

A Dying Shame

The state is not God, and the death penalty is not infallible.

by ARTHUR RIZER AND MARC HYDEN

No person shall “be deprived of life, liberty, or property, without due process of law.” Thus, according to the Fifth Amendment, capital punishment is permissible by the law of the land pursuant to principles of proportionality as laid out in the Eighth Amendment.

But should it remain a legal option? If not, who should champion capital punishment’s demise? Should it be the Left, whose answer to most political, philosophical, and moral questions is usually more government? Or should it be the Right, who have long been advocates of government restraint, fiscal responsibility, morality, and public safety?

Conservatism is not a single-issue monolith. As such, the political Right’s umbrella covers a gambit of interests and differing points of view—take immigration, trade, or national security for example. Yet the closer conservatism remains to its core values, the more credibility it brings to the table. If conservatives want to convince others that a smaller, more nimble government is best, then those values should be reflected in all policy areas, including the death penalty.

The Founding Fathers explicitly rejected the notion that government is benign. Indeed, skepticism of state power is at the heart of the American identity and conservative philosophy, and for good reason. The United States government has a history of incompetence and malfeasance, ranging from buying \$400 hammers to testing the effects of nuclear radiation on U.S. soldiers.

Our suspicion of government should not end with the criminal justice system. With respect to capital punishment, the United States has a track record of acting in an arbitrary and biased fashion. Some examples are obvious. For instance, a 19th century North Carolina law

mandated the death penalty when a black man raped a white woman, but gave a maximum punishment of one year in prison to a white man for the same crime.

While such blatantly racist laws no longer exist, the disproportionality in death penalty cases has long been an issue. For instance, a Justice Department study established that, between 1930 and 1972, when an individual was sentenced to death for the crime of rape (a crime that no longer carries the death penalty), 89 percent of the defendants put to death were black men. More disturbing was the fact that in every rape execution case, the victim was white. Not one person received a death sentence for raping a black woman, despite black women being up to 12 times more likely to be rape victims.

Furthermore, a murder victim’s race also seems to influence whether or not the accused will be put to death. Indeed, there is a much higher likelihood of this occurring if the victim is white: over 75 percent of victims in cases that resulted in executions were Caucasian. Additionally, only 15 percent were African American even though they represent a far higher percentage of murder victims. This seems to suggest that, at least through the criminal justice lens, some lives are more valuable than others.

The simple matter is that the death penalty has an extensive history of overt bias. As America has been reshaped, thanks in part to the civil rights movement, many laws have since been repealed or reformed that once permitted conspicuous racism within the justice system. In the modern era, execution rates by race have begun to more closely mirror America’s racial makeup. While the

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U.S. has taken great strides, we still have not been able to banish the bias that permeates the justice system. For it to be fair, justice must be impartial and provide defendants an equal opportunity, regardless of race. Put simply, Lady Justice must not only be blind, but also color blind.

The Innocence Project has estimated that anywhere from 2 to 5 percent of currently incarcerated Americans are innocent. Given that there are about two million people behind bars today, that roughly translates into 20,000 wrongly convicted people. If a headline read “20,000 individuals’ guns were wrongfully seized by government agents” conservatives would be infuriated, and rightly so. This makes it all the more curious that such passion for a limited government does not extend to the state’s power over life and death.

Conservatives claim to hold the government and its bureaucrats to high standards. We expect the state to be the flag bearer of moral precepts and criticize it when it fails. Indeed, the Republican platform uses the word “moral” nine times to describe topics ranging from healthcare to the environment. And regardless of a citizen’s source of morality, be it secular or ecclesiastical, the government should reflect those standards.

Despite this expectation, a core belief among conservatives is that the government is too often inefficient and prone to mistakes. Why should the death penalty’s administration by government bureaucrats be any different? We know individuals are wrongfully convicted—and to be sure, some wrongful convictions are unavoidable. However, when dealing with capital punishment, that inevitability could have irreversible consequences and can never be tolerated in a free and law-abiding society.

