

**AGAINST CAPITAL
PUNISHMENT**

***THE
ANTI-DEATH
PENALTY
MOVEMENT
IN AMERICA,
1972-1994***

Herbert H. Haines

WITH A NEW AFTERWORD BY THE AUTHOR

Against Capital Punishment

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Preface

One of the most satisfying times in a scholarly career is when a research project comes along that melds several of one's academic interests. This book represents such a convergence. Since my undergraduate years, I have focused much of my attention on various deviance, crime, and social control topics. I have written rather little along these lines, but I have taught courses in these fields to students at three academic institutions. And since my first year of graduate study, I have also been fascinated by social constructionist theories of social problems; i.e., theories about how people organize, devise shared understandings of putative social conditions that they find undesirable, and attempt to change them. The third of my primary interests is social movement analysis, and it is in this area that most of my research has been done. For a person with this array of concerns, what could be more appropriate than a book about a social movement that seeks to do away with one of the most controversial practices in twentieth-century criminal justice?

This project, like most of the research I have undertaken, was born in the classroom. I first began thinking seriously about the death penalty in 1987 while I was designing a course on the sociology of violence. Both in academic and popular discourse, talk about "violence" is too often restricted to *deviant* applications of physical force. This obscures the fact that lethal and nonlethal aggression are woven into public affairs and that institutionalized forms of violence are worthy of critical examination in their own right. To compensate for the usual myopia that characterizes this subject, I added units on warfare, police violence, and capital punishment to the more standard topics of street crime, spouse abuse, and the like. As I explored the voluminous literature on the death penalty over the next couple of years, I noticed that aside from Michael Meltsner's book on the NAACP Legal Defense Fund's litigation in the 1960s and early 1970s (1973), works that focused on "antigallows" reformers of earlier eras and a smattering of articles in mostly historical journals, anti-death penalty *activism* had been ignored. As surely as nature hates a vacuum, a researcher is loath to walk away from a topic that has been so underexplored.

This book is the culmination of over four years of research. Supported by a small travel grant from the National Endowment for the Humanities in 1991, I began to explore American anti-death penalty activism through the Sara B. Ehrmann Collection at Northeastern University, Boston, which contains the papers of the Massachusetts Council for the Abolition of the Death Penalty and the American League to Abolish Capital Punishment. Both organizations were formed in the aftermath of the executions of Nicola Sacco and Bartolomeo Vanzetti, radical Italian immigrants convicted—erroneously, in the view of many—of a double robbery-murder in 1920. The ALACP kept the abolitionist flame alive through much of this century and provided more recent activists with a tradition on which to build. I then traced the more recent phases of the struggle over capital punishment through large and small newspapers, using major newspaper indexes and the “Newsbank” database at Cornell University’s Olin Library. I was a participant-observer in several movement conferences and meetings across the United States between 1990 and 1994. Grants from the National Science Foundation (#SES-9109494) and the Research Foundation of the State University of New York made it possible for me to work full time during 1992 collecting data on anti-death penalty activism of the 1970s, 1980s, and 1990s. During 1992 and early 1993, I combed through the records of major movement organizations and the private papers of individual activists, collecting more than 5,000 pages of documents for analysis, and I interviewed nearly 50 leading figures in the movement. Those who spoke with me do not comprise a representative sample of death penalty opponents, nor do their views reflect the “other side” of the death penalty debate. But neither a representative cross section nor a “balanced” sample is necessary given the objectives of this book. Capital *litigation* is a massive topic in itself and one that, unlike the “*political*” branch of the struggle, has received a good deal of scholarly attention. Thus, many of the attorneys who have left their mark on the capital punishment system in America have not been interviewed for this book. The people I chose to contact make up a large portion of the leadership of the anti-death penalty *social movement*, the abolitionist core who set the strategic course of the battle against capital punishment over the past two decades.

I owe a debt of gratitude to many individuals for assisting me in this investigation. Henry Schwarzschild, William Bowers, and John Galliher provided encouragement in the formative stages of the project. William Bowers, Frank Hearn, Richard Kendrick, Craig Little, Louis Masur, and Joane Nagel provided helpful criticism on various phases of the project or read portions of the manuscript. Several people were generous enough to give me access to their private papers or to the files of the organizations they serve: Hugo Adam Bedau (Tufts University, the National Coalition to Abolish the Death Penalty, and formerly president of the American League to Abolish Capital Punishment); Pat Clark (Death Penalty Focus of California); Leigh Dingerson (National Coalition to Abolish the Death Penalty); Jonathan Gradess (New York State Defenders Association); Joe Ingle (formerly of the Southern Coalition on Jails and Prisons); Damaris Walsh McGuire (New Yorkers Against the

Death Penalty); Ali Miller (Amnesty International USA); Michael Nelson (Dunstable, Mass.); Eric Prokosch (Amnesty International); Henry Schwarzschild (formerly of the American Civil Liberties Union Capital Punishment Project); Paula Sites (Indiana Public Defender Council); Barbara Sproul (Hunter College, City University of New York); Donna Schneeweiss (Amnesty International USA and Kansas Coalition Against the Death Penalty); and Margaret Vandiver (University of Memphis).

