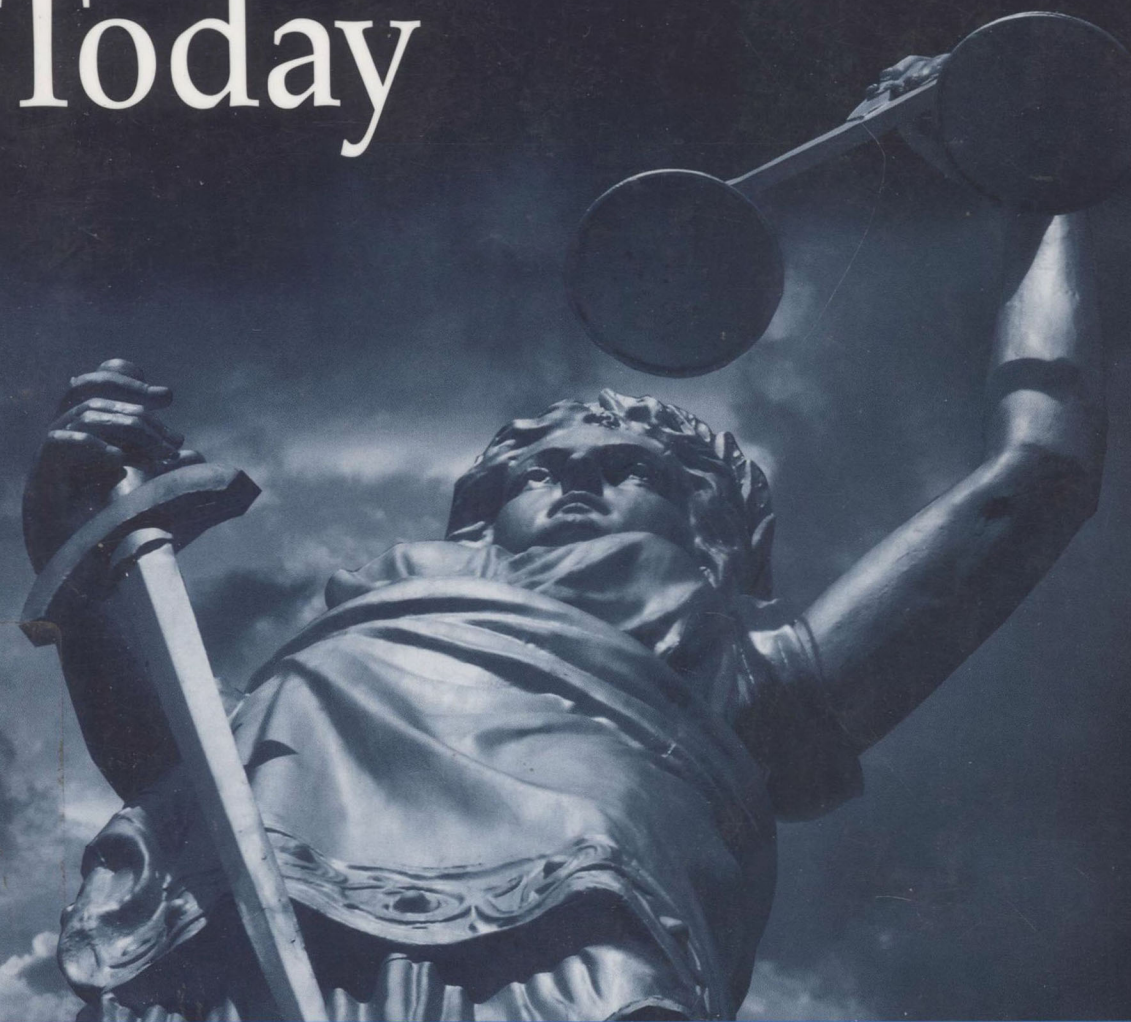


The Death Penalty Today



Edited by Robert M. Bohm



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The Death Penalty Today

Introduction

In the late eighteenth century, Dr. Benjamin Rush (1747–1813), a Philadelphia physician and signer of the Declaration of Independence, was among the most vocal opponents of the death penalty in the United States (Bedau, 1982, p. 13). Rush questioned the biblical support for capital punishment and the belief that it was a general deterrent to crime. He did not believe that the example of executions dissuades people from carrying out crimes they have contemplated committing. To the contrary, he thought that capital punishment might increase crime (Filler, 1967, p. 106; Gorecki, 1983, p. 85).

