

Race, Class, and the Death Penalty

**Capital
Punishment
in American
History**



Howard W. Allen and Jerome M. Clubb

with assistance from Vincent A. Lacey

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For our wives, Lorie and Vera

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Introduction

This book is concerned with the long-term trends in the use of capital punishment in the United States, and in areas that would become part of the United States, from the colonial period onward. The book focuses on four basic questions: How frequently has the death penalty been used, and how has the frequency of use changed? Where was the death penalty used most frequently? What were the offenses charged? What were the characteristics of the executed? As will become clear, the first two questions can be addressed more successfully than the third and fourth. All four, however, are fraught with serious ambiguities.

We also attempt in what follows to take lynching into account. Lynching was, of course, a criminal act whether carried out by vigilantes, Klansmen, or unorganized mobs, and as such it might be seen as being outside the purview of a book concerned with the legal use of the death penalty. The line between lynching and the legal use of the death penalty, however, was often far from clear. To distinguish between lynching, on the one hand, and a legal execution, on the other, of an African American following a hasty trial before a white jury, carried out under the watchful eye of a nascent lynch mob and explained as necessary to prevent a lynching, might seem a distinction without much in the way of meaningful difference.¹

How many such “legal lynchings” actually occurred will never be known. It is clear, however, that during the nineteenth and the earlier twentieth centuries lynching had the approval of many leading political figures and, at least in some areas of the nation, a sizable segment of the public. Lynching was treated as, and many probably believed it to be, a legitimate alternative to legal processes. These matters to the side, lynching claimed large numbers of victims and was, as a consequence, an important element in the context of the legal use of the death penalty. In some regions and time periods victims of lynching exceeded the number legally executed and effectively negated trends in the legal use of the death penalty.

The issues addressed in what follows are, we believe, of considerable intrinsic importance, although aside from the work of specialists they often are left unconsidered in studies of American social and political history. They also reflect, however, a number of broader and interrelated issues bearing upon the changing nature of national culture and institutions. Three of these issues were of particular importance in shaping the temporal and geographic change and variation in the incidence and nature of capital punishment.

One involves the characteristics and development of the institutions, laws, and practices governing criminal justice in the United States, which were themselves also reflections of the larger society. In his concluding chapter of the history of crime and punishment in the United States, Lawrence M. Friedman writes that

... the criminal justice "system" is not a system at all. This particular mirror of society is a jigsaw puzzle with a thousand tiny pieces. No one is really in charge. Legislatures make rules; police and detectives carry them out (more or less). Prosecutors prosecute; defense attorneys defend; judges and juries go their own way. So do prison officials. Everybody seems to have veto power over everybody else. Juries can frustrate judges and the police; the police can make nonsense out of the legislature; prison officials can undo the work of judges; prosecutors can ignore the police and the judges.²

The history of capital punishment well illustrates the point and, if anything, adds additional dimensions. If the notion of system implies a measure of uniformity—the same crimes, same legal procedures, same sentences, and same implementation of sentences—then the use of capital punishment has historically lacked systemic properties. The use of capital punishment has not only changed over time, its use also has varied from one area and jurisdiction to another and from one ethnic, racial, and social group to another. Variation is compounded when lynching is added to the context of the legal use of the death penalty. In these terms change and variation in the use of capital punishment provide an indication of the characteristics and patterns of development of the criminal justice system and, in some sense, of society more generally.

A second broad issue concerns the social biases characteristic of the United States and its various regions and jurisdictions. It will come as no surprise to learn that African Americans have been executed in disproportionate numbers during the history of the United States. Members of other ethnic and racial groups also were executed in disproportionate numbers. Apart from matters of race and ethnicity, it also will come as

no surprise that the large majority of those put to death, whatever their race or ethnicity, appear to have been of low economic status.