There are three people who deserve special acknowledgement. Two of these are Hugo Bedau and Constance Putnam, whose hospitality and personal assistance went beyond what any researcher might reasonably expect. If ever there was a gold mine of information about an American social movement, it lies in the study of their Concord, Massachusetts, home, and I was allowed to dig in that mine, alone and undisturbed, for three days. I am also especially indebted to Rick Halperin of Southern Methodist University and Amnesty International USA. Without the remarkable network he has set up to collect and disseminate news accounts concerning the death penalty and human rights issues, it would have been quite impossible for me to keep abreast of recent events.

I also thank Jeanne Holiday of the Mudd Library, Princeton University, for her assistance with the ACLU Archives, and my student research assistants—Adrienne Chickering, Tobi Clarke, Michelle Pless, Stephanie Smithson, and Kathy Zucker—who made substantial contributions in library work, transcribing recorded interviews, and coding.

Three people at Oxford University Press have worked directly with me on this book, and I am most grateful for their contributions. David Roll was the first to express enthusiasm for the project, and he advised me in the early stages of my writing. When David left Oxford, Gioia Stevens assumed his responsibilities. She might have viewed my book as a “stepchild,” passed into her care by another, but she never did so. Lisa Stallings not only dealt gently with some of my bad habits as a writer, but spotted inadvertent inaccuracies that might have gone unnoticed by a less conscientious editor.

Above all, I have benefited from the overwhelming cooperation of the people whose work this book is about, the activists who have devoted themselves to opposing capital punishment in the United States. Only one of the dozens of people I approached for interviews refused me. The rest invited me into their homes and offices, answered all my questions, and offered unsolicited insights about their movement. Many volunteered to track down documents for me or to open their files for my use. I am deeply indebted to all these people. I may not tell their stories quite the way they themselves would, but I have done my best to get those stories right. Any errors of fact or chronology are my responsibility alone.

Finally, I thank my wife and children for their patience and understanding, particularly during the period when I was away from home so often and again during the final weeks of writing.

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Against Capital Punishment

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Introduction: Death Penalty Abolitionism in America

Capital punishment¹ is in decline as the twentieth century nears its end. Once a virtually universal practice, only about 100 of the world's 180 or so nations still take the lives of those who commit serious violations of their laws (Amnesty International USA 1989a:259–262; Hood 1989:7–33). Executions have become especially rare among industrialized democracies. A few retain capital statutes dealing with extraordinary crimes such as treason, but only Japan, parts of the former Soviet Union, and the United States still carry out death sentences for “ordinary” crimes of violence.

But for at least the time being, the United States stands in stark contrast to the international trend. Capital punishment is flourishing here. After going without executions from 1967 through 1976, 38 states and the federal government have passed revised capital-sentencing statutes that meet the stiffer constitutional requirements the Supreme Court laid down between 1976 and 1983. By the time these words appear in print, at least two more states—Iowa and Wisconsin—may well have brought back the death penalty. Since 1983, the Court has removed a number of procedural impediments on the states, and the rate of electrocutions, gassings, and lethal injections has grown as a result. Thirty-eight persons were put to death in 1993, more than in any year since John F. Kennedy sat in the Oval Office. The number fell to 31 in 1994, but all indications point to a rising tide of harsh justice through the remainder of the decade. Nearly 3,000 convicts now await their dates with the executioner (see Table 1).

The phoenixlike resurgence of America's death penalty has been accompanied, and perhaps facilitated, by a corresponding wave of public enthusiasm. Surveys reveal a consistent pattern of support for capital punishment, in which around 75 to 80 percent of the persons polled agree that murderers should be executed.² These results indicate a dramatic reversal of opinion since the mid-1960s when, for a brief period, capital punishment advocates found themselves in the minority (Zimring and Hawkins 1986:39). The sustained enthusi-

TABLE 1. Convicts Under Sentence of Death, 1980–1994

<i>Year</i>	<i>Number</i>	<i>Year</i>	<i>Number</i>
1980	618	1988	2,182
1981	924	1989	2,250
1982	1,137	1990	2,412
1983	1,289	1991	2,465
1984	1,464	1992	2,575
1985	1,642	1993	2,848*
1986	1,838	1994	2,948**
1987	1,982		

*As of April 20, 1994.

