

went to the bottom of the economic ocean, may deserve severe punishment, and if convicted, they should receive what they deserve. My guess is that the threat of the death sentence would have a deterrent effect here. Whether it is feasible to apply the death penalty for horrendous white-collar crimes is debatable. But there is something to be said in its favor. It would remove the impression that only the poor get executed.

CHAPTER 21

Why the United States Will Join the Rest of the World in Abandoning Capital Punishment

Stephen B. Bright

As a nation that executes prisoners, the United States is in poor company. Most countries that have the death penalty are terrible violators of human rights. In 2012, only 21 countries performed executions, and the top executors were China, Iran, Iraq, Saudi Arabia, the United States, and Yemen. The United States carried out only 39 executions in 2013. Most of the more than 3,000 death-row inmates in America will never be put to death; they will die of natural causes.

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The United States will inevitably join other industrialized nations in abandoning the death penalty, just as it has abandoned whipping, the stocks, branding, cutting off appendages, maiming, and other primitive forms of punishment. It remains to be seen how long it will be until the use of the death penalty becomes so infrequent as

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to be pointless, and it is eventually abandoned. In the meantime, capital punishment is arbitrarily and unfairly imposed, undermines the standing and moral authority of the United States in the community of nations, and diminishes the credibility and legitimacy of the courts within the United States.

Although death may intuitively seem to be an appropriate punishment for a person who kills another person and polls show strong support for the death penalty, most Americans know little about realities of capital punishment, past and present. The death penalty is a direct descendant of the darkest aspects of American history—slavery, lynching, racial oppression, and perfumatory capital trials known as “legal lynchings”—and racial discrimination remains a prominent feature of capital punishment. The death penalty is not imposed to avenge every killing and—as some contend—to bring “closure” to the family of every victim, but is inflicted in less than 1 percent of all murder cases. Of more than 20,000 murders in the United States annually, an average of fewer than 300 people are sentenced to death, and only 55 are executed each year. Only 19 states actually carried out executions between 1976, when the U.S. Supreme Court authorized the resumption of capital punishment after declaring it unconstitutional in 1972, and the end of 2002. Eighty-six percent of those executions were in the South. Just two states—Texas and Virginia—carried out 45 percent of them.

Any assessment of the death penalty must not be based on abstract theories about how it should work in practice or the experiences of states like Oregon, which seldom impose the death penalty and carry it out even less. To understand the realities of the death penalty, one must look to the states that sentence people to death by the hundreds and have carried out scores of executions. In those states, innocent people have been sentenced to die based on such things as mistaken eyewitness identifications, false confessions, the testimony of partisan experts who render opinions that are not supported by science, failure of police and prosecutors to turn over evidence of innocence, and testimony of prisoners who get their own charges dismissed by testifying that the accused admitted the crime to them. Even the guilty are sentenced to death as opposed to life imprisonment without the possibility of parole not because they committed the worst crimes but because where they happen to be prosecuted, the incompetence of their court-appointed lawyers, their race, or the race of their victim. . . .

Further experimentation with lethal punishment after centuries of failure has no place in a conservative society that is wary

of too much government power and skeptical of the government's ability to do things well. Further experimentation might be justified if it served some purpose. But capital punishment is not needed to protect society or to punish offenders, as shown by over 100 countries around the world that do not have the death penalty and states such as Michigan and Wisconsin, neither of which have had the death penalty since the mid-1800s. It can be argued that capital punishment was necessary when America was a frontier society and had no prisons. But today the United States has not only maximum security prisons, but “super maximum” prisons where serial killers, mass murderers, and sadistic murderers can be severely punished and completely isolated from guards and other inmates.

Nor is crime deterred by the executions in fewer than half the states of an arbitrarily selected 1 percent of those who commit murders, many of whom are mentally ill or have limited intellectual functioning. The South, which has carried out 85 percent of the nation's executions since 1976, has the highest murder rate of any region of the country. The Northeast, which has the fewest executions by far—only 3 executions between 1976 and the end of 2002—has the lowest murder rate.

The United States does not need to keep this relic of the past to show its abhorrence of murder. As previously noted, 99 percent of the murders in the United States are not punished by death. Even at war crimes trials in The Hague, genocide and other crimes against humanity are not punished with the death penalty. The societies that do not have capital punishment surely abhor murder as much as any other, but they do not find it necessary to engage in killing in order to punish, protect, or show their abhorrence with killing.

