

## Chapter 1

# Introduction

Shortly after midnight, on January 5, 1993, Westley Allan Dodd was hanged in the death chamber of the Washington State Penitentiary, about a mile and a half west of my home. Although I did not realize it at the time, that event furnished the initial impetus for what is now this book. Before that date, to be perfectly candid, I had devoted little serious intellectual attention or political energy to the issue of capital punishment. However, as a member of the board of directors of the American Civil Liberties Union of Washington, I felt duty-bound to join the dozen or so grave protestors, primarily out-of-town Catholics and members of Amnesty International, who had gathered outside the penitentiary on that bitterly cold night in order to express their opposition to the first U.S. execution by hanging since 1965. About two hours after our arrival, nearly a hundred area residents appeared on the scene and were quickly corralled by armed state troopers and their German shepherds into the fenced-in enclosure labeled "For," which was immediately adjacent to our pen, labeled "Against." There, under the surreal twilight generated by the combined glare of penitentiary and television floodlights, the proponents of Dodd's execution waved signs bearing slogans such as "Hang 'Em High"; chanted doggerel, including "What the heck, stretch his neck"; taunted those on the fence's opposite side with dangling nooses; and, at precisely midnight, "lit fireworks and cheered like a football crowd at a home team victory" (*Walla Walla Union-Bulletin*, January 5, 1). The following morning, after praising state officials for their "quick" and "methodical" hanging of Dodd, the editorial staff of the *Union-Bulletin* branded the events outside the penitentiary "a disgusting spectacle" (January 5, 1993, 4); and, in 1996, after a second hanging at the same facility, urged the legislature in Olympia to shift to lethal injection as the state's default method of execution, primarily on the grounds that this reform would discourage future dis-

plays of the sort witnessed in 1993 and 1994, when “the nuts were out in force—on both sides of the issue” (February 7, 1996, 4). Shortly thereafter, the legislature obliged, and the governor concurred.

Narrowly construed, the chapters of this book represent an attempt to gain some critical perspective on the events that transpired that night and thereafter, inside as well as outside the penitentiary. How, for example, was I to understand the visceral response provoked by this particular method of execution, especially given that, a little over a century prior, so I have been told by a local historian, the public schools of Walla Walla were sometimes closed so that parents could bring their children to witness hangings? How was I to reconcile the disgust I felt toward this event’s celebrants with my more generous response to the late-eighteenth-century crowds in England and France, which, according to Michel Foucault in *Discipline and Punish* (1979), often transformed executions into popular carnivals? In light of the public character of the vast majority of nineteenth-century executions in the United States, moreover, what was I to make of the fact that, as I began to do research into these questions, state officials ranging from the penitentiary superintendent to the head of the Department of Corrections in Olympia repeatedly refused my requests for a tour of the execution chamber, one of the last remaining gallows in the United States? And, once I did manage to gain access, how was I to think about the discourse of “humanitarianism” that was so often invoked by the superintendent in explaining his relief at the legislature’s switch from noose to needle? Finally, what was I to make of the incongruous situation of the hospital gurney on which Jeremy Segastegui was executed by lethal injection in 1998, the first by this method in Washington State, in a chamber designed for hanging and directly beneath the trapdoor through which Dodd’s body had plummeted five years before?

In beginning to consider these questions, I found much of the available scholarship on capital punishment less helpful than I had hoped. With apologies for the caricature that follows, that literature may be said to fall into several general categories. First, perhaps most familiar is what might be called the “pro and con” scholarship (see, e.g., Radelet 1989; Paternoster 1991; Streib 1993; Haines 1996; Bedau 1997). Such policy-oriented work typically pits proponents against opponents of the death penalty, and their issues of contention include the morality of the death sentence, the legitimacy of retribution as a motive for pun-

