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Austin Sarat: When the State Kills

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INTRODUCTION:

“IF TIMOTHY MCVEIGH DOESN’T DESERVE TO DIE, WHO DOES?”

*Political power . . . I take to be the right of making
laws with the penalty of death.*

—JOHN LOCKE, *Second Treatise of Government*

Monstrous Deeds, Cold-Blooded Killers, and the Politics of Capital Punishment

April 19, 1995, was a bright, clear, spring day in Oklahoma City, the kind that refreshes and uplifts and makes doing the mundane tasks of daily life seem almost effortless. Early that morning Sharon and Claude Medearis woke up to their normal routine. Over coffee, they talked about Claude’s plans for the day: a trip to El Paso after a stop at the office downtown, where he worked for the United States Customs Service. After breakfast, Sharon gave him a kiss good-bye and saw him off to work. Elsewhere in town, Bob Westberry and his wife Mathilda started the morning more sadly, remembering that the next day would mark the sev-

enth anniversary of their oldest daughter's death. With that somber thought in the background, Bob went to work at the Defense Investigative Service downtown. About the same time, Linda Florence, mother of eighteen-month-old son Tray, left for her job as a secretary at the Oklahoma City office of the Department of Housing and Urban Development. At roughly the time she arrived, one-year-old Erin Langer was dropped off by her father at the America's Kids day care center.

Bob Westberry, Claude Medearis, Linda Florence, and Erin Langer never returned to their homes or loved ones. At 9:02 A.M. on that April morning they and 164 others were killed by a massive explosion that gutted the Alfred Murrah Federal Building. Investigators quickly determined that the explosion was caused by a powerful bomb. Suspicion first focused on overseas groups. Was the bombing the work of Arab terrorists, striking deep in America's heartland? As the *New York Times* reported, "So far no conclusive evidence has emerged that Arabs played any role in the bombing. Indeed, Federal officials have described the two known suspects as 'white,' a racial designation that seems to leave open their ethnic origin. Yet the speculation of Muslim involvement continues, fed by some news reports that have not been confirmed."¹ That speculation proved unfounded when, three days after the bombing, Timothy McVeigh was arrested and charged with murder in the worst act of domestic terrorism in the history of the United States.

Two images, broadcast widely and repeatedly to the nation and the world, provided the frame within which many came to think about the bombing and its perpetrator. The first, a photograph of a firefighter tenderly carrying the lifeless body of one-year-old Baylee Almon from the charred ruins of the Murrah building, captured the depth of McVeigh's monstrous deed. This act took lives indiscriminately, killing innocent children. The photograph invited the question, "What kind of person could commit such a crime?" (see Figure 1).

The second photograph gave us an answer. The initial glimpse of McVeigh came as he was being escorted out of the Noble

County Courthouse in Perry, Oklahoma, where he was held prior to his arraignment in Oklahoma City. We saw McVeigh, dressed in an orange prison jumpsuit, in handcuffs and leg irons, surrounded by people wearing FBI jackets. Confronted by a crowd of angry citizens, McVeigh, his demeanor steely stern, showed no emotion (see Figure 2). He quickly became the personification of the cold-blooded killer, a living, breathing endorsement of capital punishment.

No sooner had the dust settled at the site of the bombing than the politics of capital punishment began. Newspapers across the country reported President Clinton's first comments, "Let there be no room for doubt. We will find the people who did this. When we do, justice will be swift, certain and severe. These people are killers, and they must be treated like killers."² Joining the president, Attorney General Janet Reno added, "We cannot tell how long it will be before we can say with certainty what occurred and who is responsible, but we will find the perpetrators and bring them to justice." Without waiting for the detailed internal case-by-case review mandated by Justice Department procedures, Reno made clear her view of what justice required. She told the press "Eighteen U.S.C., Section 844, relates to those who maliciously damage or destroy a Federal building. If there is a death, if death occurs, the death penalty is available, and we will seek it."³ A day later the attorney general said of the then still unknown perpetrators, "We will find them, we will convict them, and we will seek the death penalty against them."⁴

Ordinary citizens also took up this equation of justice with state killing. "His children should be shot," someone shouted from a crowd of several hundred who had gathered outside the Noble County Courthouse to see McVeigh. As one man who witnessed this scene later explained to a reporter, "They should give him a taste of his own medicine and put him inside a bomb and blow it up."⁵ Two years later, as McVeigh's trial unfolded, a *USA Today*/CNN/Gallup poll reported that 61 percent of Americans thought that McVeigh should get the death penalty.⁶ Yet commentators also noted that "an overwhelming percentage of

Americans feel that executing McVeigh is simply not enough. The law's prescribed punishment satisfies neither our sense of justice nor does it requite our desire for vengeance." ⁷

McVeigh on Trial

Not surprisingly, the McVeigh trial was extraordinary. In response to the anticipated difficulty of finding an unbiased jury in Oklahoma, it was moved to Denver. Coming in the wake of other sensational trials, including the O. J. Simpson case, the presiding judge, Richard Matsch, refused to allow this trial to be televised and imposed a gag order limiting what participants in the case could say to the press. Nevertheless, in a move indicative of the increasing power of the victims' rights movement in the United States, the judge made special arrangements for a closed-circuit broadcast of the trial to victims and survivors in Oklahoma City.

A team of experienced and respected federal prosecutors was assembled to handle the case against McVeigh, who was charged in an eleven-count indictment for murder and conspiracy. An equally talented and respected group of six attorneys—headed by Stephen Jones—defended him. Jury selection began on March 31, 1997, and took nearly a month. Yet the trial itself was conducted expeditiously.

