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Race, Poverty, the Death Penalty, and the Responsibility of the Legal Profession

Stephen B. Bright[1]

There is a growing debate in the United States about the wisdom of capital punishment. Separate from the question of whether the state should kill, this debate involves issues of race, the quality of legal representation for people facing the death penalty, and the risk of executing innocent people. Are people being sentenced to death because of the crime they commited? Because of their race? The race of their victims? Their inability to hire a lawyer? Do we really have a working adversarial system? Are trials producing accurate results? How do these issues relate to the legal profession—especially for individuals who face the ultimate punishment?

Questions of Innocence

The number of innocent people who have been sentenced to death is extremely disturbing. Since the reinstatement of the death penalty in 1973, one hundred individuals previously sentenced to die have been found innocent and released from death row.[2] This number does not include the people who have had their death sentences commuted to life imprisonment without parole because of doubts about guilt.

Some proponents of the death penalty argue that the release of innocent people from death row shows that the system works. But someone spending years on death row for a crime that he did not commit is not an example of our criminal justice system working.

In Illinois, thirteen people left death row after being exonerated.[3] As a result, in early 2000, George Ryan, the Republican Governor, declared a moratorium on capital punishment.[4] Although Ryan had supported the death penalty and other "tough on crime" measures as a member of the Illinois

legislature, as a governor confronted with clemency questions, he recognized that the system did not work as well as he had assumed it did.[5]

One of the individuals on death row during Ryan's tenure was Anthony Porter, who had been convicted by a jury. His case was reviewed and affirmed on appeal by the Illinois Supreme Court.[6] He had gone through the state and federal post-conviction processes, and every court had upheld his conviction and sentence. The death penalty was upheld at every point. He was to be executed.

Then a question arose as to whether Porter was mentally competent to be executed; that is, whether he understood why he was going to die. A person who lacks the mental ability to understand the relationship between his crime and his punishment cannot be executed; instead he is medically treated until he is restored to competency.[7] When the individual has improved to the point that he can understand why he is being executed, he is then put to death. Because Anthony Porter was a mentally impaired individual, there was a question about whether he was competent. A court stayed his execution in order to answer this question.[8]

After Porter's stay was granted, an undergraduate journalism class at Northwestern University and a private investigator examined the case and proved that Anthony Porter was innocent.[9] The team obtained a confession from the person who committed the crime, and Anthony Porter was released from death row.[10] Soon thereafter, Governor Ryan decided that Illinois would not put anyone else to death until he found out why so many innocent people were being condemned to die.[11]

When police, prosecutors, judges, juries, and defense lawyers condemn an innocent man to die, and his life is saved instead by journalism students, the system is not working.

INTERNATIONAL HUMAN RIGHTS

The death penalty in the United States is increasingly becoming a source of curiosity and a cause for condemnation in the international community. Four countries account for eighty percent of all the executions in the world:

China, Iran, Saudi Arabia, and the United States.[12] No other country openly admits that it executes people who were younger than eighteen years old at the time they committed their crime. No other country admits that it executes mentally retarded people.[13]

Indeed, countries around the world are taking a strong position against the death penalty. When Serbia abolished the death penalty on February 26, 2002,[14] the total number of countries that have abolished the death penalty since 1985 reached thirty-six.[15] During that same period of time, only four of those countries that did not have the death penalty adopted it. One of those, Nepal, has since abolished it.[16] Only one other NATO country, Turkey, has the death penalty. It has not executed anyone since 1984 and is expected to follow Russia, Poland, and other former Soviet-bloc countries in abolishing capital punishment in order to join the European Union.[17]

Many countries refuse to extradite people to the United States who might be subject to the death penalty. For example, the Canadian Supreme Court recently reconsidered whether Canada should allow extradition to the United States in cases where a sentence of death may be imposed.[18] After observing that the court system will always be fallible and reversible while death will always be final and irreversible, the Court held that Canada will not extradite people to the United States in cases in which the death penalty can be imposed.[19] Mexico and the European countries also will not extradite people to the United States as long as the death penalty might be imposed.[20]

With such a lack of international support, the death penalty compromises the ability of the United States to be a leader in the world on human rights issues. How can we lecture other countries about human rights when we lead the world in the execution of child offenders? Is the scorn of the rest of the world a price we are willing to pay to continue this outdated form of punishment?