ishment, the efficacy of capital punishment as a deterrent to homicide, the quality of legal representation for those sentenced to death, the relative expense of lifelong incarceration as opposed to execution, and so forth. Second, students of law continue to debate the specifically constitutional and legal issues posed by capital punishment (see, e.g., Coyne and Entzeroth 1994; Koosed 1996). This literature typically asks whether the death penalty is a form of cruel and unusual punishment, whether courts can ensure that death sentences are not influenced by discriminatory considerations, such as race, gender, and socioeconomic status, whether the erosion of habeas corpus protections in recent years makes it more likely that innocent persons will be executed, whether juveniles can demonstrate the sort of criminal intent necessary to render them subject to the death penalty, and so on. Third, and finally, a steady stream of books and articles in recent decades has explored transformations in the practice of capital punishment in Europe and the United States over the course of the past three centuries or so (see, e.g., Foucault 1979; Spierenberg 1984; Bowers 1984; Masur 1989; Linebaugh 1992; Gattrell 1994). Among other questions, this scholarship has inquired into the frequency of executions in different eras, the efforts of various groups to reform or abolish capital punishment, the conduct of crowds at public executions, the shift from open to concealed executions, the substitution of one method of killing for another, and so forth.

It is this last body of scholarship that has proven most useful to me. That said, I come to this project not as a historian, but rather as a historically minded political theorist, and that is a perspective that has been more or less absent from contemporary work on the death penalty (see the essays in Sarat 1999b as well as Sarat 2001 for exceptions to this claim). To say that this is a work of political theory is, in this instance, simply to indicate my belief that the questions that have occupied my attention in recent years can be answered profitably by situating them within the context of a historically informed understanding of the liberal state and its distinctive dilemmas, primarily in the United States but also in England. My purpose, in other words, is to employ the issue of capital punishment to illuminate certain of that state's more interesting quandaries and, to say much the same thing in reverse, to show how some of those quandaries are recapitulated in the conduct of capital punishment. The questions prompted by this perspective are, for the most part, simply more abstract versions of those with which I began:

Why, for example, have certain methods of execution now come to be considered anachronistic, if not barbaric, and what does that judgment tell us about the imperatives of political rationalization in modern liberal political orders? How does the late liberal state, committed to the rhetoric of humanitarianism, seek to occlude the violence of state-sponsored killing, and what complications are engendered by the turn to quasi-medical technologies in order to achieve that end? Given that the legal order of that state can no longer justify the deliberate imposition of physical pain as a penalty, how can it offset the delegitimizing effects induced by executions gone awry? How, to move farther from my point of origin, has the liberal state sought to negotiate its commitment to equality under the law, including equal application of capital statutes, within a culture informed by gendered stereotypes that often appear to immunize women from the law's most severe punishment?

The theoretical approach I have adopted in order to think my way through these and related questions will prove unsatisfying to those who possess greater epistemological confidence than do I. Because I do not believe that such an enterprise is either intellectually feasible or politically desirable, I offer no comprehensive theory of the liberal state. The very phrase *liberal state* is a reification that glosses over the historical transformations in the character of this complex entity and its dilemmas, transformations that I have signaled throughout this book via my imperfect references to the *early modern*, the *modern*, and the *late liberal state*. An examination of John Locke's liberalism proves profitable in thinking about that state's relationship to the practice of capital punishment during its formative centuries, especially as it seeks to secure its unambiguous demarcation from the tangled web of private powers that define late feudalism. While the Lockean conception does not become irrelevant once that demarcation is (more or less) secured, by the middle to late nineteenth century, it must be supplemented by categories derived from Max Weber if we are to appreciate the pressures brought to bear on the liberal state to rationalize (in his sense of this term) its monopoly over the means of legitimate violence. Yet Weberian categories too must be supplemented (but not entirely displaced) when we move to the late twentieth and early twenty-first centuries, and as the forces of globalization and what Michel Foucault calls "governmentalization" begin to render ever less tenable the Lockean distinction between public and private spheres as well as the Weberian