These disparities cannot be taken as no more than indications of a discriminatory law and criminal justice system. We know on other grounds that the historical law and criminal justice system was massively discriminatory and placed the poor at a disadvantage. The available evidence indicates, however, that violent and criminal behavior was not evenly distributed across the various groups that made up American society, and it is reasonable to believe that most of those put to death actually committed the offenses charged or were guilty of similar offenses. We also know that other and deeper social conflicts and tensions within American society both shaped the law and criminal justice system and played a major role in shaping individual behavior. Disparities in the use of capital punishment can be seen, then, as providing a crude indication of these deeper conflicts and tensions.

The history of capital punishment also reflects a third aspect of American history, the incidence and role of violence. This is not to assume that the historical incidence of capital punishment is a reliable and consistent indicator of the incidence of violence in America. The large majority of those executed were charged with violent offenses, usually some form of homicide often accompanied by other offenses. Thus it is reasonable to at least suspect that the frequent use of the death penalty tended to occur in areas marked by high levels of violence. Similarly, the weaker assumption that the incidence of capital punishment provides in any straightforward fashion a satisfactory indicator of the incidence of homicide or other capital crimes also is untenable. While a relation undoubtedly did exist, such an assumption is undermined by historical change in the definition of capital crime and by a wide variation in the incidence of capital punishment from one time period, jurisdiction, and ethnic, economic, and social group to another. These variations allow ample room for the intervention of other factors in addition to crime rates in determining the incidence of capital punishment.

The incidence of capital punishment is, however, a measure of one type of violence. Capital punishment is, after all, a form of violence, and the most extreme form that organized society can legally impose on its members. As such, one measure of the role and incidence of violence in the history of the nation is the frequency and the conditions under which capital punishment has been used to maintain social order, however social order has been defined and whatever has been presumed to be the relationship between punishment and the maintenance of order.

Although concerned with the long sweep of American history, this study is limited in a number of respects. The bulk of the investigation focuses on the years prior to 1945. During the years immediately

following, the use of capital punishment declined sharply—it was briefly discontinued in 1972 but resumed in 1977. The years after 1977 seem to constitute something of a different era in the use of the death penalty. The numbers put to death have not reached the levels of the pre-World War II years, and a degree of centralization of control over capital punishment has occurred largely through the intervention of the federal courts. Examination of the incidence of capital punishment and sentencing after 1977 indicates both persistence and change in trends and patterns characteristic of the years before 1945. These differences and elements of continuity have provoked considerable scholarly controversy centering in part on questions concerning whether, or in what degree, they reflect persistent systemic racial, ethnic, and class discrimination. We note these disagreements and touch upon some of their dimensions. We do not attempt to reconcile them.

Our examination of the history of capital punishment is primarily descriptive in nature. We trace and examine long-term trends and regional variations in the use of the death penalty, and we attempt to place these trends and variations in the broader context of American history. At various points, but particularly in concluding chapters, we note explanations sometimes offered for violence in American history as they seem to apply to capital punishment, and we suggest rather obvious factors that are clearly related to change in the use of the death penalty. Racial and ethnic discrimination and the relations between racial and ethnic groups more generally are clearly among these factors, as are differences in economic condition. Although difficult to demonstrate, change in the age structure of the national and regional populations was probably also a factor shaping the history of capital punishment.

We have found as well that trends and patterns characteristic of the history of capital punishment seem to parallel formulations developed by Norbert Elias. Elias describes a “civilizing process” characteristic of the development of societies that shaped manners, personal behavior, and the relations between social groups and also worked to control and regulate violence.³ These formulations, particularly as applied to punishment by David Garland, provide suggestive explanations for aspects of the history of capital punishment across the sweep of American history.⁴ We do not attempt, however, to demonstrate or weigh the precise relevance of these factors and possible explanations through rigorous causal or other analysis. Our primary goal is to trace and demonstrate trends and patterns in the use of capital punishment across the course of American history.