Finally, capital punishment has no place in a decent society that places some practices, such as torture, off limits—not because some individuals have not done things so bad that they arguably deserved to be tortured, but because a civilized society simply does not engage in such acts. It can be argued that rapists deserve to be raped, that mutilators deserve to be mutilated. Most societies, however, refrain from responding in this way because the punishment is not only degrading to those on whom it is imposed, but it is also degrading to the society that engages in the same behavior as the criminals. When death sentences are carried out, small groups of people gather in execution chambers and watch as a human being is tied down and put down. Some make no effort to suppress their glee when the sentence is carried out and celebrations occur inside

and outside the prison. These celebrations of death reflect the dark side of the human spirit—an arrogant, vengeful, unforgiving, uncarving side that either does not admit the possibility of innocence or redemption or is willing to kill people despite those possibilities.

A Human Rights Violation That Undermines the Standing and Moral Authority of the United States

If people were asked 50 years ago which one of the following three countries—Russia, South Africa, or the United States—would be most likely to have the death penalty at the turn of the century, few people would have answered the United States. And yet, the United States was one of four countries that accounted for 90 percent of all the executions in the world in 2001 (the others were China, Iran, and Saudi Arabia), while Russia and South Africa are among the nations that no longer practice capital punishment. Since 1985, over 40 countries have abandoned capital punishment, whereas only four countries that did not have it have adopted it. One of those, Nepal, has since abolished it. Turkey abolished the death penalty in 2001 in its efforts to join the European Union, leaving the United States the only NATO country that still has the death penalty. . . .

The retention of capital punishment in the United States draws harsh criticism from throughout the world. . . . Capital punishment also affects the United States's relations with other countries in other ways. Canada and Mexico have repeatedly protested when their nationals are executed by the United States, as have other countries. Canada, Mexico, and most European countries will not extradite suspects to the United States if they are subject to capital punishment and will not assist in the prosecution of people facing the death penalty. Just as the United States could not assert moral leadership in the world as long as it allowed segregation, it will not be a leader on human rights as long as it allows capital punishment.

Arbitrary and Unfair Infliction

Regardless of the practices of the rest of the world or the morality of capital punishment, the process leading to a death sentence is so unfair and influenced by so many improper factors and the infliction

of death sentences is so inconsistent that this punishment should be abandoned.

The exoneration of many people who spent years of their lives in prisons for crimes they did not commit—many of them on death rows—has dramatically brought to light defects in the criminal justice system that have surprised and appalled people who do not observe the system every day and assumed that it was working properly. The average person has little or no contact with the criminal courts, which deal primarily with crimes committed against and by poor people and members of racial minorities. It is a system that is overworked and underfunded, and particularly underfunded when it comes to protecting the rights of those accused.

Law enforcement officers, usually overworked and often under tremendous public pressure to solve terrible crimes, make mistakes, fail to pursue all lines of investigation, and, on occasion, overreach or take shortcuts in pursuing arrests. Prosecutors exercise vast and unchecked discretion in deciding which cases are to be prosecuted as capital cases. The race of the victim and the defendant, political considerations, and other extraneous factors influence whether prosecutors seek the death penalty and whether juries or judges impose it.

A person facing the death penalty usually cannot afford to hire an attorney and is at the mercy of the system to provide a court-appointed lawyer. While many receive adequate representation (and often are not sentenced to death as a result), many others are assigned lawyers who lack the knowledge, skill, resources—and sometimes even the inclination—to handle a serious criminal case. People who would not be sentenced to death if properly represented are sentenced to death because of incompetent court-appointed lawyers. In many communities, racial minorities are still excluded from participation as jurors, judges, prosecutors, and lawyers in the system. In too many cases, defendants are convicted on flimsy evidence, such as eyewitness identifications, which are notoriously unreliable but are seen as very credible by juries; the testimony of convicts who, in exchange for lenient treatment in their own cases, testify that the accused admitted to them that he or she committed the crime; and confessions obtained from people of limited intellect through lengthy and overbearing interrogations.

. . . These are not minor, isolated incidents; they are long-standing, pervasive, systemic deficiencies in the criminal justice system that are not being corrected and, in some places, are even

becoming worse. . . . Law enforcement agencies have been unwilling to videotape interrogations and use identification procedures that are more reliable than those presently employed. People who support capital punishment as a concept are unwilling to spend millions of tax dollars to provide competent legal representation for those accused of crimes. And courts have yet to find ways to overcome centuries of racial discrimination that often influence, consciously or subconsciously, the decisions of prosecutors, judges, and juries.

