

## THE DEATH PENALTY: AN AMERICAN HISTORY

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Stuart Banner's thoughtful book, *The Death Penalty: An American History* (2002), serves as the basis of this review essay which explores the forces shaping the nation's experiences with capital punishment. The essay traces Banner's account of important death penalty developments throughout American history and examines justifications traditionally offered in support of capital punishment, issues of administration, and execution protocols. It concludes by projecting that, consistent with historical trends and nagged by serious and recurring administrative problems, the death penalty in America will in due course become a thing of the past.

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### INTRODUCTION

Beginning with George Kendall's 1608 death by firing squad in colonial Virginia for spying for the Spanish, historians have documented roughly 20,000 court-ordered executions occurring on American soil (Death Penalty Information Center, 2003a; Espy, 1989; Espy & Smykla, 2003; Vandiver & Coconis, 2001). Well over a third of those capital sentences were carried out during the 20th century (Bedau, 1982), including 4,457 since 1930, when the federal government began collecting execution data (Maguire & Pastore, 2001). Owing to litigation contesting the death penalty's legality, executioners were at rest for the first time in American history for almost a decade beginning in June 1967 (Acker, 1996; Meltsner, 1973). The modern era of capital punishment dawned in the US in 1976 when the Supreme Court authorized states to resume carrying out death sentences under new laws enacted to correct constitutional deficiencies identified four years earlier (*Furman v. Georgia*, 1972; *Gregg v. Georgia*, 1976). Utah was the first state to do so in January 1977 when Gary Gilmore was put to death by firing squad (Gilmore, 1994). By the end of 2002, 819 additional executions had been carried out by authority of the new state and federal laws (Death Penalty Information Center, 2003a).

Much distinguishes the death penalty practices resulting in Kendall's and Gilmore's respective executions in 17th and 20th century America. Although some of those differences are of indisputable significance, none overshadows the essential unifying feature that each man died in a hail of government bullets as punishment for a crime. Stuart Banner's comprehensive volume, *The Death Penalty: An American History* (2002), masterfully catalogues significant social and legal events that chronicle the origins and evolution of capital punishment in this land from colonial days to the start of the 21st century. Banner, a law professor at Washington University in St. Louis, describes his book as being "about the

many changes in capital punishment over the years—changes in arguments pro and con, in the crimes punished with death, in execution methods and rituals, and more generally in the way Americans have understood and experienced the death penalty” (p. 3). For all the changes in death penalty philosophies and practices that are revealed in Banner’s history, his work simultaneously demonstrates that many core aspects of capital punishment and American culture have endured remarkably over time.

## **THE DEATH PENALTY FROM COLONIAL TIMES TO THE 21ST CENTURY: CONTINUITY AND CHANGE**

### **Crimes Punishable by Death**

Prisons did not exist in colonial America. The first penitentiaries—deliberately named as institutions designed to foster true penitence, “to serve the goal of reformation, of saving the soul without killing the body” (Banner, 2002, p. 123)—did not emerge in the US until the late 1700s and early 1800s. Accordingly, fines and corporal punishment, including the public display of criminals in the stocks, and occasionally short-term incarceration in local jails, were widely utilized as penal sanctions. By necessity, capital punishment was the criminal law’s principal defense against repeat offenders and other criminals who threatened individual safety and the social order (Rothman, 1971). Although the colonies borrowed heavily from English law and custom, none came close to replicating England’s Bloody Code, which towards the middle of the 18th century defined over 200 offenses as capital. Instead, the early colonies typically punished a dozen or so crimes by death, ranging from murder and rape to adultery, sodomy, bestiality, and various property crimes (Acker, 2002).

Regional differences in the criminal laws and their administration surfaced from the outset in colonial America. Of particular note was the southern practice of relying on the death penalty to uphold landowners’ property rights, including the selective application of capital punishment for crimes committed by blacks (Banner, 2002). The discriminatory use of capital punishment laws against blacks was not confined exclusively to the south. For example, in the wake of a 1712 slave revolt, lawmakers in colonial New York made attempted murder and attempted rape capital crimes only when committed by slaves. But race-based application of the death penalty took early root throughout the south and, unlike in the north, survived by formal operation of the law through the close of the Civil War. The laws of Virginia were representative. There, slaves could be

executed for any offense for which free people would get a prison term of three years or more. Free blacks, but not whites, could get the death penalty for rape, attempted rape, kidnapping a woman, and aggravated assault if the victim was white . . . In his 1856 treatise summarizing the slave laws of the southern states, George Stroud counted 66 capital crimes for slaves in Virginia against only one (murder) for whites (Banner, 2002, p. 141).

In the mid- to late 18th century, just prior to the birth of prisons, many Americans began to question whether the death penalty should still be imposed for property crimes such as theft, counterfeiting, and burglary. Such reservations took concrete expression in the form of jury nullification, that is, jurors’ refusal to return guilty verdicts in cases that would expose defendants to capital punishment. They also found voice in newspaper editorials and in various reformers’ speeches and writings. Cesare Beccaria’s *Essay on Crimes and Punishments*, first published in Italy in 1764, was translated and widely circulated in the colonies. This influential volume included a general denunciation of the death penalty and particularly assailed the disproportionality of capital punishment for property and other

relatively minor crimes. Laws began to define capital crimes more restrictively as legislators took heed of these arguments (Banner, 2002).

Pennsylvania, owing much to the leadership of William Pitt and adherence to Quaker principles, was at the forefront of death penalty reforms. “It is the wish of every good government to reclaim rather than destroy” read the preamble to the 1786 statute that did away with capital punishment for robbery, burglary, sodomy, and buggery (Banner, 2002). Eight years later, the Pennsylvania Legislature took the further step of creating the new crime of first-degree murder and abolishing the death penalty for all other offenses. Other states adopted similar reforms in short order, although these limitations on the reach of capital punishment still did not apply to crimes committed by slaves in the southern states. By 1860, no northern state punished crimes other than murder and treason with death. Serious abolition efforts had taken hold throughout the north three decades earlier. In 1846, Michigan became the first state to abolish the death penalty for murder and Rhode Island (1852) and Wisconsin (1853) became abolition states shortly thereafter.

