

The
DEATH
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in
AMERICA

Current Controversies



EDITED BY

Hugo Adam Bedau

The Death Penalty in America

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PREFACE

The death penalty continues to make headlines across the nation, perhaps more than at any time in this century. Just consider two of the high-profile cases during 1995, the brisk trial of Susan Smith in South Carolina for murdering her two children and the seemingly endless trial of O. J. Simpson in Los Angeles for the murder of his ex-wife and her male friend. The national news media gave the nation a day-by-day account of each case from the courtrooms. For Simpson the prosecutors ruled out the death penalty before the defendant ever entered the courtroom. Smith, however, faced from the start a prosecutor openly seeking her death; fortunately for her, the jury thought otherwise.

Or consider the extensive media campaign during 1995 waged on behalf of Mumia Abu-Jamal, former Black Panther and radical journalist, under a death sentence for murdering a policeman in Philadelphia in 1981. Is he really innocent, as his friends and champions insist? Innocent or guilty, did he get a fair trial and review by the appellate courts? Each year for two decades, beginning with the death sentence and execution in Utah of Gary Gilmore in 1977, we have been bombarded from coast to coast with details about the latest gruesome murder or serial killings (Ted Bundy in Florida, John Wayne Gacy in Illinois) and the culminating events in such cases—trial, conviction, sentencing, and execution.

If one wants to probe more deeply, however, getting behind television sound bites, the often sensationalist reports in the print media, and the posturing of politicians, one will discover that there is a vast array of material in our libraries to help answer more accurately the familiar questions: Is the death penalty an effective deterrent? Why does it take so long from sentencing to execution? How do prosecutors and juries decide which murderers to sentence to death and which to life in prison? Are the innocent ever wrongly arrested, tried, convicted, sentenced to death—and executed? Is the death penalty administered in a racially biased manner? If so, can such bias be avoided? Why did the Supreme Court rule that the death penalty is not an unconstitutional “cruel and unusual punishment”? These and a host of other questions arise whenever the death penalty is discussed or seriously debated. Fortunately, good answers to most of them lie waiting in print for those who know where to look.

Unfortunately, even those who do cannot get these answers without access to a major university library. Most of the relevant information appears in law reviews, scholarly journals, government documents, local news stories, and unpublished memoranda of various sorts, almost none of which can be found on the shelves of the local public or college library. The purpose of this book is to remedy that problem, as much as a single volume can, by reprinting the essential material and providing a guide to locating the bulk of the rest.

By the mid-1990s, the wealth of relevant literature is little short of overwhelming. Consequently, no one volume can do full justice to all the important research, challenging arguments, vivid narratives, and cold statistics that are needed to tell the story in all its details. What can be done, and what I have attempted to do in editing this volume, is to review the bulk of the literature published during the past decade or so (references to events and research prior to 1985 are rare) and select from it representative items for reprinting here. Regrettably, for reasons of economy of space, I have had to cut inessential footnote references in many of the articles chosen for reprinting, as well as some text to avoid redundancies and digressions where possible. (Such deletions have been indicated in the usual manner.) The reader who demands all the details as they appeared in the originals will thus need to hunt them up.

A far more regrettable omission from the book as originally designed is the material I had planned to reprint on the Robert Alton Harris case in California. Perhaps better than any other recent case, the struggle culminating in his death in the gas chamber in April 1992 brought federal judges and the lawyers on both sides to a fever pitch. Their often bitter and angry exchanges, including the unprecedented peremptory behavior by the Supreme Court, make extraordinary reading. The curious reader can get the flavor of the controversy in the following items (fully cited in the bibliography): Kroll 1990, Lungren and Krotoski 1992, Noonan 1992, Reinhardt 1992, Caminker and Chemerinsky 1992, Calabresi and Lawson 1992, and Bork 1992.