As the government's case proceeded, prosecutors called people close to McVeigh to testify against him. Witnesses revealed that he had divulged detailed plans to bomb the Murrah Building months before the attack and had devoured the antigovernment novel, *The Turner Diaries*, which describes the destruction of a federal building as a way to spark a civil war. The government also produced rental documents, phone records, and witnesses who identified him as the man who rented the Ryder truck used in the bombing under the alias Robert Kling. Other evidence pointed to McVeigh's efforts to buy and steal bomb-making supplies. The defense countered by trying to show that McVeigh was swept up in a rush to judgment and that the government's case was based on the testi-

mony of lying, opportunist witnesses, and scientific evidence tainted by FBI mishandling and lab contamination.

The jury deliberated for more than twenty-three hours over four days before finding McVeigh guilty on all counts of the original indictment. President Clinton, again signaling the importance of victims in the politics of crime and punishment, immediately hailed the verdict as a “long overdue day for the survivors and the families of those who died in Oklahoma City.”⁸ Many of those survivors and families remained focused on ensuring that McVeigh was sentenced to death. “Jannie Coverdale, who lost two young grandsons in the bombing, confessed that she felt mixed emotions. ‘This is bittersweet,’ she said. ‘After all, this is a young man who has wasted his life. I’m glad they found him guilty, but I’m sad for him, too. I feel sorry for him. He had so much to offer his country.’ She added, ‘I want him to get the death penalty, but not out of revenge. It’s necessary. I haven’t seen any remorse from Timothy McVeigh. If he ever walked the streets, he would murder again. I don’t want to see that.’”⁹ Others who were less ambivalent also focused on the issue of capital punishment. “‘He’s not human,’ said Charles Tomlin, who lost a grown son in the bombing. ‘This is a monster that blew up a building.’ Peggy Broxterman, who listened to the verdict in an auxiliary courtroom, called it an ‘absolute thrill,’ but said vindication for the death of her 43-year-old son and others wasn’t complete. ‘It’s not over until he’s dead,’ she said.”¹⁰

After McVeigh’s conviction, his trial entered the so-called penalty phase in which the jury that had convicted him was asked to decide on his sentence. In the federal system, during the penalty phase the jury is presented with aggravating and mitigating factors on the question of execution. If it decides on the death penalty, the judge cannot overrule its decision. As the trial entered the penalty phase the key question was what role the survivors and the families of those killed would play. How much of their stories would they be allowed to tell and with what level of detail?

Responding to defense motions, Judge Matsch barred prosecutors from presenting victims’ wedding photos, a poem by a victim’s father, and testimony on funeral arrangements. He also ex-

cluded testimony about how relatives identified victims, a video of a routine day at a credit union office in the Alfred P. Murrah Federal Building, and testimony about a mourning ceremony outside the building by one family. "We have to guard this hearing to ensure that the ultimate result and the jury's decision is truly a moral response to appropriate information rather than an emotional response," said Matsch.¹¹ While acknowledging that it is natural to feel anger at such a horrible crime and empathy with its victims, he reminded jurors that the purpose of the sentencing trial was not to "seek revenge against Timothy McVeigh."¹² This admonition did not sit well with some of the victims. For example, Roy Sells, whose wife was killed in the explosion, explained "It's revenge for me. It's very simple. Look at what he's done. Could anyone deserve to die more?"¹³

The judge did allow the testimony of a ten-year-old boy whose mother died and a rescuer who held a hand buried in the rubble, only to feel the pulse stop. Matsch also admitted photos of maimed survivors; pictures of victims being wheeled into hospitals; and testimony from the coroner about the various causes of death, including that of a man who died slowly, as the presence of gravel in his lungs revealed. "We can't sanitize this scene," Matsch noted. But "the penalty phase hearing here cannot be turned into some type of a lynching."¹⁴

In fact, prosecutors called thirty-eight witnesses, twenty-six relatives of those who were killed, three injured survivors, one employee of the day care center, and eight rescue or medical workers, each of whom described how the bombing physically and emotionally devastated their lives. The penalty phase of the trial was dominated by this victim impact testimony.¹⁵ The prosecution urged that jurors not think of what happened in Oklahoma City as "mass murder. . . . There are 168 people, all unique, all individual. . . . All had families, all had friends, and they're different."¹⁶ The prosecution claimed that McVeigh "knew exactly what the effects of this bomb were going to be," and that he "intended to see blood flow in the streets."¹⁷

The prosecution closed its case by calling one last family member of a victim of the bombing. Glenn A. Seidl testified about the

death of his wife, Kathy, who was an investigative assistant at the Secret Service Office in the Murrah Building, and the impact it had on him and his nine-year-old son, Clint. "I deal with Clint's hurt all the time," he said.

I mean, it's—I mean, he's a normal boy. We try to live a normal life, but I'm always reminded this isn't a normal situation. Clint's eighth birthday, we had a big birthday party, Grandma and Grandpa, aunts and uncles. And after everybody left, Clint climbed up on my lap and started crying. And he asked me—he said, "Do you think my mom loved me?" And I said, "Well, your mom loves you more than anything in the world." And he said, "Why isn't she here."¹⁸

Seidl ended his testimony by reading a letter from Clint. "I miss my Mom, we used to go for walks," the nine-year-old's letter said. "She would read to me. We would go to Wal-Mart. . . . Sometimes at school around the holidays I will still make my Mother's Day and Valentine's Day cards like the other kids."¹⁹

McVeigh's defense sought to turn the penalty phase into a trial of the government's handling of the siege at the Branch Davidian compound near Waco, Texas, in 1992, some five years earlier. Eschewing the usual strategy that focuses on distinctive personal circumstances in the defendant's background—physical abuse and neglect, for example—McVeigh's defense portrayed him as an average American child, a patriotic war veteran whose life was radically changed by the fiery climax of the standoff at Waco. "You'll see how the fire of Waco continued to burn in Mr. McVeigh," said Richard Burr, one of the nation's foremost death penalty lawyers and leader of the defense in the penalty phase.²⁰

In his opening statement he argued that the case was rooted in McVeigh's beliefs that the eighty cultists who died at the Branch Davidian compound were murdered by the federal government. "He is at the middle of this," Burr said. "There is violence at both ends, there is much death, there is tremendous suffering, but there is also a person at the center who you will not be able to dismiss easily as a monster or a demon, who could be your son, who could be your brother, who could be your grandson."