“The institution of slavery caused events in the south to take a very different course for both blacks and whites” (Banner, 2002, p. 137). Few serious efforts were mounted in the south to do away with the death penalty, for either whites or blacks. Many crimes in addition to murder remained punishable by death, although in practice those laws were applied almost exclusively against blacks. Southern states—first Tennessee in 1838, followed quickly by Alabama and Louisiana—led the way in giving juries the discretion to sentence offenders either to death or imprisonment instead of having capital convictions result automatically in death. Even such apparently progressive reforms, however, helped further a racially motivated agenda. “The purpose of these early discretion statutes was almost certainly to allow jurors, who were all white, to take race into account in setting the penalty” (p. 215).

The abolition movement ground to a temporary halt in the north with the country’s preoccupation with the Civil War. At that time, for practical purposes, murder remained the only crime punished by death outside the south. A flurry of statutes made kidnapping punishable by death in most of the country beginning in the early 1930s, on the heels of the kidnapping of the baby of the famous aviator Charles Lindbergh (Bowers, 1984). However, executions were rare for crimes other than murder and rape (Sellin, 1967). Rape was punishable by death almost exclusively in the south (Bye, 1926; *Coker v. Georgia*, 1977). Executions for that offense followed a predictable pattern. “Of the 771 people of identified race known to have been executed for rape between 1870 and 1950, 701 were black . . . Throughout the south, for all crimes, black defendants were executed in numbers far out of proportion to their population. The death penalty was a means of racial control” (Banner, 2002, p. 230).

Declining crime rates, a corresponding softening of public attitudes about punishment, civil rights campaigns involving race and other issues, and a host of related factors combined to weaken support for the death penalty in post-World War II America. A 1966 Gallup poll reported for the first (and only) time that opponents of the death penalty outnumbered supporters, 47% to 42% (Banner, 2002). For the first time since before World War I, pressure mounted in several state legislatures to repeal capital punishment statutes. By the end of the 1960s, 14 states—a record high number—had either entirely repudiated the death penalty or retained it only for narrowly defined crimes such as murder committed by a life term prisoner or the murder of a police officer. All of the abolition and near-abolition states—Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, New Mexico, New York, North Dakota, Oregon, Rhode Island, Vermont, West Virginia, Wisconsin—were located outside the south (Banner, 2002; Bowers, 1984).

Legal challenges against the death penalty were spearheaded by the NAACP Legal Defense Fund in state and federal courts, beginning in the mid-1960s (Meltsner, 1973). They

bore fruit in *Furman v. Georgia* (1972), when five justices concurred that the death sentences in the two rape cases and one murder case before the Supreme Court—and by implication all other death sentences in the land—had been imposed in violation of the Eighth Amendment’s cruel and unusual punishments clause. In the rush to reenact procedurally sound death-penalty statutes in *Furman’s* aftermath (Zimring & Hawkins, 1986), state legislatures focused almost exclusively on murder as a capital crime. With only a handful of exceptions, they declined to make rape and other non-lethal crimes punishable by death. The Supreme Court relied heavily on such legislative trends to rule in 1977 that death is a constitutionally disproportionate punishment for the crime of raping an adult (*Coker v. Georgia*, 1977). Today, with a few arcane exceptions, including child rape in a small number of states and the federal crimes of espionage, treason, and mailing injurious articles with the intent to kill, capital punishment can be imposed in this country only in response to aggravated murder (Acker & Lanier, 1993; Snell & Maruschak, 2002).

The history of capital punishment in America thus reveals a progressive narrowing of the range of crimes punishable by death. Several factors combined to produce the atrophying list of capital crimes. They most prominently included the emergence of prison as a viable alternative punishment and a growing consensus, exemplified by jurors who stubbornly refused to return guilty verdicts in legions of trials when offenders were at risk of death, that capital punishment was neither a just nor a necessary sanction. This history also illuminates the close connection, particularly in the south, between the death penalty and racial oppression. Both explicitly, by legislation, and in practice, predominantly white legal decision makers used capital punishment for the social control of blacks. The southern states relied on the death penalty to maintain discipline among their captive slave laborers and, after the abolition of slavery, to reinforce lingering related social attitudes. As Banner (2002) notes, “In the south rape was in practice a capital crime only when the defendant was black and the victim white. This was the offense that provoked the most community outrage” (p. 205).

We can legitimately question, even within the relatively narrow domain of aggravated murder, whether the death penalty has been purged of its legacy of racial discrimination. There is evidence that in many jurisdictions it has not; that the death penalty is principally reserved for killings involving white victims, especially when committed by non-white offenders (Baldus & Woodworth, 1998; Paternoster & Brame, 2003; Pierce & Radelet, 2002; Sorensen, Wallace, & Pilgrim, 2001). By a vote of 5–4, the Supreme Court declined to attribute constitutional significance to compelling evidence of racial disparities in the administration of Georgia’s post-*Furman* death penalty law (*McCleskey v. Kemp*, 1987). The justices thus essentially washed their hands of this troubling feature of capital punishment (Kennedy, 1998). Perhaps the most optimistic outlook at the beginning of the 21st century is that, if race continues to help drive the death penalty, this odious form of discrimination at least is confined more narrowly, to cases of aggravated murder. We might also be heartened, though not satisfied, to observe that in contrast to earlier policies and practices, race operates as an extralegal factor instead of by operation of law.