A Warning That Something Is Terribly Wrong: Innocent People Condemned to Death. Over 100 people condemned to death in the last 30 years have been exonerated and released after new evidence established their innocence or cast such doubt on their guilt that they could not be convicted. The 100th of those people, Ray Krone, was convicted and sentenced to death in Arizona based on the testimony of an expert witness that his teeth matched bite marks on the victim. During the ten years that Krone spent on death row, scientists developed the ability to compare biological evidence recovered at crime scenes with the DNA of suspects. DNA testing established that Krone was innocent. On Krone's release, the prosecutor said, "[Krone] deserves an apology from us, that's for sure. A mistake was made here. . . . What do you say to him? An injustice was done and we will try to do better. And we're sorry." Although unfortunate to be wrongfully convicted, Krone was very fortunate that there was DNA evidence in his case. In most cases, there is no biological evidence for DNA testing.

Other defendants had their death sentences commuted to life imprisonment without the possibility of parole because of questions about their innocence. For example, in 1994, the governor of Virginia commuted the death sentence of a mentally retarded man, Earl Washington, to life imprisonment without parole because of questions regarding his guilt. Washington, an easily persuaded, somewhat childlike special-education dropout, had been convicted of murder and rape based on a confession he gave to police, even though it was full of inconsistencies. For example, at one point in the confession Washington said that the victim was white and at another that the victim was black. Six years later, DNA evidence—not available at the time of Washington's trial or the commutation—established that Washington was innocent and he was released.

Although DNA testing has been available only in cases where there was biological evidence and the evidence has been preserved, it has established the innocence of many people who were not

sentenced to death. A Michigan judge in 1984 lamented the fact that the state did not have the death penalty, saying that life imprisonment was inadequate for Eddie Joe Lloyd for the rape and murder of a 16-year-old girl. Police had obtained a confession from Lloyd while he was in a mental hospital. Seventeen years later, DNA evidence established that Lloyd did not commit the crime. On his release, Lloyd commented, "If Michigan had the death penalty, I would have been through, the angels would have sung a long time ago."

Sometimes evidence of innocence has surfaced only at the last minute. Anthony Porter, sentenced to death in Illinois, went through all the appeals and review that are available for one so sentenced. Every court upheld his conviction and sentence. As Illinois prepared to put him to death, a question arose as to whether Porter, who was brain damaged and mentally retarded, understood what was happening to him. A person who lacks the mental ability to understand that he is being put to death in punishment for a crime cannot be executed unless he is treated and becomes capable of understanding why he is being executed. Just two days before Porter was to be executed, a court stayed his execution in order to examine his mental condition. After the stay was granted, a journalism class at Northwestern University and a private investigator examined the case and proved that Anthony Porter was innocent. They obtained a confession from the person who committed the crime. Anthony Porter was released, becoming the third person released from Illinois's death row after being proven innocent by a journalism class at Northwestern.

Some people have been executed despite questions of their innocence. Gary Graham was sentenced to death in Texas based on the identification of a witness who said she saw a murderer from 40 feet away. Studies have demonstrated that such identifications are often unreliable. But Graham had the misfortune to be assigned a notoriously incompetent lawyer, Ron Mock, who had so many clients sentenced to death that some refer to the "Mock Wing" of death row. Mock failed to seriously contest the state's case, conduct an independent investigation, and present witnesses at the scene who would have testified that Graham was not the person who committed the crime and that the perpetrator was much shorter than Graham. Although it was apparent that Graham did not receive a fair trial and adequate legal representation, he was executed by Texas in 2000. Whether Graham was innocent or guilty will never be resolved because in his case, like most others, there was no DNA evidence that would conclusively establish guilt or innocence.

Some proponents of capital punishment argue that the exonerations of Porter and others shows that the system works and that no innocent people have been executed. However, someone spending years on death row for a crime he did not commit is not an example of the system working. When journalism students prove that police, prosecutors, judges, defense lawyers, and the entire legal system failed to discover the perpetrator of a crime and instead condemned the wrong person to die, the system is not working. Porter and others were spared, as Chief Justice Moses Harrison of the Illinois Supreme Court observed, "only because of luck and the dedication of the attorneys, reporters, family members and volunteers who labored to win their release. They survived despite the criminal justice system, not because of it. . . ."

. . . Courts will always be fallible and reversible, while death will always be final and irreversible.