typification of the state in terms of its hegemonic disposition over the instrumentalities of authoritative force. The liberal state that is taking shape today, to quote from Wendy Brown's *States of Injury*, "is both modern and postmodern, highly concrete and an elaborate fiction, powerful and intangible, rigid and protean, potent and without boundaries, decentered and centralizing, without agency, yet capable of tremendous economic, political, and ecological effects. Despite the almost unavoidable tendency to speak of the state as an 'it,' the domain we call the state is not a thing, system, or subject, but a significantly unbounded terrain of powers and techniques, an ensemble of discourses, rules, and practices, cohabiting in limited, tension-ridden, often contradictory relation with one another" (1995, 174). I concur, and I believe that the methodological precept that follows is a rejection of any monolithic theoretical perspective that claims to do perfect justice to the liberal state's manifold history and forms.

Accordingly, in the chapters that follow, I have drawn on an eclectic array of theoretical sources, including John Locke, Max Weber, Nicos Poulantzas, Friedrich Nietzsche, J. L. Austin, Michel Foucault, Judith Butler, Pierre Bourdieu, Elaine Scarry, and others. No more than with the liberal state, however, is my aim to provide definitive interpretations of these authors or to indicate their respective stances on capital punishment (which would be impossible in any event since several never expressly address this issue). From each of these authors, I have taken what I find valuable, and the remainder I have left behind (which means that, in some cases, I draw from a thinker in one chapter after criticizing him or her in another). Moreover, in order to insure that my appropriation of the conceptual categories of these thinkers does not stray too far from the gritty realities of capital punishment, which is too often the case in academic and especially legal discourse regarding this issue, in most of the chapters that follow I have constructed my argument around the interpretation of specific recent executions in the United States.

In the chapter immediately following this introduction, titled "What Is a Death Sentence?" my aim is not so much to answer the question posed by my title, but to complicate it. In doing so, I hope to render problematic the liberal state's effort to secure its legitimacy by neatly distinguishing between judge and executioner, between the pronouncement of a death sentence and its actual performance. The insta-

bility of this distinction has recently become apparent in death penalty jurisprudence through the articulation of so-called Lackey claims, which ask whether the execution of a prisoner who has spent a protracted period on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment. To show how such claims threaten to compromise the distinction between capital punishment's imposition and infliction, relying primarily on J. L. Austin's analysis of performative utterances, I suggest that the issuance of a death sentence can be understood as a deed that is continuous with and indeed at least in part constitutive of the execution it commands; and I illustrate that argument through an account of the relationship between the words uttered by a Vancouver, Washington, judge in 1990 and the death by hanging of Westley Allan Dodd three years later in Walla Walla. The law of the liberal state, I conclude, cannot acknowledge the immanent relationship between word and deed, precisely because to do so would undermine one of the basic presuppositions that now legitimates the contemporary regime of capital punishment.

In chapter 3, "John Locke's Noose," I tell in what I hope is a new way the story of the shift in London, between the sixteenth and the nineteenth centuries, from public hangings conducted at Tyburn Tree, to semipublic hangings conducted just outside Newgate prison, and, finally, to "private" hangings behind its walls. I use this account as a vehicle for reconsideration of a contemporary theoretical debate about the most apt characterization of the modern liberal state. For many, the characterizations of that state offered by Max Weber and Michel Foucault are fundamentally opposed. From the perspective of Foucault, some say, Weber represents the state as a privileged monopolist of the means of violence, and that in turn distracts inquiry from the web of extrastate disciplinary controls that render it an ever less significant locus of political power. From the perspective of Weber, some say, Foucault's antipathy toward the state as an object of inquiry distracts attention from its coercive role in securing the order that is the political presupposition of the spread of various technologies of discipline. My aim in this chapter is to sidestep what I take to be this false antinomy by telling a Foucauldian tale about the technological and organizational history of a specific practice of governmental violence, that of hanging, but to do so in a way that demonstrates how transformations internal to that practice contribute to formation of a state that is well understood in qualified Weberian terms.

