



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

Stephen B. Bright

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 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. As Bryan Stevenson describes, the death penalty is a direct descendant of the darkest

aspects of American history: lynching, racial oppression, summary capital trials known as "lynchings"—and racial discrimination remains a prominent feature of punishment. The death penalty is imposed to avenge every killing, as some contend—to bring closure to the family of every victim inflicted in less than 1 percent of murder cases. Of more than 16,000 murders in the United States, an average of fewer than 100 are sentenced to death, and only 15 are executed each year. Only 15 were carried out in 1976, when the U.S. Supreme Court authorized the resumption of punishment after declaring it unconstitutional in 1972, and the 1980s. Eighty-six percent of those were in the South. Just 10 percent were in Texas and Virginia—carried out 10 percent of them.

Any assessment of the death penalty must not be based on theories about how it should

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States of the Fading Sent

American history—states of oppression, and trials known as racial discrimination. A prominent feature of the death penalty is every killing—bring “down” of every victim. Of more than 1 percent. United States fewer than 300 to death, and only 19 states. The U.S. Supreme Court the resumption of after declaring it 72, and the end of percent of those executions South. Just two Virginia—carried out assessment of the not be based on not how it should

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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 evidence, 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 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.

Former Illinois Governor George Ryan is a prominent example of a supporter of capital punishment who, after close examination of the system, found that it “is haunted by the possibility of error—error in determining guilt, and error in determining among the guilty deserves to die. As a member of the legislature in 1977, Ryan voted to adopt Illinois’s death penalty law and he described himself as a “staunch supporter” of capital punishment until as governor in 1999, he saw that during that time the state had carried out 12 executions and released from its death row 13 people who had been

exonerated. In 2003, Governor Ryan pardoned four people who had been tortured by police until they confessed to crimes they did not commit and commuted the sentences of the remaining 167 people on Illinois’s death row. . . .

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, uncaring that either does not admit the possibility of innocence or redemption or is willing to kill people despite 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 countries—Russia, South Africa, 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 is one of four countries that account for 90 percent of all the executions in the world in 2001 (the others were Iran, and Saudi Arabia), while Russia and South Africa are among the nations that no longer practice capital punishment. Since 1985, 115 countries have abandoned capital punishment whereas only four countries that did not have capital punishment adopted it. One of those, Nepal, since abolished it. Turkey abandoned 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 United States is also home to a very small minority of nations that allow the execution of convicted criminals. Twenty-two of the 38 states that have death penalty statutes allow the execution of people who were under 18 at the time of their crimes. Between

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 Terribly Wrong: Innocent Condemned to Death

Over 100 people condemned to death in the last 30 years have been exonerated and released because evidence established their innocence or cast such doubt on the conviction that they could not be convicted. One in 100th of those people, however, was convicted and sentenced to death in Arizona based on the testimony of an expert witness whose teeth matched bite marks on the victim. During the ten years he spent on death row, scientists developed the ability to compare DNA evidence recovered at the crime scene with the DNA of suspects. This evidence established that the man was innocent. On Krone's appeal, the prosecutor said, "[Krone's] apology from us, that's a mistake was made here. You say to him? An apology. We've done and we will try to do better. We're sorry." Although the man was wrongfully convicted, it was very fortunate that there was evidence in his case. If there is no biological evidence, DNA testing.

Other defendants have had their death sentences commuted to life imprisonment without parole because of questions about their innocence. For example, in 1994, the governor of Washington commuted the death sentence of a mentally retarded man, Earl Ray, to life imprisonment because of questions about his guilt. Washington was persuaded, somewhat reluctantly, to drop the

Even if every single reform were adopted, it would not eliminate the possibility of executing innocent people. As the Canadian Supreme Court recognized in holding that it would not allow the extradition of people to the United States if the death penalty could be imposed, courts will always be fallible and reversible, while death will always be final and irreversible.

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

As a result of this there are great geographical differences in where death is imposed. Prosecutors in Philadelphia have sought the death penalty in virtually every case in which it can be imposed. A number of aggressive prosecutors and court-appointed lawyers in Philadelphia have each sent over 100 people to death—in most states. Harris County, which includes Houston, has had 100 executions in the last 30 years. No state except Texas and Virginia has a higher rate of capital cases. The case is much more likely to be executed capitally in Houston.

prosecutors to seek the death penalty or take a capital case to Philadelphia than in Dallas, Ft. Worth, or Pittsburgh. . . .