The Two Most Important Decisions—Made by Prosecutors. The two most important decisions in every death penalty case are made not by juries or judges, but by prosecutors. No state or federal law ever requires prosecutors to seek the death penalty or take a capital case to trial. A prosecutor has complete discretion in deciding whether to seek the death penalty and, even if death is sought, whether to offer a sentence less than death in exchange for the defendant's guilty plea. The overwhelming majority of all criminal cases, including capital cases, are resolved not by trials but by plea bargains. Whether death is sought or imposed is based on the discretion and proclivities of the thousands of people who occupy the offices of prosecutor in judicial districts throughout the nation. . . . Some prosecutors seek the death penalty at every opportunity, and others never seek it; some seldom seek it; some frequently seek it. There is no requirement that individual prosecutors—who, in most states, are elected by districts—be consistent in their practices in seeking the death penalty.

As a result of this discretion, there are great geographical disparities in where death is imposed within states. Prosecutors in Houston and Philadelphia have sought the death penalty in virtually every case in which it can be imposed. As a result of aggressive prosecutors and inept court-appointed lawyers, Houston and Philadelphia have each condemned over 100 people to death—more than most states. Harris County, which includes Houston, has had more executions in the last 30 years than any state except Texas and Virginia. . . .

Whether death is sought may depend on the side of the county line where the crime was committed. A murder was committed in a parking lot that contained the boundary between Lexington County, South Carolina, which at the time had sentenced 12 people to death, and Richland County, which had sent only one person to death row. The crime was determined to have occurred a few feet on the Lexington County side of the line. The defendant was tried in Lexington County and sentenced to death. Had the crime occurred a few feet in the other direction, the death penalty almost certainly would not have been imposed. . . .

Thus, whether the death sentence is imposed may depend more on the personal predilections and politics of local prosecutors than the heinousness of the crime or the incontestability of the defendant.

The Role of Racial Bias. The complete discretion given to prosecutors in deciding whether to seek the death penalty and whether to drop the death penalty in exchange for guilty pleas also contributes to racial disparities in the infliction of the death penalty. In the 38 states that have the death penalty, 97.5 percent of the chief prosecutors are white. In 18 of the states, all of the chief prosecutors are white. Even the most conscientious prosecutors who have had little experience with people of other races may be influenced in their decisions by racial stereotypes and attitudes they have developed over their lives.

But the rest of the criminal justice system is almost as unrepresentative of Americans' racial diversity as prosecutors' offices. In the South, where the death penalty is most often imposed and carried out, over half the victims of crime are people of color, well over 60 percent of the prison population is made up of people of color, and half of those sentenced to death are members of racial minorities. Yet people of color are seldom involved as judges, jurors, prosecutors, and lawyers in the courts. . . .

Although African Americans constitute only 12 percent of the national population, they are victims of half the murders that are committed in the United States. Yet 80 percent of those on death row were convicted of crimes against white people. The discrepancy is even greater in the Death Belt states of the South. In Georgia and Alabama, for example, African Americans are the victims of 65 percent of the homicides, yet 80 percent of those on death rows are there for crimes against white persons. . . .

Study after study has confirmed what lawyers practicing in the criminal courts observe every day: People of color are treated more

harshly than white people. A person of color is more likely than a white person to be stopped by the police, to be abused by the police during that stop, to be arrested, to be denied bail when taken to court, to be charged with a serious crime as opposed to a less serious one that could be charged, to be convicted, and to receive a harsher sentence. But a person of color is much *less* likely to be a participant in the criminal justice system as a judge, juror, prosecutor, or lawyer.

It would be quite remarkable if race affected every aspect of the criminal justice system except with regard to the death penalty—the area in which decision makers have the broadest discretion and base their decisions on evidence with tremendous emotional impact. The sad reality is that race continues to influence who is sentenced to death as it has throughout American history.

The Death Sentence for Being Assigned the Worst Lawyer. Capital cases—complex cases with the highest stakes of any in the legal system—should be handled by the most capable lawyers, with the resources to conduct thorough investigations and consult with various experts on everything from the prosecution's scientific evidence to psychologists and psychiatrists to investigate the defendant's mental health. The right to counsel is the most fundamental constitutional right of a person charged with a crime. A person accused of a crime depends on a lawyer to investigate the prosecution's case; to present any facts that may be helpful to the accused and necessary for a fair and reliable determination of guilt or innocence and, if guilty, a proper sentence; and to protect every other right of the accused. However, U.S. Supreme Court Justice Ruth Bader Ginsburg observed in 2001 that she had “yet to see a death case among the dozens coming to the Supreme Court . . . in which the defendant was well represented at trial. People who are well represented at trial do not get the death penalty.”

Those receiving the death penalty are not well represented because many states do not provide the structure, resources, independence, and accountability that is required to insure competent representation in an area of such specialization. . . .