In chapter 4, “The Metaphysics of the Hangman,” I ask how we might make sense of the demise of what, until the twentieth century, was the predominant method of execution employed in the United States. To answer that question, I draw chiefly on the work of Friedrich Nietzsche and, more particularly, his relational ontology in order to abstract from the complex we call “the law” several of its key ingredients: specifically, legal discourse, legal subjects, and the technological instrumentalities through which the law’s imperatives are brought to bear on human bodies. The common contemporary characterization of hanging as a “barbaric relic,” I argue, signifies that these three ingredients no longer cohere in a way that consolidates the law’s claim to legitimacy. To illustrate the nature of this threat, I offer a reading of the evidentiary hearing that was conducted one year before the Ninth Circuit Court of Appeals rejected Charles Campbell’s challenge to hanging’s constitutionality. In that hearing, although never articulated in so many words, the key question is whether the noose can be rendered a fit participant within a legal order, which, in order to sustain its own claim to rationality, must efface the violence that is necessary to destroy a human body. While the noose survives this particular challenge, the strains internal to the legal argumentation that generates this conclusion indicate why it is unlikely that there will ever be another state-sponsored hanging in this nation.

In chapter 5, “Silencing the Voice of Pain,” I explore the representation of bodily suffering that predominates in most contemporary discourse concerning the infliction of capital sentences. That representation, I contend, is specifically modernist in a Weberian sense insofar as it figures pain as an aversive secular reality that is to be minimized or eliminated through the intervention of medical science; and it is also modernist in a Cartesian sense insofar as it regards pain as a solipsistic phenomenon whose reality can never be definitively confirmed by another. This anti-political construction, I argue, renders it virtually impossible to contest any particular method of execution on the grounds that the pain it entails violates the Eighth Amendment’s prohibition of cruel and unusual punishment. To illustrate this claim, I explore the 1999 execution of Allen Lee Davis as well as the Florida Supreme Court case in which Davis figured centrally. More precisely, I indicate why, in spite of considerable visual evidence that appeared to suggest otherwise, those in dissent were unable to persuade the majority that Davis suffered any pain during his botched electrocution. In

closing, I suggest that we might begin to temper the political incapacities of the modernist construction of pain by reconsidering the relationship between it and language. If pain were to be understood as a culturally variable and discursively fashioned artifact, might it then be possible to render its reality visible in a way that discloses the contestability of state power?

In chapter 6, "Womanhood Unsexed on the Gallows," I look into the little-explored topic of capital punishment and gender. To establish a context for my primary argument, I begin by offering a brief history of women and the death sentence in the United States as well as an abbreviated account of the principal academic controversy concerning the most adequate explanation for the relatively small number of women who have been executed. In the second section, using the 1998 execution of Karla Faye Tucker to illustrate, I explain why I am persuaded that the contemporary liberal state is damned if it does and damned if it doesn't execute women. From one point of view, the state-sponsored killing of an occasional woman reinforces the liberal ideal of equality before the law, and that in turn helps to reinforce its appearance of legitimacy. Yet, at the same time, the execution of women disturbs other tales to which many in this culture are also profoundly committed. Specifically, to direct the lethal force of the state against a woman is to accentuate the harsh realities of capital punishment by bringing that violence to bear on a body conventionally coded as docile, as nonpredatory, as in need of protection. How the late liberal state in America can be expected to muddle through this dilemma is the subject of my closing remarks.