### **Ends and Means: Justifications for Capital Punishment and Details of Administration**

Organized societies dating back hundreds of years BC have made use of capital punishment (Acker, 2002; Gorecki, 1983). Reliance on the death penalty has been justified in various ways, although support can generally be classified according to the sanction’s presumed *instrumental* or *expressive* value. In the former category are objectives related to promoting societal safety and order, including preventing offenders from committing future crimes

(incapacitation) and using the threat of capital punishment to discourage other prospective offenders from committing murder or other serious offenses (general deterrence). The expressive function of capital punishment, in contrast, does not rest on utilitarian foundations. Retribution, a backward-looking justification for punishment, is simply premised on giving an offender his or her just deserts. Imposing a severe punishment allows society to express moral outrage at the offender's breach and simultaneously helps reinforce a shared sense of commitment to the violated norm. Capital punishment is sometimes asserted to be uniquely capable of denouncing criminal conduct (Berns, 1979).

The American experience reflects both instrumental and expressive justifications for capital punishment. The relative importance placed on these objectives, which tend to be complementary rather than mutually exclusive, helps to account for ebbs and flows in support for the death penalty over time. Competing with the presumed benefits of capital punishment, however, have been concerns about negative incidents and byproducts of its use, including whether it is imposed fairly, the risk of executing the innocent, and other related administrative issues.

Because prisons were unknown in colonial America, how to punish lawbreakers was in many respects an intensely practical problem. Although fines, banishment, and corporal punishment, including flogging and ear-cropping, were frequently utilized, "communities faced an obvious problem: what if the whippings did not discourage the culprit or if he repeatedly ignored the order of expulsion? . . . The gallows was the only method by which [the colonists] could finally coerce obedience and protect the community" (Rothman, 1971, p. 51). There was no ready alternative to capital punishment to incapacitate repeat and dangerous offenders.

The colonists also subscribed to the general deterrence value of the death penalty. A Virginia newspaper recounted in 1751 that "an executed criminal was 'an Example and Warning, to prevent others from those Courses that lead to so fatal and ignominious a Conclusion:—and thus those Men whose *Lives* are no longer of any Use in the World, are made of some Service to it by their *Deaths*'" (quoted in Banner, 2002, p. 10). "Fear, terror, warning—whatever one called it, the main purpose of the death penalty was conceived to be its deterrent effect, its power to prevent prospective criminals from committing crimes" (Banner, 2002, p. 10).

A corollary to general deterrence is social defense theory, which presumes that society protects other fundamental interests, in addition to controlling crime, through criminal punishment (Newman, 1978). The death penalty in colonial America and thereafter in the southern states was explicitly used as an instrument of social control against slaves. Laws unabashedly ordained punishment by death for blacks, particularly when their victims were white, for crimes that were dealt with much less severely when committed by whites. With the end of slavery, "Southern whites turned toward alternative forms of racial subjugation, and one of those was the death penalty. That capital punishment was necessary to restrain a primitive, animalistic black population became an article of faith among white southerners that persisted well into the 20th century" (Banner, 2002, p. 228). Evidence of racial disparities in the administration of modern death penalty laws helps to substantiate the argument that capital punishment serves as a tool for "majority group protection" and "minority group oppression" even though overt race discrimination has been eliminated from the statute books (Bowers, 1984, pp. 204–205).

The death penalty additionally promoted non-utilitarian objectives in early America. "The execution of a criminal was . . . not merely a forward-looking exercise in deterrence, a way of preventing crimes in the future; it was also a backward-looking effort at purging the community of guilt for crimes committed in the past" (Banner, 2002, p. 15). An abiding belief that individuals possessed free will and thus made conscious choices to engage in

wrongdoing made the colonists quick to ascribe blame to offenders, an essential underpinning of retribution. This same belief in free will gave rise to another function of the death penalty: “. . . to facilitate the criminal’s repentance. It was of paramount importance that one should die in the proper frame of mind because on that mental state depended, in large part, one’s eternal fate after death . . . In this respect a death sentence was of inestimable value. We may remember Samuel Johnson’s comment—‘when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully’” (pp. 16–17).

Of the traditional justifications for the death penalty that gained prominence in colonial America and early statehood, perhaps only the interest in criminals’ repentance has abated. There is no denying that religious doctrine has permeated capital punishment for centuries, nor that Biblical admonitions and the tenets of many religions continue to figure importantly on both sides of the question (House, 1997; Megivern, 1997; Yoder, 1997). Nevertheless, few voices are heard nowadays in support of using the death penalty to help secure an offender’s salvation.

With the advent of prisons and more recently the common alternative sanction of life imprisonment without parole, capital punishment is increasingly hard to justify on incapacitation grounds. Maximum security prisons do a very good job of protecting the general public from dangerous criminals. Although it is impossible to guarantee that corrections officers and other prisoners will never be victimized by repeat murderers, such killings are not commonplace (Marquart & Sorensen, 1989). Nor can recidivism be accurately predicted (Sorensen & Marquart, 1998). Executing convicted murderers in the name of incapacitation is a drastically overinclusive remedy akin to burning down the barn to rid it of field mice. The rise of correctional institutions and advances in their management have decisively undermined the argument that the death penalty is necessary to safeguard society from dangerous criminals (Amsterdam, 1982).

Capital punishment has long garnered support based on its assumed superiority to other punishments in deterring crime. The logical underpinnings of this argument are self-evident. Who would not reconsider committing a crime if it meant forfeiting his or her own life to the executioner? But logical objections to the death penalty’s presumed deterrence benefits are also persuasive. Crimes, including many murders, are frequently rash and impulsive acts. What brand of criminal actually takes stock before killing another and carefully weighs the risk of apprehension and punishment before deciding whether to go forward? And if such a calculation is made, what brand of criminal would not be discouraged by the prospect of being caught and spending the rest of his or her life in prison? It is crucial that the proponents’ argument only succeeds if there are marginal or incremental deterrence benefits uniquely associated with the threat of the death penalty, over and above alternative punishments such as life imprisonment (Zeisel, 1977).