To ensure that the jury could not dismiss or demonize McVeigh, the defense called more than twenty witnesses from McVeigh's past, including family, friends, neighbors, teachers, co-workers, and a woman who "loved him like a brother." Four officers who knew McVeigh in the Army testified that the convicted terrorist had been an exemplary soldier who stood far above his peers. Jurors also were shown an hour-long videotape titled *Day 51: The True Story of Waco*. It depicted the Davidians as an innocent Bible study group purposely slaughtered by government agents after a fifty-one-day standoff. Reminiscent of the video jurors saw earlier of the building McVeigh destroyed, the tape showed the Davidian compound in flames, panning to a doll left in the rubble.

The defense concluded its effort to save McVeigh's life by presenting testimony from his parents. The defendant's father showed a twelve-minute video he made about his son's life, including footage from old home movies and photographs of a young, happy Timothy McVeigh and his family. Calling him "Timmy," the elder McVeigh recounted his son's life in the small towns of Lockport and Pendleton, New York. The tape included footage from Halloweens and Christmases of Timothy McVeigh's childhood, and typical fatherly remarks, such as a comment by the elder McVeigh that his son "was a good student, although he never got the grades I thought he was capable of."

He told the jury that after a stint in the military including meritorious service in the Persian Gulf War, Timothy McVeigh returned home in 1991. "He seemed to be happy." The defense then showed jurors a photo of the father and son, smiling, their arms wrapped around one another. "To me, it's a happy Tim. It's the Tim I remember most in my life," William McVeigh noted. The father concluded his testimony by saying he loved "the Tim in this courtroom" and wanted him to stay alive.

McVeigh's mother testified that she "still can't believe to this very day he could have caused this devastation." Too many unanswered questions remain in the case, she said, adding: "He is not the monster he has been portrayed as." She remembered her son as "a loving son and a happy child. . . . He was a child any mother could be proud of." She told the jurors that despite his conviction,

the twenty-nine-year-old military veteran is still a son, a brother, and a cousin to those who care about him. "I am pleading for my son's life. He is a human being as we all are."

Despite the emotional pleas of his parents, the jury sentenced Timothy McVeigh to death. Today McVeigh's case is still on appeal, the Supreme Court having recently refused to hear the claim that his conviction was tainted by pretrial publicity and juror prejudice. Whether or not he is executed, McVeigh already has become a poster boy for capital punishment, the cold-blooded, mass-murderer.

From Timothy McVeigh to the Killing State

Today McVeigh's name is regularly brought up in arguments about the place of capital punishment in America. It is used as the ultimate trump card, the living, breathing embodiment of the necessity and justice of the death penalty. Even people normally opposed to, or indifferent about, capital punishment find themselves drawn to it in McVeigh's case. Typical is the reaction of one newspaperman who wrote, "Capital punishment has never been one of my hot button issues. Still, when asked my opinion or moved to write about it, I for years have come out against the government's killing someone after that person no longer represented a threat to society. . . . To my surprise, the Timothy McVeigh trial has convinced me that I could support the death penalty."²¹ Or, as another editorial writer put it, "We cannot undo his [McVeigh's] action, but we can deny him what is left of his life. . . . I agree with the jury that he deserves to die. But this decision did not come easily for me."²²

For many McVeigh has joined the pantheon of notorious killers—Adolf Hitler, John Paul Gacey, Jeffrey Dahmer—whose names do much of the argumentative work in the national debate about capital punishment. Yet neither McVeigh, his crime, nor his case typifies the killers, the crimes, or the cases in the capital punishment system. Most of the more than 3,600 persons now on death row are there because they committed crimes of passion

or lost their head and killed someone in the course of a robbery gone bad; few had adequate defense lawyers or elaborate trials; more than one-half are nonwhites; many come from economically disadvantaged backgrounds.²³ Unlike McVeigh's, their cases receive little or no national publicity.

Nevertheless, McVeigh's case makes vivid many of the themes surrounding the debate about the death penalty in the United States—its importance to political elites as both a political issue and a technique for governing; the increased salience of victims; the appeal of revenge as a foundation for legal punishment; the strains and conflicts that capital punishment imposes on, and exposes in, our legal system; and the iconography through which we come to know crime and punishment. Seen through the lens of the McVeigh case, as well as the hundreds of more "mundane" death penalty cases that are decided every year, Americans today live in a killing state in which violence is met with violence, and the measure of our sovereignty as a people is found in our ability both to make laws carrying the penalty of death and to translate those laws into a calm, bureaucratic bloodletting.

At the turn of the century, capital punishment is alive and well as one of the most prominent manifestations of our killing state, defying the predictions of many scholars²⁴ who thought it would fade away long ago. Despite the recent reawakening of some abolitionist activity²⁵ and a modest decline in public support for the death penalty, today more than two-thirds of Americans say they favor capital punishment for persons convicted of murder.²⁶ Scholars report that vengeance, retribution, and the simple justice of an "eye for an eye" sort provide the basis for much of this support.²⁷ This may reflect "a growing sense that capital punishment no longer needs to be defended in terms of its social utility. . . . The current invocation of vengeance reflects . . . a sense of entitlement to the death penalty as a satisfying personal experience for victims and a satisfying gesture for the rest of the community."²⁸

