

# ESSAY

## A MORALIST IN A LEGALIST WORLD: A MEMORIAL ESSAY FOR HENRY SCHWARZSCHILD

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On June 4th, 1996, the New York Times reported the previous day's U.S. Supreme Court decision which upheld the use of the death penalty in military trials.<sup>1</sup> While this expansion of capital punishment was criticized by opponents of the death penalty around the country, one voice was missing from the chorus, that of Henry Schwarzschild, long-time director of the American Civil Liberties Union's Capital Punishment Project and founder and leader of the National Coalition to Abolish the Death Penalty. Henry's obituary ran in the same edition of the Times.<sup>2</sup> Throughout his life Henry set "an example of uncompromising commitment" to social change.<sup>3</sup> With his death the nation and the world lost an eloquent and tireless moral leader in the fight against the death penalty.

Thirteen year-old Henry Schwarzschild fled Nazi Germany and then France in 1939 just ahead of Hitler's troops.<sup>4</sup> His family settled in upper Manhattan and, after completing high school, Henry served in the U.S. Army as an "enemy alien." He returned to Germany as a member of the Counter-Intelligence Corps and remained to do reconstruction work after the war ended. At that time he was preoccupied with attempting to understand the role the average German played in the Holocaust. "I drew what

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1. Linda Greenhouse, *Justices Decide, 9 to 0, That the Death Penalty in the Armed Services is Constitutional*, N.Y. TIMES, June 4, 1996, at A1. This article discusses *Loving v. United States*, 116 S. Ct. 1737 (1996), in which the Court upheld Congress' power to delegate to the President the authority to prescribe aggravating factors in capital murder cases.

2. Eric Pace, *Henry Schwarzschild, 70, Opponent of Death Penalty*, N.Y. TIMES, June 4, 1996, at B8.

3. Letter from Charles R. Halpern, President of the Nathan Cummings Foundation and former attorney with the Lawyers Constitutional Defense Committee, to Henry Schwarzschild (July 21, 1995).

4. Interview with Henry Schwarzschild in New York, NY (Dec. 1991 to Aug. 1992) (copies of tapes on file at the Columbia University Oral History Research Office).

became for me a very central lesson from that experience," he said a year before his death:

When there is a major socio-moral drama being played out in your culture, in your society, in which the merits are clear (though the outcome may not be), then to be a bystander, a passive observer, is to be morally contemptible. And when the great movement toward racial justice and civil rights began to be played out in the national arena here, at the very beginning of the 1960s, I was powerfully resolved not to be a passive observer and a bystander but rather to be a participant in the struggle.<sup>5</sup>

Henry participated in a lunch-counter demonstration in Kentucky in the Spring of 1960, was a freedom rider in 1961, and assisted the Albany, Georgia Movement in 1962. After four girls were killed in a church bombing in Birmingham, Alabama in 1963, Henry told his colleagues at the Anti-Defamation League of B'nai Brith that he was heading South for the weekend to participate in a protest march. They replied that he could go, but could not return to work the next Monday if he did. He lost his job for refusing to be a bystander.

In the spring of 1964 he accepted a position as executive secretary of the Lawyers Constitutional Defense Committee, formed by the ACLU and other legal and religious organizations to provide volunteer legal defense to the civil rights movement. In 1973 Henry became the director of the ACLU's Project on Amnesty for Vietnam draft resisters. After President Carter granted amnesty in 1976 Henry moved on to head the ACLU Capital Punishment Project, created in the wake of the *Gregg*<sup>6</sup> decision. Professor Herbert Haines, in his recent book on the abolition movement, described Henry as "the major architect" of the National Coalition to Abolish the Death Penalty.<sup>7</sup> Henry is best known for this work.

The uniqueness of Henry's contribution to the abolition cause stemmed in part from the fact that he was not a lawyer. Henry described himself as a professional activist and considered capital punishment more of a moral problem than a legal problem. "No important problem in the society is ultimately legal," he wrote me when I entered law school. "Every problem is one of *social policy*. From a traffic ticket to a double homicide, the important question is how do you want to run the society?"<sup>8</sup> He felt it essential to keep people's focus on this fact because law was too often a

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5. Henry Schwarzschild, Remarks at Lawyers Constitutional Defense Committee Reunion/Conference (June 9, 1995).

6. *Gregg v. Georgia*, 428 U.S. 153 (1976). This case held that the death penalty did not violate the constitution.

7. HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972-1994*, at 61 (1996).

8. Letter from Henry Schwarzschild to Thomas Hilbink (July 4, 1995).

medium of avoidance,<sup>9</sup> channeling attention away from arguments concerning the immorality of the death penalty toward arguments about the *constitutionality* of the death penalty. People became fixated on whether or not capital punishment violated the Eighth Amendment and stopped looking at capital punishment as a violation of fundamental moral precepts involving human dignity and civilization. Though he could speak the language of law when necessary, he was able to speak most powerfully in the language of right and wrong.

When the debate over the death penalty focused on execution of the innocent, or racist imposition of capital punishment, Henry—while not denying the injustice there involved—reminded those engaged in the debate that no matter what the outcome of these issues, the end fact remained most important: state-sponsored homicide is wrong. Though he joined the chorus in opposition to the execution of Mumia Abu-Jamal, Henry questioned the implications of that opposition:

I haven't a clue about whether Mumia did the crime or not, and I don't care. As opponents of the death penalty, our mission is to oppose the execution of the innocent not one whit more or less passionate than the execution of the guilty. . . I know Mumia is Black and that he and his advocates think that's the reason he is on death row. I have no independent judgment about that. I am as appalled by *McCleskey*<sup>10</sup> as you are and as Mumia is, but our mission as death penalty opponents is to oppose racist death judgments not one whit more or less than racially neutral ones.<sup>11</sup>

For Henry, it did not matter if an innocent person was never executed, or a person was never sentenced to death as a result of their race or class. Further, it did not matter who the person was. During his entire career as an abolition activist he only met two death row inmates.