This is why government should not be in the business of killing its citizens. This view hews to a core conservative tenet, that the government should be inferior to the people from which it derives its power. True, we invest in the state the authority to protect its citizens, which might require lethal protection by police officers in the line of duty. But when it comes to the death penalty, executions aren’t a matter of self-defense or a response to imminent danger. Rather the defendant has already been neutralized as a threat and housed in a correctional facility. In contrast to *just* wars and police responses, our penal system can and should take all necessary time and devote all appropriate resources to achieve its ultimate end—justice.

Death penalty proponents often claim that executions are beneficial because they serve as a general deterrent to murder. According to this argument, people will hesitate to commit the most heinous crimes for fear of capital punishment, which could

mean the firing squad, gas chamber, electric chair, lethal injection, or hanging—which are all legal in some states today. The problem with this theory is that there is very little valid data to support it.

Throughout the 1980s and ’90s, death penalty convictions increased sharply, particularly in the South. Indeed, in 1977 there were just over 400 people on death row in the U.S.; by 1983, that number tripled to 1,200; by 1990, that number had nearly doubled to over 2,300. Each year, death row continued to swell until hitting its maximum at 3,581 in 2001. Since then, the numbers have been slowly decreasing to what they are today at 2,743.

To determine if capital punishment accomplishes its main goal—deterrence—researchers have conducted several studies, including: 1) comparing murder rates between neighboring states that do and do not have capital punishment; and 2) comparing murder rates in states that have had the death penalty and abolished it.

Daniel Nagin and John Pepper’s 2012 publication, “Deterrence and the Death Penalty,” was the largest-ever survey of deterrence studies. After conducting their examination, the authors concluded that no evidence exists to suggest that the death penalty serves as a general deterrent to murder. In fact, when analyzing homicide rates between states that share comparable economic, demographic, and social characteristics, there is no statistically significant difference between murder rates in states with or without the death penalty.

Further, the difference between states’ homicide rates before and after abolishing capital punishment tends to undermine death penalty advocates’ arguments. One of the more recent examples of this is New Mexico, which repealed the death penalty in 2009. At that time, the state’s homicide rate was 9.9 per 100,000 citizens. Since repeal, the murder rate has steadily decreased to 6.7 per 100,000 as of 2016. This is especially stunning given that nationally, from 2009 to 2016, there was a slight uptick in murders per capita. Homicide rates have declined in virtually every state that has repealed capital punishment with the exception of Maryland and Illinois, but this is because of increased gang violence isolated in neighborhoods of Baltimore and Chicago.

Some argue that the debate over general deterrence is superfluous. For them, the basic argument is this: executions prevent murderers from killing *again*, and thus are a win. But this ignores the real possibility of accidentally executing an innocent person. It also turns eye-for-an-eye vengeance into one of the death penalty’s goals. Indeed, most capital punishment proponents do not support this kind of retribution for other crimes. Few, if any, advocate for raping a rapist, assaulting an assaulter, or robbing a robber. Yet, when it comes to the death penalty, such otherwise-rejected logic is embraced. Further, if the

death penalty's objective is to prevent individuals from killing again, then sentencing them to life without the chance of release can accomplish that goal.

There is a growing list of examples demonstrating how easily someone can be wrongly placed on death row, and Ray Krone's case is one such cautionary tale. He served honorably as an Air Force sergeant, and, after his tenure, began working for the U.S. Postal Service. Up until then, he had never been arrested. That changed one day when he was accused of murdering a waitress at a nearby bar, despite being home at the time. No evidence connected him to the crime—save for a mangled bite mark on the victim's body that an "expert" linked to Krone using bite-mark analysis. He was even dubbed the "snaggletooth killer."

Krone's defense counsel was underfunded and ill-prepared. Meanwhile, the prosecutor withheld evidence, and consequently Krone was convicted and sentenced to die. Years passed, and researchers eventually discovered DNA evidence, which was presented in court. The new finding identified a known criminal as the likely culprit. As a result, Krone was exonerated, but not before losing 10 years of his life.

