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978-0-521-81590-1 - Capital Punishment: Strategies for Abolition

Edited by Peter Hodgkinson and William A. Schabas

Excerpt

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## 1 Capital punishment: improve it or remove it?

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*Peter Hodgkinson\**

Figures vary somewhat on the number of countries that may be considered abolitionist, essentially because of differences over what constitutes *de facto* rather than *de jure* abolition. There is no dispute about the existence of an inexorable trend towards the elimination of capital punishment in national judicial systems during the twentieth century. While only a handful of countries had stopped executing offenders in 1900, by the beginning of the new century approximately two-thirds no longer impose capital punishment. In some cases, there are exceptions for war-related offences or treason. However, despite the progress it is worth remembering that, while seventy-four states out of the 195 states in the world have abolished the death penalty for ordinary crimes, this represents only 14 per cent of the world's population,<sup>1</sup> leaving 86 per cent of people living in countries where the death penalty is available.

The abolition of the death penalty stands as one of the great, albeit unfinished, triumphs of the post-Second World War human rights movement. The question we now face, at the dawn of the next century, is whether the trend will continue, or rather how to ensure it continues. I make no secret of my own view that the death penalty makes no constructive contribution to reducing the incidence of the crimes for which it is traditionally reserved. In fact, capital punishment merely perpetuates the pain and anger experienced by homicide victims' families and those employed to administer the process. I have concerns about the approaches of some in the traditional abolitionist movement believing that they may attract more support for their agenda if they could encourage a climate where respect for crime victims and their families is at least of equal importance to ensuring the legal and civil rights of the accused and

\* I wish to thank the European Commission for their continued support and funding of the Centre's activities and to the Centre's Researchers, Ms Seetal Purohit, Ms Nicola Browne and Ms Rupa Reddy for all the help they have given in the preparation of this chapter and volume. Thanks too to my co-editor, William Schabas, for his very helpful comments on this chapter. All opinions expressed are the author's.

<sup>1</sup> Amnesty International, Website Against the Death Penalty, Abolitionist and Retentionist Countries, [www.amnesty.org/rmp/dplibrary.nsf](http://www.amnesty.org/rmp/dplibrary.nsf) (30 July 2002).

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the condemned; additionally strategies towards abolition must address the expressed fears and concerns of the public, alternatives to the death penalty and the dilemmas of politicians.

There is much activity on the national level aimed at devising strategies for abolition, but little or nothing on a global scale. This essay, and the others that follow it in this volume, are an effort towards identifying the themes and issues that could ensure that the abolitionist momentum of the twentieth century continues through into the twenty-first. Not all observers are optimistic. The great English criminologist, Professor Sir Leon Radzinowicz, writing in 1999, commented:

Should Cesare Beccaria and his eminent followers come back to life and look at the map of capital punishment across the world they would hardly be able to control their disappointment . . . The heaviest blow to the abolitionist cause has come from the United States, which has resolutely rallied behind the retentionist cause . . . I am inclined to state that I do not expect any substantial further decrease in the appointment and the use of capital punishment in the foreseeable future. In my opinion most of the countries likely to embrace the abolitionist cause have by now done so.<sup>2</sup>

The volume's intention is to try to understand why countries replace, retain or restore the death penalty, and why some countries maintain the death penalty in law but have taken a formal or informal decision not to carry out any executions. The analysis is carried out in the hope that it will help to devise strategies designed to advise governments contemplating replacing the death penalty. Analysis of those jurisdictions that do not have the death penalty and have thus far been able to successfully resist calls for its restoration may also provide useful pointers for those wishing to rid themselves of the death penalty.

It was never the intention in putting together this collection of essays and expertise to cater exclusively for an academic audience, and the editors hope very much that the volume will inform and stimulate discussion among those who support and oppose the death penalty and in those forums frequented by legislators, the judiciary, medical and religious groups, the police and prison services, NGOs and others concerned with protecting human rights. The contributors were invited to bring to bear their considerable individual and collective knowledge and experience in addressing their particular expertise of the death penalty, and the hope is that through our joint endeavours we have brought something fresh to this debate.