Similarly, we have not attempted to dramatize our examination of the use of the death penalty, although it would be easy to do so. Ample descriptions are found of gruesomely botched executions as well as those that were carried out with at least a measure of humanity and

dignity, although to combine deliberate infliction of death with notions of humanity and dignity may appear as something of an oxymoron. Many stories exist about trials that were no more than kangaroo courts, but also about trials that seem eminently fair. Similarly, abundant examples are found of crimes so horrid that execution hardly seems an adequate retribution. On the other hand, many examples of the use of the death penalty seem far out of proportion to the offenses committed if, indeed, an offense was actually committed. We have attempted, however, to minimize the use of anecdotes. The simple fact is that given the paucity of evidence, it is impossible to know which of the many available anecdotes could be seen as in any sense typical of the general practices of particular times and places. In our view, the selection of anecdotes inevitably provides a biased perspective. In our view as well whether capital punishment is supported or opposed, its history is in itself a sufficiently sad and tragic story and requires no embellishment or dramatization.

DATA SOURCES

As in the case of other forms of violence in the United States, an examination of long-term historical trends in the use of capital punishment has presented major obstacles. Historical information bearing upon the use of the death penalty has existed only in scattered and often fugitive form. Historical record keeping was imperfect, the decentralized nature of the nation meant that records also were decentralized, and records of the use of the death penalty, as other historical records, have been subject to the usual ravages of time. Even limited work in the relevant historical sources, moreover, sometimes gives the impression that during much of their history Americans were often indifferent to the use of capital punishment with the consequence that careful records of its occurrence were not always kept. Newspaper and other accounts of historical executions often treated them as being of only passing significance and, aside from an occasional spectacle, of limited and transitory interest. Characteristics of the executed that are important from a historical perspective were seemingly often of little interest to people at the time. These matters to the side, the nature of historical source material has been a major obstacle to the systematic investigation of the use of the death penalty.

To examine the history of capital punishment we have drawn upon several bodies of data. The most important of these was collected by M. Watt Espy. Indeed, it is due to Espy's work that it is possible at least to begin to address basic questions concerning the historical use of the death penalty. In 1970, working out of his home in Headland, Alabama, and on the basis of his personal financial resources, Espy

began the work of systematically identifying and collecting information on all legal executions in the United States, or in areas settled or occupied by Europeans that would become part of the United States. The magnitude of this task will be apparent. On the order of two thirds of all executions in American history were carried out at the local level. To identify and collect even limited information on these executions involved widely scattered and diverse sources, including a variety of local repositories, court and other governmental records, local and regional newspapers, and local histories, as well as other sources.

Espy subsequently moved the project to the University of Alabama, and by the mid-1980s he had compiled information on over 14,000 executions, beginning with the first European executed in Jamestown in 1608. Working at the University of Alabama with the assistance of Professor John Ortiz Smykla, and with support provided by the National Science Foundation and the University of Alabama Law Center, this segment of the collection was organized and converted to usable computer-readable form. This version was then supplied to the Inter-university Consortium for Political and Social Research (ICPSR) to be distributed for scholarly use. Corrections subsequently provided by Espy were then made, and a second version of the collection was released in 1992. Although information for particular cases and variables understandably is sometimes missing, the collection includes the ethnicity, sex, and age of the executed, the place of conviction and execution, the method of execution, and the offense charged, as well as limited additional information.⁵ The Espy project continued, and by March 1996, Espy had identified and collected information bearing upon well over 4,000 additional executions. Espy's project is ongoing, again being carried out in his home in Headland and on the basis of his own resources. There can be no doubt that his work will produce evidence and information about still additional executions.