Unfortunately, his story is not unique. Krone is one of over 160 individuals who have been wrongly convicted, sentenced to die, and ultimately freed from prison since 1973. That equates to roughly one erroneous conviction and release for every nine executions. A 2014 study by Samuel R. Gross estimates that at least 4.1 percent of those sentenced to die are likely innocent, suggesting that this problem may be more pervasive than many think.

More often than not, prosecutorial misconduct, mistaken eyewitness testimony, coerced confessions, inept defense attorneys, and faulty forensics are behind these erroneous convictions. In fact, forensic analyses that were once considered a near-perfect science have since proven to be unreliable, and may have even led to wrongful executions.

It is impossible to know how many innocent people have been executed, but Carlos DeLuna might be one of those pitiable people. He was convicted of murdering a convenience store clerk, though no physical evidence linked him to the crime. Detectives failed to follow basic crime scene procedures, and the prosecution largely relied on the eyewitness testimony of one man who later admitted that he couldn't readily distinguish people of Hispanic descent.

After being accused, DeLuna identified a police informant named Carlos Hernandez as the true killer. Hernandez had been arrested dozens of times, looked similar to DeLuna, and considerable evidence pointed in his direction. On multiple occasions, Hernandez even bragged

about committing the murder and the wrong Carlos taking the fall. Despite all of this, DeLuna was executed.

Conservatives take great pride in championing the sanctity of life and respecting its intrinsic value, but a death penalty system that repeatedly and unnecessarily risks innocent lives does neither.

Beginning no later than the early 1990s, states and counties were confronted by the death penalty's exorbitant costs—pushing some localities to the brink of bankruptcy. One such example occurred in Lincoln County, Georgia, where a prosecutor was bent on securing a death sentence for a South Carolinian named Johnny Jones. The trial quickly strained the county's finances, and, in 1990, Lincoln County officials were forced to raise taxes to cover the case's costs. Eventually, they even went so far as to sue the defendant's home state in order to recoup their losses.

Jones was initially sentenced to die, but his conviction was overturned due to irregularities. This started the proceedings anew. Frustrated with the process and expense, Lincoln County commissioners balked when asked to fund Jones' retrial. The presiding judge subsequently threw the commissioners in jail. Hungry for a decent, warm meal, they relented to the judge's demands and were released after a 24-hour stint in lock-up. Ultimately, in 1992, they raised taxes again to bankroll the legal proceeding. In the end, Georgia never executed Jones.

Stories like these can be found elsewhere. The death penalty's high costs have threatened the solvency of many local governments, while similar outcomes resulted. In the 1990s, Richardson County, Nebraska, mortgaged their ambulances to fund two death cases and Jasper County, Texas, raised property taxes by 7 percent to finance capital proceedings. In response, many states have since shifted much of the financial burden from the local to the state level, but the high costs remain.

More recently, numerous cost studies have examined the death penalty's expense and found that it far outweighs the price of life without parole (LWOP). A study found that the state of Florida spent roughly \$3.2 million per death case from initial trial to execution, and the costs have almost certainly risen dramatically since. By replacing capital punishment with LWOP, North Carolina could have saved around \$11 million per year from 2005-2006, and Nebraska roughly \$14 million in 2015.

Meanwhile, since 1978, California has shockingly spent at least \$4 billion dollars maintaining and pursuing capital cases. Yet, in this same time period, the state has only executed a total of 13 people. These examples of capital punishment's expense are not outliers. More than two dozen cost studies have all demonstrated the death penalty's high price in states across the country.

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These high costs are just a symptom of the American legal system's design, and of statutory and Supreme Court mandates. First, our system requires attorneys to provide the best representation possible for their clients. Second, capital cases are given what is called "super due process" to reduce the chance of executing an innocent person. The marriage of these factors guarantees an expensive process.

