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

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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 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 in another chapter, the death penalty is a direct descendant of the darkest aspects of American history—slavery, lynching, racial oppression, and perfunctory capital trials known as “legal lynchings”—and racial discrimination remains a prominent feature of capital pun-
ishment. 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 of 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, upon close examination of the system, found that it “is haunted by the demon of error—error in determining guilt, and error in determining who 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 23 years later, he saw that during that period 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 for reasons that he eloquently sets out elsewhere in this book.

Many other supporters of capital punishment, after years of struggling to make the system work, have had sober second thoughts about the fairness with which the death penalty is imposed. Justice Sandra Day O’Connor, who joined the United States Supreme Court in 1981 and has regularly voted to uphold death sentences, has acknowledged that “serious questions are being raised about whether the death penalty is being fairly administered in this country” and that “the system may well be allowing some innocent defendants to be executed.” Justices Lewis Powell and Harry Blackmun also voted to uphold death sentences as members of the court, but eventually they came to the conclusion, as Justice Blackmun put it, that “the death penalty experiment has failed.”

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 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.5 Since 1985, over 40 countries have abandoned capital punishment whereas only four countries that did not have it have adopted it.6 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.7

The United States is also part of a very small minority of nations that allow the execution of children. Twenty-two of the 38 states with death penalty statutes allow the execution of people who were under 18 at the time of their crimes. Between 1990 and the end of 2001, these states put 15 children to death, with Texas carrying out over 60 percent of those executions. The only other countries that executed children during this time were the Congo, Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen.8 The United States and Somalia are the only two countries that have not ratified the International Covenant on the Rights of the Child, which, among other things, prohibits the execution of people who were children at the time of their crimes.

Being among the world leaders in executions and the leader in execution of children is incompatible with asserting leadership on human rights issues in the world. As Frederick Douglass said over a century ago, “Life is the great primary and most precious and comprehensive of all human rights—[and] whether it be coupled with virtue, honor, and happiness, or with sin, disgrace and misery,... [it is not] to be deliberately or voluntarily destroyed, either by individuals separately, or combined in what is called Government.”9

The retention of capital punishment in the United States draws harsh criticism from throughout the world. It is suggested elsewhere in this book that the democracies in European countries function so poorly that the elite have prevented the use of the death penalty in them for decades; however, Felix G. Rohatyn, who saw the people of Europe firsthand during four years as U.S. Ambassador to France, found that “no single issue evoked as much passion and as much protest as executions in the United States.”

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.

Judge Cassell dismisses concerns about the unfair application of the death penalty as mere “administrative objections” that are ill-founded or easily cured. But 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. There is tremendous resistance to change, as shown by the unwillingness of the Illinois legislature to adopt many of the recommendations of Governor Ryan’s commission to reduce the likelihood of wrongful convictions in capital cases. 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.\textsuperscript{11} 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—more than 100 by the end of 2002. 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."\textsuperscript{12}

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 murder 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 exoneration 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. The truth is that left to the devices of the court system, they would probably have all ended up dead at the hands of the state for crimes they did not commit. One must wonder how many others have not been so fortunate."\(^{15}\)

If there had been no question about Antony Porter’s ability to understand why he was to be put to death, his execution would not have been stayed. If his intellectual functioning had been just a little higher and he had had a little less brain damage, he would have been executed. The journalism students would not have investigated his case. Similarly, had it not been for the scientific breakthrough regarding DNA, Ray Krone would have been executed. Had not Governor Douglas Wilder commuted his sentence to life imprisonment, Earl Washington would not have lived until DNA testing proved his innocence. A different governor at a different time might well have denied commutation. Had Porter, Krone, and Washington been put to death, the proponents of capital punishment would still be strenuously arguing—as some do in chapters in this book—that no innocent person has been executed, safe in their ignorance that such fatal mistakes had been made. But for every Anthony Porter, Ray Krone, or Earl Washington whose innocence has been discovered, there are others for whom there is no biological evidence that can be subject to DNA testing, no journalism class, no lawyer, no serendipitous discovery of evidence that exonerates them. And as executions become more “routine,” with less attention to each one, they and other innocent people will be put to death.

Other proponents of capital punishment, instead of insisting that the system works when journalism students free people wrongfully sentenced to death, admit that the system is not working. Gerald Kogan, formerly the head of the homicide unit of the prosecutor’s office in Miami-Dade County, Florida, asked for the death penalty as a
prosecutor and supervised other prosecutors asking for and obtaining the death penalty. He presided over capital cases as a trial judge and reviewed hundreds more as a justice and then chief justice of the Florida Supreme Court. Upon retiring, he stated that capital punishment “does not work at this time and has not worked in the State of Florida for many, many, many years.”

Gerald W. Heaney announced, after 30 years of reviewing capital cases as a federal appellate judge, that he was “compelled . . . to conclude that the imposition of the death penalty is arbitrary and capricious.” He found that “the decision of who shall live and who shall die for his crime turns less on the nature of the offense and the incorrigibility of the offender and more on inappropriate and indefensible considerations: the political and personal inclinations of prosecutors; the defendant’s wealth, race, and intellect; the race and economic status of the victim; the quality of the defendant’s counsel; and the resources allocated to defense lawyers.”

After declaring a moratorium on executions in Illinois, Governor Ryan appointed a 14-member commission made up of respected judges, prosecutors, defense attorneys, business leaders, an author, and a former U.S. senator to study the criminal justice system in Illinois; the commission made 85 recommendations in 2002 for reforms to minimize the risk of wrongful convictions. The legislature, however, was unwilling to enact reforms such as reducing the number of capital prosecutions so that each one could be handled with appropriate care, and prohibiting death sentences when a defendant is convicted with just a single witness, a jailhouse informant, or an accomplice whose testimony is not corroborated with other evidence. Illinois and other states want the death penalty, but they are unwilling to pay the cost of reducing the risk of error and making the system fairer. And 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.