In chapter 7, titled "Needling the Sovereign," I ask, first, how we might make sense of the contemporary adoption of lethal injection as our preferred technology of state killing and, second, whether this method effectively solves any or all of the dilemmas explored in the previous chapters. To suggest why lethal injection raises more questions than it answers, I explore a 1985 U.S. Supreme Court case in which several inmates sentenced to die by lethal injection contended that, because the Food and Drug Administration had not determined that the drugs in question were "safe and effective" when employed to kill human beings, their execution by this method would be unlawful. To make sense of this paradoxical contention, as well as the conditions of its possibility, I turn back once again to Foucault and, more specifically,

to the first volume of his *History of Sexuality* (1980a) as well as his essay titled "Governmentality" (1991a). In contrast to absolutist regimes, which were paradigmatically defined by the authority of the sovereign to put subjects to death, late liberal regimes are in large part defined by a commitment to what Foucault sometimes calls "bio-politics," that is, the nurturance of healthy and docile populations in the service of maximal productivity. A perhaps nonobvious consequence of that commitment, I argue, is the rationalization and, more specifically, the medicalization of death; and one manifestation of that in turn is adoption of the execution method that is lethal injection. The fact that this technique does not appear to cause pain and leaves no visible signs of harm on the body of the condemned might lead us to conclude that it successfully overcomes the dilemmas that have now led to the virtually complete rejection in the United States of all other execution methods, including hanging, electrocution, the firing squad, and the gas chamber. In fact, however, it is lethal injection's apparent excision of the violence of killing from infliction of the death penalty that renders it unable, I argue, to reconsolidate the claim to sovereign authority that is essential to the identity of the liberal state. As such, the very success of lethal injection is the cause of its failure.

This volume contains no separate conclusion, in part because its chapters are not intended as co-constitutive parts of some more comprehensive single argument, and in part because its conclusion, to the extent that it has one, is stated in each of its chapters. If the practice of capital punishment is as riddled with contradictions as each of my chapters suggests; and if lethal injection, as I suggest in the last chapter, simply poses new dilemmas for the late liberal state; and if those dilemmas, as I also contend, can be "solved" only when executions are botched in a way that renders their violence palpable; and if graphically violent executions in turn undermine the late liberal state's already attenuated legitimacy, then it would appear to follow that this political institution is beyond repair. Does that mean that capital punishment is destined to disappear in the United States? When I first started working on this project in 1995, I had little reason to think that its days might be numbered. Today, and although I am not given to the intellectual conceit that holds that the contradictory nature of a political practice necessarily leads to its elimination, I am not so sure.

In 1997, the American Bar Association's House of Delegates

adopted a resolution (Report with Recommendation No. 107, ABA 1997 Midyear Meeting, adopted on February 3, 1997) calling on states to halt executions until equal protection of the law can be guaranteed to all. In 1998, the execution of Karla Faye Tucker prompted a national debate, especially among members of the Christian Right, about the morality of capital punishment (Verhovek 1998a and Malcolm 1999). In 1999, the Nebraska legislature approved a two-year moratorium on executions, which was later vetoed by the governor (Johnson 1999). In the first month of 2000, after thirteen men on death row were exonerated by new evidence, Governor Ryan of Illinois suspended all executions pending a formal review of capital trials in that state (Johnson 2000); and, later that same year, although thwarted by another gubernatorial veto, the New Hampshire legislature voted to abolish the death penalty, the first state to do so since the United States Supreme Court authorized the resumption of executions twenty-five years ago (Kifner 2000). Still more recently, Columbia University issued a study indicating that, of 4,578 death sentence appeals conducted from 1973 to 1995, two-thirds were successful in state or federal courts, largely due to incompetent defense counsel, mendacious police officers, and/or prosecutors whose zeal outstripped their fidelity to the law (Masters 2000); and, shortly thereafter, the U.S. Justice Department released another indicating significant racial and geographical disparities in the federal death penalty system (Vise 2000), although Attorney General John Ashcroft later denied that this study demonstrated the presence of any intentional bias in the administration of capital punishment (Stout 2001). The cumulative effect of these and other developments was registered in a *Washington Post*–ABC poll conducted in April 2001. Leaving aside what has come to be known as the “McVeigh exception,” this survey indicated that overall support for capital punishment has fallen from 80 to 63 percent since 1994; and that nearly half of all Americans would now abandon executions altogether if given a reliable option of life imprisonment without parole (Morin and Deane 2001).