Yet, as the legal historian Stuart Banner rightly observes,

Capital punishment . . . presents several puzzles. It gets more attention than any other issue of criminal justice, yet it is a minus-

cule part of our criminal justice system. It is very popular despite well-known shortcomings—it does not deter crime, it is inflicted in a systematically biased manner, it is sometimes imposed on the innocent, and it is quite expensive to administer. . . . It is often justified in simple retributive terms, as the worst punishment for the worst crime, but it is not hard to conceive of worse punishments, such as torture. . . . While capital punishment is intended to deter others, we inflict it in private, and allow prospective criminals to learn very little about it.²⁹

If all this were not puzzling enough, we remain committed to state killing in the face of increasing doubts about the reliability and fairness of the capital punishment system,³⁰ criticism in the international arena and long after almost all other democratic nations have abandoned it.³¹ Moreover, we are becoming freer in its use. For a brief period after the Supreme Court reinstated capital punishment in 1976,³² it tightly supervised the death penalty and imposed great restraint on its use, but that period is now long gone.³³ Despite domestic doubts and international criticism, the pressure is on to move from merely sentencing people to death and then warehousing them to carrying out executions by reducing procedural protections and expediting the death penalty process.³⁴

We live in a state in which killing is an increasingly important part of criminal justice policy and a powerful symbol of political power. Every year many of those on death row are actually put to death.³⁵ Capital punishment has been routinized. Indeed executions have become so commonplace that in some states, such as Texas and Virginia, it is difficult for abolitionist groups to mount a visible presence every time the state kills.³⁶ So great is the momentum in favor of executions that they sometimes proceed in cases where serious issues of innocence remain unresolved.³⁷ It now appears that the killing state will be a regular feature of the landscape of American politics for a long time to come.

What does the persistence of capital punishment mean for our law, politics, and culture? What impulses does state killing nurture in our responses to grievous wrongs? What demands does it place on our legal institutions? How is the death penalty repre-

sented in our culture? In addressing these questions, *When the State Kills* is animated by the belief that capital punishment has played, and continues to play, a major, and dangerous, role in the modern economy of power. If we are to understand this role, our thinking about the death penalty has to go beyond treating it as simply a matter of moral argument and policy debate. We must examine the connections between capital punishment and certain fundamental issues facing our legal, political, and cultural systems. We must ask what the death penalty does *to* us, not just what it does *for* us.

State killing exacerbates some of the most troubling aspects of the American condition. Capital punishment provides a seemingly simple solution to complex problems, encouraging our society to focus compulsively on fixing individual responsibility and apportioning blame, as if the evil deeds of the McVeighs of the world could be wished away by repeating “evil people do evil things.” Moreover, part of what is at stake in the contemporary politics of the death penalty is a contest to claim the status of victim. Today this label is widely appropriated, used by persons accused of capital crimes to explain what they did and why they did it as well as by the so-called victims’ rights movement to claim that the only *real* victims are those innocent citizens whose lives are tragically ended by capital crimes.³⁸

Instead of the difficult, often frustrating work of understanding what in our society breeds such heinous acts of violence, state killing offers all of us a way out. Those acts are “their” fault, not our problem. The world can and should be understood in a set of clear typologies of good and evil, victim and villain. State killing depends on flattened narratives of criminal or personal responsibility of the type found in melodrama and responds to insistent demands that we use punishment to restore clarity to the moral order.³⁹ As Harvard law professor Martha Minow argues, the struggle over “blame . . . obscures the complex interactions of individual choice, social structures, and the historical obstacles within which both individuals and institutions operate. As a result, public debate, legal solutions, and political talk neglect the complex solutions needed to sustain and equip victimized indi-

viduals to choose differently while also restricting the individuals and social forces that oppress them."⁴⁰ This is not to say that responsibility and blame should not be assigned; but state killing, by responding to and encouraging a yearning for a world without moral ambiguity, does not make us safer or our society healthier.

Capital punishment is caught up in, and sustained by, a series of contradictions in our social and political attitudes. The power of the victims' rights movement in the United States arises, in part, from increasing distrust of governmental and legal institutions, yet it is to those very institutions that the families of victims must turn as they seek to ensure an adequate response to capital crimes. This same contradiction sometimes is revealed when jurors decide to impose the death penalty. Some jurors do so because they doubt that a life sentence will actually mean life. They express this doubt by imposing a death sentence because they believe that appellate courts will ensure that state killing is used with great scrupulousness. Moreover, our society's continued support for capital punishment is fueled by both a deep awareness of the complexities of life at the dawn of the twenty-first century and, at the same time, a willed blindness to these complexities and their implications.⁴¹

State killing distracts. It encourages the quest for revenge rather than efforts at reconciliation and social reconstruction. Who after all could forgive McVeigh or seek some common meaning with him? But does state killing make our society any less violent than it would otherwise be? Ask McVeigh. The prospect of a death sentence did not keep him from blowing up the Murrah Building. And, in the quest to kill the killers do we exacerbate the racial divide that continues to plague the American condition? Does race continue to be a shadow presence when the state kills? The answer, I fear, is yes.

State killing damages us all, calling into question the extent of the difference between the killing done in our name and the killing that all of us would like to stop and, in the process, weakening, not strengthening, democratic political institutions. It leaves America angrier, less compassionate, more intolerant, more divided, further from, not closer to, solutions to our most pressing

problems. While ending state killing would not be a cure for our ills, doing so would allow us to focus more clearly on dealing with those issues.

When the State Kills brings a broadened perspective to the study of the death penalty. It addresses the powerful symbolic politics of state killing, the way capital punishment pushes to, and beyond, the limits of law's capacity to do justice justly, and the place of the politics of state killing in contemporary "culture wars." It points the way toward a new abolitionist politics in which the focus is not on the immorality or injustice of the death penalty as a response to killing, but is, instead, on the ways that the persistence of capital punishment affects our politics, law, and culture.