We wanted too to redress the distortion in death penalty scholarship by shining a light onto issues and parts of the world that too rarely get

<sup>2</sup> Leon Radzinowicz, *Adventures in Criminology* (London: Routledge, 1999).

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exposure. The vast majority of death penalty scholarship is based on experience in the United States and, though it represents the experience of only 4 per cent of the world's population, its data and debate tend to dominate the Western approach to capital punishment. While one should not ignore the wealth of information and scholarship the US experience provides, the reality is that there is precious little authoritative material on capital punishment in other countries,<sup>3</sup> and we hope that the chapters on Lithuania, Georgia, South Korea and Japan, the Commonwealth Caribbean and Islam go some way to addressing this poverty of knowledge. The crucial distinction that I want to make is that between the valuable contribution the US data make to the general debate and its questionable relevance for abolitionist strategies worldwide.

The core reasons for retaining or removing the death penalty differ from country to country but generally include such issues as deterrence, public opinion, rights of victims, and alternatives – all these against a background of understandable concern about an explosion in violent crime that would follow the removal of the death penalty. The debate elsewhere in the world is usually far from the much-publicised and well-known debate in the United States. This chapter will briefly review some of the 'usual suspects' in the debate whilst others deal with such issues as physician involvement, alternatives to the death penalty, international law, victims, public opinion, mode of execution and religion.

Professor Roger Hood identifies several factors that he believes have influenced the increase in the number of abolitionist countries: the spread of international treaties and of the human rights movement; political pressure; political leadership; and the rejection of injustices associated with totalitarian regimes. He proposes four main objections to the death penalty: (1) capital punishment violates the fundamental right to life; (2) capital punishment is not a unique deterrent; (3) the administration of the death penalty, even in developed legal systems, is inherently and irredeemably flawed; and (4) its effect is counter-productive in that it gives out very confused moral messages.<sup>4</sup>

In an effort to identify what has motivated legislators to abolish the death penalty and to maintain abolition in the face of ongoing demands

<sup>3</sup> See, for example, the remarks on this subject by Professor Roger Hood, who has conducted the United Nations' last three quinquennial reviews of the status of the death penalty worldwide: R. Hood, *The Death Penalty: A Worldwide Perspective* (2nd edn, Oxford: Clarendon Press, 1996), pp. 1, 2. Detailed information about Russia and the CIS, China, Commonwealth Africa, post-communist Europe and the UK is to be found in Peter Hodgkinson and Andrew Rutherford, *Capital Punishment – Global Issues and Prospects* (Winchester: Waterside Press, 1996).

<sup>4</sup> R. Hood, 'Capital Punishment – A Global Perspective' (2001) 3 *Punishment & Society* 331–54.

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for harsher criminal sanctions, Professor John Galliher and his colleagues have looked at nine of the twelve states in the United States that are currently without the death penalty.<sup>5</sup> They note that, while ‘the history of violence, executions and murder rates has a limited impact on death penalty abolition, heinous acts against children, women, and the elderly generally have considerable influence on capital punishment legislation’. Such brutal crimes outrage political leaders, the public and the media, and can trigger efforts to reinstate capital punishment even in jurisdictions where such crimes are rare. The consequence, as the study notes, is that every abolitionist state provides for life imprisonment of dangerous offenders without any possibility of parole – a fact that undoubtedly strengthens the position of those opposed to the death penalty in any restoration discussions.

Galliher and his colleagues considered six empirical questions concerning imposition of the death penalty. In none of these six critical areas of investigation could they establish significant causal links with successful abolitionist strategies. From the standpoint of abolitionist strategies, most of these factors do not lend themselves to meaningful manipulation. For example, there is not a lot abolitionists can do to improve the economic or employment status of a society. In any event, the study rejects suggestions that the death penalty survives during periods when the economy is depressed and unemployment high.<sup>6</sup> Several of the abolitionist jurisdictions, such as Alaska, Michigan, West Virginia and Washington, DC, had chronic economic problems. Nor can abolitionists do much to influence population diversity. But here too, the Galliher study found a broad range of mobility patterns in the nine abolitionist states that were studied. They nevertheless observe that in Alaska and Hawaii, as well as in Washington, DC, the political empowerment of minority populations, and the history of racism in the imposition of the death penalty, can only have encouraged the abolition of capital punishment.