[T]o get to know death-row prisoners was to like some and not others and then to worry more, to fight more, to mourn more for the ones you liked than the ones you didn't like, a bad rule, I thought, for opponents of the death penalty whose principle cannot be, "I don't want the state to execute people I like, but executing the others is not so bad," because in that case the country would be promptly depopulated. I have not liked (or disliked)

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9. MILNER S. BALL, *THE WORD AND THE LAW* 12 (1993).

10. *McCleskey v. Kemp*, 481 U.S. 279 (1987) (holding that although studies indicated that Georgia's death penalty statute was applied with much greater frequency to black defendants than to white defendants, the discrepancy did not amount to a constitutional violation).

11. Letter from Henry Schwarzschild to Sibyl Sender, Member of the Bruderhof Community (July 6, 1995).

anyone on the row, and it must not, it has seemed to me, make any difference.<sup>12</sup>

Henry did not object to others befriending death row inmates and he supported those who fought racist imposition of the death penalty, but for him the issue was basic, clear, and unchanging. He did not wish to cloud the moral issue by bringing in other matters.

If the death penalty were demonstrably a uniquely effective deterrent to crime, if it could be fairly and evenhandedly administered, never made a mistake, and were a cheap method of punishing offenders with ultimate severity, the moral issue would not be differently resolved.<sup>13</sup>

What capital punishment did to the executed was not as important as what it did to the society carrying out the punishment. For this reason, Henry led the battle to stop the execution of Gary Gilmore in 1977 despite Gilmore's vehement opposition to intervention in the case by the death penalty opponents. Gilmore argued, "There are people in the world so evil that their lives are forfeit by the nature of their being manifested in dark acts against other men. They warrant execution."<sup>14</sup> Henry replied,

Sorry, but we won't let you turn us into killers—of you or of anybody else. Someone sentenced to death, like you, is to be executed 'in the name of the people,' and we believe that the killing of human beings is an act so appalling that we would not have the state do that in our name.<sup>15</sup>

The issue was not whether Gary Gilmore had a right to not be executed, but whether the state of Utah should murder another human being. "We are not imposing our wants and attitudes on you; we are seeking to impose humanity and decency upon the State of Utah in this matter."<sup>16</sup> Capital punishment debases society, Henry told *Time Magazine* in 1984. "A society that believes that the killing of a human being is a solution to any problem is deeply uncivilized."<sup>17</sup>

Henry often proposed to lawyers and law students the following: As a capital trial begins, the defense lawyer should stand before the court and state that since lawyers are an essential part of the imposition of capital

12. Letter from Henry Schwarzschild to Samuel Gross, Professor of Law, University of Michigan (undated, approx. Dec. 1995).

13. Henry Schwarzschild, *Reflections on Capital Punishment*, 25 *ISR. L. REV.* 505, 507 (1991).

14. Open Letter from Gary Gilmore (undated), reprinted in ROBERT M. COVER, OWEN M. FISS, & JUDITH RESNIK, *PROCEDURE* 441 (1988).

15. An Open Reply from Henry Schwarzschild to Gary Mark Gilmore (Jan. 3, 1996), reprinted in *id.* at 442.

16. *Id.* at 443.

17. Kurt Andersen, *An Eye for an Eye*, *TIME*, Jan. 24, 1983, at 28, 38.

punishment she refuses to play a part in the killing, then walk out.<sup>18</sup> The lawyer would challenge "the legitimacy as well as the jurisdiction of a court by disassociating herself from the proceedings and leaving."<sup>19</sup> The idea is anathema to lawyers and could lead to disbarment. Henry understood this problem. "[M]orally radical impulses will not get you anywhere as a lawyer. Still, I would feel better if lawyers had the impulse. Controlled it, but at least had it, the intuition."<sup>20</sup> Just as he was at times guided by law, he wished lawyers would at times be guided by morals.

By the time of his death Henry had grown rather pessimistic about the hopes of seeing capital punishment abolished. On his retirement from the ACLU in 1991 he joked that since things had only gotten worse in the area since he officially joined the fight in 1976, perhaps his departure would bring a reversal of fortune for the abolition movement. Though that has not been the case, winning the battle was not the end Henry sought. He was driven by the self-imposed moral duty not to be a bystander. He quoted a spiritual text on this point: "It is not given to you to finish the task, but neither are you free to desist from it."<sup>21</sup> The battle for abolition of capital punishment is even bleaker today, but like Henry, those in the battle are not free to desist from it. As he wrote to one friend, "We must keep a candle burning."<sup>22</sup>

Henry Schwarzschild was a bright candle. While his death dimmed the abolition landscape there are many who carry candles first lit or strengthened by Henry's uncompromising commitment to abolition of capital punishment. His flame has not been extinguished.

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18. BALL, *supra* note 9, at 7.

19. *Id.* at 12.

20. *Id.*

21. *Id.* at 14 (quoting THE SAYINGS OF THE FATHERS).

22. Letter from Henry Schwarzschild to Joe (last name unknown) (undated).