In what follows we draw upon the 1992 revised computer-readable Espy file supplied by the ICPSR. Espy also has been kind enough to supply us with summary information bearing upon over 4,000 executions identified between 1985 and early 1996. We have combined this additional information with the 1992 revised ICPSR version of the collection. This combined data collection provides the primary basis for our examination of capital punishment.⁶ Data from executions after 1945 are from the Death Penalty Information Center.⁷

Characteristics of the combined Espy collection are discussed in greater detail in the Appendix of this book, which explores as well some of the strengths and weaknesses of the collection, and the characteristics of the collection are noted in the text and footnotes that follow as they relate to particular generalizations or categories of generalizations. The Appendix also describes work directed to assessing the reliability of the

collection. These include comparison with other and more limited compilations, with a variety of relevant secondary works, and a limited examination of original sources.

On the basis of this work we have developed considerable confidence in the collection as a source of a reasonably accurate view of the use of the death penalty in American history. As the Appendix indicates, it is likely, as would probably be expected, that the collection is relatively less complete for the earlier years and for the Southern and Border states. It is likely as well that in the future additional executions will be identified either by Espy or others, and it is virtually certain that the collection includes an unknown number of spurious cases. Even so, we believe that the collection provides a sound basis for an approximation of the ethnic, geographical, and temporal distribution of executions in American history. Our confidence is increased by the degree to which the patterns and relations identified through the examination of the collection conform to prior expectations. Information bearing upon the characteristics of the executed, the offenses charged, and the methods of execution is less complete, as we indicate. In these areas as well, however, the observed patterns are highly predictable, and our confidence in our findings is thereby increased.

To avoid possible confusion, we should note that we do not treat the Espy collection as a sample in either the dictionary or technical sense of that word. In the first place, the collection was not intended as a sample but is an effort to collect information on the total universe of legal executions carried out in American history. Because of the nature of historical sources and record keeping, that effort could not be entirely successful. However, the direction of biases characteristic of the collection is known or can be reasonably assumed, and the consequences estimated in at least general ways. One consequence of this approach is that we often treat small numbers as real values—as approximations of historical reality—not as only the possibly erroneous products of inadequate sampling.

Sources for examination of lynching and their characteristics also are discussed in greater detail in the Appendix. These sources present many of the same difficulties as sources for the study of capital punishment in even more serious ways. Sources of information are widely scattered, often in the form of local and regional newspaper accounts. The problem is compounded by the fact that lynching was a criminal act that usually did not result in official records, except on the rare occasions that perpetrators were the subjects of criminal action. As a consequence, nothing exists that approaches a complete list of lynchings or of the names and characteristics of victims. Here again, however, we have benefited from the work of others. Stewart E. Tolnay and E. M. Beck supplied data on lynching for ten Southern and, in our definition,

Border states for the years 1882–1930 that they used in their study *A Festival of Violence: An Analysis of Southern Lynchings, 1882–1930*.⁸ For three additional Border and Southern states we have used compilations published by George C. Wright and W. Fitzhugh Brundage.⁹ For the rest of the nation, several older compilations, including the National Association for the Advancement of Colored People publication *Thirty Years of Lynching*, have been used.¹⁰ The characteristics and limitations of these sources also are discussed in an appendix. Richard Maxwell Brown, in *Strain of Violence: Historical Studies of American Violence and Vigilantism*, provides estimates of the numbers lynched by organized vigilante groups from 1767 through 1904.¹¹

In relating the incidence of executions and lynchings to population, we have used the extensive files of historical computer-readable data also drawn from U.S. Census reports related sources, maintained by the ICPSR.¹² In using these data, however, we also have drawn upon the corrections and additions at the state level to the original census reports provided by the *Historical Statistics of the United States*. We have also relied upon the *Historical Statistics* for estimates of the colonial population.¹³

All of the data sources that we have employed are imperfect, and all are marked by an error of one sort or another. We attempt to call attention to these imperfections as they may affect our interpretations and inferences. Suffice it to say here that the data sources provide an approximate view of the historical incidence of capital punishment. The degree of approximation varies from one time period and region of the nation to another, as does the possible type and magnitude of error. We believe, however, that what follows is a valid approximation of historical reality.