Initial trials are far longer and resource intensive, and death cases even have an additional trial not found in LWOP cases, which exists to determine whether an execution is merited. This is followed by a longer, multi-tiered appeals process with more appealable issues than LWOP cases. Meanwhile, once sentenced to die, inmates are housed on death row, which, due to increased security protocols, is more expensive than housing in the general population. Put simply, by following the law and corrections policies, every level of the process is necessarily more complex and costly. Given the death penalty's high costs compared to LWOP, it's clear that capital punishment is antithetical to fiscal conservatism.

Reverend Billy Bosler was a Florida minister who opposed capital punishment. On at least one occasion, he even informed his daughter, Suezann Bosler, that if he were ever murdered he wouldn't want his killer to be put to death. Sadly, one day, a man forced his way into the Boslers' parsonage whereupon Bosler was murdered and Suezann was critically wounded.

Before long, the perpetrator was captured and charged with murder. The prosecutor sought the death penalty, but Suezann remembered her father's uncompromising stance on capital punishment. Through the long process, Suezann objected to the death penalty, but the prosecutor evidently didn't care. In fact, when called to testify, Suezann was threatened with being held in contempt of court and jailed if she revealed her death penalty views. Suezann's story is a lamentable reminder that, while people are told that the death penalty is in part exercised for the benefit of victims and victims' families, their wishes are not always considered.

The death penalty process fails victims' families in other ways too. They desire a system that is swift and sure. Contrary to their needs, the proceedings are complex, time-consuming, and heart-wrenching. At every court appearance over the course of decades, victims' family members must repeatedly relive the worst moments of their lives—ensuring that healing is elusive. If an execution ever comes to fruition, it usually occurs around 15 years after the original conviction date. Further, the families of murder victims must live in constant uncertainty because death sentences are frequently overturned on appeal, which starts the process anew. In fact, there

are serious, reversible errors in more than two thirds of capital cases.

Murder victims' families deserve better than the system that they must endure, but policymakers are faced with a catch-22. The death penalty process cannot be shorter, less complex, or have its appeals limited without virtually guaranteeing that innocent people will be executed by the state. It seems that if murder victims' well-being was a primary focus, then prosecutors would more frequently seek a briefer, simpler, surer proceeding like LWOP.

The creation of the Grand Old Party, and in many ways the modern conservative movement, traces its lineage to anti-slavery abolitionists. Their beliefs about human dignity have influenced current conservatives' views on the sanctity of life. Conservatives should return to the root principles of liberty and dignity to ensure that the criminal justice system is fair, just, and respects life.

It's not hard to see what the Right stands to gain by making real attempts to exemplify the 2000 presidential campaign slogan "compassionate conservatism." Conservatives can shed the impression—deserved or not—that the Right has no mercy or compassion for the underprivileged. Showing grace to those who some may feel deserve the death penalty would go a long way toward accomplishing this.

Forgiveness and empathy are firmly rooted in Christianity. In fact, modern Catholic teaching has attempted to embody the notion of grace. Pope John Paul II strived to respect life's invaluable worth, provide all humans the best chance of redemption, and truly exhibit compassion. Thus, in 1997, Pope John Paul II updated the Church's position on the death penalty to reflect these ideals. The revision greatly limited capital punishment's approved application to instances in which executions are absolutely necessary to suppress the guilty. However, with the advent of modern prisons, this is never the case in America. Today, there are other options available to neutralize the convicted as a threat to society and protect the general public without executing the guilty.

Earlier this year, Pope Francis built upon Pope John Paul II's teaching. He ordered the *Catechism* to be updated so that it declares the death penalty to be "inadmissible because it is an attack on the inviolability and dignity of the person." Regardless of whether or not one is a Catholic, a philosophy that respects life, offers the opportunity of salvation, and extends compassion to others should be embraced.

Perhaps more than anything else, opposition to the death penalty should boil down to a lack of faith in a woefully error-prone government. After all, how willing are *you* to trust your life to this system? ■