Engaging with elites emerges as an important factor in maintaining an abolitionist position, and the informing of such elites should, in their

<sup>5</sup> J. F. Galliher, L. W. Koch, D. P. Keys and T. J. Guess, *America Without the Death Penalty – States Leading the Way* (Boston: Northeastern University Press, 2002). Michigan, Wisconsin, Maine, Minnesota, North Dakota, Hawaii, Alaska, Iowa and West Virginia. The other three, Massachusetts, Rhode Island and Vermont have an important abolitionist pedigree and differ from the other nine in that their death penalty was removed, not by legislative means but by the state Supreme Courts which found the penalty to be unconstitutional. Mention is also made of the ‘distinguished history of death penalty abolition’ in the District of Columbia, which has successfully resisted efforts by the United States Congress to restore the death penalty.

<sup>6</sup> G. Rusche and O. Kirchheimer, *Punishment and Social Structure* (New York: Columbia University Press, 1939).

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view, be part of the agenda of those working to remove the death penalty. As to public opinion, they believe that Zimring and Hawkins are probably correct in their assertion that abolition has usually taken place in the face of the opposition of measured public sentiment.<sup>7</sup>

Though there are examples where abolition and public support for it coincide, for understandable reasons, such as in Romania, West Germany and Cambodia. Zimring and Hawkins have argued that public opinion evolves following abolition until it eventually opposes capital punishment, but the Galliher study claims that attitudes concerning capital punishment differ little, if at all, between the residents of abolitionist and death penalty states – an observation supported by the majority of abolitionist countries worldwide.

Perhaps the strongest effect identified by Galliher and his colleagues is the influence of the media. Decades ago, J. Hagan highlighted the importance of the contribution of the press to all types of legislative activity,<sup>8</sup> and the Galliher study states that, without the *Des Moines Register* and the *Charleston Gazette*, Iowa and West Virginia respectively would probably have become death penalty states.

An earlier piece of research along similar lines conducted by the Centre for Capital Punishment Studies on behalf of Hands Off Cain in the late 1990s<sup>9</sup> produced a report that provides a country-by-country review of the status of the death penalty. The data was gleaned through questionnaires sent to Justice and Foreign Ministries of all countries, permanent missions to the UN, the Council of Europe and other country groupings.

### Review of the debate: the usual suspects

#### *The moratorium movement: progress or procrastination?*

The focus of abolitionist activity in recent years has been the push for a moratorium on executions. The idea of a moratorium as a campaign demand dates to early activity in the United Nations, in the late 1960s. Treaty bodies like the Human Rights Committee have frequently recommended that states still using the death penalty consider a moratorium, as if this will further the goal of abolition set out in Article 6(6) of the

<sup>7</sup> F. E. Zimring and G. Hawkins, *Capital Punishment and the American Agenda* (New York: Cambridge University Press, 1986).

<sup>8</sup> J. Hagan, 'The Legislation of Crime and Delinquency: A Review of Theory, Method and Research' (1980) 14 *Law and Society Review* 603–28.

<sup>9</sup> 'Towards Abolition – The Law and Politics of the Death Penalty', research conducted by Laban Leake, researcher with the Centre for Capital Punishment Studies. The report and its updates are available from Hands Off Cain, Via di Torre Argentina, 76, Rome 00186, Italy.

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International Covenant on Civil and Political Rights. The moratorium demand was revived in 1994, in the doomed United Nations General Assembly resolution, and again in 1999. It has been part of the controversial resolution adopted annually by the United Nations Commission on Human Rights since 1998.