The debate about whether the threat of the death penalty helps discourage crime “has persisted up to the present, but what is striking about its contours in the early nineteenth century is the virtual absence of any attempt by either side to back up its claims with numbers” (Banner, 2002, p. 114). This lack of empirical assessment of the death penalty’s impact on crime levels is understandable in light of the dearth of reliable data and the rudimentary statistical techniques then available to take account of the myriad other factors that might help explain crime trends. Some early attempts were made to compare execution rates and crime rates, including Massachusetts legislator Robert Rantoul’s use of 1840s data from Belgium to buttress the counterintuitive claim that cutting back on executions actually leads to a reduction in murders. Rantoul’s provocative analysis foreshadowed 20th century researchers’ more systematic evaluation of the so-called “brutalization” effect of the death penalty. This theory postulates that executions may coarsen attitudes, implicitly sanction lethal violence, and thus unwittingly inspire the commission of more instead of fewer

murders (Bailey, 1998; Bowers, 1988; Bowers & Pierce, 1980; Cochran & Chamlin, 2000; Cochran, Chamlin & Seth, 1994).

Numerous 20th century studies have investigated whether the death penalty has a demonstrable impact on murder rates. Although a few researchers have reported finding that executions inhibit the commission of murder (Ehrlich, 1975, 1977; Phillips, 1980; Stack, 1987, 1998), those findings are in the distinct minority and suffer from methodological weaknesses (Baldus & Cole, 1975; Bowers & Pierce, 1975; Klein, Forst, & Filatov, 1978; Radelet & Akers, 1996). The vast preponderance of research has failed to uncover any relationship between execution rates and murder trends, suggesting that the claimed deterrent effect of capital punishment is illusory (Bailey & Peterson, 1994; Bohm, 1999; Peterson & Bailey, 1998). The Supreme Court has nevertheless credited deterrence as rationally justifying capital punishment (*Gregg v. Georgia*, 1976), and the theory continues to have supporters in legislative arenas (Galliher & Galliher, 2002) and elsewhere.

Perhaps owing in part to the dubious empirical support for the deterrent value of the death penalty, contemporary advocates of capital punishment have given increasing emphasis to retribution. Most Americans who favor the death penalty report that they would continue to do so even if they were persuaded that life imprisonment is an equally effective deterrent to murder (Ellsworth & Gross, 1994; Ellsworth & Ross, 1983). Shifting assumptions about the extent to which crime is a product of free will, or instead is largely determined by biological or environmental influences beyond the individual's control, have resulted in Americans placing more or less weight on retribution as a justification for the death penalty (Banner, 2002). Rising crime rates also tend to fuel retributive sentiments, which in turn translate into enhanced support for capital punishment (Ellsworth & Gross, 1994). The Supreme Court has expressly recognized that retribution is a legitimate aim of the capital sanction (*Gregg v. Georgia*, 1976), and this notion appears to have regained "intellectual respectability" (Banner, 2002, p. 282) during the death penalty's modern reign.

With the increasing erosion of incapacitation and general deterrence, and the emergent dominance of retribution in justification of the death penalty, an important countertrend has begun to undermine support for capital punishment in some quarters. Questions are increasingly surfacing at the turn of the 21st century about whether the death penalty is being administered unfairly and in some cases erroneously. Perhaps these concerns are the ironic flipside to the renewed popularity of retribution. Although death penalty proponents sometimes strive to distinguish between notions of justice and fairness (van den Haag, 1978), the nuances of these differences elude others, who may believe that a sanction imposed unfairly is not in fact a just punishment. Such concerns are not new: well-established historical links exist between process, substantive justice, and capital punishment.

One example is the centuries-old quest to find the proper balance between consistent application of the death penalty and the need to take into account individual differences before deciding that death is an appropriate punishment. During colonial times and well into the 19th and even 20th century in some states, a capital sentence followed automatically on conviction for a crime. In form, mandatory capital punishment statutes maximized consistency: all convicted offenders met the same fate. Yet, these laws were mandatory in name only. Jurors, knowing what punishment was in store and resolute to avoid dispatching offenders to the executioner when in their eyes justice would not be served, stubbornly refused to convict even the most obviously guilty criminals of capital crimes. Jury nullification of the harsh, mandatory capital punishment laws was a major reason for their eventual dismantling (Banner, 2002; *Woodson v. North Carolina*, 1976).

Even following conviction, offenders were spared the consequences of mandatory death penalty laws with great frequency by resort to other legal devices. Early on, the doctrine of "benefit of clergy," which denied secular courts jurisdiction over church functionaries, was

given strained application to allow judges to withhold death sentences in cases involving laypersons (Acker & Lanier, 1993; Banner, 2002). Executive clemency was dispensed regularly, further ameliorating the unjust application of death sentences flowing automatically from convictions. Upwards of half of the death sentences imposed in some of the colonies were forgiven by governors' use of clemency powers (Banner, 2002). Sentencing discretion thus was not eliminated by mandatory death penalty laws; it continued to surface and regularly did so in defiance of formal rules.

Criminal justice systems eventually responded by dispensing with mandatory capital punishment and forthrightly giving juries discretion to choose between sentencing capital offenders to death or imprisonment. Individualized sentencing considerations thus gained above-board acceptance, taking precedence over the objective promoted by mandatory death penalty statutes of achieving consistent results. Yet, accompanying the newfound sentencing discretion was the inevitable risk that it would be abused. The trend towards legal recognition of sentencing discretion in capital cases began in the 1830s and 1840s in southern states. Ironically, this apparently progressive reform was probably stimulated in part by sinister objectives. "The purpose of these early discretion statutes was almost certainly to allow jurors, who were all white, to take race into account in setting the penalty" (Banner, 2002, p. 215).

Focusing on the potential for arbitrary and invidious application of capital punishment under laws that gave jurors unregulated discretion in choosing between death and prison sentences, the Supreme Court invalidated death penalty legislation across the country in *Furman v. Georgia* (1972). The approved replacement statutes promised to channel capital sentencing discretion by narrowing the range of crimes eligible for the death penalty and providing legislative criteria, typically in the form of aggravating circumstances, to help guide the ultimate sentencing decision. Relevant sentencing information could be offered under the new laws at a separate penalty hearing, following adjudication of guilt (*Gregg v. Georgia*, 1976).

