

CAPITAL PUNISHMENT

A Reference Handbook

Michael Kronenwetter

CONTEMPORARY WORLD ISSUES



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From the beginning of our Nation, the punishment of death has stirred acute public controversy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death.

Supreme Court Justice William Brennan, in his concurring opinion in the case of Furman v. Georgia, 408 U.S. 238, 257 (1972).

societies that hold human life most sacred. Many nations—most of them either in the Western Hemisphere or in Europe—have totally abolished capital punishment. Others confine its use to the most hardened and brutal criminals. Still others allow for it in their laws but never—or almost never—actually impose it.

In the United States, use of the death penalty has been on the rise in recent decades, following a period during the late 1960s and early 1970s when there were no executions at all. Today 36 states make at least one crime punishable by death, as do the federal government and the United States military. Fourteen states and the District of Columbia have no death penalty.

Plan of the Book

This book begins with an overview of the entire subject of capital punishment, complete with a discussion of the many controversies that swirl around the practice. It goes on to provide a selection of valuable information relating to the death penalty, and suggestions for obtaining still further information on the subject.

Chapter 1 consists of a general introduction. It includes an explanation of the justifications most often put forward for the death penalty, as well as a brief history of the practice, giving special attention to its use in Britain and the United States. Chapter 2 explores the many criticisms—both practical and philosophical—often leveled at the death penalty, including claims that it is ineffective, unconstitutional, and immoral.

Chapter 3 presents a chronology of important developments, while Chapter 4 provides brief biographies of people, past and present, who have helped to form modern attitudes toward capital punishment. Chapter 5 presents a variety of significant facts and figures, many in the form of tables and graphs; as well as excerpts from important documents and key articles on the subject.

Chapter 6 presents a list of organizations that do work relating to the death penalty. Chapters 7 and 8 offer annotated bibliographies and resource lists. The book concludes with a glossary of terms frequently used in discussions of capital punishment.

Taken as a whole, it is hoped that this book will provide a useful resource for anyone interested in this ancient, but increasingly controversial, practice.

An Introduction to Capital Punishment

1

WHY CAPITAL PUNISHMENT? WHY DOES SOCIETY feel the need to take some of its criminals and kill them as punishment for their crimes?

On the face of it, killing criminals seems to be a brutal and uncivilized thing to do. Killing is, after all, a violent act, no matter how it is done, and no matter who carries it out. It is not as though we have nothing else to do with those Americans who break the rules of our society. Hundreds of thousands of them, in fact, are held for varying periods of time in the many jails and state and federal prisons that dot the national landscape. Some will be imprisoned for the rest of their lives. How can we, as a society, justify taking what amounts to only a handful of this multitude of prisoners and killing them?

As individuals, most of us instinctively shrink from the idea of taking the life of another human being. Killing is forbidden by every major religion, and murder is considered a crime in every civilized human society. How can the government of a civilized society claim the right to kill any of its citizens—and to kill them in the name of the very law that condemns murder?

In reality, the prohibition on killing has never been absolute—even many religions make exceptions. Despite the commandment “Thou shalt not kill,” for example, most branches of the Jewish and Christian faiths accept at least the occasional need

for war, as well as the right of an individual to kill in self-defense or to protect someone else from a murderous attack.

If anything, civil governments make even more exceptions than major religions. In time of war, soldiers are not only permitted to kill other human beings, they are required to do so. Many U.S. jurisdictions permit a citizen to kill not only in self-defense but (in some circumstances, at least) in defense of his or her property. Capital punishment, then, is only one of many exceptions that our society makes to the general prohibition against killing. Still, the question remains. Why? Why does society kill? Why should society kill? Proponents of the death penalty make a number of arguments on its behalf, ranging from the practical, to the moral, to the philosophic.

“Uncontrollable Brutes”

Several of the reasons put forward for capital punishment have to do with the protection of society. Certain criminals must die, the defenders of the death penalty argue, so the rest of us can be safe (or, at least, safer).

How do the deaths of some criminals protect the rest of us? In several ways, according to the death penalty's proponents. On one level, the execution of dangerous criminals can be seen as a simple matter of self-defense, because, at the very least, death stops executed criminals from ever repeating their crimes. This is how Judge Alfred J. Talley of New York saw it in a famous debate with lawyer Clarence Darrow. “If I, as an individual, have the right to kill in self defense,” asked Talley, “why has not the State, which is nothing more than an aggregation of individuals, the same right to defend itself against unjust aggression and unjust attack?”¹

Some supporters of the death penalty argue that truly vicious criminals are like rabid animals that must be destroyed. There is no way to cure them of their disease, which makes them attack and kill others. Why not simply get rid of them before they kill or injure someone else? As the scientist Albert Einstein once suggested, “There is no reason why society should not rid itself of individuals proved socially harmful.”²

Philosopher Jacques Barzun compares such criminals to wolves and calls for them to be dispatched by what he terms judicial homicide: “The uncontrollable brute whom I want put out-

of the way is not to be punished for his misdeeds, nor used as an example or a warning; he is to be killed for the protection of others. . . .”³

Even some of the “brutes” themselves agree with this prescription. Westley Allan Dodd, who was executed in 1993, asked for the state of Washington to kill him. Dodd's crimes had been especially horrible. He had raped and murdered three young boys, the youngest of whom was only four years old. He tortured one of the children for two days before killing him, keeping a diary of his atrocities, and taking pictures of the boys to keep with him afterwards. When he was arrested, he was in the process of kidnapping still another young victim from the bathroom of a movie theater. The actual details of the killings were so awful that some of the jurors who were forced to listen to them went for psychiatric counseling after the trial.⁴

Dodd asked to be put to death, insisting that only execution could stop him from continuing his murderous ways. If he were not executed, he told a judge, he would kill a guard in order to escape. Once free, he would seek out more young boys to kill. The state of Washington willingly granted his request, and he was hanged on 5 January 1993.

