

## **Capital Punishment in a Time of Drones and Beheadings: The American Death Penalty in Global Perspective**

When Professor Gaskins called me several months ago to gauge my interest in speaking at this event, I recall my mood as dour and my response as unhelpful. I expressed reluctance to speak again on a subject that has been so often trod, so much so that I myself had spoken on the same subject at this very university at a Brandeis Birthday commemoration in, I think, 2001. "What new is there to say on the subject?", I grumbled. "What minds are to be changed, what new perspective is to be gained? The death penalty is barbaric, its application is flawed beyond repair, its use is in decline, the subject is passé." Plainly, my motives were selfish and the prospects for a connection were dim. But if you know Richard, you know he is not easily deterred; and so we kept talking and before I knew it, my exasperated query "what is the point of discussing the death penalty in an age of drones and beheadings?" had been converted into what seemed, for that moment at least, a provocative and potentially interesting inquiry.

Let me be clear from the outset that, while I did write a passionate high school essay in favor of the death penalty, both my experience teaching in an inner city school and especially my long career as a public defender have led me to a fervent and unyielding opposition to state executions, on both moral and utilitarian grounds. My biannual testimony before the Massachusetts legislature in opposition to death penalty legislation is still publicly available on the Committee for Public Counsel Services website, [www.publiccounsel.net](http://www.publiccounsel.net).

When I put my question to Professor Gaskins I was not questioning my own death penalty opposition in light of modern atrocities. Yet, I did wonder whether the longstanding debate concerning the American death penalty, which is at least somewhat constrained by elements of due process, might be informed at all by the ferocity of the wars surrounding terror -- in the torture, mutilation and/or execution of the absolutely innocent without any remotely "due" or sufficient process -- whether, in other words, these horrible modern realities might have any bearing on the question whether an American government, state or federal, has the right to execute its citizens after trials and appeals laden with procedural protections.

What I hope to do tonight is, first, make a few observations about the status of the death penalty in America and the world today. Then I will address U.S. drone strikes and terrorist beheadings; and finally, try to connect those disparate dots into some coherent expression. And because this is Brandeis, where inquiry and robust debate are so wonderfully pervasive and valued, I know I can look forward to a vibrant Q & A that will fill all or at least some of the voids in my analysis.

So, what is the status of the death penalty in late 2014? Certainly it is being used much less frequently in the United States. The Death Penalty Information Center ([www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org)) provides a wealth of data, including these:

\* 18 states now prohibit the death penalty, up from 12 a decade or so ago;

\* executions are down from a high of 98 in 1999, to 39 in 2013, and a likely maximum of 35 this year, which would be a record low since executions resumed following the 1976 decision in *Gregg v. Georgia*, 428 U.S. 153;

\* imposed death sentences have declined from 277 in 1999, to 79 in 2013;

\* while 32 states nominally retain the death penalty, only 19 of those states have executed as many as 10 people since state executions became constitutionally permissible in 1976;

\* just 10 of those 19 states have accounted for 83% of the 1,390 people executed; five states have conducted over 65% of all executions; a mere three states have killed a majority (53%); and a single state has executed 518 people, more than 37% of the total.

One may conclude that with respect to state executions, the United States are divided not into two camps, but rather three: we may count about ten states that (to widely varying degrees) actively kill; eighteen states that prohibit executions; and about twenty-two whose ambivalence is in accord with profoundly mixed public sentiment, and is demonstrated by their behavior over the thirty-eight year history of the post-Furman American death penalty. I am reminded of a comment made by former Attorney General and Speaker Robert Quinn, at a time when the death penalty was a hot-button issue in Massachusetts in the early 1990s. As a member of the Committee for Public Counsel Services, he assured me that he would support my proposal that the Committee publicly oppose the death penalty proposal then offered by Governor Weld. But privately he expressed a wish that we might have a death penalty on the books for symbolic purposes only, without it ever being used. He knew, of course, that this was no solution, that the public pressure would call for its application when the next heinous murder occurred; but it reflected a experienced political leader's intuitive comprehension of the difficulty and complexity of the issue, given the ambivalence of the public as to how we should respond to the worst of crimes.