Some abolitionists believe that a period without capital punishment will show its folly, or that it is unnecessary, or that it bears unnecessary political and financial costs.<sup>10</sup> In this way, it is believed, a moratorium will lead to genuine abolition. Retentionists, on the other hand, hope to use the moratorium period to ‘fix’ capital punishment’s flaws. In the US, religious fundamentalist supporters of the death penalty, like Pat Robertson, Jerry Falwell and members of the Christian Coalition, are aligned to their current moratorium movement solely for the purpose of tidying up capital punishment’s worst excesses, to make it more palatable for both domestic and international audiences. That the two sides have found some common ground presents those who seek the replacement of the death penalty with both opportunity and danger.

Is there really evidence for the premise that abolition will follow a period of review? The most recent example, that of Illinois, is inconclusive. Governor Ryan of Illinois, a conservative Republican and a strong supporter of the death penalty, was finally satisfied that all was not well with the administration of the death penalty in his state when confronted with the harsh reality that between 1990 and 2000 ten executions had been carried out and that during the same period thirteen prisoners were released from their death sentences for a variety of reasons. On 31 January 2000, he imposed a moratorium on any further executions until a thorough review of the administration of the death penalty had been conducted.<sup>11</sup> He was quoted as saying that ‘[t]he Illinois capital punishment system is so fraught with error and has come so close to the ultimate nightmare, the state’s taking of an innocent life’.

Since he imposed the moratorium, nine other states have launched similar studies, and there have been widespread calls for similar action. Governor Ryan’s Commission presented its findings in April 2002, making eighty-five recommendations, all with the objective of correcting the flaws and weaknesses identified in the Illinois system. While not part of the Commission’s brief, a narrow majority of its members were inclined to the position that the death penalty should be replaced believing that the system was incapable of being corrected. Yet those who favour the

<sup>10</sup> ‘Moratorium 2000 – Organising Against the Death Penalty’, [www.moratorium2000.org](http://www.moratorium2000.org).

<sup>11</sup> Report of the Governor’s Commission on Capital Punishment, April 2002. Available on the website of the Death Penalty Information Centre, [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org).

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death penalty in Illinois and elsewhere view the experience of Illinois as a measure of the rigour of the capital punishment process in identifying such flaws. In May 2002, Governor Ryan announced new legislation based on the eighty-five recommendations of his Commission. During August and September 2002, clemency petitions were prepared on all death row inmates by the Parole Commission with a view to considering commuting the death sentences of some or all of them. At the time some saw this as posturing to encourage the legislature to speed up their deliberations on the new Bill and to challenge the prospective candidates for the governorship after the present governor leaves office in January 2003. The abolitionists hoped that Governor Ryan was laying the foundations for what would be an historical blanket commutation of all those on death row. Governor Ryan kept everyone guessing in the last months of his term of office, leaving it until 11 January 2003, two days before he left office, to announce, at a lecture at Northwestern University Law School, that he was commuting the sentences of all 156 inmates on Illinois' death row.<sup>12</sup>

It was a courageous decision, though rationally it was the only decision that he could have taken as it would have been manifestly unfair to proceed with the executions of those already on death row in the near certain knowledge that some will be innocent and all will have been processed by a system ravaged by the many flaws identified by his Commission. This moratorium, which will remain in place under the new Governor, has led to the death penalty being removed from 156 people, 153 of whom will spend the rest of their lives in prison, while three have had their sentences commuted to less than life. A further four have been pardoned. To this extent, the suspension of executions has been beneficial but – and it is a big but – the future in Illinois seems to be concerned with improving the death penalty not removing it.

In May 2002, Parris Glendening, Governor of Maryland, also announced a moratorium on executions<sup>13</sup> until the research he had commissioned had been completed and reviewed. The research commissioned of the University of Maryland<sup>14</sup> has now been completed and, 'While criminologist Ray Paternoster found that the race of the defendant was not significant in death penalty-eligible cases, the race of the victim proved a major factor in determining whether prosecutors sought the

<sup>12</sup> *Chicago Tribune*, 11 January 2003.