But there was a catch. Even under the new, "guided discretion" death penalty legislation, convicted offenders had to be given the chance to introduce any and all mitigation evidence relevant to avoid a capital sentence. Several members of the Supreme Court, the same institution responsible for fixing the new death penalty rules, were troubled by this requirement. Justice White immediately complained:

By requiring as a matter of constitutional law that sentencing authorities be permitted to consider and in their discretion to act upon any and all mitigating circumstances, the Court permits them to refuse to impose the death penalty no matter what the circumstances of the crime. This invites a return to the pre-Furman days when the death penalty was generally reserved for those very few for whom society has least consideration (*Lockett v. Ohio*, 1978, p. 623, dissenting opinion).

Justice Rehnquist agreed:

The new constitutional doctrine will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it. By encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a "mitigating circumstance," it will not guide sentencing discretion but will totally unleash it (*Lockett v. Ohio*, 1978, p. 632, dissenting opinion).

Those views were moderate compared to Justice Scalia's, who was similarly distressed about the Court's apparently contradictory capital sentencing mandates.

To acknowledge that "there perhaps is an inherent tension" between [the objectives of achieving rational, consistent capital sentencing and requiring unconstrained consideration of individualized mitigating circumstances] is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines [of cases] as pursuing "twin objectives" is rather like referring to the twin objectives of good and evil. They cannot be reconciled (*Walton v. Arizona*, 1990, p. 664, concurring opinion).

Justice Scalia's discomfiture led him to repudiate the requirement that the sentencing authority in capital cases must be allowed to consider and give effect to mitigation evidence without constraint. Justice Blackmun, on the other hand, agreed that the court's death penalty jurisprudence was fundamentally flawed for reasons including those identified by his colleagues but came to a very different conclusion. He believed that the impossibility of achieving nonarbitrary capital sentencing results while simultaneously instructing judges and juries to take individual case circumstances into consideration helped doom the modern death penalty enterprise. Blackmun concluded:

I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants “deserve” to die?—cannot be answered in the affirmative . . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution (*Callins v. Collins*, 1994, 1145–1146, dissenting from denial of certiorari).

Although one of the failures of modern guided discretion laws has been their inability to eradicate racial disparities in the administration of the death penalty, other types of unfairness also persist. Cases are legion in which indigent defendants' sojourn on death row and eventual execution have unwittingly been facilitated by inadequately funded, ill-prepared, and shamefully deficient court-appointed counsel (Acker & Lanier, 1999; Bright, 1994; Mello & Perkins, 1998). Geographic disparities in death sentences have also been an issue. A prosecutor with unusually aggressive or cautious charging policies can have a much more dramatic influence on case outcomes than the offender and offense circumstances that are supposed to drive capital punishment law (Nakell & Hardy, 1987; Paternoster & Brame, 2003). Still, the problem plaguing the death penalty's administration that has troubled most observers involves the risk that innocent people will be convicted and executed.

This issue is hardly new to capital punishment. Assertions that innocent parties had been or inevitably would be executed figured prominently in pre-Civil War abolition efforts. “The risk of executing the innocent ha[s] haunted capital punishment for centuries” (Banner, 2002, p. 303). What perhaps is new is the development of technologies, such as DNA identification, which have proven conclusively that erroneous convictions do occur in capital cases and that executing innocent parties is indisputably possible (Kogan, 2002; Scheck, Neufeld, & Dwyer, 2000). The revelation that 13 defendants had been wrongfully convicted and sentenced to death in Illinois in little over a decade led former Governor Ryan to order a highly-publicized moratorium on executions in that state, effective January 2000 (Governor's Commission on Capital Punishment, 2002). Just before leaving office in January 2003, Ryan commuted the death sentences of all 167 prisoners then on Illinois' death row, representing the largest blanket commutation in the nation's history (Wilgoren, 2003). These events, coupled with the release of over 100 death-sentenced individuals nationwide over the past quarter century based on either their demonstrated innocence or substantial doubt about their guilt (Death Penalty Information Center, 2003b), have unquestionably focused public attention on the innocence question.

The Illinois moratorium on executions was but one manifestation of the growing public unease with capital punishment. Governor Parris Glendening of Maryland ordered a halt to executions in that state in May 2002 pending completion of a University of Maryland study, which subsequently revealed significant disparities in capital prosecutions and sentences, depending upon the race of the victim and location of the crime (Paternoster & Brame, 2003). The Nebraska Legislature voted in favor of an execution moratorium in 1999, though Governor Johanns declined to sign the measure into law. The New

Hampshire Legislature went farther still and voted to repeal that state's death penalty law in 2000 only to see the measure vetoed by the governor. Official commissions were appointed in a host of other states to investigate the functioning of their death penalty systems (Lanier & Acker, in press). Numerous localities pressed for statewide moratoria on executions and calls increased for executions to halt in states across the nation (Kirchmeier, 2002).

Meanwhile, the Supreme Court surprised many observers during 2002 by overruling important death penalty precedent. The justices declared the death penalty unconstitutional for mentally retarded offenders (*Atkins v. Virginia*, 2002, overruling *Penry v. Lynaugh*, 1989) and also required that juries—not judges—must decide whether the aggravating factors on which death sentences are based have been proven beyond a reasonable doubt (*Ring v. Arizona*, 2002, overruling *Walton v. Arizona*, 1990). In the wake of those decisions, federal district courts in New York (*United States v. Quinones*, 2002) and Vermont (*United States v. Fell*, 2002) seized on different issues to declare federal death penalty law unconstitutional, although the former ruling was overturned on appeal and an appeal in the latter case is pending.

