The Top Ten Death Penalty Myths: The Politics of Crime Control

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Foreword by Sister Helen Prejean
To Joseph Alexander Rudolph Gerber,

*Non egit Maris jaculis.*

—Horace

R.G.

To Kailey Ann Johnson and Kyle Laban Johnson,

Hope for tomorrow.

J.J.
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Foreword

Sister Helen Prejean

It is my great pleasure to say a few introductory words about this fine book on the mythology of capital punishment. Both the authors are well-known scholars in the legal and social sciences. Rudolph Gerber served as a prosecutor, trial judge, appellate judge, and member of a major Phoenix law firm. He is one of the few people who can claim to have drafted death penalty statutes, prosecuted death cases, defended them, presided over them as a trial judge and on appeal, including before the U.S. Supreme Court. John Johnson is a longtime distinguished professor in the School of Justice and Social Inquiry at Arizona State University, a position inspiring his prior thirteen books on justice-related topics. He, too, has had intimate familiarity with capital punishment—he has witnessed an execution, taken a public controversial position on capital punishment, and has maintained regular contact with condemned persons on Arizona’s death row. Readers could not find authors with more real-world experience regarding the topics in this book.

The topics addressed in these pages are the big ones, the issues that surface in every legislative or popular discussion about capital punishment: deterrence, retribution, closure, infallibility. Does the death penalty deter potential murderers from homicidal behavior? Apart from that answer, does it serve some kind of moral command to mete out justice on an “eye for eye” basis? Does it provide therapeutic closure for the real emotional pain of homicide survivors? And what about the justice system itself? Is it trustworthy, speedy, and certain, or does it make mistakes like those addressed in my book The Death of Innocents? Sooner or later one must also confront the bottom-line financial question: does capital
punishment possibly save the taxpaying public the expense of a sentence of life imprisonment? And looming over all these issues is the moral question: is capital punishment appropriate for the evolving standards of decency that the Supreme Court says define our moral standards today?

These topics, plus the others addressed in these pages, are perennial. They not only appear in every legislative and academic debate on the death penalty but reach the very moral and political underpinnings of our system of justice. That system ought to profit from the careful analyses in these pages. What is striking about the many state legislatures that enacted death penalty laws after the Furman decision in 1972 is that they have had to enact them over and over again to correct flaws that have been condemned by courts. This legislative and political churning of death has absorbed enormous amounts of time, money, and effort on the part, not only of legislators and politicians, but also the nation’s state and federal court systems. One of the most frequent (but certainly not the sole) legislative tack is to add new categories of first degree murder, often coupled with additional aggravating factors qualifying more defendants for the ultimate penalty. These endless legislative tinkerings give politicians pregnant opportunities to capitalize on the victimization potential of specific constituencies, such as the aged, women, children, and minorities. Enacting and campaigning on death-related statutes in the wake of the Furman decision appear as among the most satisfying legislative and political opportunities to further the careers of many of our elected officials. This book offers a needed reflection on whether these goals serve the general public and the justice system in any way other than fostering fear-based electoral decisions.

The death penalty appears to be not merely a forceful symbolic statement about the lengths we will go to achieve crime control. It also expresses a very important view of the relation of citizens to the state and the great power that some societies entrust to their elected officials. At the end of the seventeenth century John Locke said that political power included “a right of making laws with penalties of death,” a right we Americans inherited in forming our own country. Today this ultimate penalty continues to display its political cache as a mainstay for many elected officials who easily find ways to use its emotional appeal to excite, rally, and at times enflame supporters.

Readers of this thoughtful book are invited to look beneath these surface appeals into the very fundamental assumptions about the justice system, its assumed infallibility, its assumed precision and neutrality, its ability to better and worsen lives, in order to explore whether these beliefs and practices amount to anything more than useful myths—or, perhaps,
myths useful to political figures but detrimental to everyone else. My hope is that all readers, including our legislators, will take these carefully wrought pages to heart as they explore the mythic aspects of our system of capital punishment.