This ambivalence has played out starkly in several states. Of the 3,049 people awaiting execution as of July 1, 2014, for example, California had 745 on death row, as compared to 13 people executed; and Pennsylvania had 191 prisoners sentenced to die, compared to 3 executions. In July of this year, California's death penalty was ruled unconstitutional, because the 25-plus year delay between imposition of a death sentence and the statistically remote possibility of execution destroyed the deterrence and retribution purposes that are essential to the death penalty's constitutionality. In his ruling, Federal District Judge Carney stated that "[f]or all practical purposes...a sentence of death in California is a sentence of life imprisonment with the remote possibility of death -- a sentence no rational legislature or jury could ever impose." *Jones v. Chappell*, United States District Court, Central District of California, Case No. CV 09-02158-CJC (July 16, 2014). In a similar vein, Emory University professor Daniel La Chance has written that the more than 3,000 prisoners on death row "have become the unwitting cast of a never-ending production of 'Waiting for Godot'"; and has suggested that an abolition program that casts the death penalty as "another failed government program" might succeed where

abolitionist efforts based on moral grounds have failed. See "What Will Doom the Death Penalty" *The New York Times* (September 8, 2014).

Looking at the global situation, we find a similar trend, at least with respect to governmental action. The Secretary-General of the United Nations, Ban Ki-moon has publicly stated that "[t]he death penalty has no place in the 21st century." The UN Office of the High Commissioner for Human Rights reports that 98 countries have abolished the death penalty altogether, while as many as 160 now avoid its practice. While some 40 countries conducted executions in the mid-1990s, only about half that number do so today. On the other hand, the recent UN report, "Moving Away from the Death Penalty: Arguments, Trends and Perspectives" also includes the disquieting observation that the number of executions has increased in 2014, often after proceedings which fail to comply whatsoever with international human rights standards. For example, it has been reported that Iran executed 525 people in 2013, or more than the state of Texas has executed during the past 35 years.

Beheadings: the front page story in the *New York Times* on October 26, 2014, "The Horror Before the Beheadings", provided an immense public service by explaining in excruciating detail the torture and the humiliation to which innocent hostages were subjected by their captors before four of them -- James Foley, Steven Sotloff, David Cawthorne Haines, and Alan Henning -- were forced to their knees and publicly beheaded. Clearly, these men were victims, not in any sense criminals. Foley and Sotloff were American journalists, Henning and Haines were British aid workers. They seem to have been executed, while others were released, because their governments refused to pay ransoms. I see these executions, and the torture that preceded them, as reprehensible acts committed by criminals; acts that are atrocious and beyond any justification.

Besides the horror of the hostages' abominable treatment and humiliating public executions, what leaped out at me in the article was its recitation of the many ways in which the captives' mistreatment mirrored what we know of the torture by the United States government of suspected terrorists at such places as Abu Graib, Guantanamo, and CIA "black sites". The mimicking of the orange jumpsuits, the waterboarding, the sleep deprivation, the humiliation, the manacled hangings, the mock executions: all constituted macabre forms of humiliating and degrading payback. One questions whether we are now reaping what we have sown.

The drone strikes are more complicated but well worth examining. On the one hand, their intention is to remove dangerous terrorists thought to be planning imminent attacks, and their use is preceded by and dependent upon an extremely thorough decision-making process, as has been evidenced by the court-ordered and heavily redacted release in June, 2014 of internal government documents that are full of intensive legal parsing in justification of the execution of the alleged terrorist American citizen Anwar al-Awlaki. On the other hand, the President of the United States acts as judge, jury and executioner; and there is no question that innocent persons, perhaps very many of them, have been killed in the long-distance effort to eliminate high-level terrorists. The Bureau of Investigative Journalism has estimated that these drone

attacks in recent years have killed over 2,500 people in Pakistan and Yemen, killing close to 500 noncombatant civilians including 175 children. Attorney General Eric Holder has stated a three-pronged justification for the targeted killing of American citizens abroad: an imminent threat, the infeasibility of capture, and adherence to principles of war. Senatorial and other critics have raised serious questions as to each of these criteria, and have condemned the "collateral damage" in the killings of innocent persons.

Now, I do not suggest that anyone should justify the death penalty in America by contrasting it to torture, beheadings and drone strikes. Nor should anyone fail to see the distinctions between condemning murderers of sufficient age and mental capacity, after extensive judicial processes and the judgment of a citizen jury properly instructed in the law; and the cruel torture and humiliation of aid workers and journalists, or the widespread killing from a remote location of innocent people, including children, from the air. But, in seeking new perspectives in the assessment of where our society should stand with respect to the allowance or prohibition of the death penalty, I have turned to three authors in two short volumes who have struggled with the issue in ways that I admire and therefore want to share with you.