This book is, in short, based upon “secondary analysis,” that is, mostly upon data collected by others in some cases for purposes other than historical investigation. We have spent some time working in the relevant primary sources mainly for purposes of verification. We have come to recognize that the limitations of the data that we have used are in considerable measure a reflection of the primary sources and to appreciate the work of original data collectors.

Chapter 1

The Death Penalty in National Perspective

From the very beginning capital punishment has been an integral part of American history. The first execution of a European in what would become part of the United States was in Jamestown in 1608, only a few months after the colony was founded.¹ During the next twenty years only occasional executions took place. By mid-century, some fifty people had been executed. By the end of the seventeenth century, on the order of 300 European, African, and Native Americans had been put to death. One hundred years later, the number had grown to almost 3,000. While the number of executions steadily grew, the population grew at a more rapid rate. As a consequence, viewed in relation to population, the use of capital punishment actually declined. Even so, by the end of 1945, more than 17,000 people had been legally put to death.

This chapter examines the trends in the incidence, racial, ethnic, and gender distribution of executions in the continental United States, or what would become part of the continental United States, from 1608 through 1945. The incidence of capital punishment is examined both in terms of the actual number of executions and in relation to population. Both perspectives are, of course, valid and useful but for different purposes, and each provides support for different generalizations.

In recent years, as is well known, a disproportionate number of those put to death have been African Americans. This disproportion appeared early in American history. Beginning in the early eighteenth century, a majority of those executed in most years were of African descent, and the pattern persisted. African Americans, of course, never constituted a majority of the colonial or national population. When other racial and ethnic groups are combined with African Americans, whites appear as a distinct minority of those executed. The gender distribution

of capital punishment is considered only briefly later. In American history, the death penalty has been, very largely, a male monopoly.

FREQUENCY OF EXECUTION

During most of American history capital punishment has been characterized by a long-term rising trend. The shape of that trend from the early seventeenth century through 1945 is summarized in Figure 1.1. Viewed in detail, the incidence of capital punishment, particularly during the earlier years, fluctuated widely from one year to the next. To somewhat smooth out these fluctuations and to facilitate relating the number of executions to population at a later point, the figure gives the average number of executions per year for each ten-year period through 1945. For these purposes, each period is centered on the decennial census year and is defined as beginning with the year ending in six, as 1886, and closing with the next year ending in five, as 1895.²

Even when smoothed out in this fashion, the series is marked by rather wide fluctuations. Despite these fluctuations, the rising trend in the number of executions is clear. During the ten-year period from 1606 through 1615, the data collection records only two executions, both in Virginia. The number rose to an average of about six per year for the ten-year period from 1686 through 1695, and to approximately forty each year during the ten years centering on 1790. One hundred years later (1886 through 1895), an average of about 120 people were executed each year, roughly two per week. High points in the number of executions were reached during the twenty-year period from 1926 through 1945. Over 1,500 individuals, an average of almost three each week, were put to death during the years 1926 through 1935 and 1,491 during the next ten-year period. Thereafter, the incidence of executions declined.

Since we know that data collection is continuing, and that additional executions will be identified, it is reasonable to ponder the degree to which the trend in Figure 1.1 is a reflection of historical reality. It is certainly possible that some of the extreme fluctuations, particularly during the earlier years, may be indicative of executions that actually occurred but have not yet been identified. At later points we discuss other factors that also help account for some of these fluctuations. These include the Revolutionary War and the Civil War, both of which were accompanied by comparatively heavy use of the death penalty, and help account for two of the peaks in the time series in Figure 1.1.