The book consists of thirty-three chapters, including seven essays that appear here for the first time and excerpts from five important U.S. Supreme Court decisions, organized into seven parts. The introduction (chapter 1) sketches the main features of the death penalty today as it emerged during the past three centuries of our history. Part I digests information on the nation's capital punishment laws, the volume and rate of criminal homicide in recent years, the distribution of death row prisoners across the nation, the annual number of executions, and other similar data that can be presented in tabular form. The part concludes by placing the current American death penalty scene in an international context. Part II is devoted to reporting and examining public opinion on the death penalty and alternative punishments. Part III examines the debate over deterrence and incapacitation in light of the most recent research. Part IV reviews the Supreme Court's decisions and opinions on the issue of the death penalty as a "cruel and unusual punishment," followed by two commentaries on the constitutional debate and a brief examination of the death penalty in this country as seen from a perspective of international human rights law. Part IV also reviews other important Supreme Court decisions relevant to the death penalty, focusing on the decade-long controversy over federal habeas corpus. Part V considers two of the main charges brought against the death penalty as applied: that it is racist, and suffered only by the poor. Part VI focuses exclusively on the death penalty as applied and tracks the flow of capital cases from the prosecutor's office to the execution chamber. It opens with a study of a Pennsylvania prosecutor's decision making in murder cases, then looks at new research on juror decision making in the sentencing phase of capital trials. This is

followed by a discussion of wrongful convictions in capital cases, a case study of a campaign to obtain clemency for a death row prisoner in Nebraska, a debate over whether executions ought to be shown on television, and an account from an eyewitness of an execution in Texas. The final chapter of this part closes by considering the economic costs of our current death penalty system. Part VII completes the book with two debates over the death penalty between Christian theologians and secular philosophers. Readers who have studied all the material preceding these debates should be in a reasonably good position to evaluate them on their merits.

In 1964, in my preface to *The Death Penalty in America: An Anthology* (the grandparent of this book), I warned the reader that it was not a volume conceived in scholarly neutrality. I was then and still am opposed to the death penalty in all its forms, no matter how awful the crime or how savage the criminal. Readers who do not share that conviction may well wonder whether I have been reasonably fair in presenting both sides of the many controversies that figure in the debate over the death penalty. I can only plead that I have tried, within the constraints of space and the relative importance of some material over other, and that the reader dissatisfied with my judgment should follow up the references I have made to the writings of those who disagree with me. By doing so one will easily trace out what is to be found in print presenting all shades of opinion. I do confess to having given the opponent of the death penalty the last word in several of these controversies—notably, on deterrence, on whether the death penalty is a “cruel and unusual punishment,” on whether the death penalty is functionally racist, on the costs of our current death penalty systems, and on miscarriages of justice in capital cases. I have done this because I sincerely believe the critics of the death penalty have the better of the evidence and the argument on each of these topics.

It should be added that proponents of the death penalty have done little or no research on most aspects of the policy they favor. With few exceptions, they have confined themselves to poking holes in the empirical research that favors abolition and to making armchair rebuttals of abolitionist arguments; this is most evident in the controversies discussed in parts III, V, and VI. As a result, it is simply impossible to present both sides at comparable length and in comparable detail. The weight of the overall argument is reflected, and properly so in my judgment, by the greater bulk of the book being given over to the abolitionist side.

The table of cases mentions only cases I have cited in my introductions and essays; the references cited by the various authors whose work is reprinted here have not been reproduced in the bibliography. For these additional references one must consult the works cited (if any) at the end of each article. The reader should not suppose that I have tried to cite all the relevant publications in the bibliography; far from it. Nor is omission of an author’s work from this list to be taken as evidence of my low estimate of its worth. No attempt has been made to edit the reprinted materials to achieve uniformity of citation style.

Readers familiar with the third edition of *The Death Penalty in America* (1982) may well wonder to what extent the present volume overlaps and goes beyond that one. Although several of the topics, subtopics, and their sequence in the two books are the same, the content of this book is entirely new, except for excerpts in part

IV from four of the Supreme Court's death penalty cases. Similarly, the 1982 edition consisted entirely of new material with respect to the first (1964) edition. (The second edition of 1967 is only a slightly revised version of the first edition and for most purposes is indistinguishable from it.) Indeed, I have not called this book the fourth edition of *The Death Penalty in America* because it would be far more accurate to think of it as the third volume in a series that includes both the 1964 and the 1982 editions, since the overlapping contents among the three books is so slight. Taken together, these three volumes—nearly fifteen hundred pages—preserve and make available a large fraction of all of the most important material on the death penalty in this country covering the past forty years.

Carmel-by-the-Sea, California
October, 1996

H. A. B.

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