State Killing and Democratic Politics

What is the political meaning of state killing in a democracy? Does it express or frustrate popular sovereignty, strengthen or weaken the values on which democratic deliberation depends? Or, we might ask more directly, is capital punishment compatible with democratic values? Surely there must be serious doubts that it is.⁴² Capital punishment is the ultimate assertion of righteous indignation, of power pretending to its own infallibility. By definition it leaves no room for reversibility.⁴³ It expresses either a "we don't care" anger or an unjustified confidence in our capacity to recognize and respond to evil with wisdom and propriety. Democracy cannot well coexist with either such anger or such confidence. For it to thrive it demands a different context, one marked by a spirit of openness, of reversibility, of revision quite at odds with the confidence and commitment necessary to dispose of human life in a cold and deliberate way.⁴⁴ Moreover, democratically administered capital punishment, that is, punishment in which citizens act in an official capacity to approve the deliberate killing of other citizens, contradicts and diminishes the respect for the worth or dignity of all persons that is the enlivening

value of democratic politics.⁴⁵ A death penalty democratically administered implicates us all as agents of state killing.

“Capital punishments,” Benjamin Rush once observed, “are the natural offspring of monarchical governments. . . . An execution in a republic is like a human sacrifice in a religion.”⁴⁶ Along with the right to make war, the death penalty is the ultimate measure of sovereignty and the ultimate test of political power.⁴⁷ With the transition from monarchical to democratic regimes, one might have thought that such a vestige of monarchical power would have no place and, as a result, would wither away. Yet, at least in the United States, which purports to be the most democratic of democratic nations, it persists with a vengeance. How are we to explain this?

It may be that our attachment to state killing is paradoxically a result of our deep attachment to popular sovereignty. Where sovereignty is most fragile, as it always is where its locus is in “the people,” dramatic symbols of its presence, like capital punishment, may be most important. Capital punishment may be necessary to demonstrate that sovereignty can reside in the people. In this view, if the sovereignty of the people is to be genuine, it has to mimic the power and prerogatives of the monarchical forms it displaced and about whose sovereignty there could be few doubts. Yet while state killing does this for us, what it does to us is to violate or impede the achievement of the more capacious ideas of democracy associated with what I labeled the tentativeness and scrupulousness of democratic politics and democratic respect for persons.

As any American who lived through the 1970s, 1980s, and 1990s surely knows, the politics of law and order have been at center stage for a long time. From Richard Nixon’s “law and order” rhetoric to Bill Clinton’s pledge to represent people who “work hard and play by the rules,” crime has been such an important issue that some now argue that we are being “governed through crime.”⁴⁸ In the hurry to show that one is tough on crime the symbolism of capital punishment has been crucial.⁴⁹ Thus former speaker of the United States House of Representatives Newt Gingrich once explained that the key to building a new

conservative majority in the United States rests with “low taxes and the death penalty.”⁵⁰

Capital punishment also has been crucial in the processes of demonizing young, black males and using them in the pantheon of public enemies to replace the Soviet “evil empire.”⁵¹ The death penalty is directed disproportionately not only against racial minorities, but also against those who kill white victims.⁵² In some jurisdictions blacks receive the death penalty at a rate 38 percent higher than all others; since 1976, 35 percent of those executed have been African Americans.⁵³ State killing is thus but one part of the intense criminalization of African American populations that occurred during the 1990s. “Governing through crime,” law professor and criminologist Jonathan Simon contends, “is a way of reviving the traditional appeal of white supremacy that African-Americans be governed in a distinct and degrading set of institutions.”⁵⁴

Moreover, the politics of capital punishment is crucial in an era when government action in other areas of our social and political life is under suspicion. When, as President Bill Clinton announced, “the era of big government is over,” emphasis is increasingly placed on freedom and responsibility as a prevailing cultural ethos. Yet this era also is associated with a hardening of attitudes toward crime and a dramatic escalation of state investment in the apparatus of punishment. As a result, no American politician today wants to be caught on the wrong side of the death penalty debate.

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. This helps explain why the immediate response to the bombing in Oklahoma City was the promise that someone would be sentenced to death, and it also helps explain the energy behind recently successful efforts to limit habeas corpus and speed up the time from death sentences to state killings.⁵⁵ A state unable to execute those it condemns to die would seem too impotent to carry out almost any policy whatsoever.

At the same time we have been witnessing a push for more executions, we have also seen an increased emphasis on victims and victimization as the touchstone of crime policy in general and death penalty politics specifically. In this one sense the McVeigh case was by no means exceptional. In even the least celebrated cases the death penalty reinforces public anxieties about violence at the same time as it seeks to satisfy public desires for revenge. "The centrality of crime to governing, especially in a democratic state," Simon explains, "requires citizens who imagine themselves to be potential victims or those responsible for the care of such victims. . . . The death penalty remains the ultimate form of public victim recognition."⁵⁶

Our politics increasingly emphasizes the special place of victims as carriers of civic virtues; what unites us as citizens is our vulnerability and our dependence on the state to prevent and respond to our pain.⁵⁷ "I draw most of my strength from victims," Attorney General Reno recently said, "for they represent America to me: people who will not be put down, people who will not be defeated, people who will rise again and stand again for what is right. . . . You are my heroes and heroines. You are but little lower than the angels."⁵⁸

State Violence and Legal Legitimacy

If it is true that capital punishment plays an increasingly powerful role in our politics and governance, it is equally true that its importance is growing in our legal institutions. To be legitimate at all, state killing must appear to be different from the violence to which it is opposed and to which it is seen as a response. A crucial part of this difference is in the way law deals with those accused of capital crimes and those who are sentenced to death. In these cases does law respect or reject its own basic values? Does it treat capital defendants with respect and bend over backward to ensure fairness for those sentenced to death?