A more serious question concerns the degree to which the trend in Figure 1.1 is the product of error in the form of executions that have not yet been identified rather than actual historical change. As discussed briefly in the Introduction and at greater length in the Appendix, it is

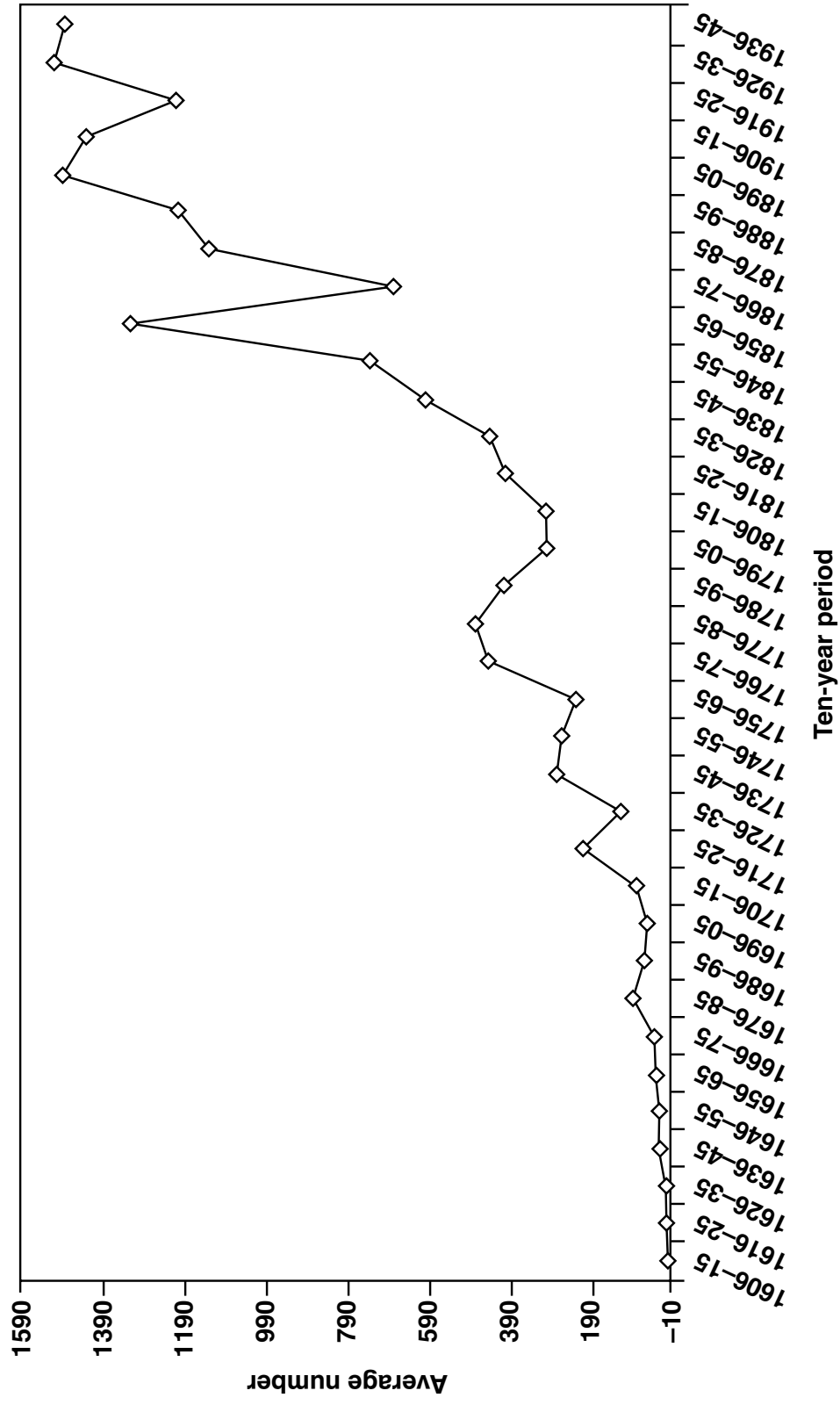


Figure 1.1 Average annual number of executions per year by ten-year period, 1606-1945