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THE JUSTICE OF LIFE AND DEATH: PROBLEMS AND PERSPECTIVES IN TEACHING CAPITAL PUNISHMENT LAW

VICTOR STREIB¹

Please use this brief sketch to think along with me as I struggle with my continuing problems in teaching an upper-level law school course on capital punishment. Although I have been teaching it for six years, I continue to have serious doubts about my ability to do it. If I can intrigue you enough with my quandary, maybe I can squeeze out of our encounter a few insights to allow me to do better, or at least to keep me searching for answers. In return, maybe I can suggest some limitations on the justice mission of law faculty.

The details of the course are fairly unimportant to the issue I want to discuss. My capital punishment course is a traditional semester-long, bluebook exam course in which some students will write papers. It began years ago as an advanced seminar but I moved away from that structure for reasons not germane here. In essence, law school seniors enroll in the course for the same reasons they enroll in any course—the time slot in which it is scheduled, the perceived toughness or mercifulness of the instructor, the chance for a high grade, etc.

A couple of factors about this course which may attract students are also a large part of the problem I have with the course. First, the topic is Capital Punishment Law. This sounds somehow more interesting, sexier than, say, Advanced Secured Transactions or Ethiopian Antitrust Law. Second, my reputation as an outspoken opponent of the death penalty is well known to our students, with flatulent, sophomoric articles appearing in a variety of newspapers, magazines, etc. Indeed, many more students know of my appearance on the Oprah Winfrey Show than know of anything I might have published in an academic journal.

Now to the problem. I want (or at least like to think I want) to lead the students carefully through a step-by-step analysis of the complex capital punishment statutes, the long-winded capital punishment case opinions, and the facts and figures of the capital punishment system in operation, as well as the various jurisprudential schools of thought concerning the appropriate place for this ultimate punishment within our legal system. However, discussion and analysis of capital punishment tends quite easily to drift away from rational analyses of neutral facts and principles toward emotional exchanges of bumper sticker slogans. While I treasure the passion the students bring to the course (third-year law students actually giving a damn about what

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is going on in class!), I have trouble keeping the passion from flooding over the quieter, less boisterous legal analysis.

I have identified three fairly obvious sources of this problem. First, the topic of capital punishment seems inherently to be a vehicle for emotional exchanges in which neither side is distinguished by dizzying flights of rational discourse. While other topics are also in this category, it appears to me that they are few in number. Abortion, gun control, animal rights, fear of violent crime are ones that come to mind, and undoubtedly there are more, but not too many more. My twenty-three years of teaching a wide variety of subjects has never uncovered any as emotionally explosive as capital punishment. So maybe the subject itself is inherently problematic.

Second, students typically bring to the course a strong opinion about the appropriateness or acceptability of the death penalty. Educated and informed persons in our society can hardly have missed the issue, and politicians seem to talk about it endlessly. I confess that at times I think my students have already made up their minds and do not want to be confused by facts which might cause them to revisit the issue intellectually. And this is true whether they are for or against capital punishment. Sometimes it seems like asking a Christian fundamentalist to engage in a rational analysis as to whether Jesus was the Son of God. The response often is that the Bible says it and I believe it—end of discussion!

If the first two aren't enough, third, the students know of my strong personal opposition to the death penalty and tend to assume that anything I say as the course instructor is tainted by my personal views. It is much more extreme than the daily occurrences of this phenomenon in all of the courses we teach. Here students are entering the course with a fixed attitude of skepticism or acceptance for literally everything the professor says about the topic. I try my best to dispel this attitude with repeated pledges to be as neutral as possible but have not noticed any major impact from my effort. Candidly, of course, I wonder if my old-fashioned striving for neutrality from the lectern can work in a course of this nature. Despite my misgivings, so far it appears to be the superior choice to that of fifteen weeks of oral advocacy for my cause.

Finally, I wonder if I am not too personally involved in this issue to be able to teach it. Can a teacher care too much about her subject? Is it like representing yourself or someone you love in a complex legal matter? Is a minimal distance from this or any subject necessary to be an effective teacher? Yes, my worst fears are that my students are right, that I am more preacher than teacher.

There lies my particular dilemma with the topic of this conference, the justice mission of American law schools. I rush to enlist when David Barnhizer issues to the law faculty the clarion "demand that there be concern with seeking to answer the critical questions of justice and fairness, right and wrong to the extent of one's ability, and to facilitate positive change." I understand how to pursue this justice mission in my pro bono litigation and other law reform efforts—I simply am certain to be on the side of justice (as I see it, of course). In my death penalty work so far, this has not been difficult. I am less certain about slanting my published scholarship toward seeking justice rather than

extending the frontiers of knowledge, but I suppose I have made an uneasy peace with the advocacy nature of legal scholarship.²

Ought I try to "facilitate positive change" when I teach my capital punishment course or, for that matter, any course? It seems to me that a large part of my difficulty in teaching the capital punishment course is that the students fear I am doing just that, and my worst fears are that my students are right. My search up to now has been for ways to achieve more neutrality in my students' opinions and in my teaching techniques. Am I now simply to abandon that search and to treat my class like an appellate court to be convinced of the wisdom of my opposition to capital punishment?

I am a true believer in the obligation of faculty to speak truth to power (I take particular delight in speaking truth to Deans and Provosts). I enjoy telling prosecutors, judges, and legislators "the truth" about capital punishment. That they represent "power" is clear to me and to my condemned clients. However, my students are not in a position of power toward me or my clients. Indeed, the control I have over my students via grades, recommendations, etc. makes it clear with whom the power lies.

Should the classroom be exempt from the justice mission of law faculty? At least for courses addressing particularly emotional topics, it would appear that the need is to tone down the advocacy nature of teaching and to push as strongly as possible for a neutral stance from the instructor. And if the instructor is too emotionally involved in the topic to be able to accomplish that end, then maybe she should teach something else.

Barnhizer queries "at what junctures" law faculty ought to pursue the concerns of justice. Perhaps all I have done is to suggest one juncture at which such pursuits are part of the problem rather than part of the solution. Until convinced otherwise, I will continue to try to keep my personal justice mission out of my capital punishment course.

²My views on this related topic are sketched in Victor L. Streib, *Academic Research and Advocacy Research*, 36 CLEV. ST. L. REV. 253 (1988).

