Capital Punishment: A One-Sided Contribution to a Complex Debate

by John G. Malcolm

A Review of:

End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice, by Brandon L. Garrett

https://www.amazon.com/End-Its-Rope-Killing-Criminal/dp/0674970993

Note from the Editor:

This review discusses a book about the death penalty's decline and criticizes some of its assumptions about the death penalty.

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- Sean Illing, *The death penalty is dying. Here's what that means for the criminal justice system.*, Vox (Nov. 26, 2017), https://www.vox.com/2017/11/26/16666952/death-penalty-america-criminal-justice.
- Maurice Chammah, What's Behind the Decline in the Death Penalty?, The Marshall Project (Oct. 2, 2017), https://www.themarshallproject.org/2017/10/02/what-s-behind-the-decline-in-the-death-penalty.
- Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699 (2002), https://its.law.nyu.edu/faculty/profiles/representiveFiles/Stevenson PoliticsofFear2003 991BB95C-A26D-3E6F-46E5FEFE874815E8.pdf.
- Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICHMOND L. REV. 671 (2015), http://lawreview.richmond.edu/files/2015/04/Bright-493.pdf.

About the Author:

John G. Malcolm is the Vice President of the Institute for Constitutional Government and the Director of and Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. At least you know where he stands right from the start. Brandon Garrett, the inaugural L. Neil Williams, Jr. Professor of Law at Duke University School of Law, begins his book *End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice* as follows:

We can abolish the death penalty. We *must* abolish the death penalty. Ten years ago, that declaration would have been laughable, just another liberal fantasy. But no more.

The death penalty in the United States is at the end of its rope. We can abolish it not in a matter of generations, but in a matter of years. And it is imperative that we do so, for its abolition will be a catalyst for reforming our criminal justice system.

What follows is, not so much a liberal fantasy, but a lengthy, onesided elaboration of the arguments that liberals and other death penalty opponents (some of whom are conservatives) have been making for years. This is a shame.

While Garrett certainly does an admirable job of laying out his side's perspective, the death penalty is a contentious and complicated issue with strong arguments to be made on both sides. The topic is deserving of a more thorough, nuanced, and balanced treatment than it receives here. Indeed, in arguing that the death penalty is unjust and unconstitutional, Garrett makes repeated references to the Eighth Amendment's prohibition against "cruel and unusual punishment." He does not, however, mention the fact that, whether it is good or bad policy, there are several explicit references in the Constitution itself condoning the use of the death penalty; specifically, the Fifth and Fourteenth Amendments provide that "No person shall be held to answer for a capital . . . crime, unless" indicted by a grand jury, that a person cannot twice "be put in jeopardy of life" for the same offense, and that a person may not be "deprived of life . . . without due process of law."

Garrett claims that the death penalty has declined in usage and popularity in recent years. While he is certainly correct that there have been fewer executions recently, it is far less clear that public support for capital punishment has significantly waned. The death penalty is still favored by a majority of Americans. According to a June 2018 poll by the Pew Research Center, 54% of Americans favor capital punishment for those convicted of murder, up 5% over the last two years.² These numbers are similar to those found in another poll released by Quinnipiac in March, which showed that Americans support the death penalty for people convicted of murder by a margin of 58% to 33%, with 9% undecided, and that 64% of Americans feel even more strongly that the death penalty should *not* be abolished nationwide.³ Death penalty opponents, including Garrett, are quick to note that support for the death penalty is down quite

¹ He was the Justice Thurgood Marshall Distinguished Professor of Law at the University of Virginia School of Law when this book was published.

² Baxter Oliphant, Public Support for the Death Penalty Ticks Up, Pew Res. Ctr. (June 11, 2018), http://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/.

³ Most U.S. Voters Back Life Over Death Penalty, Quinnipiac University National Poll Finds; Voters Back Anti-Gun March 2-1, But Say It Won't

a bit from its high-water mark of 80% in 1994, but they fail to mention it is way up from the 42% support it enjoyed in 1966.⁴

Moreover, when presented with the facts in individual cases—such as those of Timothy McVeigh, the Oklahoma City bomber who killed 168 people and injured over 800 more, or Khalid Sheik Mohammed, the self-professed mastermind of the 9/11 plot that killed nearly 3,000 people—support for the death penalty goes much higher. Indeed, according to an October 2017 Gallup poll, 39% of Americans do not believe that the death penalty is imposed often enough, compared with only 26% who believe it is imposed too often. In 2016, despite a well-funded campaign by death penalty opponents, voters in California, Oklahoma, and Nebraska voted to retain the death penalty. The citizens in those and most other states (31 in total) continue to believe that the death penalty—despite its flaws—is the only punishment befitting those who commit certain particularly heinous and depraved murders.