The pace of executions slowed across the country and executions for the most part clustered regionally and in a few conspicuous states. After climbing steadily for a decade, beginning with 23 in 1990 and peaking at 98 in 1999, the annual number of executions took a downturn. In 2000, 85 prisoners were executed, then 66 in 2001, and 71 in 2002 (Death Penalty Information Center, 2003a; Snell & Maruschak, 2002). Executions overwhelmingly remained a southern phenomenon. Just 14% occurred outside the south in 2002, with nearly half of the nation's total that year (46.5%) taking place in Texas (Death Penalty Information Center, 2002). New admissions to death rows also began to plummet. Beginning in 1982, the number of new death sentences imposed throughout the country each year consistently topped 250 and frequently exceeded 300. However, in 2000, just 229 offenders were sentenced to death, followed by a second and more precipitous decline in 2001, to 155 (Snell & Maruschak, 2002).

Attention also began to focus on the financial costs of capital punishment. Studies conducted in several jurisdictions suggested that maintaining a death penalty system is considerably more expensive than incarcerating convicted murderers for life (Bohm, 1998a; Cook & Slawson, 1993). When litigated properly, death penalty trials tend to be lengthy and complex, involving numerous motions, expert witnesses, prolonged jury selection and, in cases that result in capital convictions, a sentencing hearing in addition to a guilt trial (Garey, 1985; Spangenberg & Walsh, 1989). Additional costs are incurred by the intensive supervision of prisoners while on death row for the decade or more that is typically required to complete state and federal judicial review of convictions and sentences (Bohm, 1998a). Significantly, in a great many cases, the additional expense associated with capital case litigation will be for naught. If roughly half of capital trials result in a sentence of death (Baldus, Woodworth, & Pulaski, 1990), then clearly the extra investment for the half ending in prison sentences immediately proves to be futile. Even where death sentences are handed out following a trial, roughly two out of three are vacated through later court action. In most of these cases (about 82%) the offender is not resentenced to death (Liebman, Fagan, & West, 2000). The frequent reversals mean that many more costs have fruitlessly been incurred without any payoff in the form of executions.

As the various administrative drawbacks to the death penalty penetrate public consciousness, it is little wonder that many Americans' support for the death penalty is at best lukewarm. When asked not simply whether they support capital punishment for murder, but rather whether they would prefer to see the death penalty or life imprisonment without possibility of parole, poll respondents are not nearly so keen on the death penalty. Although

abstract support for the death penalty has hovered around 70% over the past decade, capital punishment and life imprisonment without parole are in a virtual dead heat when respondents are asked to express a preference between the two sentencing options. And when asked to select either the death penalty or a sentence of life imprisonment without parole plus restitution paid from the offender's labors to the murder victim's family, respondents decisively choose the latter option (Bohm, 1998b; Bowers, Vandiver, & Dugan, 1994; Ellsworth & Gross, 1994; Sandys & McGarrell, 1995). At the beginning of the 21st century, doubts about the death penalty's fairness, a heightened concern about the risk of executing innocent people, and the availability of a severe alternative punishment (life imprisonment without parole) that is capable of protecting the community from dangerous offenders, and at lower financial cost, are combining to cause many more Americans to have second thoughts about capital punishment.

### **Execution Rituals: Where, How, and When**

In days gone by, executions were conducted in public and attracted large crowds of onlookers. They were highly ceremonial, involving an elaborate procession to the gallows, ministers' sermons, the last and typically contrite words of the condemned, and culminated with the offender being "launched to eternity" according to a court's final judgment. Executions usually were carried out by hanging in early America and they were conducted in the community where the crime had been committed. They served important social functions, centering around the offender's repentance and the state's emphatic expression of authority in punishing crime. As Banner (2002, pp. 31–32) points out:

An execution was a dramatic portrayal of community at the moment when the fear of danger to the community was at its highest. Crime, then as now, prompted a terror of disorder. At a hanging, where the criminal's repentance and God's forgiveness took center stage, the instigator of that terror could be symbolically reintegrated into society . . . [In addition, w]atching a hanging allowed spectators to signify, in the strongest possible way, their disapproval of crime and the criminal. The ritual of hanging day put the words of the criminal law into practice, in the clearest and most dramatic way possible. By attending, a spectator could witness and participate in a depiction, literally in the flesh, of the community's most important norms, those proscribing grave crimes.

Executions followed soon after the wrongdoing. The connection between crime and punishment was not lost on either the offender or the public. Enough time passed to allow the offender the chance to reflect on his or her transgressions, be counseled by ministers, and hopefully to repent and seek salvation. Appeals, even in capital cases, were unavailable or infrequent and rapidly decided, so no time-consuming judicial review delayed death sentences. Because a gallows could be constructed, a rope made available, and no uncommon expertise was needed to conduct a hanging, there was no need to distance executions from the sites of crimes. Local officials conducted hangings in the watchful presence of the wronged community.

The passage of time brought significant changes to American executions. All northern states put an end to public hangings between 1830 and 1860. The south lagged somewhat behind, and the last public execution was carried out as recently as 1936 when between 10,000 and 20,000 spectators gathered in Owensboro, Kentucky to watch Rainey Bethea, a black man, hang for raping and murdering a white woman (Banner, 2002; Bessler, 1997). Executions first moved out of public squares to jail yards, and later were removed from local communities altogether and enshrouded deep within prison walls where they were observed by only a few carefully selected witnesses and media representatives.

The movement away from public executions was partially explained by changing sentiments about the decency of such displays, which in turn were fueled by the often-

raucous behavior of the large crowds that gathered to watch. It was additionally spurred on by the changing technology of executions. In their quest to spare offenders any unnecessary suffering, and observers the discomfort of watching, jurisdictions enlisted new execution methods. New York led the way by developing the electric chair, which it first employed in 1890 (Denno, 1994). Nevada introduced the gas chamber in 1921. Virtually all states had abandoned hanging in favor of electrocutions and lethal gas by the mid-20th century (Banner, 2002). Today, lethal injection is used throughout the nation, with the exception of Nebraska which continues to rely on electrocution to carry out executions (Death Penalty Information Center, 2003a). Unlike hangings, which could be conducted virtually anywhere and required no sophisticated equipment or unusually skilled supervision, these later execution methods demanded both novel technologies and peculiar expertise. Accordingly, there was further impetus to centralize and bureaucratize executions instead of carrying them out publicly in the local communities in which crimes had been committed.