More than two centuries later, religious justifications and deterrence are no longer key issues in the death penalty debate. At the beginning of the twenty-first century, the death penalty is still as controversial as it was in the late eighteenth century, but different issues now drive the debate. The ten chapters in this book examine some of those new issues. In the first part of this book, the focus is on miscarriages of justice, including the current lethal injection controversy, and innocence. The second part of the book addresses death penalty opinion, media access to executions, consensual executions, and the relationship between lynching and the death penalty. Following is a brief description of each of the chapters.

In Chapter 1, “Errors in Capital Cases and What Can Be Done about Them,” Robert M. Bohm describes the types of errors that occur in capital cases and provides an inventory of possible remedies. He argues that errors in capital cases happen with regularity and frequency, and the special procedural safeguards provided in capital cases do not significantly reduce them. According to Bohm, implementing the remedies described in his study could significantly reduce errors but that strategy would create a dilemma for death penalty opponents because to significantly reduce errors in capital cases might increase the legitimacy of a process that abolitionists are trying to undermine. He notes that although the public is becoming increasingly aware of problems with administering capital punishment, it may not make any difference because policy makers are unlikely to do much about them. If policy makers addressed the problems, they would have to admit the likelihood that many other criminal cases that do not receive nearly the scrutiny of capital cases also must be infected with errors.

In response to recent revelations about continuing problems with administering the death penalty, such as those described in Chapter 1, several states have created investigative bodies charged with the task of reviewing their

death penalty systems. James R. Acker, in Chapter 2, "Scrutinizing the Death Penalty: State Death Penalty Study Commissions and Their Recommendations," examines thirteen death penalty study commissions and their work. Acker describes the origins, participants, and charges of the commissions, summarizes their essential findings and recommendations, and provides observations about the studies' potential to help shape future death penalty laws and practices.

In Chapter 3, "Themes of Wrongful Executions in the Post-*Furman* Era," Talia Roitberg Harmon identifies common themes among eighteen factually innocent capital defendants who were executed in the post-*Furman* era. She examines the evidence that suggests the defendants were factually innocent, the potential causes of the wrongful convictions, and the factors that led to the executions despite significant doubt about the defendants' guilt. She also provides a summary of the geography, the timeframe, and the races of the executed innocents and their victims. These datasets are then compared to the population of post-*Furman* executions more generally to identify any significant differences between the two populations.

Cathleen Burnett, in Chapter 4, "Making It Work: Compensation for the Wrongfully Convicted," describes how society deals with the reintegration problems of death row inmates who have been exonerated and released from prison. She notes that the exonerated frequently leave prison with just a bus ticket and a suit of clothes because the legal system is not set up to take responsibility for their predicament. Ironically, had they been paroled from prison, observes Burnett, they would have been assigned a parole officer who at least could help them find a job and shelter. Burnett points out the inadequacies of the three options currently available to the exonerated, and then relates the obstacles she has encountered in trying to implement an administrative solution to the problem in Missouri.

In Chapter 5, "A Painless Cocktail? The Lethal Injection Controversy," Gavin Lee describes the interesting but troublesome development of lethal injection as a method of execution. Lethal injection is now the execution method employed by all death penalty jurisdictions but one, Nebraska, which still provides for electrocution but rarely executes (only three post-*Furman* executions). Almost 85 percent of the nearly 1100 post-*Furman* executions (as of August 10, 2007) have been carried out by lethal injection. Lee reveals the flaws with lethal injection, which has been chosen as superior to hanging, firing squad, electrocution, and lethal gas because it supposedly amounts to "no more than putting a condemned individual to sleep," causing a "painless death."

Findings from a survey of death penalty experts are presented by Matthew B. Robinson in Chapter 6, "Assessing Scholarly Opinion of Capital Punishment: The Experts Speak." Robinson randomly selected authors of death penalty books and articles published since 2001. The experts responded

to questions about whether the death penalty achieves its goals of retribution, incapacitation, and deterrence; whether death penalty practice is plagued by problems such as race, class, and gender bias; and whether the death penalty is used against the innocent, and other problems.

In Chapter 7, "Police Managers' Attitudes toward Capital Punishment," Gennaro F. Vito, Geetha Suresh, and William F. Walsh present the results of their survey of mid-level police managers. Vito and his colleagues compare police managers' level of death penalty support with the level of death support expressed by prosecutors, legislators, public defenders, prison inmates, and criminologists. They also compare the death penalty attitudes of their police managers with the death penalty attitudes of both rank-and-file police officers and police chiefs.

In Chapter 8, "The United States Can't Televisе an Execution Because It Will Make Condemned Men Feel Bad about the Death Penalty: Issues Raised by the Suit to Make McVeigh's Execution Public," Paul Leighton addresses the provocative question: why is a photographer at an execution of a criminal or, in McVeigh's case, why is it a crime to make a videotape of a mass murderer's execution? The answer to that question not only involves the First Amendment but also the related larger issues of whether an open democratic society should use the coercion of the criminal law to prevent photographic recordings of executions and to what degree and in what ways government should be held accountable to its citizens.

