

# IDEAS

## FOR AN OPEN SOCIETY



### THE DEATH PENALTY DEBATE

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Tanya E. Coke

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## *Reappraising Death*

# The new debate over **CAPITAL** punishment

**D**uring a half-century of extraordinary social change, few issues have seemed as intractable as the death penalty. Mired in a conflicting set of Biblical imperatives, the debate generally pitted the idea of mercy versus that of “just deserts” in a contest of moral absolutes. At least since the 1988 presidential debates, most often the discussion came grinding to a halt with some variation of the Bernie Shaw-to-Michael Dukakis question: “But what if *your* wife were brutally murdered?” One measure of the death penalty’s signifying power was that, by the early 1990s, the issue had become thoroughly non-partisan, as Democrats began using it to outflank Republicans on crime. In 1992, Bill Clinton took a well-publicized detour from his presidential campaign to preside over the execution in Arkansas of Ricky Ray Rector, a black man with severe brain damage.

Yet a remarkable shift has occurred in the public and political climate. George Ryan, Republican governor of Illinois, declared a moratorium on executions last year. A few months later, New Hampshire voted to repeal its death penalty statute, only to have its Democratic governor, Jeanne Shaheen, veto the legislation. This year, every one of the 38 death penalty states but Kansas introduced bills to reform or curtail capital punishment. Texas and Florida — two states at the buckle of the “death belt” — actually passed legislation barring executions of the mentally retarded (though Gov. Rick Perry vetoed the Texas bill). Polls show public support for capital punishment at its lowest point in 20 years, with a majority of American voters favoring a temporary halt to executions while the issue receives further study, and substantial numbers amenable to replacing the death penalty with life in prison without parole.

Even the execution of Timothy McVeigh on June 11 offers a revealing litmus of the new atmosphere. Hollywood could not have produced a more compelling candidate for execution: a domestic terrorist, killer of babies,

BY TANYA E. COKE



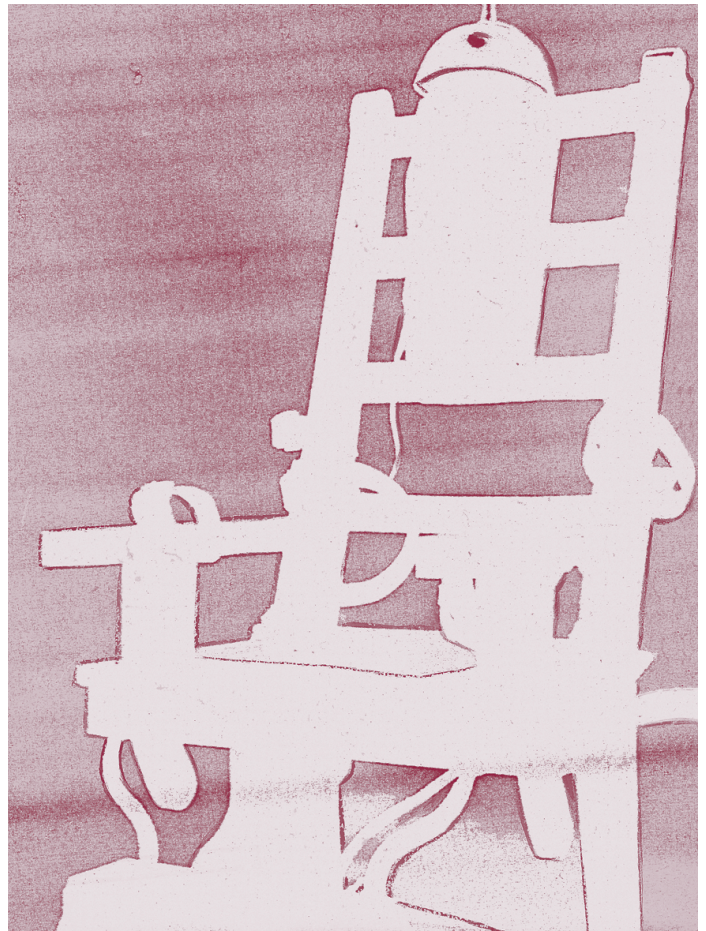
apparently sane and unremorseful. Yet remarkably, the drop in public support for capital punishment generally (whatever the sentiment about McVeigh individually) has held, a fact that suggests the public is not undifferentiating in its view of the issue. A few years ago, focused attention on such a notorious case would have decimated the opposition.

What accounts for the new climate, and what lessons can be drawn for advocates who wish to abolish the death penalty in this country? At least three factors seem to have bolstered the case for abolition, or at least serious reform.