Banner (2002) argues that the new execution protocols worked fundamental changes involving “the intuitive sense of justice that required the community to punish crime:”

The drama of hanging had ensured that all would perceive the execution as a collective act of the community, but the very different ceremony surrounding the electric chair and the gas chamber focused attention on a very different actor. It was the state, not the people, that was doing the killing . . . Maybe hangings would have eventually been conducted indoors, deep within remote state prisons, by specialists, before tiny hand-picked audiences. But there can be no doubt that this process was accelerated by the technical demands of the electric chair and gas chamber. A distaste for inflicting pain had been assuaged by technology, and technology had transformed the meaning of an execution (pp. 206–207).

## **HISTORY AS PROLOGUE: THE FUTURE OF CAPITAL PUNISHMENT IN AMERICA**

Since colonial times, Americans have logged nearly four centuries of experience with capital punishment. Although the death penalty has endured over the country’s lengthy development, it has done so amidst a constantly eroding landscape. At the turn of the 21st century, changes both internal and extrinsic to the punishment enterprise have left the death penalty on a teetering foundation, tilting precariously towards demise. History and its constantly unfolding lessons suggest that capital punishment is, and is increasingly perceived to be, an unnecessary, fundamentally flawed, and unjustifiable response to crime.

The death penalty is difficult to defend on utilitarian grounds. Although communities originally lacked the means to incapacitate criminals and thus had no readily identifiable alternatives to the death penalty to protect themselves from dangerous and repeat offenders, the advent of prisons in the late 18th and early 19th centuries solved that problem. Offenders could be segregated and, if not rehabilitated, at least isolated so as not to present a danger to the larger community. Life imprisonment without the possibility of parole is now commonly available and is adequate in all but the most exceptional cases—involving speculative escapes, future changes in the law, the exercise of executive clemency, and unpredictable prison violence—to safeguard the community.

General deterrence, or using the death penalty against convicted offenders in an attempt to discourage other, unknown individuals from committing future crimes, has been a common but controversial justification for the death penalty over the years. Debate endures about the morality of such a glibly utilitarian basis for taking human life, particularly in light of questions regarding the logical and empirical underpinnings of the general deterrence argument. Research has produced scant evidence in support of the notion that the death penalty is a uniquely effective warning to potential law violators not to commit crimes. Murder rates appear to be essentially indifferent to capital punishment practices, a finding

that surprises few willing to wend through the assumptions necessary to make the logical case for general deterrence. Many countries around the world, and the 12 states and the District of Columbia within this country that have abandoned capital punishment, have found it unnecessary to rely on the threat of the death penalty to deter would-be murderers.

But the death penalty is difficult to defend not just because it is unnecessary. Its use is accompanied by drawbacks that urgently threaten to overwhelm its illusory benefits. Historically, capital punishment overtly served as a tool of racial oppression. It was used to subjugate and terrorize slaves and thus maintain rigid boundary lines between white and black society. The vestiges of that legacy remain. Racial disparities persist in the administration of the death penalty, even if not by formal operation of law. Killings involving white victims, and to a lesser extent those committed by non-white offenders, command disproportionate attention in the modern era of capital punishment. The courts have responded with yawning indifference to evidence of these enduring racial disparities.

Defendants not wealthy enough to hire the best legal talent—the kind that anyone accused of a crime would want if his or her own neck were on the chopping block—are too often abandoned to the services of lawyers who lack the resources, experience, or ability to mount a decent defense. Whereas financially well-off murder defendants will hire a dream team of lawyers and experts, indigents may be saddled with a fatal nightmare; lawyers who drink on the job, sleep through trials, and are grossly inept. Many observers see more than a grain of truth in the old saying: If you don't have the capital, you get the punishment.

Capital punishment systems, like other government-operated, human institutions, are prone to error. Yet the stakes are much higher than in most other government enterprises, including other trials. Mistakes are inevitable. The risk that they will happen, even when the cost involves human life, does not inevitably mean that an activity must be abandoned. Motor vehicle traffic continues despite thousands of accidental fatalities a year; construction projects will predictably result in the loss of workers' lives; football and boxing involve occasional tragic deaths; yet few seriously argue for their elimination. Activities of this nature are considered to entail sufficient social benefits to outweigh their unavoidable costs. The same argument is not so easily advanced in support of capital punishment. Criminal trials cannot and should not be stopped because of the inevitable risk of erroneous convictions and miscarriages of justice. But a halt can and should be brought to errors that are predictable, irreversible, uniquely severe, and avoidable—the kind that occur when innocent people are convicted, sentenced to death and executed—unless the benefits of sustaining death penalty systems decisively override the daunting prospect that innocent people will be delivered to the executioner. Errors can be corrected when murder is punished by life imprisonment. Executing an innocent person is forever.

The death penalty is also expensive. Estimates of the incremental costs of executing offenders, as opposed to imprisoning them for life, range from hundreds of thousands to millions of dollars per death sentence. This is a hefty price tag, especially when translated into lost opportunity costs for alternative expenditures, such as investing more in law enforcement programs and social initiatives that could be effective in preventing crime, or providing compensation and services to the unfortunate victims of crime. Even in coldly rational, economic terms, capital punishment is a dubious social investment.

Perhaps objections regarding the death penalty's doubtful utility, and concerns about its administrative shortcomings, could be overlooked if its expressive value, that is, its contributions to justice, loomed large. Murder is a horrible act. It deservedly inspires outrage and anger. Impassioned outcries for retribution are understandable. But the measured justice exacted by a reflective society need not mirror the reflexive retaliation that might meet with

approval among private parties, outside an organized system of law. Murder deserves the law's severest punishment. But there is no scale intrinsically fixing that punishment at death. Through its legal system and otherwise, society can choose differently.