The nearly one in eight persons executed post-*Furman* who did not pursue all available avenues of appeal is the subject of Chapter 9, "Let's Do It!": An Analysis of Consensual Executions," by Margaret Vandiver, David J. Giacomassi, and K. B. Turner. Vandiver and her colleagues provide a statistical overview of prisoners who dropped their appeals, contrasting them to those who have been executed only after all appeals were exhausted. Drawing on Durkheim's theory of suicide, they explore whether his categories of suicide are applicable to the phenomenon of consensual executions. Finally, they investigate individual cases to discover the various motives condemned prisoners have for dropping their appeals and to create a tentative typology of those motives.

In Chapter 10, "Some Hypotheses about Capital Punishment and Lynching," Hugo Adam Bedau begins to construct a theory about the relationship between capital punishment and lynching. He proposes and comments on 31 hypotheses. His underlying motive appears to be the development of another argument against capital punishment. As he explains, "If the death penalty shares many important features with lynching, and decent people have always known that lynching is a terrible criminal act, then for that reason we ought to oppose and abolish the death penalty."

As noted previously, the death penalty in the United States remains a hotly debated and controversial issue. However, in much of the rest of the

world the death penalty is no longer a salient issue. On the occasions when the subject of capital punishment is raised, most of the countries that have abolished it simply express disdain for the countries that have retained it.

The United States is becoming increasingly isolated and reviled on the subject of the death penalty. At the beginning of the twentieth century, only three countries—Costa Rica, San Marino, and Venezuela—had abolished the death penalty for all crimes (Amnesty International, 2007). By 1977, only 16 countries had abolished the death penalty for all crimes, but, as of August 2007, 90 countries had abolished the death penalty for all crimes; another 11 countries had abolished it for all but exceptional crimes; and 29 countries had abolished it in practice (i.e., they retain the death penalty but have not carried out an execution for at least ten years and are believed to have a policy or established practice of not using the death penalty) (Amnesty International, 2007). More than 50 countries have abolished the death penalty since 1990 (Amnesty International, 2007). Since 1985, only four abolitionist countries have reintroduced the death penalty. Two of those countries, Nepal and the Philippines, have since abolished it again; and the two others, Gambia and Papua New Guinea, have not executed anyone since reintroducing the penalty (Amnesty International, 2007). So, as of August 8, 2007, about two thirds of the countries in the world, 130 of them, have abolished the death penalty in law or practice, including all of the United States' major allies except Japan (Amnesty International, 2007). Only 67 countries and territories have retained the death penalty (Amnesty International, 2007). Still, among the countries that have retained the death penalty only a few of them actually execute anyone in a given year. In 2006, for example, 91 percent of all known executions occurred in only five countries: China, Iran, Pakistan, Iraq, Sudan, and the United States (Amnesty International, 2007).

Even in the United States, 14 jurisdictions (13 states and the District of Columbia) do not have the death penalty (Death Penalty Information Center, 2007). Moreover, of the 39 jurisdictions (37 states, the U.S. government, and the U.S. military) that do have a death penalty, only five of those jurisdictions (Texas, Virginia, Oklahoma, Missouri, and Florida) account for about two thirds of all post-*Furman* executions (as of September 6, 2007). Texas, alone, executed nearly 37 percent of the total (Death Penalty Information Center, 2007). In short, the death penalty is actually used with some regularity in only a few of the world's countries and a few of the states within the United States.

The material presented in the chapters of this book clearly shows that more than thirty years after the Supreme Court reinstated the death penalty, it is still plagued by egregious problems. One wonders when death penalty states in the United States will join the fourteen jurisdictions in the United States and two thirds of the world's countries and realize that the goals of criminal justice can be achieved without resorting to the death penalty?

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Robert M. Bohm is a professor of criminal justice and legal studies at the University of Central Florida in Orlando and a fellow of the Academy of Criminal Justice Sciences. He has published numerous journal articles, book chapters, and books in the areas of criminal justice and criminology, including *Deathquest III: An Introduction to the Theory and Practice of Capital Punishment in the United States* (3rd ed., LexisNexis/Anderson, 2007), *The Death Penalty in America: Current Research* (Anderson, 1991), and *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Sanction* (2nd ed.), with James R. Acker and Charles S. Lanier (Carolina Academic Press, 2003). He served as president of the Academy of Criminal Justice Sciences in 1992–1993.

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Miscarriages of Justice and Innocence

1

Errors in Capital Cases and What Can Be Done about Them

1

ROBERT M. BOHM

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