Sister Helen Prejean, CSJ, author of *Dead Man Walking* and *The Death of Innocents*
Acknowledgments

We are indebted to many others who have helped make our dedication to this project possible and enjoyable. The School of Justice and Social Inquiry at Arizona State University, our academic home, and its distinguished colleagues, including Director Doris Marie Provine, provided both time and stimulation for many of the thoughts in these pages.

For John Johnson, the long friendship of Arizona State University Regents Professor David L. Altheide has been especially rewarding and nurturing for intellectual growth. The long and loving friendship of Viva LeRoy Nash, currently on death row for over twenty-five years in Arizona, has been both challenging and inspirational; over the years he has taught many lessons. For Rudy Gerber, his colleagues at the Arizona Court of Appeals and at the law firm of Shughart Thomson and Kilroy PC contributed not only insights but also a dedicated commitment to the justice issues underlying these pages.

Hilary Claggett, our editor at Praeger, offered helpful suggestions and endured our problems with deadlines with equanimity and patience.

Our wonderful spouses, Kathleen and Susana, indulged our need for time to think, discuss, and write. The following pages are offered in gratitude for your love and support.
Introduction

Roland Barthes once commented favorably on the wondrous practices that supposedly allow Buddhists to see an entire landscape in a single bean. If American capital punishment is taken as the landscape, this book presumes to play the role of the bean to provide a compact view of the major “plantings” decorating its landscape.

More precisely, these pages explore how support for capital punishment in the United States constitutes one or more myths. That investigation, we expect, ought to provide some helpful answers in the ongoing death penalty debate. We expect, also, that these chapters examine death penalty justifications not only because of that worthy topic but also as an aid to advocates’ self-knowledge about how their own values play into support for capital punishment.

An introductory word seems in order about the meaning of “myth.” Unlike Joseph Campbell’s popular depictions of cultural and religious myths, these pages instead focus on argumentative beliefs—the sometimes polite, sometimes aggressive assertions by government and community leaders seeking to justify capital punishment in principle and in practice as a matter of national policy. These arguments usually address, among others, such capital punishment issues as community bonding, deterrence prospects, costs and benefits, its assumed infallibility, its political utility, and the claim to address victim needs for therapy and vengeance.

Myths do serve some purposes for myth-holders apart from any consideration of their truth. For those who hold them as part of a wider belief system, myths about capital punishment may help to bring order and meaning to the universe of crime and punishment, a world often seeming
chaotic, even threatening, to the average citizen. When the reality of crime generates public fear, myths about capital punishment may help to provide myth-holders with a semblance of comfort. Myths might make the world seem more ordered, more tolerable, more oriented toward “justice,” however broadly defined.

Myths also play a role within the criminal justice system itself. They reinforce practitioners’ existing distinctions of conduct as criminal or law abiding. They support crime control strategies, usually aggressively punitive ones. The public usually constructs its understanding of justice in general and criminal justice in particular by reference to mythic beliefs that offer comfort and reassurance that justice in some satisfying sense is working its way out as criminals are being caught, convicted, and at times, sentenced to death. Executions in this scenario might appear as a kind of penultimate confirmation that wrongdoers need to be punished severely enough to reassert our community values distinguishing right and wrong, “good guys and bad guys.”

In addition to providing psychological comfort, crime myths, including myths about capital punishment, provide a convenient glue to fill gaps in knowledge. Myths provide a personal mortar not only to fill in knowledge gaps but also to cement together a whole pattern of justice strategies regarding morality, guilt, enforcement, and punishment. Capital punishment myths can occupy spaces in our knowledge that we assume the social sciences either cannot answer at all or fail to answer to our satisfaction. When social science offers unproductive or unsatisfying data, capital punishment mythology can fill the noetic void with instinctive and commonplace assumptions about its utility apart from any contrary data. These practices can be reassuring on a quick inspection. Indeed, since our country’s founding these lethal practices have erected well-embedded political and social structures that serve, even reward, certain personal and political goals associated with the death penalty.