<sup>13</sup> State of Maryland, Governor's Press Office, [www.gov.state.md.us/gov/press/may/html/baker.html](http://www.gov.state.md.us/gov/press/may/html/baker.html).

<sup>14</sup> R. Paternoster and R. Brame, 'An Empirical Analysis of Maryland's Death Sentencing System with Respect to Race and Legal Jurisdiction' (University of Maryland. 2003), [www.urhome.umd.edu/newsdesk/pdf/exec.pdf](http://www.urhome.umd.edu/newsdesk/pdf/exec.pdf) (Executive Summary) and [www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf](http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf) (Final Report).

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death penalty and furthermore, the race of the victim and offender taken together showed significant differences. Prosecutors filed death notices, indicating their intent to seek the death penalty, in almost 1/2 of the homicides where a black defendant killed a white victim, but only in about a quarter of all other homicides.<sup>15</sup> The findings confirm Glendening's principal concern of racial and prosecutorial disparity.

In the 1960s, executions in the United States were halted *de facto* and between 1972 and 1976 there was a *de jure* halt to executions.<sup>16</sup> On that occasion, we know that the death penalty system was 'fixed', not abolished. Many countries, of course, go through periods of *de facto* abolition before they proceed to eliminate the death penalty from their statute books – though to describe the status of such countries as *de facto* abolitionist is misleading, and it would be more correct to describe their status as having suspended executions as in general the rest of the panoply of death penalty legislation continues. This type of suspension should be considered only as a last resort as politicians are already past masters at the art of delay and prevarication and one should not be in the business of providing formal opportunities to justify further delay. What is important is that the moratorium not become a goal in itself, and that it be continually presented – by abolitionists, at any rate – as a step towards total and permanent replacement of capital punishment. Even more desirable, where possible, would be to obtain the suspension of the entirety of the death penalty process while the raft of changes to legislation and infrastructure is put in place to prepare society for a life without capital punishment. This in essence is the approach the Council of Europe institutes in those states seeking membership.

### *Deterrence*

Deterrence claims for the death penalty make occasional appearances in the academic literature and more often in the rhetoric of activists and politicians who favour capital punishment, prompting equally ill-informed rebuttals from the anti-lobby. Most informed debate has put the deterrence justification on one side because it provides more heat than light and is essentially a distraction and a political ploy that serves only to raise the hopes of an electorate fearful of crime who are receptive to any solutions on offer.

<sup>15</sup> Associated Press, 7 January 2003.

<sup>16</sup> For further discussion of the moratorium approach in this era, see H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972–1994* (New York: Oxford University Press, 1996).



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In Roger Hood's words, 'the issue is not whether the [death penalty] deters some people, but whether, when all the circumstances surrounding the use of capital punishment are taken into account, it is a more effective deterrent than the alternative sanction: most usually imprisonment for life or very long indeterminate periods of confinement' (p. 1, para. 2). He 'conclude[s] that econometric analyses have not provided evidence from which it would be prudent to infer that capital punishment has any marginally greater deterrent effect than alternative penalties' (p. 6, para. 23), and that '[i]t is futile therefore for such states to retain the death penalty on the grounds that it is justified as a deterrent measure of unique effectiveness' (p. 6, para. 27).<sup>17</sup>

Even so, the issue of deterrence is frequently raised by governments to support their retentionist position, and the evidence most frequently relied on is based on Isaac Ehrlich's<sup>18</sup> work usually without any reference to the many authoritative refutations of his findings and methodology. Ehrlich set out to refute earlier studies by criminologist Thorsten Sellin, who had argued that his research showed that the death penalty is no better a deterrent to murder than life imprisonment. Ehrlich's work, which attempts to present 'a systematic analysis of the relation between capital punishment and the crime of murder', uses sophisticated economic statistical analysis to come to the conclusion that from 1933 to 1965 'an additional execution per year . . . may have resulted on the average in seven or eight fewer murders'. However, he did concede that this alone was not necessarily sufficient justification to use the death penalty over other punishments. More recent and as yet not validated research claiming to demonstrate strong deterrent effects includes that of Hashem Dezhbakhsh, Paul Rubin and Joanna Shepherd,<sup>19</sup> who argue that their results suggest that capital punishment has a strong deterrent effect, and that each execution results on average in eighteen fewer murders. An increase in any of three probabilities – arrest, sentencing or execution – tends to reduce the murder rate. They claim to have improved and expanded upon the model designed by Ehrlich in the 1970s. On the other hand, John Sorenson, Robert Wrinkle, Victoria Brewer and James

