America’s experiment with capital punishment: reflections on the past, present, and future of the ultimate penal sanction

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I. INTRODUCTION

These new books focusing on capital punishment issues come at a time when if there is not renewed interest in the death penalty, there is at least some surprise, among advocates, academics, and toilers in the criminal justice system, that we find ourselves where we are at the end of the millennium. Capital punishment is here to stay for the foreseeable future; thirty eight states have reenacted capital statutes.(1) The number of those executed since 1976 has passed 500.(2) Over 3,000 people, mostly men, who are disproportionately from the ranks of the poor and ethnic minorities, await execution on state death rows.(3) That there are so many on death row, and that the technicalities of executions--as opposed to technicalities of law or constitutional guarantees of due process--preoccupy the courts at present, is part of the surprise.

Where is the debate over the death penalty? America is the only western country, some would say the only democracy, where capital punishment is still practiced.(4) Public executions are periodic demonstrations of state authority in China, Nigeria, Iraq and Pakistan.(5) Some argue that if the United States is to retain capital punishment, the practice of the State killing people under the authority of the law, then our executions also should be public, as they were until well into this century.(6)

Opponents of the death penalty argue that if `the public'--whoever that is--`really knew'--whatever that means--how capital punishment in America was practiced, they would insist their law makers get rid of it.(7) Proponents of the death penalty also argue that the public should `really know' what the death penalty is. Others address the issue laterally--by describing some aspect of what the death penalty means in practice in the United States today.(8) Gregg v. Georgia ushered in the new capital punishment era in 1976,(9) and the execution of Gary Gilmore by firing squad in January of 1977 announced that the new capital punishment really had arrived.(10) The era of the United States Supreme Court's emphasis in Gregg and its companion cases upon the due process protections for defendants ensured by the structure of the new capital statutes, with jurors making explicit findings on statutory aggravating and mitigating factors, shifted empirical academic research to jury decision making.(11)

Several of the books reviewed here engage in these arguments: what is capital punishment in America at the end of the twentieth century? Why do we still have it? Who is affected by it, and what does it cost? Who is informed about it, and what role does it play in elections? Where is there an open and honest discussion about it, and who are the participants? The books reviewed here raise other nontrivial questions: For whom are they written? What difference do they make, or can they make? The capital punishment engine seems...

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