Given the political importance of capital punishment and the pressure to turn death sentences into executions, the answer to

these questions may be no. It is precisely this hydraulic political pressure that threatens to undermine important legal values, such as due process and equal protection. The much-publicized execution of Robert Alton Harris is one of the most striking examples of how this can happen. The first execution in California after the Supreme Court reinstated the death penalty in 1976, the case is a sobering reminder of the pressure on law to compromise its highest values and aspirations in the rush toward execution.⁵⁹ During the twelve-hour period immediately preceding Harris's execution, no less than four separate stays were issued by the Ninth Circuit Court of Appeals.⁶⁰ Ultimately, in an exasperated and dramatic expression of Justice Rehnquist's blunt aphoristic response to the seemingly endless appeals in capital cases—"Let's get on with it"—the Supreme Court took the unprecedented, and illegal, step of ordering that "no further stays shall be entered . . . except upon order of this court."⁶¹ In so doing it displaced Harris as the soon-to-be victim of law, and portrayed law itself as the victim of Harris and his manipulative lawyers. To defend the virtue of law required an assertion of the Court's supremacy against both the vexatious sympathies of other courts and the efforts of Harris and his lawyers to keep alive a dialogue about death. With this order, the Court stopped the talk and took upon itself the responsibility for Harris's execution.

In so doing it took an enormous risk. What kind of law is it that would do something illegal to ensure the death of one man? The Court's action in the Harris case was symptomatic of a state of affairs in which impatience to facilitate state killing arouses anxiety and fear; it suggests that state violence bears substantial traces of the violence it is designed to deter and punish. The bloodletting that the Court enables strains against and ultimately disrupts all efforts to normalize or routinize state killing as just another legally justifiable and legally controlled act. It may be that law is controlled by, rather than controls, the imperatives of the killing state.

Numerous recent decisions of the Supreme Court have eroded, not enhanced, the procedural integrity of the death sentencing process.⁶² Moreover, in 1996 Congress delivered a one-two punch

directed against those who have tried to stop state killing. First it enacted Title I of the Anti-Terrorism and Effective Death Penalty Act, which severely limited the reach of federal habeas corpus protections for those on death row by barring federal courts from reviewing state court judgments unless the state proceeding “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court.”⁶³ It then defunded Post-Conviction Defender Organizations, which provided legal representation for many of those contesting their death sentences.⁶⁴

Even as evidence emerges that innocent persons have, with some frequency, been sentenced to death, American society seems ever more impatient with the procedural niceties and delays attendant to what many now seem as excessive scrupulousness in the handling of capital cases. What good is having the death penalty, so the refrain goes, if there are so few executions? Blood must be let; lives must be turned into corpses; the “charade” of repeated appeals prolonging the lives of those on death row must be brought to an end.

And yet, if legitimacy is to be preserved, the state’s violence must, in the daily operations of the death penalty system, seem different from lawless violence. For many, this need seems to answer itself. State violence is after all legal. What more is there to say? But for those who confront state violence at the end of a police baton, in the vivid images of the tape-recorded beating of Rodney King, or in the increasingly frequent reports of the death of yet another victim of America’s attachment to capital punishment, those questions will be direct, immediate, and painful. For them, some answer must be given.

In our current political situation there is, and must be, an uneasy linkage between law and violence. Law cannot work its lethal will and ally itself with the killing state while remaining aloof and unstained by the deeds themselves. As pervasive and threatening as this alliance is, it is, nonetheless, difficult to understand that relationship or even to define clearly what it might be. This difficulty arises because law is violent in many ways.⁶⁵

Violence, as both a linguistic and physical phenomena, as fact and metaphor, is integral to the constitution of modern law. A thoroughly nonviolent legality is inconceivable in a society like this one.

Yet to say that law is a creature of both a literal, life-threatening, body-crushing violence, and of imaginings and threats of force, disorder, and pain, is not to say that it must embrace all kinds of violence under all conditions. If law cannot adequately define the boundary between life and death, guilty killing and justifiable execution, then what is left of law? If law cannot adequately effect a reconciliation between violence and reason, then how can law itself survive?

Only in and through its claims to legitimacy is state killing privileged and distinguished from “the violence that one always deems unjust.”⁶⁶ Legitimacy is thus one way of charting the boundaries of state violence. It is also the minimal answer to skeptical questions about the ways that state violence differs from the turmoil and disorder the state is allegedly brought into being to conquer. But the need to legitimate this violence is nagging and continuing, never fully resolved in any single gesture. When law, as in the Harris case, goes too far in facilitating state killing, it undermines its own claims to legitimacy and thus casts doubt on all its violent acts.

The Cultural Life of Capital Punishment

The impact of state killing is, however, not limited to our political and legal lives but has a pervasive effect in our culture as well. *When the State Kills* seeks to trace those cultural effects. It takes up law professor David Garland’s argument, namely that we should attend to the “cultural role” of legal practices, to their ability to “create social meaning and thus shape social worlds,” and that among those practices none is more important than how we punish.⁶⁷ This book extends that argument to the domain of the death penalty.

Punishment, Garland tells us, “helps shape the overarching culture and contribute to the generation and regeneration of its terms”; it is a set of signifying practices that “teaches, clarifies, dramatizes and authoritatively enacts some of the most basic moral-political categories and distinctions which help shape our symbolic universe.”⁶⁸ Punishment lives in culture through its pedagogical effects. It teaches us how to think about categories like intention, responsibility, and injury, and it models the socially appropriate ways of responding to injuries done to us.

But crime and punishment also live as a set of images, like the compelling photographs in the McVeigh case, and as a pervasive aspect of our popular culture.⁶⁹ We are surrounded by reminders of crime and punishment, not just in the architecture of the prison, or the speech made by a judge as he sends someone to prison, but in novels, television, and film. Punishment has traditionally been one of the great subjects of cultural production, suggesting the powerful allure of humankind’s fall from grace and of our prospects for redemption.