Dodd is a prime example of the kind of criminal Barzun wants destroyed. If the death penalty were limited only to those like him, however, it would almost never be applied. Obsessive killers like Dodd are rare. They make up a tiny fraction of the thousands of murderers convicted in the United States each year. Most fall into very different categories. A few are professional killers for hire. Many more commit murder in the process of committing a robbery or other crime. Some kill in the throes of a drug- or alcohol-induced fit. Perhaps the largest percentage of all kill in the heat of the moment, in a sudden burst of rage or jealousy. Still others act in desperation, like the battered wives and abused children who strike out in a final attempt to free themselves from a situation they can no longer endure.

Some murderers, like Dodd, may be determined to kill again and again, but most are not. Many are only as likely to kill again as the average citizen is to murder someone in the first place. It is no more necessary to execute them to keep them from repeating their crimes than it is to execute others who once turned violent without actually killing anybody. However, some supporters of capital punishment believe society is protected by executing any

killer, believing that executions discourage other potential murderers from carrying out their crimes.

Deterrence

Robert E. Crowe, the Illinois state's attorney who demanded the death sentence for the infamous Chicago murderers Leopold and Loeb, was a great supporter of capital punishment. "I urge capital punishment for murder," he once explained, "not because I believe that society wishes to take the life of a murderer, but because society does not wish to lose its own. . . . It is the finality of the death penalty which instills fear in the heart of every murderer, and it is this fear of punishment which protects society."⁵

In other words, Crowe wanted Leopold and Loeb to die, not to protect society from them, but to protect society from others who might come after them. This is probably the most common of all the arguments made for the death penalty—the belief that the deaths of some criminals will deter others from committing similar crimes.

Many cold-blooded murderers plan their acts. This is particularly true of professional criminals, but it is often true of others as well, including spouses who kill each other for insurance money and enemies who kill out of hate or revenge. In making their plans, these potential killers must consider many different factors: How good is their plan? How likely are they to succeed in accomplishing what they set out to do? How likely are they to get caught? If they are caught, how likely is it that they will be convicted? If they are convicted, what will their punishment be?

One factor potential murderers should have to take into account, say proponents of the death penalty, is the likelihood—if not the certainty—that they will be killed if they get caught.

There is a great deal of debate over how powerful a deterrent capital punishment actually is. Most of us, however, have an instinctive feeling that the death penalty *must* deter, at least to some extent. Deterrence is, after all, one of the fundamental reasons for punishment of any kind. The harsher the punishment, the stronger the deterrent effect.

Since death is considered the harshest punishment available under the law, it seems logical that it must also be the most effective deterrent to crime. "No other punishment deters men so

effectually from committing crimes as the punishment of death," remarked the English barrister James Stephen more than 125 years ago. "In any secondary punishment, however terrible, there is hope; but death is death; its terror cannot be described more forcibly."⁶

Another aspect of the deterrence argument applies to criminals who have already received the harshest punishment available in law short of death. They are the lifers, who have been condemned to spend the rest of their lives in jail.

Without the threat of execution to hold over these prisoners' heads, argue some prison officials, there is nothing to deter them from committing further terrible crimes while in prison. The dangers of this situation were pointed out by Professor Ernest van den Haag of New York University in an interview in 1976—a time when no death penalty had been carried out in the United States for several years. "The federal prisons now have custody of a man sentenced to life imprisonment who, since he has been in prison, has committed three more murders on three separate occasions—both of prison guards and inmates. There is no further punishment that he can receive. In effect, he has a license to murder."⁷

A Sense of Justice

The reasons for the death penalty discussed so far are essentially utilitarian. They assume the death penalty accomplishes something useful for society; that is, it protects society from criminals who might prey on it in the future if the death penalty is not there to stop them. However, not all the reasons for supporting capital punishment are utilitarian. For many people, support for the death penalty is not so much a practical decision as a gut instinct. It does not depend on logical arguments, but on a deep sense of justice—a sense that death is the only punishment truly fitting for crimes too monstrous to be dealt with in any other way.

As Professor Ernest van den Haag explains: "Our system of punishment is based not just on deterrence but also on what is called 'justice'—namely that we feel a man who has committed a crime must be punished in proportion to the seriousness of the crime. Since the crime that takes a life is irrevocable, so must be the punishment."⁸ It was this sense that caused Judge Alfred J. Talley to refer to the death penalty as the very "symbol of justice."

Lord Justice Denning, Master of the Rolls of the Court of Appeals in England, made the same point before a royal commission considering whether England should retain capital punishment some years ago: "It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else. . . . The truth is that some crimes are so outrageous that society insists on adequate punishment because the wrongdoer deserves it, irrespective of whether it is deterrent or not."¹⁰

The American judge Samuel Hand made a similar point almost 70 years earlier, tying it to the Judeo-Christian tradition of American law:

In truth, there is inherent in all punishment for crime the idea of executing justice, of rewarding the offender according to his misdeeds. It is an idea entirely separate from and independent of any notion of prevention, even of public safety.

"Vengeance is mine, and I will repay," saith the Lord," but vengeance—righteous vengeance—is the right and duty of the state. The state is, in this respect, the representative of the Divine Governor. To it, the sword of justice and retribution is delivered. By it, it must be wielded.

Capital execution upon the deadly poisoner and the midnight assassin is not only necessary for the safety of society, it is the fit and deserved retribution of their crimes. By it alone is divine and human justice fulfilled.

This is the crowning and all-sufficient ground for the destruction of the convicted murderer by the civil power.¹¹

The death penalty has always been considered especially appropriate for the crime of murder. To many people, death seems the logical—and even the inevitable—consequence for that particular crime: the only fit retribution. Death is, after all, the only punishment that has the same remorseless finality as murder itself. As Shakespeare had a haunted man proclaim about the murderer he had committed, "It will have blood, they say; blood will have blood."¹²

Some supporters of the death penalty believe that it is precisely this appropriateness that justifies capital punishment. The "real reason" for the death penalty, says Los Angeles County District Attorney Ira Reiner, is that "the overwhelming majority of [the American public] feels that it is the appropriate penalty for certain limited types of crimes." Those crimes, Reiner specifies, are "the most horrendous of the murder cases."¹³

Historically, the special connection between murder and capital punishment is emphasized by the fact that when states began cutting back on the use of the death penalty in the nineteenth century, most retained it for murder. Today, not only the United States but most other countries in the world that still use the death penalty continue to reserve it primarily for murderers.