On the surface, the slim volume Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty appears merely as the thoughts of one member of Illinois Governor George Ryan's Commission on Capital Punishment which in 2002 presented a plethora of proposals to reform death penalty practice in that state. But that member, former prosecutor, pro bono defender and famous author Scott Turow, has written an unusually sensitive, comprehensive and objective analysis which pays as much heed to the suffering of murder victims, their families, and the public's need to live in a safe and lawful society as it does to the barbarity, inconsistency, bias and injustice of state executions. For example, he perceives the wish of some murder victims' families for the murderer's death not as a blind wish for revenge: rather he deduced this from the survivors who testified before the Commission:

"The justice they seek is the same kind embedded in the concept of restitution: the criminal ought not end up better off than his victim. To survivors it is unconscionable and infuriating that after all the misery the murderer has wrought, he still experiences many of the small joys of existence, and thus in some measure his life and his family's is better than the victim's and theirs."

Similarly, in a chapter entitled "Moral Proportion", Turow addresses the moral question directly:

"For ultimate evil must there not be ultimate punishment? The issue is not revenge or retribution exactly, so much as moral order....[I]t is essential to recognize that our adherence to the death penalty arises not because it provides tangible benefits like deterrence but rather from our belief that capital punishment makes an unequivocal moral statement."

When the Commission had concluded its work, and its members were called upon to vote in favor or against continuing the death penalty, Turow came to his own personal conclusion and

voted for abolition. I think his best statement as to why he did so occurs in his chapter on moral proportion, as follows:

"The argument for moral proportion places an enormous burden of precision on the justice system. Every execution must be just. If we execute the innocent or the undeserving, then we have undermined, not vindicated, our sense of moral proportion and the clear message capital punishment is meant to send. Accordingly, the system has to be unfailingly accurate; it must operate with a fine-tuned sense of what ultimate evil is, and it must identify unerringly who has committed it." Few people who are familiar with the death penalty as it has actually been practiced in the United States would disagree with Turow's conclusion that we have not come remotely close to achieving this bedrock requirement.

Turow's insistence upon unerring justice brings to mind an outraged op-ed article of mine that was published in the Boston Herald ten years ago. In a single week in Federal District Court in Boston, one man was sentenced to die for two murders, while another, who was facing the death penalty in three states, was allowed to plead guilty to ten murders for a sentence of life imprisonment. The man who committed the two murders was a fugitive who had attempted beforehand to turn himself in to the Boston FBI office, but his call was ignored. The man who got life for ten murders was a notorious career criminal whose offer of testimony in exchange for his life was thought by the Office of the United States Attorney to be helpful in its prosecution of a rogue FBI agent. The incongruity of the sentences, I wrote, "underscores the illusion that the death penalty can ever be applied in a morally justifiable and consistent manner." Justice isn't served by executions, *The Boston Herald* (January 29, 2004).

I found a more absolute and unforgiving conclusion against the death penalty - any death penalty - in an entirely surprising place. It was late 2010, and I was about to move my professional activity from Boston to Albany, New York, when I was lucky enough to attend the discussion of a new book, Because It Is Wrong: Torture, Privacy and Presidential Power in the Age of Terror, by the extremely well known Professor Charles Fried and his less widely-known son, Professor Gregory Fried (W.W. Norton, 2010). I think I attended the event because of its focus on torture, which I had addressed in my course on International Criminal Law and Human Rights here at Brandeis; because I was interested in hearing what the elder Fried would have to say on that subject; and because I was intrigued by the authorial combination of father and son. What I came away with was a precious book, signed by the authors, which utilizes philosophy, art, law and logic to conclude that torture is always and everywhere wrong: it is utterly without justification. It cannot be permitted under any circumstances, simply and precisely "because it is wrong."

And then, toward the end of a chapter entitled "Bordering on torture", I stumbled upon five pages of revelation about the death penalty, beginning with these words:

"In trying to understand what makes torture absolutely wrong, and what is allowed and forbidden in warfare, it surprises us that what we have concluded has implications for the moral

permissibility of the death penalty." The authors describe the history of the death penalty, from the time when it was often preceded or accompanied by gruesome tortures, to the modern American effort to make executions painless and private. Their conclusion? It does not matter.