Thus, whether the death sentence imposed may depend more on the personal predilections and politics of local prosecutors than the heinousness of the crime or the incorrigibility 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 40 of the states, all of the chief prosecutors are white. Even the most conscientious prosecutors who have had extensive 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 American's racial diversity as prosecutors' offices. In the South, where the death penalty is most imposed and carried out, over 90 percent of the victims of crime are people of color. In the North, well over 60 percent of the population is made up of people of color, and half of those sentenced to death are members of minorities. Yet people of color are seldom involved as judges, jurors, or prosecutors, and lawyers in the South. In the last 30 years, for example, not one African American or Hispanic judge has been appointed in Houston, and not one in the last 30 years in Dallas.

For example, there is not one African American or Hispanic judge on the nine-member Texas Court of

Criminal Appeals, the court of last resort for all criminal cases in that state, even though 43 percent of the population of Texas is nonwhite, over 65 percent of the homicide victims are people of color, and nearly 70 percent of the prison population is black, Hispanic, or other nonwhite. This court handles over 10,000 cases each year, most of them involving the lives and liberty of people of color. In Alabama, no African American sits among the nine members of the Alabama Supreme Court or the five members of the Alabama Court of Criminal Appeals—the two courts that review capital cases—even though 26 percent of the population of Alabama is African American, 59 percent of the victims of homicide are African American, and over half those on death row are black. In many court-houses, everything looks the same as it did during the period of Jim Crow justice. The judges are white, the prosecutors are white, the lawyers are white and, even in communities with substantial African American populations, the jury may be all white. In many cases, the only person of color who sits in front of the bar in the courtroom is the person on trial. The legal system remains the institution that has been least affected by the civil rights movement.

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. Studies of capital sentencing have consistently revealed such disparities. . . .

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 experts on everything from the prosecution's scientific evidence to pathologists 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; to prepare 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 never seen a death case among the cases coming to the Supreme Court in which the defendant was well represented at trial. People who are not represented at trial do not get the death penalty."

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

Justice Hugo Black wrote in the U.S. Supreme Court in 1962, "[t]here can be no equal justice of the kind of trial a [person] depends on the amount of money [or she] has." But today, no one seriously doubts that the kind of justice, a person depends very much on the money he or she has. The quality of legal representation tolerates

conduct thorough investigations, consult with various experts, and bring in all the evidence from the prosecution and the defense. Psychologists, psychiatrists, and other mental health professionals are often called upon to investigate the mental health of the defendant. The right of a person to a fair trial is the most fundamental right of a person accused of a crime. A person's right to a fair trial depends on the quality of the representation they receive. The prosecution must present any facts that are relevant to the accused's guilt or innocence, and the defense must be able to present any facts that are relevant to the accused's innocence or guilt. The right of a person to a fair trial is the most fundamental right of a person accused of a crime. A person's right to a fair trial depends on the quality of the representation they receive. The prosecution must present any facts that are relevant to the accused's guilt or innocence, and the defense must be able to present any facts that are relevant to the accused's innocence or guilt.

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; by a massive infusion of funding from the legislatures that are searching for revenue for education, transportation, and other areas that have a constituency; or some other miracle. The result is that competent representation is rare. In the abstract, but most especially in the case 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.

Death for the Disadvantaged

Capital punishment is inflicted on the weakest and most troubled members of our society such as children, the delusional, the paranoid, the brain-damaged, the chemically imbalanced, those who were abused and neglected as children, and people who endured the most terrible trauma imaginable in military service during war, who came back with post-traumatic stress syndrome, addicted to drugs, with various mental and emotional problems.

Charles Rumbaugh is one of many examples of the execution of the mentally ill. He was only 17 at the time of his crime and suffered from schizophrenia and depression to the point that he repeatedly mutilated himself and attempted suicide. Rumbaugh's parents tried to convince a court not to let him withdraw his appeals. During a hearing, Rumbaugh advanced on a marshal and provoked the marshal to shoot him in the courtroom. He was taken to the hospital while the hearing continued. He was allowed to withdraw his appeals and was executed by Texas.