**INNOCENCE.** For years, the public took for granted that the system was fair. More than any other single factor, the discovery that dozens of people sentenced to death were actually innocent of the crimes charged has driven a wedge in public thinking about the accuracy and fairness of the death penalty. Since 1973, 96 men and women have been exonerated and released from death row. The advent of DNA testing in particular has given abolitionists a powerful political tool: irrefutable proof that the system is not failsafe. It was a critical mass of 13 exonerations in Illinois — more than the state had managed to execute since reinstating the penalty in the mid-1970s — that led Governor George Ryan to declare a moratorium pending further study.

Exonerations that came through many years of appeals, or through new investigation by cub journalists, have weakened the claim of proponents who have argued that justice must be not only harsh, but swift. They have also thrown a spotlight on the welter of due process flaws that make the system unreliable in the first place, and have given new credibility to complaints of unfairness long voiced by defense lawyers. Indeed, a study by Columbia University released last year shows that 68 percent of the more than 5,000 death sentences imposed since 1976 have been overturned for serious error implicating basic fairness, like incompetent counsel, prosecutorial and police misconduct, and judicial errors.

**CONSERVATIVE CRITICISM.** The innocence cases have brought another, very useful dividend for abolitionists: conservative allies. In face of an ever-growing number



of exonerations, even staunch proponents of the death penalty are questioning the fairness of the system. Conservatives like William Sessions, former FBI director, and columnist George Will have called for reforms to address shoddy legal counsel and lack of access to DNA; Pat Robertson and Jerry Falwell have criticized the clemency process as driven more by politics than mercy or merit. Most recently, Justice Sandra Day O'Connor has suggested that lack of good representation, among other things, has rendered the modern experiment with capital punishment deeply flawed. This criticism from both the Right and the Left has shuffled the political cards and made it easier for proponents of the death penalty in both parties to take a principled stance in favor of death penalty reforms or moratoria.

*The fact that the death penalty—long a “no-go” issue in polite conversation—is now being discussed around office water coolers is a major step forward.*

**DOUBT AMONG THE VICTIM COMMUNITY.** A third factor is increasingly operative: the realization that victims do not uniformly support the death penalty. If the press coverage is to be believed, six years after the Oklahoma City bombing, a substantial number of survivors and family members would just as soon have seen McVeigh rot in prison for life. A national organization of victims opposed to the death penalty—Murder Victims’ Families for Reconciliation—has even incorporated to give support and voice to victims who seek alternatives. Indeed, MVFR’s slogan, “Not in My Name,” is a deliberate rejoinder to those who claim the death penalty is necessary to honor victims. The reasons for opposition among victim family members are as complex as the grieving process itself. For some, opposition arises out of a desire to focus on the needs of victims, not on the offender. “Everyone knows Tim McVeigh,” says Renny Cushing, director of MVFR. “But no one remembers the name of any of his victims.” One thing that many survivors agree on is that the death penalty does not bring the “closure” that prosecutors and politicians promise. As one Oklahoma survivor says, “you close on a house. You don’t close on a death.” More often than not, say victims, the protracted years of appeals and media attention that accompany a death sentence only force family members to relive the loss with every new court hearing.

**A** look at how the death penalty has fared internationally suggests that abolitionists have the wind of history at their backs: since 1970, over 80 nations have abolished the death penalty, including formerly totalitarian regimes like South Africa and Russia. President Bush was roundly booed (indeed mooned) by protestors during his European debut for his record on the death penalty, human rights, and the environment. And an illustrious array of bipartisan former U.S. ambassadors have politely suggested to the U.S. Supreme Court that the American practice of executing mentally retarded defendants is branding our nation as a international human rights violator, and harming our standing in international deliberations. Indeed, there is little question that the death penalty played a role in the United States’ ouster from the U.N. Human Rights Commission this spring.

Still, the new momentum against the death penalty in the United States could disappear as quickly as it came. Abolitionists face several challenges, none of them small. The first, paradoxically, is the sudden viability of legislative reform. For many years, state capitols were the place abolitionists most feared to tread: if the death penalty came up at all, it was likely to be a campaign to widen its use or reinstate it in the 12 states with no death statute. Abolitionists focused public education efforts elsewhere, organizing campaigns in schools and church basements around court proceedings or executions in high profile cases. Now, state anti-death penalty organizations, most of them volunteer-led, have to learn the ropes of the state legislative process on the fly.

A second challenge is funding. Death penalty abolition has trouble competing with a welter of social issues with more appealing beneficiaries. Although a few new foundations, encouraged by the opportunity to foster real change, are stepping in, new sources of funding must be found both in the United States as well as in Europe, where sentiment against capital punishment is far stronger.

A third is the difficulty of grassroots organizing on an issue as controversial and remote as the death penalty. To be sure, there are other, equally divisive issues like abortion, that have nonetheless mobilized thousands in

grassroots movements for reform or retention. But a death row of 3,600 residents lacks the personal salience or immediacy of abortion, gun control, or even racial profiling—issues that affect hundreds of thousands of people. In an era where a million pairs of feet marching has become the benchmark of organizing “success,” the death penalty presents a special challenge for abolitionists seeking to build a constituent movement for change.