As Garrett notes, the number of executions has, as a general matter, declined recently, although the number of executions over the last four years (28 in 2015, 20 in 2016, 23 in 2017, and 14 so far in 2018, with several more scheduled before the year ends) exceeds the number carried out from, for example, 1988 to 1991 (11, 16, 23, and 14, respectively). Garrett attributes this decline to several factors, including the facts that the murder rate has dropped precipitously over the last twenty years and that defense attorneys in capital cases are now better funded and better trained—both of which are laudable developments. Nobody supports incompetent defense attorneys, racist prosecutors, or bad judges, especially in capital cases, and Garrett certainly does a thorough job of chronicling seemingly every instance where such bad actors have been involved and the convictions have

Work, QUINNIPIAC U. (Mar. 22, 2018), https://poll.qu.edu/images/polling/us/us03222018_ugnt93.pdf/.

been overturned (although, in his view, others have not been overturned when they should have been).

While Garrett notes the increased costs associated with capital cases and the ever-increasing length of time between conviction and execution in capital cases, he neglects to discuss the concerted strategy by death penalty opponents to drag out the process and to make it as costly as possible. In other words, death penalty opponents are urged to wage what Justice Samuel Alito has called "a guerilla war against the death penalty," even in cases in which their perfectly competent clients (such as convicted double murderer Scott Dozier) wish to end their appeals and face execution.¹⁰ Houston attorney Katherine Scardino, who has been referred to as "the Clarence Darrow of death penalty lawyers in Texas," has a word of advice for anyone appointed to a capital case: "Spend money. That will get everybody's attention." 11 And it certainly does. In short, if death penalty opponents cannot persuade their fellow citizens to abolish the death penalty on the merits, they will simply try to bleed the system dry—and they often succeed, as Garrett candidly acknowledges when he points out that "mounting costs may explain why rural counties have almost entirely stopped death sentencing, and why, over the past two decades, death sentencing has retreated to a handful of large, densely populated counties that can still afford it."

In 1985, the average time between a death sentence and execution was just under 6 years. ¹² By 2013, it was 15 years, 6 months (which was actually slightly lower than the previous two years). ¹³ Two people executed earlier this year (Carlton Michael Gary and Robert Van Hook) had been sentenced to death more than 30 years ago. While there are nearly 750 inmates on death row in California, California has executed only 13 people since 1978, and none in the last decade. ¹⁴ No wonder many prosecutors and citizens decide that, even though they want to retain the death penalty, the game is not worth the cost or the candle.

Garrett also points to racial disparities in death penalty cases and boldly asserts that there is only one explanation for these disparities: endemic racism. That explanation may or may not

⁴ See Jeffrey M. Jones, Americans' Support for Death Penalty Stable, GALLUP (Oct. 23, 2014), https://news.gallup.com/poll/178790/americans-support-death-penalty-stable.aspx.

⁵ Jeffrey M. Jones, U.S. Death Penalty Support Lowest Since 1972, GALLUP (Oct. 26, 2017), https://news.gallup.com/poll/221030/death-penalty-support-lowest-1972.aspx.

⁶ See Mark Berman, Nebraska and California Voters Decide to Keep the Death Penalty, Wash. Post (Nov. 9, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/11/09/nebraska-and-california-voters-decide-to-keep-the-death-penalty/?utm_term=.524ec6475b2b.

⁷ See, e.g., Paul J. Larkin, Jr., The Demise of Capital Clemency, 73 Wash. & Lee L. Rev. 1295, apps. B, C (2016), available at https://papers.srn.com/sol3/papers.cfm?abstract_id=2862704; Gary Cartwright, Free to Kill, Texas Monthly (Aug. 1992), https://www.texasmonthly.com/articles/free-to-kill-2/; Jessica Suerth, Another John Wayne Gacy Victim ID'd, Ending Family's 40-Year Agony, CNN (updated July 20, 2017), https://www.cnn.com/2017/07/19/us/john-wayne-gacy-victim/index.html; Serial Killers Documentaries Channel, YouTube, https://www.youtube.com/user/999popular/featured.