Crime myths, especially myths about capital punishment, also help to tell us about the myth-holders themselves. Even apart from their score on a truth/falsity scale, myths allow myth-holders to separate themselves from those others who deserve condemnation and punishment, even the ultimate punishment of death. Myth thereby may help distinguish us good folks as law-abiding from the others who deserve condemnation, even death. These myths with moral overtones also help distinguish supporters and opponents of executions and the values implied in each position. Crime myths, including those about the death penalty, constitute a powerful belief system that usually reflects a person’s wider moral and political convictions.
To a large extent citizen myths about the death penalty appear in public opinion polls. It is no secret that public opinion in the United States as of 2007 continues to show majority, though declining, support for capital punishment. Our nation’s capital supporters include within their ranks a committed, ideologically driven core of citizens and politicians whose devotion to the death penalty exists independently of changes in the legal culture, public opinion, or social science research.

Some Americans in this core group support capital punishment in their “gut.” They assert its supposed retributive or deterrent or therapeutic or economic advantages without the need for recourse to any social science confirmatory data. Some advocates express support for it even while acknowledging that it can be unfairly applied, be ineffective, or even entail the conviction and sentencing of innocent people.

How, then, can support for capital punishment co-exist along with such reservations about its shortcomings? In part the answer seems to lie in the fact that this pro–death penalty segment of the community finds its concepts of justice well served by deep-seated, perhaps unconscious, beliefs in myths about justice that override the shortcomings of our penal system.

Proponents of capital punishment like those quoted in these chapters’ introductory pages tell us that an executing government acts in the best interests of the entire community. An act of execution in this perspective appears as a way to re-assert, even re-invigorate, easily overlooked basic community values, like differences between right and wrong, responsibility for one’s behavior, respecting other lives, learning consequences. In this view an execution brings these moral insights directly back before our eyes to remind us of the universal values that all in this country share. Those who assert this communal dimension of executions see the death penalty as a social exercise of value reinforcement rather than as the isolated activity of a distant legal system.

Proponents of capital punishment also often claim that it deters potential murderers from crime in general and homicide in particular. In some public opinion polls deterrence appears as the most often cited reason for supporting capital punishment. More than once on the campaign trail our second Bush president stated that he supported capital punishment because, in his words, it “saves lives.” Whether the death penalty deters crime is obviously an important question from a policy standpoint. The deterrence claim stands as one that social science can explore in detail to reveal whether it is a reality or a myth. Most people believe that criminal justice systems exist, in good part, to deter others from committing crime, but many of the same group fail to investigate what the social sciences have to say about our ability to realize that possibility.
While cost may appear to be less immediately important than the deterrence goal, the importance of death penalty economics remains by no means minor. Some advocates of capital punishment rest their support precisely on the financial assertion that the death penalty justifies itself because, and only because, it saves taxpayers the greater costs of supporting an inmate for a lifetime, or many decades, in prison. This economic assumption rests in part on the belief that executions occur more quickly and efficiently than serving a life sentence.

A related belief among death penalty supporters lies in the notion that the justice system, like the legal system generally, is nearly infallible. While the system may make an occasional mistake, such mistakes readily appear and can be made to disappear in the magic of the appellate process. This view usually also maintains that our capital machinery accurately separates the guilty from the innocent and punishes accordingly, without regard to race or social status or finances. Some people nursing this cluster of beliefs like to say that the wheels of justice grind slowly but “exceedingly fine.” The legal “grinding” always succeeds, eventually, in separating the wheat from the chaff and does so impartially. Given their career investment in this system, judges have been known to entertain this belief.

Other supporters of the death penalty take a more moralistic approach. To them the important justification for capital punishment lies in giving every offender his “due.” In this philosophical position capital punishment finds its support in the notion of moral “desert,” where desert implies a punishment required to be proportionate in kind, severity, or amount of pain matching the original crime. In the famous tradition of Immanuel Kant, advocates of this view maintain that the most convincing justification for the death penalty lies in the assertion that punishment should mirror the gravity of the original crime, as in the phrase, “an eye for an eye, a life for a life.”