What can abolitionists do to make the death penalty go the way of slavery?

First, national anti-death penalty groups must shift their attention and resources to the states, where hope for concrete, immediate change resides. State organizers need financial resources and technical assistance to educate the public about the practical and moral case against capital punishment. The good news is that years of hard-scrabble organizing have created an infrastructure of local anti-death penalty groups in every state.

The anti-death penalty movement must also focus on recruiting new faces and spokespeople who can attest to the lack of utility and other harms of capital punishment. The victim-abolition movement is creating new spokespeople, like Bud Welch, father of Oklahoma bombing victim Julie Marie Welch. But abolitionists must also reach out to other unusual allies, like law enforcement, former corrections officials, and even religious evangelicals.

Fresh approaches to organizing are also needed. Abolitionists have long known that African-American communities are more wary of the death penalty than others. New styles of organizing, and more diverse ranks of advocates are needed. One good sign: An increasing number of young activists are joining the anti-death penalty movement as they make the connection between disinvestment in public schools, racial profiling, and profligate government spending on mass incarceration and the death penalty. These young people bring fresh energy and a more combative approach that favors ACT-UP-style direct action over candlelight vigils.

Finally, the heightened sensitivity to issues of fairness creates new opportunities for defense lawyers and activists to work together to expose and educate the public about fundamental problems of racism, class bias, and shoddy counsel that plague the prosecution of so many cases. (*See accompanying profile of the Equal Justice Initiative of Alabama.*)

Even in the new climate, on an issue as politically volatile as capital punishment, abolitionists ought take nothing for granted. The movement requires a truly diverse strategy that speaks variously to liberals and libertarians, to racial minorities and the religiously minded, as well as to the vast middle of Americans who value fairness and justice, but are not quite sure about abolition. Embracing

the pragmatic need not mean relinquishing the moral case against capital punishment. Indeed, there is a strong link between the new debate, which focuses almost entirely on practical application, and the moral claim. Not so long ago in this country, smoking in public was seen as an inalienable personal right. Few of us dared ask a neighbor on the bus or an office co-worker to take it outside. Yet after a 20-year public health campaign of aggressive restrictions on cigarettes, smokers have been thoroughly divested of the moral authority to force their choices on the rest of us. In similar fashion, the more capital punishment is limited, the more empowered are individual citizens to re-examine the assumption that state killings are a morally righteous or inevitable feature of civil society. Indeed, the fact that the death

penalty—long a “no-go” issue in polite conversation—is being discussed around office water coolers is an important step forward. For the public debate emboldens those who might previously have feared being dismissed as “out of the mainstream,” and invests ordinary citizens with the right to question a sanction that for too long has been passed off as substantive justice.

Tanya E. Coke is director of the Gideon Project, part of the Open Society Institute’s Criminal Justice Initiative. She is a former public defender and director of research for the Capital Punishment Project of the NAACP Legal Defense and Educational Fund.



# Breaking down walls of irrationality

## The Equal Justice Initiative of Alabama

**B**RYAN STEVENSON is widely described as a brilliant defense lawyer. He holds a joint degree from Harvard Law School and Harvard's John F. Kennedy School of Government. In 1995, at age 36, he won the prestigious MacArthur Fellowship Award. Presently, he's using his prodigious talents to defend a man who stole a bike.

For Stevenson's client, Jerald Sanders—a former postal worker from Mobile County, Alabama—the bicycle incident was the fourth in a string of convictions for non-violent offenses. He had stolen a radio; stolen some work tools; and had entered an abandoned building to urinate, which earned a charge of third degree burglary. So when

BY ANDY MIARA

Sanders was convicted of stealing the \$60 bicycle, the judge, handcuffed by

restrictions in Alabama law, delivered the only sentence he could: life in prison—without parole.

"It makes no sense and almost no one will defend the outcome," says Stevenson. "Yet this man remains in prison because we've trapped good judgment and sensible responses to crime behind a wall of toughness and irrationality."

Stevenson wonders why Alabama is willing to spend \$18,000 per year, for 60 to 70 years, to keep a man in prison for stealing a \$60 bike. "Purely in economic terms," he says, "it's a waste of money." But money is not Stevenson's main concern; it's the criminal justice system's inability to deal with race and poverty and, on a more fundamental level, the way this reflects "a profound absence of hope" in our society.

In 1989 Stevenson created the Equal Justice Initiative of Alabama, an organization committed to providing quali-

ty representation to people on Alabama's death row. "To me, the death penalty is the ultimate expression of hopelessness," explains Stevenson, who, with his staff of five attorneys and two fellows, represents nearly 100 of the condemned men, women, and juveniles currently facing execution in Alabama. "It essentially says that someone's life is without purpose or value—meaning beyond hope, beyond redemption."

