the specific standards for imposing death sentences, whereas arbitrariness and capriciousness increase as the standards are more broadly defined. In a liberal polity, dedicated to the ideals of liberty and equality, when an admittedly cruel punishment is imposed in an unusual, infrequent and capricious manner, perhaps that punishment should not be inflicted.

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