**As of October 20, 1994.

Source: NAACP Legal Defense Fund; U.S. Justice Department, Bureau of Justice Statistics.

asm of Americans exceeds anything seen in most other Western countries. For example, Virginia activist Marie Deans described the difference in atmosphere she encounters when traveling in Europe:

It's wonderful to go over there, because they treat you with such warmth, you know. Here, we get hate mail, nasty phone calls in the middle of the night, people calling you names and writing nasty letters to the editor about you, and stuff like that. And you go over there, and it's like culture shock! . . . This has not happened to me once, this has happened to me *many* times in England and Ireland and Scotland. I'll get in a taxicab and they hear this southern accent and they want to know where I'm from. And I can tell them I'm *from* South Carolina but I live in Virginia. And they'll say "That's one of those state's that's killing people all the time!" They *talk* about this stuff! *Taxi drivers* wanting to know what's *wrong* with us!³

Of course, not all Europeans agree with those Deans has encountered. Many citizens of the United Kingdom, France, and elsewhere would prefer that executions resume in their lands. But these attitudes rarely lead to serious reintroduction drives. In the United States, by contrast, elected officials scramble to capitalize on pro-death penalty sentiment.

Why is this country bucking what appears to be a world-historical trend away from capital punishment? There are probably several reasons. The most important may be America's special curse—levels of violent crime so high as to be unique in the industrialized world. We are at much greater risk of being robbed, raped, assaulted—and especially murdered—than citizens of countries such as Germany, Great Britain, Canada, and Japan. Americans have grown

increasingly angry and fearful about the situation in their streets, and the death penalty has become a symbol of that mood, a red button waiting to be pressed by politicians and journalists alike.

But another piece of the answer lies with the weakness thus far of the anti-death penalty movement (ADPM) in this country. Such a movement exists. Its members call themselves “abolitionists,” as did nineteenth-century opponents of slavery. Some of them are lawyers who specialize in capital defense and who struggle to overturn the convictions of death-sentenced inmates in appellate courts. Others are policy advocates who lobby state legislators, plead with governors to grant clemency, and attack capital punishment in countless public debates, call-in talk shows, and op-ed columns from coast to coast. Still others are Christians who work with death-sentenced prisoners and their families out of a sense of religious duty. Some abolitionists are single-minded in their dedication to contesting what they see as state-sanctioned murder, whereas others see the death penalty as one human rights violation among many that must be addressed.

The diversity of the movement often leads to philosophical and strategic disputes, but so far it has managed to avoid the factional splintering that has plagued other crusades in America. Nevertheless, the anti-death penalty movement has been unable to stem the resurgence of executions. There have been too few members, too little money, and too little broad appeal in the messages the movement has tried to deliver. Clearly, a strong anti-death penalty movement would not be enough to bring capital punishment to a quick end. But it is a necessary precondition. For we in the United States have exhibited a great capacity for self-deception on matters of crime and justice. Only a reasonably large, vigorous, and well-provisioned army of activists could turn the country around on this issue, and that army has not yet emerged.

Based on information gleaned from the statements of media commentators and politicians, one might quickly conclude that popular support for the death penalty is irreversible. This is not necessarily the case. The death penalty remains a highly controversial subject, and executions raise issues that, in a nation founded on principles like equal justice, individual rights, and due process, regularly capture widespread attention. In one recent three-year period, for example, three capital cases received sustained front-page coverage from coast to coast:

- On April 21, 1992, Robert Alton Harris died in California’s gas chamber. Harris’s case had been the focus of enormous attention because he was the first convict to be executed in that bellwether state since the early 1960s—thus putting to rest the image of capital punishment as primarily a southern phenomenon—and because he was said to suffer from the effects of fetal alcohol syndrome. A serious attempt to have the execution televised was blocked by the courts. And months later, death penalty opponents battled with the state over whether a videotape of his death, alleged to be graphic proof of the cruelty of death in the gas chamber, should be made public.