Unfortunately, in the 12 years since Stevenson founded EJI, the problems with Alabama's death row have only grown. One hundred eighty-seven people are currently sentenced to die in Alabama—twice the number from 10 years ago—with 300 more awaiting capital murder trials. Last year, Alabama executed more people per capita than any other state.

Stevenson speaks with the hint of a southern accent, relating stories from death row in even tones that belie his fury. He recalls sitting with one of EJI's first clients moments before the man's execution.

"I never will forget him saying, 'More people have said what can I do to help you in the last 14 hours of my life than they ever did in the first 19 years of my life.' And holding that man's hands I couldn't help but think, yes, where were they when you were three years old being physically assaulted by your stepfather? Where were they when you were six and you were being sexually assaulted by your step-siblings? Where were they when you were nine, experimenting with heroin and cocaine? Where were they when you were 14, roaming the streets of Birmingham, Alabama, drug addicted with no place to go. I know where they were when you were 19 and you were accused of this offense—they were lining up to execute you."



Stevenson attributes such problems in Alabama primarily to the state's lack of a public defender system. Instead, the state pays court-appointed lawyers a maximum of \$1,000 per case, an amount that attracts mostly inexperienced and under-qualified attorneys.

Judges too, suggests Stevenson, are part of the problem. Lawyers are appointed by judges who, in this largely pro-death penalty state, often campaign on the number of people they've sentenced to death. The same elected judges also have the freedom to arbitrarily reject a jury's verdict of life and impose the death penalty. At present, 25 percent of the people on Alabama's death row originally received a life sentence.

Despite the evidence, the state of Alabama insists there is no problem. Attorney General Bill Pryor has claimed, for example, that his court-appointed opponents in death penalty cases are both "experienced" and "competent."

Stevenson, however, is undaunted. He contends that criminal policy in the United States has always been incident-driven. Policies are instituted because of high-profile crimes. And reform, he says, will be similarly incident-driven.

So the Equal Justice Initiative is using incidents, like the case of Jerald Sanders, to challenge a complacent public. "By talking about this a lot," says Stevenson, "you can provoke people to say we need to break down that wall of irrationality and toughness and do what's sensible and efficient."

This hypothesis seems to be confirmed by a national shift in public opinion around the death penalty. Driven by publicity about

wrongful convictions and other errors in death row cases, public and political support for the death penalty is at its lowest in 20 years.

In the last 10 years, Stevenson and his office have won 60 reversals of death row cases. And while they maintain their commitment to their clients, EJI is adding community education, reform litigation, and policy analysis to its agenda. During the last 16 months EJI has pushed editorial boards and legislators to confront the issue of judicial override. Though no legislation is forthcoming, all the leading Alabama newspapers are now advocating for an abolition of that judicial prerogative.

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While EJI attempts to expose flaws in the application of the death penalty, their work is fueled by the belief that the death penalty, in principle and practice, violates human rights. "Each of us is more than the worst thing we've ever done," explains Stevenson. "I think if you tell a lie, you're not just a liar. If you take something that doesn't belong to you, you're not only a thief. And that even if you kill someone, you're not just a killer. There's something more to you than that single act and that's entitled to some basic human dignity."

Andy Miara works in the Communications Department of the Open Society Institute's U.S. Programs.

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## OSI and the death penalty debate

**I**n 2000, OSI launched the Gideon Project to improve the quality of criminal legal advocacy for poor and moderate-income people in the United States. The program takes its name from the 1963 Supreme Court ruling, *Gideon v. Wainwright*, which required state and local governments to provide legal representation free of charge to criminal defendants unable to afford their own. Working to

fulfill the promise of that landmark ruling, the Gideon Project makes grants in four areas: improved public defense for low income adults and juveniles, including expansion of the defender mission to include community concerns about the fair administration of the criminal justice system; death penalty representation, reform and abolition; racial profiling; and prosecutorial accountability.

The Open Society Institute is a private operating and grantmaking foundation that promotes the development of open society around the world. OSI's U.S. Programs seek to strengthen democracy in the United States by addressing barriers to opportunity and justice, broadening public discussion

### Mission Statement

about such barriers, and assisting marginalized groups to participate equally in civil society and to make their voices heard. U.S. Programs challenge over-reliance on the market by advocating appropriate government responsibility for human needs and promoting public interest and service values in law, medicine, and the media. OSI's U.S. Programs support initiatives in a range of areas, including access to justice for low and moderate income people; independence of the judiciary; ending the death penalty; reducing gun violence and over-reliance on incarceration; drug policy reform; inner-city education and youth programs; fair treatment of immigrants; reproductive health and choice; campaign finance reform; and improved care of the dying. OSI is part of the network of foundations, created and funded by George Soros, active in more than 50 countries around the world.



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