The Death Penalty: An American History

By Stuart Banner
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Reviewed by Jon M. Sands

The juvenile was set to be executed. Clemency had been denied, and the hour of his death was approaching. The arguments for clemency had focused on his youth and lack of criminal record. The arguments for the penalty had pointed to deterrence and society’s need for protection. Even by 1821, in Massachusetts, the arguments on both sides of the death penalty were familiar. The execution occurred by hanging, but the issue would not die with the defendant. Though he had been found guilty of arson and had confessed, he had, after all, burnt only a barn, and no one had died. He was 16 years old. This execution of the boy was not soon forgotten, and it became the signature argument for the abolition of the death penalty in Massachusetts. The scene and the arguments were to be repeated again and again throughout our history.

The Death Penalty is a history of 250 years of capital punishment in America. Stuart Banner takes the death penalty as a means of both crime control and social control, and he follows its course through a substantial, complex, and erudite study. His book is interesting even when one does not agree with its emphases. Its judicious mapping of the debate, and of the death penalty’s supporters and opponents, is fair and balanced. The author performs the valuable service of providing a historical context for the arguments. It is a masterful and lucid account.

In Banner’s historical sweep, the death penalty in America can be said to fall into three main phases. There was the founding period, from the 17th until the early 19th centuries, when the death penalty was the preferred, and at times the only, means of punishment for serious crime. This was followed by a penalogical age, from the 19th to the late 20th centuries, which saw use of the penalty generally wane until it became virtually nonexistent in the 1960s. The third period, the politicization of the death penalty, occurred, paradoxically, with the Supreme Court’s invalidation of all death penalties in 1972 in Furman v. Georgia. This invalidation did not forbid capital punishment but required standards and regulations so that the death penalty would not be considered freakish and random. The modern death penalty advocacy movement grew from reaction to Furman and the politicization of crime.

Capital punishment was common in the European legal tradition, especially in England. This is not surprising. The death penalty was quick, certain, and cheap, whereas prisons and rehabilitation were expensive. In the American colonies, with jails few and far between, law enforcement minimal, and the perceived need for deterrence strong, the death penalty was the preferred method for most felonies. And for the death penalty to serve as a warning, it had to be public.

In Colonial and early America, the death penalty was mandated for many offenses and was imposed on many defendants. There was almost no appellate recourse, but clemency re¬ prized half of those sentenced. Clemency by the governor followed its own customs, with community members weighing in and the defendant’s contrition being required. The frequent use of clemency at the time stands in stark contrast to its rare use today, when political considerations and procedural requirements (parole or clemency board recommendations) govern. Clemency today is extolled as the last resort by the courts, but in practice it is almost nonexistent. The archetypical phone in the death chamber now never rings at the last minute with a clemency reprieve from the governor. The phone call, if it comes at all, is from an appellate court instead.

Beginning with the founding period, and throughout his study, Banner focuses on the day of execution, discussing both the technological changes — from rope to gas to injection — and the social changes, from the very public spectacle of execution to its occurrence today inside of prisons. Execution once had an air of celebration, with the rites of the walk and the defendant’s last words, but modern sensibilities require specially constructed execution chambers, with carefully screened and limited witnesses.

On the “hanging day” in the colonies and the early republic, all were expected to pay witness, and religion was front and center. The deterrent aspect was stressed, with calls to beware, and the condemned expected to make a stock speech, warning others to avoid what had led him to his fate. Ministers used the occasion to preach to the multitude about sins. It is telling, as Banner points out, that executions were not uncommon but were not so common that the singularity of the event was lost on the social consciousness. Banner recounts travelers’ journals and diaries in which landmarks are identified as being the site where so and so was hanged for such and such an offense.

The founding period also saw the beginnings of the abolitionist movement. As the 18th century ended, sensibilities slowly began to shift toward a recognition of the humanity of the condemned, even in such a wretched form. This recognition — combined with the Enlightenment belief in rationality and the possibility of reform and the development of penal alternatives (imprisonment leading to rehabilitation) — made it seem scientific and progressive to seek reform or even abolition of the death penalty. Starting in the 1790s, college students were writing essays predicting that capital punishment would soon be abolished. Their essays put forth many of the same arguments that are raised today, including the lack of deterrence, the risk of executing innocents, and the irrationality of the death penalty.

The penalogical period, when use of the death penalty waned, mirrored the social times. Examples, such as the execution of the 16-year-old arsonist in Massachusetts, provided a human face for the proponents against death, and
the limiting of capital offenses began. The anti-death penalty movement also gained support from anti-slavery sentiment. Some states, such as Massachusetts, in light of the cause célèbre of the juvenile case, abolished capital punishment. But other states, notably in the South and West, continued to use capital punishment widely as a means of deterrence and punishment as well as for social control of minorities and immigrants. Banner traces the predilection for capital punishment in the South throughout American history. He sees the South's greater prevalence of violence and its more agrarian culture as relevant. But the key factor, as so often in American history, has been race.