The quality of Legal Representation for the Poor

The right to a lawyer is the most fundamental right of a person accused of a crime. A legal right means nothing without a competent lawyer. Our

adversarial system relies on lawyers to assert the constitutional rights of criminal defendants, present the jury with facts, and—in capital cases—present the jury with evidence and arguments that support life imprisonment instead of the death penalty. One reason that so many innocent people have been convicted and sentenced to death is that defense lawyers have not done the necessary factual and legal investigations. As a result, critical evidence of constitutional violations, innocence, and mitigating circumstances is not presented to the jury.

Failing to assert constitutional protections can have deadly consequences, as demonstrated by the case of John Eldon Smith, who was executed in Georgia on December 15, 1983.[21] Smith's lawyers were unaware of a recent Supreme Court decision in which under-representation of women in the jury pool was held to violate the Sixth Amendment's guarantee that juries be comprised of a fair cross section of the population.[22] As a result, they did not challenge the jury composition in Smith's case. The lawyers for Smith's codefendant, tried separately, were aware of the law and raised the issue, resulting in a federal court granting a new trial.[23] At the second trial, Smith's codefendant was sentenced to life imprisonment by a jury that fairly represented the community. However, because Smith's lawyers had failed to raise the identical issue in his case, the same federal court refused to grant Smith a new trial and upheld his death sentence.[24] Simply switching the lawyers in this case would have resulted in a new trial for Smith—and death for his codefendant.

In Gary Drinkard's case, exonerating evidence was kept from the jury because his lawyers, one who specialized in collections and commercial work and another who specialized in foreclosures and bankruptcy law, failed to conduct a sufficient pretrial investigation.[25] As a result, in 1993, Drinkard was sentenced to death for murder.[26] The lawyers failed to show that on the day of the crime Mr. Drinkard was disabled with a back injury. He had, in fact, been to a neurologist that day.[27] The lawyers also failed to present a witness who was at Mr. Drinkard's house and saw him there at the time the crime was committed.[28] Fortunately, the case was reversed due to prose-

cutorial misconduct.[29] Last May, Mr. Drinkard received a new trial, after seven years in custody including five years on death row, where he watched prisoners being taken down the hall for the last time and smelled them burn as they were put to death in Alabama's electric chair. He was acquitted. Today, he is a free man and is back in business as a carpenter.

Just prior to Horance Dunkin's execution in Alabama, some of the jurors who had decided his fate read in the newspaper that Mr. Dunkins was mentally retarded.[30] One juror wrote a letter to the governor explaining that the jurors would never have voted for the death penalty if they had known that Dunkins was mentally retarded.[31] Dunkins's history was not revealed to the jurors because the court-appointed lawyer had not bothered to get Dunkins's school records. Had they done so, they could have told the jury that Dunkins was in special education, had an IQ of 56, and was profoundly impaired in his intellectual functioning.[32]

Justice Hugo Black once described the courts as "havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."[33] He also recognized that "[t]here can be no equal justice where the kind of trial a [person] gets depends on the amount of money he [or she] has."[34] Yet we all know that the justice available in our courts depends very much on the amount of money a person has. This disparity was stated bluntly by Judge Alvin B. Rubin:

> The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel. . . . Consequently, accused persons who are represented by "not-legally-ineffective" lawyers may be condemned to die when the same accused, if represented by *effective* counsel, would receive at least the clemency of a life sentence.[35]

Many people are surprised to learn that there are jurisdictions that have no public defender offices staffed with full-time lawyers who specialize in the defense of indigent people. In Georgia, for example, only 21 of the 159

counties have public defender offices.[36] More popular approaches include appointing individual lawyers to cases and paying them by the hour or the case and contracting with a lawyer or lawyers to represent all of the indigent defendants on a part-time basis for a set amount during a specified time period. Many jurisdictions award the contracts to the lowest bidder. A county simply announces that it needs a lawyer or lawyers to handle a certain number of criminal cases it expects to have coming through the system and asks who is willing to do it and for how much.

These approaches do not provide adequate representation to those facing misdemeanor charges, and they are totally ineffective at providing lawyers for people facing the death penalty. As a result, in those counties, being poor means being represented by a court-appointed lawyer who may lack the skill, resources, and, in some cases, even the inclination to provide a competent defense.[37] Once convicted and sentenced, many are unable to challenge their convictions and sentences in post-conviction proceedings because they have no lawyer.[38]

RACIAL DISCRIMINATION

Studies have confirmed that race plays a role in capital sentencing.[39] Recently, the United States Department of Justice examined its own record on the use of the death penalty and found that over 75% of the people given the death penalty were members of racial minority groups.[40] Over 50% were African-American.[41] In Georgia, although almost 65% of murder victims are African-American,[42] about 90% of the executions carried out in that state have been for cases in which the murder victims are white.[43]