- On January 5, 1993, child killer Westley Allan Dodd was executed in Walla Walla, Washington. His death received widespread media coverage because it employed a method that hadn't been used in the United States in 28 years: hanging. The fact that Dodd had *chosen* hanging over the option of lethal injection added to the macabre celebrity of the case.
- On January 4, 1995, Jesse DeWayne Jacobs died from a lethal injection in Texas. Jacobs, who the state had first accused of murder, was later seemingly absolved of killing the former wife of his sister's boyfriend. The case was notorious because prosecutors changed their account of the crime after Jacobs had been convicted. During his trial, they alleged that he had shot the victim after his sister, Bobbi Hogan, had persuaded him to try to scare the woman into giving up custody of her children. In Ms. Hogan's subsequent manslaughter trial, the same prosecutors alleged that she, not Mr. Jacobs, had fired the fatal shot. Accomplices in capital murders are subject to the death penalty under Texas law, but even staunch advocates of capital punishment were disturbed by the inconsistency in the state's story. This was the latest in a series of Texas cases involving the execution or near execution of men for crimes they may not have committed.

In spite of the widespread approval that capital punishment enjoys, the details of cases like those of Harris, Dodd, and Jacobs stir deep feelings of ambivalence, even among persons who are philosophically committed to the death penalty.

Furthermore, the very momentum of capital punishment seems to contain the seeds of future crises and debates whose outlines are only gradually becoming apparent. For example, the steady rise in the population of the nation's death rows virtually guarantees that one of two things will occur. The first possibility is that further curtailment by the courts of the legal grounds for appeals will produce an unprecedented bloodbath, with hundreds of executions a year taking place in American prisons. The other is a continuation of the status quo, a slow and uncertain form of justice that almost everyone—retentionist and abolitionist alike—sees as unsatisfactory. Moreover, the sheer cost of capital prosecutions, which has been estimated to range from 1.8 million to \$15 million per case (New York State Defenders Association 1982; Magagnini 1988), is forcing state and county governments to make exceedingly difficult choices: should they cut expenditures for schools, police protection, and human services in order to pay the bill for a handful of death penalty cases? The sheer expense involved is coming to be seen as an intractable problem that may soon bring capital punishment in the United States to a critical juncture.

Against Capital Punishment traces the evolution of anti-death penalty activism, with emphasis on the period since 1972. The book draws on current social movement theory in order to account for both the movement's successes in preventing the use of capital punishment on a truly massive scale (certainly a distinct possibility in a nation with nearly 20,000 homicides a year) and for its inability to pull this country along in the same current that is carrying the remainder of the democratic West.

Historical Cycles of American Abolitionism

The death penalty has been in almost continual use in this country since the early Colonial period. The first person to lose his life at the hands of an executioner in what was to become the United States was Captain George Kendall, who was put to death in 1608 (Espy and Smykla 1987). Since that time, some 14,000 men, women, and even children have been put to death. This figure excludes thousands of lynching victims (Bedau 1982:3). Their crimes included not only murder, but also rape, theft, witchcraft, counterfeiting, and a wide variety of other transgressions.

Through most of the nation's history, the proposition that authorities had the legal and moral right to take the lives of those who committed serious crimes was taken for granted by the bulk of the citizenry. Nevertheless, organized opposition to capital punishment is not a recent development. On the contrary, abolitionism has existed in one form or another since the eighteenth century. Prior to the American Revolution, anti-death penalty sentiment was primarily confined to such groups as the Quakers and to occasional essayists who criticized it as a violation of scriptural dictates, an ineffective deterrent, or a disproportionately severe punishment for crimes other than murder (Masur 1989:4). But such reformers were up against formidable obstacles. The public was accustomed to executions, which took place in public. Since incarceration was not yet a common means of punishing serious offenders, a society without a death penalty was difficult to imagine.

After the Revolution, the debate over capital punishment became more visible. Abolitionism was almost indistinguishable from the prison reform movement at this stage. Thus, some of the vocal critics of executions were associated with such groups as the Philadelphia Society for Alleviating the Miseries of Public Prisons, and some were among the most important intellectual and political leaders of the time—Benjamin Rush, Benjamin Franklin, and Thomas Jefferson.⁴ They drew their rhetorical ammunition from European reformers like Cesare Beccaria, whose *Essay on Crime and Punishments* was published in the United States in the 1770s and was frequently cited by prison reformers and abolitionists (Post 1944:38). Beccaria claimed that the certainty of punishment, not its severity, was the key to deterring crime, and that capital punishment was less helpful in preventing murder than life imprisonment at hard labor. The writings of English prison reformer John Howard were also used by American reformers in their speeches and pamphlets.

Although Beccaria provided a convenient source of debating material, his work was not the only source of abolitionist sentiment during the post-Revolution years, nor even the primary one. America was fertile ground for anti-capital punishment reform for reasons of political ideology. There was a growing distaste in many quarters for unfettered state power (Friedman 1993: 63). The rule of law, and the impulse to *reform* wrongdoers rather than to dispose of them, seemed to symbolize the difference between the monarchy