A particularly recent justification for the death penalty considers the plight of suffering victims. Some victim advocates maintain that capital punishment finds its primary justification in its ability to nurture victims in either or both of two ways—by providing a kind of “closure” to their painful victimization and/or by providing an outlet for their emotional need for vengeance. The ascendancy of these victim rationales for punishment plays a major role today in support for capital punishment. Some segments of the victim rights movement assert that the wishes of hurting victims alone require capital punishment of those who have caused their unfortunate plight.

Another more legalistic belief, espoused by some constitutional scholars, including some Supreme Court Justices, asserts that fidelity to the
constitution requires adherence to the beliefs and practices of our Founders. When a constitutional text about capital punishment is being interpreted today, nearly three centuries after our founding, persons in this camp assert that the original words of the Founders must be read to mean today exactly what they meant at the time of their adoption. Only in this way can our nation’s leaders recognize and perpetuate the values defining our nation at its origin. Anyone interested in the present-day constitutionality of the death penalty issue needs to explore the question whether fidelity to the Constitution requires this kind of historical textualism in order to be true to our Constitution and in particular to the Eighth Amendment.

Finally, as our penultimate chapter puts it, must a dedicated elected official adhere to capital punishment on altruistic grounds of constitutional fidelity or victim welfare or crime fighting, or, by contrast, is there something else going on in politicians’ devotion to capital punishment, perhaps something that serves their own interests while disserving the interests of their electorate? Put otherwise, is devotion to capital punishment a reliable mark of the dedicated politician who claims to protect the public with the assertion that capital punishment will make a dent in crime? At a minimum these questions raise again the prospect of mythic thinking, this time in the political arena.

The belief landscape described in the foregoing paragraphs, plus others in the following chapters dealing with myths of equal justice, costs, and humane executions, receives detailed scrutiny in the “bean” of the following pages. In the end these popular attitudes appear, at least to us, as myths, comfortable beliefs that may serve some beneficial personal purpose but do not constitute empirically based reasons for supporting capital punishment.
1  Death Penalty History and the Myth of Community Bonding

In a country whose principles forbid it to preach, the criminal law is one of the few available institutions through which it can make a moral statement. . . . The only way it can be made awful or awe inspiring is to entitle it to inflict the penalty of death.


Through the imposition of just punishment civilized society experiences its sense of revulsion toward those who, by violating its laws, have not only harmed individuals but also weakened the bonds that hold communities together.

—Judge Paul Cassell, Debating the Death Penalty (New York: Oxford University Press, 2004), 198

Professor Berns and Judge Cassell laud the American death penalty for its “awe-inspiring” ability to strengthen the community’s retributive and deterrent messages. They exalt our capital justice system as a humane mechanism for expressing and strengthening community moral bonds. To them the death penalty serves as an “awesome” promoter of community union. But are these convictions anything more than uninformed myth? The history of our death penalty can test these laudatory Berns-Cassell statements about communal bonding.

COLONIAL EXECUTIONS

Our colonial and post-revolutionary capital rituals do reflect an original effort to maximize the community’s moral vision of executions as the wages
of serious sin. Colonial executions usually occurred in the town square, preceded by a procession along main roads, with throngs lining pathways for views of the condemned person. School and work recessed so large crowds could assemble. In their gallows speeches sheriffs, ministers, and sometimes even the condemned person sought to impress on the assembly the gravity of crime and the mortal consequences for any in the crowd tempted to act likewise.

Colonial executions generally occurred within a few days of convictions. Following imposition of a capital sentence, officials typically needed time only for erecting gallows and adjusting work and school schedules to muster crowds to the place of execution. This process typically occurred only a few days after the conviction that itself usually occurred only a few days after capture. The gallows sometimes stood near the scene of the crime but nearly always in an open space able to hold a large crowd composed of all social classes. The public assembly sought not only to deter potential delinquents but also to strengthen both the authority of local government and its citizens’ allegiance by orchestrating collective abhorrence of evil deeds and the certainty of swift retribution.