A person of color is more likely than a white person to be stopped by the police; more likely to be abused during that stop; more likely to be arrested at the end of that stop; more likely to be charged with a crime; more likely to be denied bail when those charges are presented to the court; more likely to spend pretrial time in jail as opposed to in the community; more likely to be convicted; and more likely to get the harsher punishment, whether it is prison instead of probation, or death instead of life imprisonment.[44]

The criminal justice system is the part of society that has been the least affected by the civil rights movement. In the deep South, where almost thirty percent of the population is African-American, often the only person of color before the bar during capital trials is the accused. Everyone else—the judge, the prosecutor, the appointed defense lawyers and the jury—is white.

The Legal Profession

This terrible and extraordinary punishment of death is forcing us to reexamine our national commitment to racial equality, fairness, decency, and the rule of law. All are being sacrificed in the war on crime. It is a war we are fighting against our own people. It is a war we are fighting against our own children. It is a war that we are often fighting against the mentally ill, mentally retarded, and children. It has become class warfare, fought top-down against the poorest and the most powerless people in our society.

People accused of crimes, especially those facing the death penalty, have more at stake than any other litigant in the legal system. They may be mentally ill or mentally retarded, they may be suffering from fetal alcohol syndrome or posttraumatic stress disorder, or they may be children who lack the maturity necessary to make judgments about their cases. All may be accused of crimes that arouse public outrage. Yet most of the legal profession has priced itself out of providing legal representation for poor people facing criminal charges.

There must be a reckoning in the legal profession. If our society continues to underfund legal representation for the poor and ignore the racial discrimination that infects every aspect of our criminal justice system, then we must sandblast the words "Equal Justice Under Law" off the Supreme Court building. It is time for the entire legal profession to call attention to the crisis in the system. Lawyers must educate people about the importance of fair process and about the need for competent legal representation for those accused of even the most vile and horrible crimes. Lawyers must respond when politicians denigrate the Bill of Rights as nothing more than a collection of technicalities. The profession must help build indigent defense

programs in places that do not have them, such as Alabama, Georgia, Mississippi, and Texas. Lawyers must assure that indigent defense agencies everywhere have the resources and independence that are essential to providing zealous and effective representation to accused persons.

Representing the poor is not a sacrifice. It is no sacrifice to make the same amount of money that school teachers, fire fighters, and police officers make. Sacrifice is spending years in prison for standing up for justice like Nelson Mandela and Vaclv Havel did before they became presidents of their counties.

Representing a person whose life or liberty is at stake is a privilege. Beyond that, as Dietrich Bonhoeffer said, it is "an experience of incomparable value . . . to see the great events . . . from the perspective of the outcast, the suspects, the maltreated, the powerless, the oppressed, the reviled—in short, from the perspective of those who suffer . . . to look with new eyes on matters great and small."[45]

Dr. Martin Luther King, Jr., said in one of his many great sermons that we should be "drum majors for justice."[46] Dr. King described the drum major for justice as one who speaks the truth even when the truth is unwelcome and uncomfortable.[47] The drum major gives his or her life to serving others—to feeding the hungry, clothing the naked, visiting those who are in prison, and loving and serving humanity.[48] The practice of law can be a ministry. It can be a calling. It can be a great and worthy thing to do.

The commitment of individual lawyers is critical to realizing the constitutional promise of competent legal representation for poor people accused of crimes. The legislatures are not going to provide the resources. The courts are not going to order it. But lawyers can be there in commitment and in service to others, to move us forward toward this aspiration of equal justice for all. As Langston Hughes said, "to save the dream for one it must be saved for all."[49]