Here is how a nineteenth-century judge expressed this peculiar appropriateness to a murderer he was sentencing to die:

By our law, the crime of which you stand convicted is the only one that is punishable with death. Against the murderer, the law has attached the greatest penalty known to criminal jurisprudence. The universal opinion and sanction of all ages has induced our legislature to put this law upon the Statute book; and as life is the most sacred boon to man, it is only allowed to be taken for the highest offense which it is considered in the power of man to inflict upon his fellow-man, of this offense you stand convicted.¹⁴

This feeling is so strong in some judges in non-capital-punishment states that they hunger for the ability to impose death sentences. In 1992 one frustrated Wisconsin judge sentenced a 34-year-old man who had killed three people and wounded another with a machine gun to three life sentences for the killings, plus another 25 for attempted murder. Since people serving life sentences in Wisconsin eventually become technically eligible for parole, the judge set the killer's potential parole date as the year 2100.¹⁵

Keeping Order

In ancient times, individuals were expected to take their own revenge on those who had wronged them. If a man robbed or killed another person, or raped a woman, it was up to the victim or the victim's family to exact their price from the wrongdoer. Sometimes that price was paid in money, sometimes in blood.

This practice had some obvious flaws. One of the worst was that it left the weak at the mercy of the strong. Another was that it led to social disorder. One act of violence led to another. Families developed vendettas against one another, and violence multiplied over the generations.

Through the centuries, governments took over the job of exacting retribution from wrongdoers and carrying out society's ever-changing view of justice. Laws, police forces, courts, and prisons were developed to discover and punish criminals.

No legal system was ever perfect. Some punishments seemed much too harsh, others much too light. Some criminals escaped discovery and punishment altogether. By and large, however, people tended to agree that legal systems worked better than private vengeance ever did. Here in the United States, most people believed that the American legal system worked better than most.

There were times and places, however, when people believed the legal system had broken down. They lost faith in the law's version of justice and became dissatisfied with the way the government protected them. In times like these, people frequently took the law into their own hands.

In frontier days there were usually few sheriffs, judges, or other legal officials to deal out justice throughout a large territory. Some communities had no law enforcement officers at all. Not wanting to be at the mercy of toughs and criminals, local citizens formed vigilante groups, private organizations that became their own "law" and took it upon themselves to punish wrongdoers or to chase out of town people they considered dangerous.

In time virtually every American community of any size organized an official police force of some kind, and federal and state courts extended effective coverage over the entire country. Gradually the need for regular vigilante organizations disappeared. Even then, however, there were still individual cases in which outraged citizens became impatient with the law and took it upon themselves to punish criminals—or those they thought were criminals.

Occasional acts of vigilantism were common in parts of the United States in the late nineteenth century, continuing well into the twentieth. These were not acts of individual vengeance, but group actions carried out by self-righteous mobs. Minor criminals were daubed with hot tar, sprinkled with feathers, and escorted to the county line. Accused rapists or murderers were lynched. Lynchings of black men—sometimes men whose worst crime was showing disrespect to a white person—remained fairly common in the South into the 1930s. Individual cases continued to occur even into the 1950s and 1960s.

Vigilante lynchings are different from other murders because they are accepted—even condoned—by the community. Although many citizens personally disapprove of lynching, few want to see the killers punished. In some sense, the killers are seen as trying, however misguidedly, to uphold the community's sense of justice.

The need to control or end vigilantism is still another reason put forward for having the death penalty. In Colorado, for instance, capital punishment for murders was briefly abolished in 1897. Within a few years, Colorado mobs had lynched three accused criminals they believed were murderers. One victim, a black man, was horribly burned at the stake. The death penalty was quickly reinstated.¹⁶

U.S. Supreme Court Justice Potter Stewart recognized the lynching problem in his concurring opinion in the historic *Furman v. Georgia* decision in 1972. "The instinct for retribution is part of the nature of man," he wrote, "and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law."¹⁷

Vigilante lynchings have been rare in recent decades, but the threat is always there. "Most people desire some sort of retribution," warns Richard Samp of the pro-capital-punishment public interest group, Washington Legal Foundation. "If they don't get it from the criminal justice system, some, at least, will be tempted to take justice into their own hands. "[T]he one way we can prevent vigilante justice into their own hands. "[T]he one way we can prevent vigilante justice," says Samp, is to give people "confidence that society is going to mete out justice to people who commit violent crime."¹⁸ For the worst examples of premeditated first degree murder, Samp would argue, death is the only punishment potential vigilantes will accept as just.

This reason for the death penalty assumes that there is a fundamental difference between ordinary citizens killing criminals and the state doing the same thing. If the family of a murder victim hangs the killer from a tree, that is a lynching. If the state electrocutes the same killer, that is justice. The murderer is dead in either case, but in the first case, social order and the rule of law have broken down. In the second, insist the supporters of the death penalty, they have been reinforced.

The Origins of Capital Punishment

We know the death penalty was prescribed for various crimes in Babylon at least 3,700 years ago, and we can assume that it was used in many parts of the world long before that. Some ancient societies applied it sparingly, and only for the most terrible of crimes. Others imposed it even for minor offenses. Under Rome's law of the Twelve Tablets in the fifth century B.C., for example, death was the penalty for publishing "insulting songs" and disturbing the peace of the city at night.¹⁹ Under Greece's Draconian legal code in the seventh century B.C., death was the punishment for *every* crime.