Most nations throughout the world, and in particular those endorsing the democratic values shared by the US, have chosen to abolish capital punishment, in law or in practice. Abolitionist countries include the US's neighbors Canada and Mexico and most of Central and South America. The death penalty similarly is unknown throughout virtually all of Europe, Australia, New Zealand, and South Africa. The US, or rather the federal government and those 38 states that retain the death penalty, share the company of the People's Republic of China, the Democratic Republic of Congo, and Iran as the world's leading executioners (Death Penalty Information Center, 2003c). In short, the US is increasingly out of step with its closest international allies on the issue of capital punishment.

In Banner's (2002) assessment, capital punishment in contemporary America is "an emotionally charged political issue administered within a legal framework so unworkable that it satisfied no one . . . Mercy had been banished from the system, replaced by an arcane set of rules that haphazardly selected who would live and who would die. Americans were stuck with a compromise between adopting and abolishing the death penalty that embodied the worst of both options" (p. 310). He perceives no ready escape from this dilemma. One possible resolution would be for the Supreme Court "to dismantle the constitutional structure it has built around the death penalty since 1972 and allow the states to return to older, simpler procedures for sentencing criminals to death" (p. 310), an outcome Banner considers to be unlikely. Another solution would be

for state legislatures to abolish capital punishment. The death penalty is so popular that abolition will be impossible without a significant shift in public opinion. Such shifts have occurred several times in the past 250 years, however, and may well occur again. In the past they have been caused by changing attitudes about the extent to which crime is a consequence of the criminal's free will, changes that at the time seemed to flow from better understandings of human behavior. We can expect similar developments in the future . . . [T]he balance of Americans' beliefs about free will is not likely to remain static forever. When it changes, so too will opinion on capital punishment (pp. 310–311).

It is questionable whether Americans' beliefs about free will can be expected to dominate future attitudes about capital punishment or whether other factors will be more important. Assumptions about free will are relevant to any system of punishment that presumes that people make choices about their behavior and thus can be fairly blamed for engaging in unlawful conduct. These notions are so deep-rooted in the American legal tradition that a sea change in thinking would be required before support for the death penalty is likely to be undermined by shifting attitudes. History suggests that we might focus elsewhere in anticipation of future changes in American death penalty opinions and practices.

In perspective, history has not been kind to capital punishment in this country. Once imposed automatically on conviction, in response to a dozen or more crimes, and carried out amidst great ceremony and public display, the death penalty today is but a shadow of its prior self. Nowadays only aggravated forms of murder are punished by death. Death sentences are imposed only after the sentencing authority, usually a jury, carefully weighs relevant aggravation and mitigation evidence according to elaborate statutory frameworks. Courts review convictions and sentences for procedural error, sometimes painstakingly, with reversals more the rule than the exception. The death sentences that are eventually carried out—at no time exceeding 100 annually over the quarter century since executions resumed in 1977, in a nation where 15,000 to 20,000 intentional criminal homicides have been committed each year—are deliberately hidden from view and cloaked in euphemisms that shield a distant public from the grim realities of state-sponsored killings.

This decline in the death penalty's availability and use over time is almost certainly owing to Americans' growing realization that it is no longer necessary for social protection, and to mounting concerns that it is inflicted neither fairly nor justly. This combination of influences seems destined to serve as a wedge, driving public opinion increasingly against capital punishment. Within the arena of public opinion, the ultimate survival or demise of this unique sanction will be dictated by the dominant symbolism evoked by the death penalty.

Fear and anger sustain capital punishment; fear of crime and burning anger at the criminals who commit it. "The death penalty by the end of the 20th century was less a method of punishing criminals than a terrain of cultural argument, within which one could declare one's allegiance either with the criminal or with the law-abiding majority" (Banner, 2002, p. 284). In competition with the facile link between capital punishment and the denunciation of crime—a link which is no less solidly forged when the punishment for murder is life imprisonment—is the growing symbolism of the death penalty as a racially biased, arbitrarily administered, costly and error-prone enterprise that too often places innocent people at risk. "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" (Sarat, 2001, p. 30).

The steady historical trend towards reserving capital punishment for narrower and narrower classes of crime, and for ever-winnowing categories of offenders, has exposed the fragile vulnerability of this sanction. Death, a punishment once thought necessary and appropriate for a vast number of crimes, has now been discarded as unneeded and unacceptable save for a select few people convicted of the most aggravated forms of murder. This progression is destined eventually to arrive at its logical conclusion, which is complete abolition. The erosion of support for capital punishment will be sustained and accelerated by the corrosive elements of death penalty systems that further undermine their utility and legitimacy. The death penalty's positive symbolism will inevitably be supplanted by an unseemly new visage. Americans will certainly come to recognize that capital punishment is as destructive to society and its fundamental ideals and values as it is to the offenders against whom it is directed. They can then be expected to take action on that realization.

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### **Biography**

**James Acker** is a Professor at the School of Criminal Justice at the University at Albany. With Charles Lanier, he is co-director of the Capital Punishment Research Initiative at the University at Albany, an organization consisting of student volunteers and a shoestring budget devoted to research and education about the death penalty. The Capital Punishment Research Initiative has recently begun work on developing a National Death Penalty Archive at the University at Albany Library; is conducting a study of the clemency process in capital cases in concert with Professor William Bowers at Northeastern University; will be working with Professor Bowers in connection with his Capital Jury Project research; and is developing a website designed to link capital punishment researchers and offer descriptions of relevant research projects. Acker earned his law degree at Duke University, his PhD at the University at Albany, and has written extensively about the death penalty. With Robert Bohm and Charles Lanier, he is co-editor of *America’s Experiment With Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Carolina Academic Press, 1998).