[1] Director, Southern Center for Human Rights, Atlanta, Georgia; Senior Lecturer, Emory Law School; Visiting Lecturer, Yale and Harvard Law Schools; B.A. 1971, J.D. 1974, University of Kentucky. This article is based on a speech given on February 28, 2002, which was sponsored by the Career Services Office at the University of Washington Law School as part of Public Interest Awareness Month.
[2] Richard Willing, *Fight Against Death Penalty Gains Ground*, USA TODAY, Feb. 11, 2002, at 3A; *DNA Frees Man Convicted in Slaying*, L.A. TIMES, Apr. 9, 2002, at A10.
[3] Steve Mills & Ken Armstrong, *Governor to Halt Executions*, CHI. TRIB., Jan. 30, 2000, at C1.
[4] *Id.*
[5] Rick Pearson & Cornelia Grumman, *A Change of Heart on Execution Cases*, CHI. TRIB., Feb. 11, 1999, at N1.
[6] People v. Porter, 647 N.E.2d 972 (Ill. 1995).
[7] *See* Ford v. Wainwright, 477 U.S. 399 (1986).
[8] Pam Belluck, *Class of Sleuths to Rescue on Death Row*, N.Y. TIMES, Feb. 5, 1999, at A14.
[9] *Id.*
[10] Jon Jeter, *A New Ending to an Old Story*, WASH. POST, Feb. 17, 1999, at C1.
[11] Mills & Armstrong, *supra* note 3.
[12] Amnesty International, *Facts and Figures on the Death Penalty, at* http://www.amnestyusa.org/abolish/act500299.html (April 1999) (on file with the Seattle Journal for Social Justice).
[13] *Id.*
[14] *Serbian Parliament Replaces Death Penalty with 40-year Prison Sentence*, BBC, Feb. 26, 2002.
[15] *See* Amnesty International, *supra* note 12.
[16] *Id.*
[17] Douglas Frantz, *Turkey's Choice: European Union or the Death Penalty*, N.Y. TIMES, May 30, 2001, at A3.
[18] *See* United States v. Burns, [2001] S.C.R. 283.
[19] *Id.* at 355–56
[20] *See, e.g*, John Kifner, *France Will Not Extradite If Death Penalty Is Possible*, N.Y. TIMES, Mar. 31, 2001, at B4.
[21] *See* Rhonda Cook, *The Death Penalty Debate*, ATLANTA J.-CONST., July 2, 1996, at 7A.
[22] Smith v. Kemp, 715 F.2d 1459, 1471 (11th Cir. 1983) The case, which was decided just six days earlier, was *Taylor v. Louisiana*, 419 U.S. 522 (1975).
[23] *Id.* (Hatchett, J., concurring in part and dissenting in part) ("[Smith's codefendant's] lawyers timely raised this constitutional objection. They won; she lives."). *See* Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982).
[24] *Id.* at 1472.
[25] *See* Southern Center for Human Rights, *Innocent Man Found Not Guilty at Trial, After 5 Years on Alabama's Death Row, at* http://www.schr.org/news/news_alainnocent.htm (April 5, 2002) (on file with the Seattle Journal for Social Justice).
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Ex parte* Drinkard, 777 So.2d 295 (Ala. 2000).
[30] Peter Applebome, *2 Electric Jolts in Alabama Execution*, N.Y. TIMES, July 15, 1989, at A6.
[31] *Id.*

[32] *Alabama*, USA TODAY, July 11, 1989, at 6A.
[33] Chambers v. Florida, 309 U.S. 227, 241 (1940).
[34] Griffin v. Illinois, 351 U.S. 12, 19 (1956).
[35] Riles v. McCotter, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).
[36] *Our Opinion: State Should Pay for Indigent Defense*, ATLANTA J.-CONST., Dec. 31, 2001, at 11A.
[37] *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).
[38] *See* Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services To the Poor When Life and Liberty Are at Stake*, N.Y.U. ANN. SURV. OF AM. LAW 783 (1997), *available at* http://www.geocities.com/icacpstudent/counselnyu.pdf.
[39] *See* David C. Baldus, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998); U.S. GEN. ACCT. OFF., REP. NO. GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990).
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[42] Southern Center for Human Rights, *Death Penalty: Georgia Justice*, *at* http://schr.org/death-penalty-info/index.html (Apr. 4, 2002) (on file with the Seattle Journal for Social Justice).
[43] *Id.*
[44] *See* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN AMERICAN CRIMINAL JUSTICE (1999).
[45] DEITRICH BONHOEFFER, LETTERS AND PAPERS FROM PRISON 17 (Eberhard Bethge ed., Macmillan Co. Enlarged ed. 1972) (1953).
[46] MARTIN LUTHER KING, JR., *The Drum Major Instinct*, *in* A KNOCK AT MIDNIGHT: INSPIRATION FROM THE GREAT SERMONS OF REVEREND MARTIN LUTHER KING, JR. 169, 185 (Clayborne Carson & Peter Holloran eds., 1998).
[47] *Id.*
[48] *Id.*
[49] LANGSTON HUGHES, *Dream of Freedom*, *in* GOOD MORNING REVOLUTION: UNCOLLECTED WRITINGS OF SOCIAL PROTEST BY LANGSTON HUGHES 170 (Faith Berry ed., 1992).