What is true of punishment in general is certainly true of those instances in which the punishment is death. Traditionally the public execution was one of the great spectacles of power and instructions in the mysteries of responsibilities and retribution. Yet making execution private has not ended the pedagogy of the scaffold.⁷⁰ Execution itself, the moment of state killing, is even now an occasion for the production of public images of evil or of an unruly freedom that must be contained by a state-imposed death, and for fictive recreations of the scene of death in popular culture.

Traditionally, the cultural politics of state killing has focused on shoring up of status distinctions and distinguishing particular ways of life from others.⁷¹ Thus it is not surprising that the death penalty marks an important fault line in our contemporary culture wars. To be for capital punishment is to be a defender of traditional morality against permissivism and of the rights of the innocent over the rights of the guilty. To oppose it is to carry the burden of explaining why the state should not kill people like Timothy McVeigh, of producing a new theory of responsibility

and of responsible punishment, and of humanizing inhuman deeds.

Yet all of this may miss the deepest cultural significance of state killing. To understand state killing and the American condition, then, we have to move from the drama and spectacle of cases like McVeigh's, to the grim, day-to-day realities of the capital punishment system, from the hypervisibility of the celebrated case to the often unnoticed workings of the execution system. When we do, we will see that state killing is today carried on against the background of cultural divides that are becoming ever more intense as they become more complex and unpredictable.

Overview of the Book

The next two chapters begin my exploration of capital punishment and the American condition by taking up the question of why the state kills and kills as it does. State killing, I contend, both expresses sovereign prerogative and, as in the McVeigh case, satisfies public desires for vengeance by responding to the pain of the victims of crime. However, responding to those desires reveals both the weakness of the state and its strength, its dependence and its power. State killing co-opts the call for vengeance and the politics of resentment as much as it seems, at first, to express them.

Chapter 2 illuminates this duality by connecting the political popularity of capital punishment with the search for simple solutions to complex problems and a politics of "demonization." We kill those who murder because we have lost faith in our ability to figure out other ways to prevent killing. Politicians embrace the death penalty to show their toughness and to provide symbolic satisfaction to constituencies searching for recognition at a time of deep and deepening cynicism about our political process.⁷²

To develop this argument I concentrate on the contemporary victims' rights movement and, in particular, on its mobilization in capital cases. Victim politics looks like vengeance pure and simple. Yet it is also a symptom of frustration and cynicism with

our public institutions. While the goals of the victims' rights movement are complex, emphasizing crime prevention and pressing for policy changes in addition to expressive, punitive responses, it is "more expedient for politicians to respond to the victims' punitive than their preventive impulses."⁷³ Calls for victims' rights are taken to be indicators of dissatisfaction with the state and its criminal justice policies, and, to some extent, they are. Yet by looking at the controversy surrounding calls to allow the survivors of murder victims to play a larger role in capital cases we see a slightly more complex and revealing picture.

Bringing the families of murder victims into the capital punishment system both amplifies and co-opts their voices. Ceding a place to victims exemplifies a legitimacy crisis felt in neoliberal regimes as public confidence in political and legal institutions wanes. It is also a deft way of giving those aggrieved by crime voice without giving them control. In this way state killing walks a dangerous and uncertain line, fueling, while also trying to manage, anger, resentment, and the desire for revenge.

One of the deep contradictions of state killing in the United States is that even as the death penalty responds to and stirs up the passion for "an eye for an eye," the recent history of execution is marked by repeated efforts to find ever more "humane" technologies for taking life. Chapter 3 suggests that the movement from hanging to electrocution, from electrocution to the gas chamber, from gas to lethal injection reads like a macabre version of the triumph of progress, with each new technique enthusiastically embraced as the latest and best way to kill without imposing pain. Yet, if bringing victims into the capital punishment process is meant to give voice to their anger, the practice of killing painlessly may force questions from those who see in state killing a way to satisfy the calls of vengeance.

In chapter 3 I discuss various court cases dealing with the ways the state kills: hanging, electrocution, lethal gas, lethal injection. In most of them the key question is, Do these methods kill painlessly? Yet one might quite reasonably ask whether the state should be concerned about the suffering of those it puts to death. In addition, what does it tell us about the condition of America

that we seek to kill, but yet to kill gently? It is not, as some in the victims' rights movement have argued, that we are moved by misplaced sympathy. The quest to kill painlessly, I contend, is better understood as an act of grace or, better yet, as itself part of a strategy of political legitimation.

The next three chapters move from broad themes about why the state kills and kills as it does to examine the legal process through which judgments are made about who will be sentenced to death, describing that process through the words of the legal professionals and ordinary citizens who help make those judgments. In addition, these chapters analyze the cultural significance of the legal strategies and arguments used in capital cases.

The fragile accommodation that marks state killing in the United States is on display in every capital case, from the most dramatic to the most common. Chapter 4 presents the story of a single, uncelebrated capital case that I traveled to a small Georgia town to observe, hoping to understand, as much as an outsider could, the pain that surrounds every so-called ordinary murder and the challenges that law faces in attempting to respond to that pain. This case drew me into the excruciatingly sad story of the rape and murder of a white woman, Jeannine Galloway, by a young, African-American man, William Brooks.

In this case, as in almost every other, three narratives compete for primacy. First, of course, is the story of the victim and the crime. Typically it has a simple structure, an evil person, so we are told, unjustifiably takes the life of an innocent citizen. Violence is a matter of monstrous deeds done by individuals who must be held responsible for those deeds. This story deliberately ignores the social conditions that some say give rise to crime. The second narrative is one of denial or doubt designed to exculpate the accused, which often becomes one of excuse or mitigation, a story used to explain why the evil act was committed. It recounts the life of the defendant and incorporates precisely those elements—poverty, neglect, social decay—that the first story excludes. The third story is of punishment. In this tale prosecution and defense produce different versions of the appropriateness of the death penalty for this crime and this criminal.