The Draconian Code was an exception, however. Death was rarely the only available punishment. Captured criminals who were not executed were often tortured or maimed. Many primitive societies did not have the death penalty at all, and many of those that did reserved it either for crimes against the ruler or religious crimes like blasphemy. Punishment for crimes committed against individuals—like murder, rape, and robbery—was rarely handed down by any legal authority. It was left up to the victims, or their families or clans, to exact the appropriate penalty or to carry out the appropriate revenge.²⁰

Beginning in ancient times and continuing well into the twentieth century, executions were usually carried out in public. Execution grounds were set up in spacious town squares or jail yards—easily accessible places where there was plenty of room for crowds of spectators. Ordinary citizens were not only allowed but encouraged to watch wrongdoers pay for their crimes.

Public executions had benefits for everyone concerned. For surviving victims of the criminals, the executions provided the grim satisfaction of witnessing the final punishment of those who had wronged them. For the authorities, executions served as vivid demonstrations of their determination to protect the public safety. With criminals being dispatched before large crowds in the city square, who could doubt that the police and judges were doing their jobs?

Public executions actually helped authorities to do their jobs by serving as grisly object lessons for potential wrongdoers. What better way to strike fear into the hearts of those who might be tempted to take up a life of crime than to show them the fatal consequences if they did? In some places, corpses or body parts of

executed criminals were displayed in public places. Bodies were left dangling from gibbets on hills outside of town. Decapitated heads were perched on stakes at the city gates.

For the spectators, meanwhile, the awful ceremonies served as a kind of spectacle—a rare opportunity to gather together and share the horror and excitement of watching other men and women die. In some times and places, executions were actually regarded as a form of public entertainment—a kind of blood sport. This was true, for example, in the days of the Roman Empire, when condemned criminals were forced to participate in battles to the death known as gladiatorial games.

Even the condemned criminals themselves had something to gain from having their deaths take place in public. It was one last chance to publicly proclaim their innocence, or to cry out their defiance of the society that was executing them. It was also an opportunity to win sympathy from the crowd. There was some honor to be gained by "dying well," and the authorities often complained that some execution victims were regarded as heroes by the crowds.

Class Distinctions

In many societies, the extent and nature of criminal punishment depended as much on the social standing of the criminal as on the nature of the crime. Commoners were executed more often than aristocrats and nobles, and for a wider variety of crimes. Minorities and foreigners were treated more harshly than members of the dominant group. In many European countries, from the seventh century on, clergymen could not even be tried, much less put to death, by civil authorities for ordinary crimes.

The method of execution varied as well. In general, the more socially privileged the criminal, the more merciful the form of execution. (An exception was sometimes made for nobles who committed treason.) As late as 1813, Jews, Christians, and members of other religious minorities who ran afoul of the law were still being impaled alive in at least one corner of the Ottoman Empire: stakes being driven up through their bodies with blows of a heavy mallet. Turks, on the other hand, were swiftly decapitated.²¹

The Death Penalty in England

The death penalty was used less commonly in England than in most European countries in the Middle Ages. During much of the eleventh century, in fact, it wasn't used at all. Neither King Canute (1016–1035) nor William the Conqueror (1066–1087) relied on the executioner to keep order in the kingdom. That didn't mean they dealt gently with criminals, however. Death penalty or no death penalty, it was a violent age. Torture was common, and many prisoners died while being tortured. However, there were few, if any, executions as such.

Later English rulers reimposed the death penalty, but for centuries British law remained merciful compared with the laws on the continent. During the late Middle Ages, at a time when several European countries continued to execute people for minor offenses, England primarily reserved the death penalty for such relatively serious crimes as murder, treason, rape, arson, and robbery. (Pickpockets and other petty thieves were still often executed, however.)

Hanging and beheading were the most common methods of execution in England, as they were in most European countries. As in Europe, beheading was usually reserved for members of the upper classes, while hanging was favored for other criminals. When there was a desire to make sure a traitor or other heinous criminal suffered as much as possible, he or she might be left to dangle for a while, choking at the end of a rope, before being taken down and gutted with a knife. Others were drawn and quartered.

The array of crimes punishable by death in England increased over the years, until by the early nineteenth century more than 200 different crimes had become capital offenses. Gypsies could be executed simply for overstaying their welcome in the country. Even the native born could be hung for stealing fish out of a pond, illegally hunting deer, or cutting down a growing tree.²² Passing a single forged bank note could send a counterfeiter to the scaffold. Several women as well as men were executed for that crime. In the single year of 1820, some 46 people were hung for forgery.²³

The Death Penalty in the American Colonies

English law provided the main model for the legal codes of Britain's American colonies. Even so, the colonies did not imitate the mother

country's policies slavishly. In fact, each of the colonies had its own laws and its own list of crimes punishable by death. Even though they all flowed from a common legal tradition, there was a great range of difference among them.

On one end of the American spectrum were two colonies whose laws reflected the Quaker beliefs of their founders: William Penn's Pennsylvania, which prescribed the death penalty only for murder and treason, and West Jersey, which originally had no capital crimes at all. On the other end were colonies like Virginia, which imposed death even for petty crimes.

Most of the American colonies fell somewhere between these two extremes. While the laws were changeable, the average colony made roughly ten crimes subject to the death penalty at any given time. For example, at one time thirteen offenses were punishable by death in Massachusetts, at another, only nine.²⁴ Pennsylvania eventually went from its original two to fifteen.²⁵

Murder was a capital crime in every colony at one time or another, as was treason or rebellion. Other crimes typically punishable by death were rape, robbery, arson, and perjury in a capital case. Some of the colonies also prescribed death for such sexual offenses as adultery, sodomy, and bestiality, as well as for such religious offenses as witchcraft or blasphemy (public disrespect for God). In Massachusetts, at one point, even cursing one's parents was a capital crime.²⁶

The Death Penalty in the United States

In the wake of the American Revolution, the U.S. Constitution gave both the states and the federal government the right to set their own criminal penalties. The very first Congress of the United States passed federal laws making death the penalty for rape and murder, and each of the original states made several other crimes punishable by death as well.

The usual manner of execution in most states was hanging, although Native Americans and slaves were sometimes burned at the stake. In Louisiana, whose legal traditions were French instead of British, beheading was sometimes used, at least for slaves. As in most other parts of the world, executions in the early United States were public affairs, and the bodies of the executed were often put on display for days—and sometimes months—afterwards.