"Abstracting from everything about the death penalty except the ending of life makes vivid what the death penalty really is: a live person completely helpless in the hands of his captors is put to death without hope or opportunity of resistance or remonstrance....All moral equality between executioner and victim is denied. The condemned...exists only to be killed. Worse still, it is not only the executioner who has this total power over the condemned, but society as a whole that has organized itself to kill."

Comparing the rituals of torture and executions by the state, the authors continue:

[Torture] does its work by acknowledging human consciousness and sensitivity in order to excite, overwhelm and destroy it. If a human being is a painting, then torture defaces that image by cutting, fouling, and finally obliterating it. Execution by lethal injection denies humanity in another way. It treats its victim as if he were an inhuman object. The execution not only affirms society's control over the condemned, its right to restrain him and protect itself, but also enacts society's total ownership of him....He is treated as an object to be eliminated, a machine to be decommissioned and disposed of, vermin to be exterminated."

They conclude:

"Our self-respect allows us to defend ourselves even to the point of killing. That was the starting point of the discussion in this chapter. Because the condemned, like the torture victim, is immobilized, he does not present an immediate threat. The execution is preemptive; it anticipates and eliminates the need for future defense, but killing is not a necessary way of doing that, only the cheapest and most certain way, and that is not enough to justify it."

The absolute nature of the Fried's condemnation immediately brought to mind Turow's somewhat different perspective explained in chapter 12 of his book, entitled "When They Murder Again". In it, Turow insists upon visiting the Tamms prison, where the state's most notorious and repeat murderer is incarcerated. He explains:

"I regarded seeing Tamms as critical. Henry Brisbon's execution might not deter other people from killing, but it will definitely keep Brisbon from murdering anyone else. Thus, the pivotal question for me was whether there were means besides execution to control the Brisbons of the world, the prisoners whose records suggest they are so bad to the bone that they are clearly prone to murder again if given the opportunity. If the conditions of their confinement cannot reliably prevent this, the argument in favor of capital punishment in Brisbon's case, and others like it, seems overwhelming to me. It is simply unjust to force a kind of lottery on correctional officers, doctors, nurses and other inmates waiting to see which one of them will eventually be maimed or murdered." In his conversations with the warden, Turow received qualified

assurances in response to his question. How, indeed, could any warden promise more? As described earlier, Turow ultimately voted for abolition. But one can perceive that his opposition to the death penalty is more nuanced, less securely grounded in a sense of morality, than that of the Frieds.

What, then, can we say of state executions, torture and beheadings, and fatal drone strikes? One connection, to be sure, is our abhorrence at any execution of an innocent person. As Turow puts it in his chapter "Convicting the Innocent", wrongful executions in America constitute a "special horror", because "executing the innocent stands justice on its head, making the law a force of barbarism rather than of civilization." But what connection may we find between the possibility of an innocent or undeserving person being subjected almost at random for execution in the United States, and the intentional torture and execution of hostages by terrorists in the Syrian desert, and the killings of innocent people, including children, under the euphemism of "collateral damage" in drone strikes? A distinction that comes to mind is that between the universal American abhorrence of executing the innocent; the completely intentional execution of innocent persons by terrorists who seek to justify their actions by fealty to their cause; and the systematized governmental indifference to the certain slaughter of innocent persons during remote attacks targeted against suspected but not convicted terrorists. One may agree with the Frieds that executions are always and everywhere wrong, and yet have an array of emotional reactions to the context in which such killings occur. Though I agree with the Frieds that the death penalty is always and everywhere morally indefensible, and therefore I will always and everywhere oppose it, I see significant differences between its motivations and application in the three scenarios that we have been considering.

Perhaps I am too dour, but I see a world in which violence of many forms is becoming more and more prevalent and ingrained and uncontrolled; in which hard-won advances in civilization and tolerance and respect for every person are being eroded; and in which the country I love has been contributing to the deterioration more than it has been leading the effort to reverse it. Contrast our leadership in insisting upon full and fair trials for some of the worst of the Nazi war criminals at Nuremberg with our ambivalent and often contradictory policies today. And so here is where I will attempt to connect the dots and suggest a commonality. It is this. The best reason to eliminate our death penalty by joining the majority of nations which have done so; the best reason to renounce unnecessary foreign military intervention; and the best reason to adhere scrupulously to international treaties and declarations protective of individual integrity and human rights may be twofold: not only because these are the right things to do, but also because they are the acts most likely to reverse a trend of increasing violence that threatens to become ever more bestial and ever more destructive of our common humanity. Now let's talk.

Bill Leahy  
Brandeis University  
November 3, 2014