While this pattern appears regularly in legal executions, an even quicker and illegal procedure developed with the lynchings prevalent in the eighteenth and nineteenth centuries. Especially common in the South, this form of execution, particularly involving blacks, reflected a community tradition of vigilante justice disdainful of government officialdom and delay. Frontier lynchings achieved almost instant execution following apprehension, usually without any trial. Lynching appears as a significant precursor to twentieth-century capital punishment: the states that most frequently lynched a century ago remain as those that most frequently execute today.\textsuperscript{1} This cultural gap did not end with the abolition of slavery after the Civil War; instead, a lengthy era of lynchings occurred, especially of black men in the South, without due process or judicial involvement.\textsuperscript{2}

Excluding dissimilar lynchings, which manifested only meager public rituals, authorized colonial executions accomplished at least three goals: they drew a large crowd to hear public messages about the wages of criminality, the ritual offered a solemn pedagogy about power and respect for law, and the entire ceremony from jail to scaffold constituted collective community retribution. The assembled crowds comprised fearful subjects, legal witnesses, and unruly spectators. The large audiences, long processions, gallows rituals, lengthy speeches, and sermons undoubtedly did offer a collective and powerful lesson about the goal of community respect for authority.
THE EXECUTIONER

In England and elsewhere in Europe, death sentences regularly involved professional executioners. The American colonial pattern differed. Sheriffs charged with this responsibility delegated these unpleasant tasks whenever they could. When Caleb Gardner was sentenced to death in Albany, New York, the sheriff placed a newspaper bulletin soliciting persons willing to perform the execution for good money. Such efforts often involved a hood and liquor to strengthen the nerve of lay executioners.

A sheriff unable to find a substitute executioner to perform the work for money and drink often sought to entice another condemned prisoner to do the job in exchange for a reprieve. Courts and governors regularly cooperated. Maryland found it so difficult to find an executioner that it hired a succession of criminals who would be reprieved from their own death sentences for serving as hangmen. Isaac Bradford, sentenced to death in Pennsylvania for robbery, escaped his execution in exchange for hanging two burglars. In Massachusetts John Battus went to his hanging thanks to an accommodating fellow prisoner. A Maryland slave named Tony survived by executing four fellow slaves, all condemned for killing their owners. Sometimes a willing executioner could not easily be found. “Last week one Robert Roberts was hanged” in Somerset County, New Jersey, the Pennsylvania Gazette reported in 1731, “and the Sheriff not being able to procure an Executioner, was necessitated to perform the Office himself.”

Reluctant sheriffs also encouraged capital prisoners to diminish everyone’s burden by designing their own death devices in order to relieve official executioners from the task. In 1892 a Colorado deputy warden built a gallows the condemned prisoner could operate himself. The prisoner stepped onto a platform attached to a cord connected to a large cask of water balanced by an iron weight. The prisoner’s weight pulled the plug from the cask of water, causing the weight to drop and jerk the prisoner upward. Thatcher Graves died in this mechanical way in Denver in 1892.

In 1894 a Connecticut prisoner invented a self-controlled gallows where his weight opened a cylinder containing fifty pounds of shot, also causing him to be suddenly jerked upward. That year John Cronin became the first person to ascend to his death this way. The “upright jerker” was not the only method of self-execution. Francis Barker invented an electrical device for his own 1905 Nebraska execution to release the trap door in the floor by pressing a button strapped to his thigh, allowing him to drop at a time of his choosing. His push-button trap door, reported Popular Mechanics, “would be most welcome to sheriffs and wardens generally.”
TRANSITION FROM PUBLIC TO PRIVATE PLACES

From colonial days onward, both legal and illegal executions regularly occurred in public, in broad daylight, until well into the mid-nineteenth century, usually publicized with posters, advertisements, and bulletins alerting the citizenry and encouraging their attendance. When “Four Negroes,” all unnamed, were about to be executed on “Duncan’s Island” in the Mississippi River across from St. Louis in 1841, steamboat and carriage lines lavishly advertised the event with carnival-type ads and posters promising spectators good views of the hangings.