Although the death penalty was widely accepted throughout the early United States, it was not approved by everyone. The founders of the United States were profoundly influenced by the ideas of the European Enlightenment, and one of the most striking of those ideas was the belief that capital punishment might be abolished. This radical notion was proposed by an Italian named Cesare Beccaria in a landmark essay entitled *On Crimes and Punishment*, which was translated into English in 1767. The essay had already played an important part in leading Tuscany to abandon capital punishment, and it encouraged many thoughtful Americans to consider abandoning the practice here.

Some prominent founders of the United States, like Thomas Jefferson, had serious doubts about the death penalty and hoped to see its use severely limited in the new nation. Others—like Dr. Benjamin Rush, the Surgeon General of the American forces during the revolutionary war—called for it to be abolished altogether. So, although capital punishment was initially established in every state, it remained controversial, particularly among intellectuals.

There would be three great waves of anti-death-penalty sentiment in the first two centuries of the country's history. The first, which occurred in the mid-nineteenth century, led to important restrictions on the use of the death penalty in several northern states, while Michigan, Wisconsin, and Rhode Island abandoned the practice altogether. The movement for the abolition of the death penalty was led by many of the same reformers who called for the abolition of slavery. As slavery became a more and more important issue, the death penalty tended to recede into the background, until it all but disappeared in the smoke and blood of the Civil War. As historian David Brion Davis wrote, "Men's finer sensibilities, which had once been revolted by the execution of a fellow being, seemed hardened and blunted."²⁷

The second wave of abolition rose up toward the end of the nineteenth century and continued until the country's entry into World War I. The state of Missouri and the territory of Puerto Rico both abolished the death penalty in 1917, but no other state or territory would abolish it for 40 years to come.

Opposition to the death penalty gathered strength again in the mid-twentieth century. Sympathy for the cause was fueled by the controversial executions of Willie Francis, Burton Abbott, Caryl Chessman, and Barbara Graham. What's more, powerful and popular movies about Chessman (*Cell 2455 Death Row*) and Graham (*I Want To Live!*) vividly portrayed both the sufferings of

the condemned and the possibilities for error inherent in putting people to death. Once again, several states either abolished or restricted the use of the death penalty.

In 1972 abolitionists scored their greatest success ever. In the case of *Furman v. Georgia*, the U.S. Supreme Court declared that the death penalty, as then practiced, was "cruel and unusual" punishment under the Eighth Amendment and was therefore unconstitutional. For a time, it seemed the abolitionists had finally won, once and for all. However, many state legislatures scrambled to write new laws that the Court might consider constitutional, and four years later, in *Gregg v. Georgia*, the Court announced that several of those efforts had succeeded. Once again, the death penalty was considered constitutional in the United States, and it remains so today.

Conclusion

Capital punishment is a well-established element of the American criminal justice system. The great majority of states have capital punishment laws on their books, and 21 of them have actually carried out executions since 1976, when the Supreme Court ruled the death penalty constitutional.²⁸ What's more, public opinion poll after public opinion poll shows that the vast majority of Americans approve of the death penalty.

Still, capital punishment remains extremely controversial. It has been abandoned not only by 15 states but by the overwhelming majority of the western developed nations. In the following chapter, we will explore the objections abolitionists raise to the death penalty, and examine the arguments both for and against this most ancient form of criminal punishment.

NOTES

1. "Should Capital Punishment Be Retained?" *Congressional Digest* (August–September 1927): 231.
2. Albert Einstein, *Berliner Tageblatt*, quoted in *Congressional Digest*, 243.
3. "In Favor of Capital Punishment," *American Scholar* (Spring 1962). Reprinted in *Social Ethics: Morality and Social Policy*, Thomas A. Mappes and Jane S. Zemba, eds. (New York: McGraw-Hill, 1977), 89.

- 5th century B.C.** (cont.) they are committed against freemen, for instance, or only when they are committed by slaves.
- c. 399 B.C.** In Britain, executions are being carried out for a variety of offenses.
- c. 399 B.C.** The Greek philosopher Socrates is required to drink poison for the offenses of heresy and corruption of the young.
- c. A.D. 29** In the most infamous execution in history, Jesus Christ, the founder of Christianity who is revered by his followers as the son of God, is crucified on a hill outside Jerusalem.
- c. 315** The Emperor Constantine abolishes crucifixion in the Roman Empire.
- 438** The Code of Theodosius makes more than 80 crimes punishable by death.
- 1500** Only eight crimes are officially punishable by death in England. They are murder, treason (treachery against the state), petty treason (murder of a husband by his wife), larceny, robbery, burglary, rape, and arson.
- 1509–1547** Despite the relatively small number of crimes punishable by death, the reign of Henry VIII may be the bloodiest in English history. Estimates of the number of Englishmen and women executed by the oft-married monarch range as high as 72,000.
- 1608** In the first known execution in British America, George Kendall, an ex-councillor of the colony of Virginia, is executed for supposedly plotting to betray the British colony to the Spanish.
- 1612** Under its governor, Sir Thomas Dale, Virginia institutes the most unrelenting criminal code in any of the American colonies. Known as the Divine, Moral, and Martial Laws, it prescribes death even for such relatively minor offenses as trading with the Indians, killing chickens, and stealing grapes.
- 1619** The so-called Divine Laws are softened because it has become clear to Virginia officials that fear of the executioner is making potential colonists reluctant to settle in Virginia.
- 1636** The Capitall Lawes of New-England go into effect in the Massachusetts Bay Colony. Among the crimes made punishable by death are murder, witchcraft, sodomy, adultery, blasphemy, idolatry, assault in sudden anger, rape, statutory rape, manstealing, perjury (in a capital trial), and rebellion.
- 1665** New York colony institutes the so-called Duke's Laws, which make death the penalty for a wide variety of crimes, including sodomy and denial of the true God.
- 1682** William Penn's Great Act makes only two crimes—treason and murder—punishable by death in Pennsylvania. West Jersey soon passes a similar law. These two colonies, both settled by Quakers, are the most lenient of England's American colonies. Most of the others prescribe death for at least 11 or 12 separate crimes.
- 1689** The English Parliament adopts a Bill of Rights, which among other provisions forbids cruel and unusual punishments.
- 1747** 9 April. Simon, the Lord of Lovat, is the last person executed by decapitation in England.
- 1754** Russia abandons death as a penalty for ordinary criminal offenses, including murder. It retains capital punishment for use against political criminals, however.
- 1756** Pennsylvania, once the most lenient of the American colonies, now mandates the death penalty for 14 different crimes.
- 1764** Cesare Beccaria's *Essay on Crimes and Punishments* is published in Italy. It calls for an end to capital punishment.
- 1767** Beccaria's *Essay on Crimes and Punishments*, which is already having a great impact in intellectual circles in Europe, is translated into English and begins to influence American abolitionists.¹