Another example is Pernell Ford, who was allowed to discharge his lawyers and represent himself at his capital trial in Alabama in 1984. Ford wore only a sheet to the penalty phase of the trial. He tried to call as witnesses people who were no longer alive. After lawyers appealed his conviction to a federal court, Ford wrote to the court and asked that the petition be dismissed. During a hearing, Ford said that he wanted to die.

because he was a member of the Holy Trinity, he had supernatural powers that would be enhanced when he died, and he would be able to transfer his soul to people outside the prison. He said that when he died, his 400 thousand wives would receive the millions of dollars he had put in Swiss bank accounts. One psychiatrist who evaluated Ford said that these statements were reflective of Ford's religious beliefs—not evidence of mental illness. Another psychiatrist found that Ford suffered from depression and personality disorder but was still capable of making rational choices. A third psychiatrist found that Ford was incapable of thinking rationally. The court concluded that Ford could give up his appeals because he understood the "bottom line" of his legal situation. Like Charles Rumbaugh, he was allowed to withdraw his appeals. Alabama executed him. . . .

The execution of such severely mentally ill people and treating mentally ill people so that they can be executed should be beneath the American people. Unfortunately, many mentally ill people are left on their own without support and supervision. Society would be better served by providing some care to insure that they take their medications and receive proper treatment to prevent episodes of violence than by executing people who are out of touch with reality. And once a severely mentally ill person has committed a serious crime the appropriate response is to place them in secure mental health facilities, not in execution chambers. . . .

Abandoning fairness, the quest for racial equality of law, and the independence of the judiciary are enormous prices to pay to bring a few more people to justice. Some are willing to pay even more—the lives of innocent people. They argue that we are in a "war on crime," and, as in any war, there are going to be some casualties. The American ideal of justice was once that it was better to let ten guilty people go free than to let an innocent person be executed. Now, proponents of the death penalty argue it is acceptable to sacrifice more than a few innocent people in the war on crime.

Conclusion

Courts should not be war rooms. Courts are halls of justice. It is time to end the "war of crime"—the United States is fighting a war against its own people, its own children, its own poorest and the most poor people in society. The American people must ask what kind of society they want to have and what kind of people they want to be. We want a hateful, vengeful society that turns its back on its children, then executes them, then turns its back on the mentally ill the treatment and medicine they need and then sends them to death when they are no longer kept at bay. We have nothing to the survivors of the crime except to ask for the maximum sentence and watch an execution.

We should have the courage to admit that the legal system

fairness, reliability, racial equality, the rule of law, independence and the judiciary are essential to bring about a society willing to sacrifice the lives of innocent people. That we are fighting a war, and, as in any war, to be some innocent American notion that it was better to go free than to be convicted of the death penalty, is not a sacrifice that we are willing to make.

It is not be war zones. It is time to recognize "crime"—a war against crime—fighting against our own children, and the most powerless people. The American people, what kind of society and what kind of punishment to be. Whether a vengeful society on its children and them, that demands the treatment and need and then when their demand kept at bay, that survivors of the maximum sentence.

have the humility the legal system is

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. ■

III The Continuing Debate

What Is New

Perhaps the biggest impact on the contemporary capital punishment debate has been that of the development of DNA testing, and the use of DNA evidence to establish the innocence of many persons wrongly convicted and sentenced to death. Illinois governor George Ryan had been a steadfast supporter of capital punishment; but after 13 Illinois death row inmates were proved innocent through DNA testing, in 2000 he called for a moratorium on capital punishment in Illinois. The Death Penalty Information Center, using DNA studies, has uncovered over 100 cases of innocent prisoners wrongly sentenced to death, and many more who were wrongly convicted of lesser crimes have been exonerated by DNA evidence. Since DNA evidence is available for review only in the case of a small proportion of those who have been convicted, the question arises of how many current death row prisoners were wrongly convicted.

Where to Find More

Full transcripts of all U.S. Supreme Court cases dealing with capital punishment can be found at www.Oyez.org. For further study of key Supreme Court death penalty cases, a good source is Barry Latzer, *Death Penalty Cases: Leading U.S. Supreme Court Cases on Capital Punishment* (Woburn, MA: Butterworth-Heinemann, 1997).