<sup>17</sup> R. Hood, 'Capital Punishment, Deterrence and Crime Rates', Seminar on the Abolition of the Death Penalty, Kiev, 28–29 September 1996, Council of Europe Parliamentary Assembly, Doc. AS/Jur (1996) 70.

<sup>18</sup> Isaac Ehrlich, 'The Deterrent Effect of Capital Punishment: A Question of Life and Death' (1975) 65 *American Economic Review* 397–417, <http://wings.buffalo.edu/economics/ehrllich.aer.1975.pdf>.

<sup>19</sup> Hashem Dezhbakhsh, Paul H. Rubin and Joanna M. Shepherd, 'Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data', Department of Economics, Emory University, January 2002, <http://userwww.service.emory.edu/~cozden/Dezhbakhsh.01.01.paper.pdf>.

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Marquart examined executions in Texas between 1984 and 1997, speculating that, if a deterrent effect were to exist, it would be found in Texas because of the high number of death sentences and executions within that state. Using patterns in executions across the study period and the relatively steady rate of murders in Texas, the authors found no evidence of a deterrent effect. The study concluded that the number of executions was unrelated to murder rates in general, and that the number of executions was unrelated to felony rates.<sup>20</sup>

From my experience, reliance on this justification is usually short-lived once the concerns of methodology and interpretation raised by the research are dealt with. This, coupled with the realisation that most deterrence research is conducted about the paradigm offence of murder when, for example, in Taiwan there are 157 offences that attract the death penalty, leads to a realisation that reliance on the deterrence justification is based more on hope than evidence.

Any lingering doubts about the putative deterrent benefits are soon dispelled when introduced to the evidence of the multiple inherent flaws in the administration of the death penalty revealed by the US research. A deeper appreciation of the issues and the research generated by the deterrence debate is provided by Bailey and Peterson<sup>21</sup> in Hugo Bedau's *The Death Penalty in America: Current Controversies*, Roger Hood's *The Death Penalty: A Worldwide Perspective* and William J. Bowers and G. L. Pierce,<sup>22</sup> whose study using Ehrlich's methods model did not find any deterrent effect.

#### *Judge/jury sentencing in capital trials*

Justice Harry Blackmun of the United States Supreme Court tried for decades to fine-tune the death penalty in order to make it compatible with the Constitution. In his last judgment before retirement, he announced that he would no longer 'tinker with the machinery of death', and that the incremental reforms that he had fought for so hard could not eliminate the fundamental inequalities and injustices of capital punishment.<sup>23</sup>

The two most recent examples of 'tinkering' are provided by the US Supreme Court's judgments in 2002 on jury sentencing in capital trials

<sup>20</sup> John Sorenson, Robert Wrinkle, Victoria Brewer and James Marquart, 'Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas' (1999) 45 *Crime and Delinquency* 481–93, <http://www.deathpenaltyinfo.org/deter.html>.

<sup>21</sup> W. C. Bailey and R. D. Peterson, 'Murder, Capital Punishment, and Deterrence: A Review of the Literature' in Hugo Adam Bedau (ed.), *The Death Penalty in America: Current Controversies* (New York: Oxford University Press, 1997).

<sup>22</sup> William J. Bowers and G. L. Pierce, 'The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment' (1975) 85 *Yale Law Journal* 187–208.

<sup>23</sup> *Callins v. Collins*, 510 US 1141 (1994), at p. 4 (slip opinion).