Nineteenth-century executions gradually became embroiled in class and taste issues challenging public venues. Particularly in the North, sights intended to be uplifting to the rabble in the early 1800s became alarming to respectable classes only a few years later. Between 1830 and 1860 every Northern state moved hangings from the town square to a more secluded place inside a walled jail or prison yard. While most Southern states kept the ceremony nominally open to the public well into the early twentieth century, they too gradually moved them from public places to secluded jail yards, allowing more control over attendees.

Unwelcome media coverage contributed heavily to this privatization trend. Journalists focusing on botched proceedings described in minute detail the technical failings prolonging the death agonies. Penal officials found these reports a decidedly unwelcome comment on the quality of their work. Legislation as well as pressure from local officials soon sought to exclude journalists from public executions in order to save face in newspaper reports of execution failings.

Because journalists could not be excluded from public squares, state governments eventually decided they had to move the execution well inside jail or prison yards to monitor admission. An invitation soon became a necessity, further diminishing the general public. By the mid-1800s legislatures in most Northeastern states had passed “gag laws” banning journalists from jail yard executions precisely in order to suppress their impartial and sometimes embarrassing reporting.

In 1824 the Pennsylvania House of Representatives became the first state legislature to consider privatizing executions. Its comments about “community benefit” clash with the Berns and Cassell quotations at the start of this chapter. “Few, very few, such characters attend an execution from choice,” its committee observed, and “while they approve of the sentence of the law, they avoid being spectators of its execution.” The death rituals played to an audience “composed chiefly of those among whom moral feeling is extremely low,” namely, “the thoughtless; the profligate; the idle; the
intemperate; the profane; and the abandoned," attending the ritual, according to the committee, not to profit from the moral lesson but "to be amused; to enjoy a day and season of mirth and indulgence."6

In 1834 New York considered a bill to end the "vicious assemblages and demoralizing tendencies of public executions." Shortly before its legislature privatized executions in 1835, a state senator unsuccessfully tried to convince the sheriff in Saratoga County to order a private execution. "The sheriff said that such an order ‘would draw down upon him the ill will of the multitude of grocers and tavern keepers and merchants who always anticipate great profits from these executions.’"7

The first state to abolish public executions, Connecticut in 1830, presaged six other Northeastern states: Rhode Island, Pennsylvania, New Jersey, New York, Massachusetts, and New Hampshire. Mississippi and Alabama became the first Southern states to move hangings into the jail yard. By 1860 public hangings had ended throughout the North and most of the South because, rather than promulgating an uplifting moral message to the community, officials found the public execution "to be demoralizing in its tendency and disgraceful."8

By the mid-1840s every state in the Northeast and mid-Atlantic Coast had passed laws restricting public access. The seclusion trend met little opposition. A few insightful observers grasped the changed message that a private execution would decrease any deterrent value. Some capital punishment supporters worried on logical grounds that a government ashamed to execute in public for the entire citizenry to witness, under the same reasoning, soon would abolish the death penalty completely.

By the end of the nineteenth century public hangings had disappeared in Virginia, Kentucky, Maryland, Louisiana, Missouri, South Carolina, and Tennessee. Arkansas abolished public hangings in 1901 except for rape, largely limited to blacks, moving rapists’ hangings away from the community eye five years later. Georgia and Mississippi briefly reauthorized public hangings at the turn of the century before returning to private rituals.

By the early 1900s the handful of states that still hanged in public began switching to the electric chair, a procedure requiring a specially equipped indoor room. When the electric chair spread to North Carolina, Oklahoma, Florida, and Texas between 1909 and 1923, these states by necessity stopped executing in public. The last holdout, Kentucky, ended its public executions with the hanging of Rainey Bethea in a town square before 20,000 unruly spectators in 1936. Rather than showing the awe of Berns’s and Cassell’s moral and communal bonding, the riotous crowd at his publicized hanging "swarmed like carrion over the gallows while his body was still suspended . . . they tore the hood off his frightened, hunted face to get souvenirs."9