1776

At the outbreak of the American Revolution, every colony except Rhode Island makes at least ten crimes punishable by death.

1777

A group of reformers led by Thomas Jefferson proposes abolishing capital punishment in Virginia, except for treason and murder. The exception for treason is somewhat ironic, considering that the reformers are engaged in what England regards as treason against the mother country.

1785

A bill to abolish capital punishment is defeated by a single vote in the Virginia legislature.

1787

9 March. Speaking in the home of Benjamin Franklin, Dr. Benjamin Rush delivers an address in which he opposes capital punishment. It is the first time a prominent American has publicly called for total abolition of the death penalty.

1789

Dr. Joseph-Ignace Guillotin proposes using a beheading machine (later called a "guillotine") for all executions in France. The idea of executing nobles and peasants by the same method is a truly radical notion. It is the democratic ideal of the French Revolution taken to the extreme and applied to the death penalty itself. Even the revolutionary National Assembly is reluctant to go this far.

1790

The first Congress to meet after adoption of the U.S. Constitution passes laws prescribing death by hanging as the punishment for the crimes of rape and first degree murder.

1791

The first nine amendments to the Constitution of the United States, known collectively as the American Bill of Rights, come into effect. Although none of them is primarily concerned with the death penalty, the Eighth prohibits cruel and unusual punishments and the Fifth forbids the government to deprive anyone of life without due process of law.

1792

25 April. A highwayman named Nicolas Pellecier becomes the first victim of the new French guillotine.

21 August. Louis Collot d'Angremont, the secretary of the administration of the National Guard of France, becomes the first political victim of the guillotine. D'Angremont is

executed for his supposed involvement in a royalist plot. Although first proposed to the National Assembly by two prominent doctors, Joseph-Ignace Guillotin and Antoine Louis, as a more humane method of execution, it is fast becoming the most feared symbol of the revolutionary Terror that is sweeping France.

1793

"An Enquiry into How Far the Punishment of Death Is Necessary in Pennsylvania," by Pennsylvania Attorney General William Bradford, finds no strong evidence to support the need for a death penalty. Bradford, who will later become attorney general of the United States, recommends abandoning capital punishment for all crimes except murder and treason, at least until the question can be studied further.

1794

27 April. Pennsylvania becomes the first American state to abandon the death penalty for all crimes except murder in the "first degree." This is the first time that murder has been defined in terms of different degrees, subject to different punishments.

1812

Sixteen slaves who had participated in a slave rebellion are beheaded in New Orleans.

1820

At this time, roughly 200 crimes are punishable by death in England. They include stealing fish and cutting down a growing tree.

1824

Three white men are hanged for the murder of nine Native Americans at Fall Creek, Indiana. Three of the victims were women, two were children. So far as is known, this is the first time in American history that a white person is executed for the murder of an Indian.

Two other white men are involved in the incident, known as the Massacre at Fall Creek. One has already fled to escape prosecution. The other, who is hardly more than a boy, is also sentenced to die, but he is saved from death when James Brown Kay, the governor of Indiana, arrives at the execution site on horseback and pardons him.

1830

One thousand English bankers present a petition to the British Parliament requesting it to remove death as the punishment for forgery. The bankers argue that the death penalty is actually encouraging counterfeiting by making

1830 (cont.) jurors reluctant to convict forgers. Jurors don't want to be a party to executing a man for such a relatively minor and nonviolent crime.

1833 Edward Livingston's "Introductory Report to the System of Penal Law Prepared for the State of Louisiana" calls for an end to capital punishment in that state.² Livingston is a native of New York State who has become a well-respected lawyer in New Orleans. The Louisiana legislature had commissioned him to suggest penal reforms for Louisiana, and Livingston made the abolition of the death penalty the heart of his proposal. Although the legislature rejects his recommendation to do away with capital punishment, Livingston's ideas are widely discussed, not only in the United States but in Europe as well.

1834 Pennsylvania becomes the first of the United States to ban public executions. Some other states, including New York, have already stopped conducting executions in public, although it remains legal to do so there. In most states, however, executions are still watched by large and often rowdy crowds.

1835 Over 10,000 people flood the streets of the state capital of Maine, jockeying for position to witness what is only the second execution in state history. Fights break out, and the police have to step in to prevent what threatens to become a riot.

1837 Tennessee gives juries the option of imposing lesser sentences than death for capital crimes. Until now, death has been mandatory (required) in all states for anyone convicted of any crime that carries the death penalty.

Still shocked by the near riot that took place at an execution two years before, the Maine legislature passes what comes to be known as the Maine Law. The measure requires the governor to wait for one full year after a person is convicted of a capital crime before signing the death warrant. It is intended to make governors think twice before ordering executions.

1844 By almost two to one, New Hampshire's voters turn down a referendum calling for an end to the death penalty.

1845 Reformers from several states meet in Philadelphia to establish a national organization to fight the death penalty. The new body is to be known as the American Society for the Abolition of Capital Punishment. Its first president is the Vice President of the United States, George Mifflin Dallas.

1846 Michigan becomes the first state to formally abolish capital punishment, except for the crime of treason against the state.