On the basis of such evidence, it is tempting to predict, as Robert Jay Lifton and Greg Mitchell recently did, that, “before long, the death penalty apparatus in our country will collapse under its own moral, psychological, and eventually political weight” (2000, 231). That prognostication, though, may be so much wishful thinking. If support for capital punishment has waned in recent years, this is not so much

because new abolitionist arguments have been articulated and widely accepted, but because of the publicity afforded to individualized stories of capital defendants represented by sleeping, intoxicated, and/or disbarred attorneys, of persons on death row proven innocent by undergraduate journalism students at Northwestern University, of exonerations of the condemned on the basis of DNA testing, and so on. Woven together, these stories have loosened the grip of conventional narratives in favor of the death penalty, which told of disingenuous lawyers manipulating legal technicalities in order to postpone indefinitely the execution of coddled criminals, and thereby created space for a new, more skeptical narrative, which worries about whether possibly innocent persons are being hustled toward the death chamber by officials who, like too many government bureaucrats, are prone to corruption and slipshod work.

While the impact of these stories in shaping public opinion is not to be minimized, it may be that these tales are better suited to generate support for a moratorium on the death penalty than for its wholesale abolition. "There is no inconsistency," write Samuel Gross and Phoebe Ellsworth, "in the fact that 64% of the population favors a moratorium (at least when DNA is mentioned), and about the same number favors the death penalty" (2001, 53). A moratorium, while attractive as a way of breaking the rhetorical impasse that materializes when persons, absent a third alternative, feel compelled to choose between unvarnished support for or opposition to capital punishment, is ultimately a strategy of deferral. As such, it may simply elicit additional efforts to do what legislatures and courts have been trying (unsuccessfully) to do since the U.S. Supreme Court lifted its temporary ban on executions in 1976, that is, to rationalize the administration of capital punishment in a way that rectifies its most troubling and glaring defects. And, if that is so, then it is not inconceivable that, in the long run, the moratorium movement may play into the hands of those who now seek to exploit the gains secured by the Federal Death Penalty Act of 1994 (Pub. L. No. 103-322, 108 Stat. 1959), which made some sixty additional categories of crime, such as major narcotics trafficking, subject to the federal death penalty, and, far more important, by the Anti-Terrorism and Effective Death Penalty Act of 1996 (Pub. L. No. 104-132, 110 Stat. 1214), which reduced the power of federal courts to review the fairness of state capital prosecutions. In addition, support for a moratorium may vanish as

quickly as it has arisen, especially should the American economy experience a significant downturn or should crime rates take a marked upturn, in which case killing the despised will almost certainly reemerge as a potent strategy for deflecting attention from more systemic ills.

Such skepticism aside, the fact remains that we now stand at a remarkably volatile moment in the history of capital punishment in America. Whereas just five or six years ago, the death penalty appeared so firmly entrenched that it required no explicit defense against its marginalized opponents, today it appears vulnerable and so in need of justification. Perhaps, then, the optimistic forecast offered by Lifton and Mitchell (2000) is correct, although I am by nature too cautious to hazard such a prediction in print. What I am willing to say is that, if and when what Justice Harry Blackmun called the “machinery of death” (*Callins v. Collins*, 510 U.S. 1141 [1994]) is dismantled, that accomplishment will signify an important reconfiguration of the way we think about and do politics in the United States. The imposition and infliction of a death sentence entails what John Leonard calls a claim to “the authority of perfect knowledge in final things” (quoted in Lifton and Mitchell 2000, 240). Affirmation of such authority is inconsistent with liberalism’s commitment to the establishment of inviolable limits on state power, and it is inconsistent with democracy’s presupposition of the fallibility of all human judgment. To strip the state of that authority is to move one step closer to a politics we can live with.