These three stories highlight many of the most important aspects of contemporary America. They illustrate the pervasiveness and power of ideas of victimization as well as the way decisions about punishment may come to depend on our ability to recognize who in our society are the “real” victims. These stories depend on an appeal to sentimentality, asking listeners to identify with the alleged victim, engaging emotion, and promising moral clarity.⁷⁴ Moreover, the stories told in cases like that of William Brooks feature central themes in today’s politics and culture, in particular the sexualization and racialization of danger and of our responses to it. These cases show how deep a cultural divide there is over responsibility and its limits. I show in chapter 4 how all these complexities and others were played out before a jury asked to decide this one man’s fate.

Chapter 5 considers the remarkable role of the jury in capital cases. At almost no other time does a group of citizens calmly and rationally contemplate taking the life of another, all the while acting under the color of law. This kind of democratically administered death penalty is a reminder of an enduring puzzle in social life, namely the question of how otherwise decent people come to participate in projects of violence and how cultural inhibitions against the infliction of pain can be turned into legal support for such action. In the jury’s decision to condemn someone to death, or to allow him to live, we see an affirmation of the kind of sovereign prerogative I mentioned earlier, only now carefully circumscribed and transferred to the people.

This chapter addresses the controversy surrounding the role of the jury in capital cases by again examining the kind of case that is on court dockets everyday throughout the United States, this time the senseless killing of a clerk during a convenience store robbery by a young man, John Henry Connors. I use interviews to allow the Connors jurors to describe their experience in their own words. Those interviews reveal a deep sense of responsibility in judging both his guilt and whether he should be executed as well as the ambivalent reaction many Americans have to the “sad stories” of troubled lives that lead to criminal violence. Jurors were torn between a sympathetic understanding of the defendant

and a powerful insistence that just because someone has had a difficult life that can be no excuse for killing. Another part of the story that this chapter tells is how both mistrust of government and the legal system itself, of the kind that today is so prevalent, led the Connors jurors to vote for death.

After a death verdict is rendered, the effort to prevent state killing often does not end. At the center of the continuing effort to stop state killing in the United States stands a small group of lawyers who dedicate their professional lives to saving those condemned from being killed by the state. As do the lawyers in the cases discussed in chapters 4 and 5, they take on the burden of representing some of the most hated persons in America. Unlike trial lawyers, who defend a legally innocent person against the most serious criminal charges, these lawyers seek to save the lives of those already found guilty and sentenced to death. They are widely blamed for unfairly complicating the process of moving from executions to state killings. They are said, by conservative leaders in the culture wars, to exemplify elitist indifference to the lives and pains of ordinary people. Death penalty proponents as well as the grieving relatives of murder victims regularly ask, What kind of people are these who would give aid and comfort to murderers?

Chapter 6 tries to answer this question. It is based on interviews I conducted with more than forty death penalty lawyers from across the United States. In these meetings I heard the story of state killing as it is lived and told by those on the firing line in the daily struggle to prevent that killing. This version, not popular in the current pro-death penalty climate, is one that must be heard if we are to understand the killing state. It shows how the practices of state killing increasingly rub up against the legal protections that, not a generation ago, were thought essential to guaranteeing fairness in capital cases. Today, death penalty lawyers carry on a rearguard action to vindicate those guarantees of fairness, to ensure that law is not stampeded in the service of political expediency.

In the chapters that constitute part three I move from the legal process in which judgments about life and death are made to con-

sider the cultural representations and resonances of capital punishment, the connection between what we see and what we believe about state killing and the American condition.

Modern executions are no longer public. Nevertheless, newspaper accounts and television news reports, as well as courtroom narratives, all attempt to capture the act of execution. Still the question persists of how widely shared the privilege of witnessing and viewing should be and what, if any, limits should be placed on the media's representation. Chapter 7 discusses whether executions should be televised and asks what it would mean for us and for our culture if citizens could choose to become viewers of capital punishment?

While executions are not televised, they are frequently portrayed in popular culture. From such cinema classics as *Angels with Dirty Faces* and *I Want to Live* to contemporary hits like *Dead Man Walking*, there is now a substantial body of film dealing with state killing. Chapter 8 examines the presentation of state killing in death penalty films as well as their cultural politics.

The appearance of capital punishment in film, I suggest, typically distracts from an adequate assessment of the impact of state killing on the American condition. I develop this argument through an extended analysis of three recent films: *Dead Man Walking*, *Last Dance*, and *The Green Mile*. These and other death penalty films get their dramatic force by focusing narrowly on the question of whether a particular person really deserves to die rather than on broader questions about state killing or about the social conditions that produce violence in America. As a result, such films highlight the issue of individual character and responsibility and rely frequently on categories of thought that are key weapons of the most conservative elements in today's culture wars. Moreover, they silently acquiesce in the bureaucratization and privatization of capital punishment through their "You are there" representations of execution itself, seeking, through such representations, to inspire confidence that their viewers can "know" the truth about the death penalty even as they raise doubts about its appropriateness in particular cases.

The conclusion of *When the State Kills* summarizes the main arguments, namely that state killing contributes to some of the most dangerous features of contemporary America. Among them are the substitution of a politics of revenge and resentment for sustained attention to the social problems responsible for so much violence today; the use of crime to pit various social groups against one another and to generate political capital; what has been called an effort to “govern through crime”; the racializing of danger and, in so doing, the perpetuation of racial fear and antagonism; the erosion of basic legal protections and legal values in favor of short-term political expediency; the turning of state killing into an invisible, bureaucratic act, which can divorce citizens from the responsibility for the killing that the state does in their name. In response I argue for what I call a “new abolitionism.” This view suggests that the time may be at hand to condemn state killing for what it does *to*, not *for*, America and what Americans most cherish.