1848 November. In France, the constitution of the newly established Second Republic outlaws the death penalty for political crimes.

1852 Rhode Island abolishes the death penalty.

1853 Wisconsin abolishes the death penalty.

1862 The U.S. Congress provides an optional punishment for treason. Previously death has been the only punishment for this crime. From now on, however, treason will be punishable either by death or by a term in prison of at least five years, plus a fine of at least \$10,000.

The nation of Greece abolishes the death penalty for criminal offenses.

26 December. Thirty-eight Native Americans are hanged at one time in what may be the largest mass execution in U.S. history.

1863 Colombia becomes the first nation in the Western Hemisphere to abolish the death penalty for criminal offenses.

1868 The Fourteenth Amendment to the Constitution of the United States extends the Fifth Amendment's protections to cover the states, forbidding them to "deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws."

1870 The Netherlands abolishes the death penalty.

1872 Iowa abolishes the death penalty.

- 1874 Executioner William Marwood introduces the "long drop" to England. When done right, this method of hanging, in which the victim is dropped at the end of a long rope, kills instantaneously of a broken neck. Before this, most hanging victims had been left to choke to death slowly, dangling at the end of short ropes.
- 1875 The U.S. Congress amends the federal capital punishment laws of 1790 to give federal juries the option of convicting criminals of rape or first degree murder "without capital punishment." These new crime categories are subject to a penalty of either death or life imprisonment as the juries wish.
- 1876 The state of Maine abolishes the death penalty.
- In Europe, Portugal abolishes the death penalty for ordinary crimes.
- 1878 Iowa becomes the first state to reinstitute the death penalty after once abandoning it.
- 1879 The U.S. Supreme Court decides (*Wilkerson v. Utah*) that a sentence of public execution against a murderer named Wilkerson does not violate the Eighth Amendment rule against cruel and unusual punishment. It is the first time the Court has ruled on the question of how the Eighth Amendment applies to a capital case. For the next century and more, the legal debate over the death penalty will center on this amendment.
- 1883 Maine reinstates the death penalty, which it had abolished only seven years before.
- 1887 Changing its mind once again, Maine abolishes the death penalty for the second time in 11 years.
- 11 November. Four men convicted of taking part in a bombing that killed seven Chicago policemen and wounded over 60 more during a labor rally in Haymarket Square the year before are hung in Illinois. A fifth man, who had also been sentenced to die, blew himself up in prison. Many if not most observers were convinced that the men, who were known as the Haymarket anarchists, had been railroaded.
- 1889 1 January. New York becomes the first state to adopt the electric chair as its method of execution.
- 1890 The U.S. Supreme Court rules (*In re Kemmler*) that "the punishment of death is not cruel within the meaning of that word as used in the Constitution." As used in the Eighth Amendment, says the Court, the term "implies... something inhuman and barbarous, something more than the mere extinguishment of life." The case involves the first use of electrocution as a method of execution.
- 6 August. William Kemmler, whose case prompted an important U.S. Supreme Court decision on the meaning of "cruel and unusual punishment" becomes the first criminal to die in an electric chair. The event takes place in Auburn Prison at Auburn, New York.
- 1895 The American Federation of Labor adopts a resolution calling for the abolition of capital punishment, which it terms "a revolting practice."³
- 1897 The number of federal crimes punishable by death is dropped from 60 to only three: treason, murder, and rape. Of these, only treason carries a mandatory (required) death sentence. In effect, this brings the federal laws more in line with the laws of most states.
- Colorado abolishes the death penalty.
- Ecuador abolishes the death penalty. It had already abandoned capital punishment for political crimes in 1852.
- 1901 Alarmed by a rash of lynchings in the wake of the state's abolition of the death penalty in 1897, Colorado reinstates the death penalty.
- Panama abolishes the death penalty.
- 1903 Norway becomes the first European nation in the twentieth century to abolish capital punishment for ordinary crimes.
- Kansas, which has not actually carried out an execution for 35 years, formally abolishes capital punishment.
- 1907

Two Historic Views on Capital Punishment

No one has had a greater influence on the capital punishment issue than the eighteenth-century Italian jurist, Cesare Beccaria. It was Beccaria, more than anyone else, who launched the modern debate on the subject with the publication of his famous essay.

Excerpts from Cesare Beccaria's *An Essay on Crimes and Punishments*, as published in England in 1775

The useless profusion of punishments, which has never made men better, induces me to enquire, whether the punishment of death be really just or useful in a well governed state? What right, I ask, have men to cut the throats of their fellow-creatures? Certainly not that on which the sovereignty and laws are founded. The laws, as I have said before, are only the sum of the smallest portions of the private liberty of each individual, and represent the general will, which is the aggregate of that of each individual. Did any one ever give to others the right of taking away his life? Is it possible, that in the smallest portions of the liberty of each, sacrificed to the good of the public, can be contained the greatest of all good, life? If it were so, how shall it be reconciled to the maxim which tells us, that a man has no right to kill himself? Which he certainly must have, if he could give it away to another.

But the punishment of death is not authorized by any right; for I have demonstrated that no such right exists. It is therefore a war of a whole nation against a citizen, whose destruction they consider as necessary, or useful to the general good. But if I can further demonstrate, that it is neither necessary nor useful, I shall have gained the cause of humanity.

ONLY ONE REASON FOR THE DEATH PENALTY

The death of a citizen cannot be necessary, but in one case. When, though deprived of his liberty, he has such power and connections as may endanger the security of the nation; when his existence may produce a dangerous revolution in the established form of government. But even in this case, it can only be necessary when a nation is on the verge of recovering or losing its liberty; or in times of absolute anarchy, when the disorders themselves hold the place of laws. But in a reign of tranquillity; in a form of government approved by the united wishes of the nation; in a state well fortified from enemies without, and supported by strength within, and opinion,

perhaps more efficacious; where all power is lodged in the hands of a true sovereign; where riches can purchase pleasures and not authority, there can be no necessity for taking away the life of a subject.

