

## THE DEATH PENALTY ON THE BALLOT

Investigating the attitudes about capital punishment in contemporary America, this book poses the question: Can ending the death penalty be done democratically? How is it that a liberal democracy like the United States shares the distinction of being a leading proponent of capital punishment with some of the world's most repressive regimes? Reporting on the first study of initiative and referendum processes used to decide the fate of the death penalty in the United States, this book explains how these processes have played an important, but generally neglected, role in the recent history of America's death penalty. While numerous scholars have argued that the death penalty is incompatible with democracy and that it cannot be reconciled with democracy's underlying commitment to respect the equal dignity of all, Professor Austin Sarat offers the first study of what happens when the public gets to decide on the fate of capital punishment.

Austin Sarat is William Nelson Cromwell Professor of Jurisprudence and Political Science at Amherst College, Massachusetts. He is author or editor of over ninety books in the fields of law and political science, including *Gruesome Spectacles: Botched Executions and America's Death Penalty* (2014). His book *When Government Breaks the Law: Prosecuting the Bush Administration* (2010) was named one of the best books of 2010 by the Huffington Post.

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**AMERICAN DEMOCRACY AND THE  
FATE OF CAPITAL PUNISHMENT**

**Austin Sarat**

With

**John Malague**

And

**Sarah Wishloff**



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*For Stephanie, whose wisdom and love make  
everything possible.*

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## PREFACE

In the sciences, students have long had the opportunity to do research with faculty. They have worked in labs, analyzed data, attended conferences, and co-authored articles. But, until recently, there was no parallel for students in the humanities and humanistic social sciences. Thanks to the support of the Mellon Foundation, several years ago, Amherst College launched an initiative to encourage research collaborations between students and faculty in these areas. This book is a result of that new opportunity for student–faculty collaboration.

In the spring semester of 2017, I offered a course on America’s Death Penalty to six Amherst undergraduates. My goal was to introduce them to the various scholarly traditions that have informed work on capital punishment and equip them to do research in this area. During the semester, I invited my students to work with me on a project on the history of death penalty ballot measures in the United States. Over the next eighteen months, we identified all those measures that occurred during the period from 1912 to 2016. We developed a conceptual framework and an analysis plan and tried to make sense of the death penalty’s ballot history. We co-authored one scholarly article.

Two of those students, John Malague and Sarah Wishloff, whose names appear on the title page, continued to work with me on this book. We met regularly to review the progress of our work, discussed and debated different approaches and interpretations, and exchanged memos and drafts. While the publisher allowed only my name to appear on the front cover, John and Sarah are its co-authors. Our collaborative work is manifest on every page.

## ACKNOWLEDGMENTS

We are grateful for the support of the Mellon Foundation and Amherst College's Dean of the Faculty Catherine Epstein. We benefited from the generous critiques and comments offered by colleagues at the 2018 Meeting of the Association of Law, Culture, and the Humanities.

Finally, even though our subject is an unrelentingly difficult and painful one, our collaboration has been a wonderful experience for all of us.

“If people want the death penalty, they should have it. That is democracy. We want to live in a deep democracy. We want to choose our government, be able to express our opinions freely, have our voices heard, and be able to shape the economic and political life through our active citizenship like referendums. We want a framework that ensures the rule of law and justice for all. As citizens of a democratic country we want elected representatives who are accountable to us. Democracy needs civic engagement, inclusive, transparent and effective mechanisms and institutions, mutual trust, a sense of collective responsibility and courage to work for the common good. Democracy requires daily vigilance and constant action. A referendum on the death penalty falls within these principles.”

Rich Mkhondo, “Let’s Be Democratic About the Death Penalty”

“Terrible as it may sound, choosing to seek the death penalty whenever it’s legally permissible to do so is a classic example of experimental democracy. So long as the Supreme Court says the death penalty is legally permissible when the procedures are performed correctly, it’s logically within the rights of individual states – or individual counties within states – to become heavy execution zones. That’s a terrible idea, to be sure. But it’s a terrible idea that can be corrected by experience. And whatever else it is, the decision isn’t arbitrary – at least from the perspective of the voters.”

Noah Feldman, “Democracy and the Death Penalty”

“In every Western democracy that has scrapped the death penalty, politicians have acted against the wishes of a majority of voters . . . Abolitionists routinely argue that referendums are unwinnable because it is impossible to get voters to focus on the question clearly, and not get sidetracked by individual, high-profile murder cases. They add, sometimes, that civil rights for blacks would never have been achieved if put to a referendum.”

*The Economist*, “Democracy and the Death Penalty . . . Do Voters Want to be Asked What They Think About the Death Penalty?”

“The right to be free of cruel and unusual punishments, like the other guarantees of the Bill of Rights, ‘may not be submitted to vote; [it] depend[s] on the outcome of no elections.’ The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”

Justice William Brennan, *Furman v. Georgia*

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