In states with no public defender offices, lawyers in private practice are assigned to defend capital cases and paid well below market rates. Lawyers, like many people, are attracted to work that pays well. Few lawyers are willing to take the most difficult and emotionally demanding cases with the highest stakes for wages that are among the lowest in the legal profession. A paralegal who works on a federal

bankruptcy case is compensated at a higher hourly rate than a lawyer who defends a capital case in Alabama, Georgia, Mississippi, Virginia, and many other states that send many people to death rows. . . .

In several states where journalists have investigated—Illinois, Kentucky, Tennessee, and Texas—they have found that a fourth to a third of those sentenced to death were represented at their trials by lawyers who were later disbarred, suspended, or convicted of crimes. . . .

Many courts continue to operate on the fiction that anyone licensed to practice law—even someone whose practice is mostly real estate or divorce law—is competent to handle capital cases. This is like saying that every doctor is competent to do brain surgery. . . .

Justice Hugo Black wrote for the U.S. Supreme Court in 1956 that “[t]here can be no equal justice where the kind of trial a [person] gets depends on the amount of money he [or she] has.” But today, no one seriously doubts that the kind of trial, and the kind of justice, a person receives depends very much on the amount of money he or she has. The quality of legal representation tolerated by some courts shocks the conscience of a person of average sensibilities. But poor representation resulting from lack of funding and structure has been accepted as the best that can be done with the limited resources available. The commitment of many states to providing lawyers for those who cannot afford them was aptly described by a Chief Justice of the Georgia Supreme Court: “[W]e set our sights on the embarrassing target of mediocrity. I guess that means about halfway. And that raises a question. Are we willing to put up with halfway justice? To my way of thinking, one-half justice must mean one-half injustice, and one-half injustice is no justice at all.”

The proponents of capital punishment are always quick to say that people facing the death penalty *should* receive better legal representation. But they do not explain how this is going to be accomplished—whether by a sudden burst of altruism on the part of members of the legal profession, who are going to suddenly start taking capital cases for a fraction of what they can make doing other work; a massive infusion of funding from state legislatures that are searching for revenue for education, transportation, and other areas that have a constituency; or some other miracle. The right to competent representation is celebrated in the abstract, but most states—and most supporters of capital punishment—are unwilling to pay for it. As a result the death penalty will continue to be imposed not upon those who commit the worst crimes, but upon those who have the misfortune to be assigned the worst lawyers. . . .

Conclusion

... We should have the humility to admit that the legal system is not infallible and that mistakes are made. We should have the honesty to admit that our society is unwilling to pay the price of providing every poor person with competent legal representation, even in capital cases. We should have the courage to acknowledge the role that race plays in the criminal justice system and make a commitment to do something about it instead of pretending that racial prejudice no longer exists. And we should have the compassion and decency to recognize the dignity of every person, even those who have offended us most grievously. The Constitutional Court of South Africa addressed many of these issues in deciding whether the death penalty violated that country's constitution. Despite a staggering crime rate and a long history of racial violence and oppression, the Court unanimously concluded that in a society in transition from hatred to understanding, from vengeance to reconciliation, there was no place for the death penalty. The American people will ultimately reach the same conclusion, deciding that, like slavery and segregation, the death penalty is a relic of another era, and that this society of such vast wealth is capable of more constructive approaches to crime. And the United States will join the rest of the civilized world in abandoning capital punishment.

CHAPTER 22

Hellhole

Atul Gawande

The Eighth Amendment of the U.S. Constitution forbids "cruel and unusual punishment." Over the years, the U.S. Supreme Court has made it clear that a punishment does not need to be both cruel and unusual to be disallowed—simply being cruel is enough. Here, Atul Gawande argues that tens of thousands of American prisoners are currently being subjected to cruel conditions by being held in long-term solitary confinement. Since Dr. Gawande wrote this article, it has come to light that around 50% of the suicides in American prisons are committed by the less than 4% of inmates being held in solitary confinement.

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Human beings are social creatures. We are social not just in the trivial sense that we like company, and not just in the obvious sense that we each depend on others. We are social in a more elemental way: simply to exist as a normal human being requires interaction with other people.

Children provide the clearest demonstration of this fact, although it was slow to be accepted. Well into the nineteen-fifties, psychologists were encouraging parents to give children less attention and affection, in order to encourage independence. Then Harry Harlow, a professor of psychology at the University of Wisconsin at Madison, produced a series of influential studies involving baby rhesus monkeys.

Source: Atul Gawande, "Hellhole," *The New Yorker* (March 30, 2009).