If the experience of all ages be not sufficient to prove, that the punishment of death has never prevented determined men from injuring society; if the example of the Romans; if twenty years reign of Elizabeth, empress of Russia, in which she gave the fathers of their country an example more illustrious than many conquests bought with blood; if, I say, all this be not sufficient to persuade mankind, who always suspect the voice of reason, and who choose rather to be led by authority, let us consult human nature in proof of my assertion.

It is not the intenseness of the pain that has the greatest effect on the mind, but its continuance; for our sensibility is more easily and more powerfully affected by weak but repeated impressions, than by a violent, but momentary, impulse. The power of habits is universal over every sensible being. As it is by that we learn to speak, to walk, and to satisfy our necessities, so the ideas of morality are stamped on our minds by repeated impressions. The death of a criminal is a terrible but momentary spectacle, and therefore a less efficacious method of deterring others, than the continued example of a man deprived of his liberty, condemned, as a beast of burthen, to repair, by his labour, the injury he has done to society. *If I commit such a crime, says the spectator to himself, I shall be reduced to that miserable condition for the rest of my life.* A much more powerful preventative than the fear of death, which men always behold in distant obscurity.

THE EFFECT OF VIOLENCE IS MOMENTARY

The terrors of death make so slight an impression, that it has not force enough to withstand the forgetfulness natural to mankind, even in the most essential things; especially when assisted by the passions. Violent impressions surprise us, but their effect is momentary; they are fit to produce those revolutions which instantly transform a common man into a Lacedaemonian or a Persian; but in a free and quiet government they ought to be rather frequent than strong.

The execution of a criminal is, to the multitude, a spectacle, which in some excites compassion mixed with indignation. These sentiments occupy the mind much more than that salutary terror which the laws endeavour to inspire; but in the contemplation of continued suffering, terror is the only, or a least predominant sensation. The severity of a punishment should be just sufficient to excite compassion in the spectators, as it is intended more for them than for the criminal.

A punishment, to be just, should have only that degree of severity which is sufficient to deter others. Now there is no man, who upon the

least reflection, would put in competition the total and perpetual loss of his liberty, with the greatest advantages he could possibly obtain in consequence of a crime. Perpetual slavery, then, has in it all that is necessary to deter the most hardened and determined, as much as the punishment of death. I say it has more. There are many who can look at death with intrepidity and firmness; some through fanaticism, and others through vanity, which attends us even to the grave; others from a desperate resolution, either to get rid of their misery, or cease to live; but fanaticism and vanity forsake the criminal in slavery, in chains and fetters, in an iron cage; and despair seems rather the beginning than the end of their misery. The mind, by collecting itself and uniting all its force, can, for a moment, repel assailing grief; but its most vigorous efforts are insufficient to resist perpetual wretchedness.

In all nations, where death is used as a punishment, every example supposes a new crime committed. Whereas in perpetual slavery, every criminal affords a frequent and lasting example; and if it be necessary that men should often be witnesses of the power of the laws, criminals should often be put to death; but this supposes a frequency of crimes; and from hence this punishment will cease to have its effect, so that it must be useful and useless at the same time.

SLAVERY AND THE DEATH PENALTY

I shall be told, that perpetual slavery is as painful a punishment as death, and therefore as cruel. I answer, that if all the miserable moments in the life of a slave were collected into one point, it would be a more cruel punishment than any other; but these are scattered through his whole life, whilst the pain of death exerts all its force in a moment. There is also another advantage in the punishment of slavery, which is, that it is more terrible to the punishment of a sufferer himself; for the spectator considers the sum of all his wretched moments, whilst the sufferer, by the misery of the present, is prevented from thinking of the future. All evils are increased by the imagination, and the sufferer finds resources and consolations, of which the spectators are ignorant; who judge by their own sensibility of what passes in a mind, by habit grown callous to misfortune.

... The punishment of death is pernicious to society, from the example of barbarity it affords. If the passions, or the necessity of war, which are intended to shed the blood of our fellow creatures, the laws, increase it by examples of barbarity, the more horrible, as this punishment is usually attended with formal pageantry. Is it not absurd, that the laws, which detect and punish homicide, should, in order to prevent murder, publicly commit murder themselves? What are the true and most useful laws? Those compacts and conditions which all

would propose and observe, in those moments when private interest is silent, or combined with that of the public.

What are the natural sentiments of every person concerning the punishment of death? We may read them in the contempt and indignation with which everyone looks on the executioner, who is nevertheless an innocent executor of the public will; a good citizen, who contributes to the advantage of society, the instrument of the general security within, as good as soldiers are without. What then is the origin of this contradiction? Why is this sentiment of mankind indelible, to the scandal of reason? It is, that in a secret corner of the mind, in which the original impressions of nature are still preserved, men discover a sentiment which tells them, that their lives are not lawfully in the power of any one, but of that necessity only, which with its iron scepter rules the universe.

If it be objected, that almost all the nations in all ages have punished certain crimes with death, I answer, that the force of these examples vanishes, when opposed to truth, against which prescription is urged in vain. The history of mankind is an immense sea of errors, in which few obscure truths may here and there be found.

But human sacrifices have also been common in almost all nations. That some societies only, either few in number, or for a very short time, abstained from the punishment of death, is rather favourable to my argument, for such is the fate of great truths, that their duration is only as a flash of lightning in the long and dark night of error. The happy time is not yet arrived, when truth, as falsehood has been hitherto, shall be the portion of the greatest number.

In the nineteenth century, the anti-capital-punishment and antislavery causes were often championed by the same people. A similar religious fervor prompted many of their leaders to attack what they saw as twin evils—two practices that were not only unjust but un-Christian.

One exception to this rule was the Reverend George Cheever, a popular preacher who may have been the most influential defender of the death penalty in the nineteenth century. Cheever was himself a zealous Christian reformer—and an abolitionist when it came to slavery—and so was able to challenge the opponents of capital punishment on their own terms. What may be his best summary of the pro-death-penalty position appeared in the December 1881 issue of the *North American Review*.