The penological period's limiting of capital punishment proceeded in fits and starts. Crime waves, labor wars, and political terrorism lent support to the ultimate punishment, but the reform tide continued to swell. The 1860s to the 1960s saw a steep decline in capital punishment from the hundreds, if not thousands, per year to a mere unfortunate few. Executions became freakish in nature, and seemingly random, though it was usually the poor and minorities who were struck down. The death penalty could be seen as a remnant of an earlier time.

The Supreme Court issued what it likely thought would be the end of capital punishment in its 1972 Furman decision. Throwing out all death penalties because of unguided discretion, the Court acknowledged that death was indeed different. The punishment demanded channeled discretion, and a means of weighing the ultimate penalties with aggravating and mitigating factors. Furman proved, however, not to be the victorious end of the reform movement but rather, ironically, the starting point of the modern death penalty.

Furman sparked a challenge for law and order advocates to enact a death penalty that met the Court's more stringent due process requirements. Georgia adopted a plan that enumerated aggravating and mitigating factors to be found, weighed, and balanced by the jury. This plan came before the Court in Gregg v. Georgia.

In Gregg, the Court affirmed the use of structured penalties, approving a weighing of factors and the calibrating of discretion. Banner charts the upsurge in support for the death penalty, citing possible reasons for such support, from the surge in crime, to racial issues, to exploitation by politicians. Banner rightfully cannot conclusively say why the death penalty became such an emotional political issue, but a coalescing of circumstances gave capital punishment a new life. This time though, as the death rows filled, clemency was not so forthcoming, and the traditional safety valves for the penalty were slowly cut off by legislation and politics. The poor and minorities, of course, continue to be disproportionately executed.

Banner, perhaps, could have emphasized more the disproportionate number of minorities sentenced to death. The use of execution against the disenfranchised and disempowered makes it a potent political as well as penal weapon. This is especially true in the South. Banner notes this, but this reviewer would have underscored it more, both historically and in the modern imposition of the death penalty.

Banner does not view capital punishment as a uniquely American phenomenon. He astutely acknowledges support for the death penalty in other countries that have outlawed capital punishment. Rank-and-file citizens in Western Europe may favor the death penalty, but elites do not. As Banner points out, America may still have the death penalty because the government is more democratic than that of other Western nations. Nevertheless, the company that the United States keeps with various despotic regimes in imposing the death penalty does give one pause.

Banner weaves the arguments for and against the death penalty throughout his study. He does not take sides, but points out that the debate has been and will continue to be political; it is untenable for the courts to dismantle the judicial apparatus they have erected, though they can remove select classes, such as the mentally handicapped or juveniles, from among those eligible for the death penalty. The real battle must be in public opinion, as it has been for the past 250 years, with the nation becoming increasingly skeptical of the death penalty in the middle of the 20th century, and perhaps now becoming so again, with the realization that numerous innocent people have been condemned to death.

These concerns over the fairness of the system and the possibility of error may well have contributed to the decline in the number of capital convictions for the first time in a generation. Indeed, the number of new inmates on death row in 2001 was the lowest since 1973. These concerns, moreover, were the prime factors in the recent decision of Illinois Gov. Ryan to commute all 167 state death sentences. His view of the death penalty system as fundamentally flawed and unfair, “haunted,” in his words, “by the demon of error” in determining guilt and determining which of those convicted would die, may presage yet a new phase in the debate about the death penalty.

This phase, as Banner notes in his epilogue, comes with the realization that the judicial creation of an intricate death penalty jurisprudence fails to address the ultimately moral decision that surrounds the issue. No amount of tinkering with the judicial “machinery of death,” in Justice Blackmun’s words, can absolve society from its responsibility for this decision. It is a decision that will continue to be debated, because the death penalty, despite its admitted flaws, continues to have popular support, increased by the war against terrorism and the fear inspired by the sniper murders in the Washington, D.C., area last October.

The opposing strains are reflected in the issue of juvenile eligibility for the death penalty. Execution of the young has always furnished the abolitionist movement with one of its strongest emotional arguments. The world in general is opposed to the death penalty but is appalled at the penalty for those under 18. The tide against allowing such executions in America seemed to be gaining such momentum that it was realistic to believe that juveniles would be found ineligible for capital punishment under an evolving “cruel and unusual standard,” as applied to the mentally retarded recently by the Supreme Court's Atkins decision. Yet

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attention is now focused on the juvenile D.C. sniper, Lee Malvo, who is being prosecuted first by a state (Virginia) that allows juveniles to be executed rather than by a state (Maryland) that does not. The calls for Malvo’s death are not slackened by his age.

In charting and covering the breadth and depth of the death penalty debate, one can ask for no better guide than *The Death Penalty: An American History*. Banner’s accomplishment in providing a historical dimension to the issue cannot be underestimated. If we are to debate the death penalty, we must have a historical sense of where it came from and how it has evolved. In his somber, solid, and dispassionate account of a most passionate subject, Banner has provided a record that both sides must take into account in arguing their convictions and making their appeals. TFL

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