⁸ Death Penalty Info. Ctr., Facts About the Death Penalty (updated July 18, 2018), https://deathpenaltyinfo.org/documents/FactSheet.pdf.

Transcript of Oral Argument at 14, Glossip v. Gross, 135 S. Ct. 2726 (2015) (No. 14-7955).

¹⁰ See Maurice Chammah, The Volunteer, THE MARSHALL PROJECT (Jan. 18, 2018), https://www.themarshallproject.org/2018/01/18/the-volunteer; David Montero, Execution Halted After Drug Company Sues Nevada to Stop It, Governing (July 12, 2018), http://www.governing.com/topics/public-justice-safety/tns-nevada-execution-fentanyl.html.

¹¹ Maurice Chammah, *The Price of Death*, SLATE (Dec. 17, 2014), https://www.slate.com/articles/news and politics/jurisprudence/2014/12/
death-penalty-cost-prosecutors in rural counties can t afford to bring-capital.html.

¹² TRACY L. SNELL, CAPITAL PUNISHMENT, 2012—STATISTICAL TABLES 14, BUREAU JUSTICE STATISTICS (May 2014), https://deathpenaltyinfo.org/documents/cp12st.pdf.

¹³ Tracy L. Snell, Capital Punishment, 2013—Statistical Tables 14, Bureau Justice Statistics (Dec. 2014), https://www.bjs.gov/content/pub/pdf/cp13st.pdf.

¹⁴ Phillip Reese, California Could Restart Executions. The Counties are Most Likely to Condemn Murderers., SACRAMENTO BEE (updated May 4, 2018 11:24 AM), https://www.sacbee.com/news/local/crime/article209498514.html.

be true, but Garrett does not even attempt to probe alternative possibilities. It is certainly true that, according to the last census, African-Americans constitute roughly 12.3% of the population in this country, but, as of 2016, 42.3% of the population on death row.¹⁵ This is a shocking disparity until one considers that, as of 2016, African-Americans constitute 52.6% of those arrested on charges of murder and non-negligent manslaughter¹⁶ and only 34.3% of those who have been executed since the death penalty was reinstated in 1976.¹⁷ Moreover, in terms of interracial murders, there are far more black-on-white crimes than there are white-on-black crimes. 18 Inter-racial violent crimes are committed at much higher rates by strangers usually in the act of committing other crimes such as a rape or armed robbery, the kinds of aggravating factors that are often taken into account by prosecutors in deciding whether to pursue the death penalty.¹⁹ None of this is to deny the possibility that race plays a role in decisions about when to seek or impose the death penalty. But these facts are offered to suggest that there may be other, nonracial explanations for some of these disparities; Garrett does not mention, much less discuss, any such alternative possibilities.

A reader would think based on the descriptions in this book that every time the death penalty is imposed, it is due to ignorance or heartlessness by juries, crooked and overzealous prosecutors, biased "Hang 'Em High" judges, incompetent defense attorneys, and poor and misunderstood defendants. In leaving that impression, Garrett mischaracterizes the process, the difficult decisions that jurors face, and the sobriety and earnestness with which they approach their grim task.

There are other noteworthy omissions. For example, Garrett points to a handful of horrific, high-profile botched executions as another reason why some people have turned against the death penalty. He fails to mention, however, that the successful lobbying efforts of death penalty opponents—which have resulted in reputable drug manufacturers refusing to supply drugs for lethal injections and in trained medical professionals refusing

to participate in carrying out executions—have dramatically increased the likelihood that executions will be botched.

And Garrett points to a number of so-called exonerations (some of which are actual exonerations in the sense that it was definitively determined that the accused did not commit the murder, while others are reversals because of some procedural irregularity or new evidence that casts doubt upon the verdict) as proof that innocent people have clearly been executed since the Supreme Court reinstated the death penalty in 1976. Despite the best efforts of death penalty opponents, however, it has never been definitively established that anyone has been wrongfully executed since then. But this does not stop Garrett from confidently declaring that "[d]eath penalty states are no doubt still executing innocent people." Has an innocent person been executed since the Supreme Court reinstated the death penalty? It is certainly possible. As is the case with any human endeavor, mistakes can be made in the imposition of the death penalty. Nonetheless, in addition to the fact that there would still be arguments to support the death penalty even if an innocent person has been executed, it is also true that virtually all death penalty cases receive multiple layers of judicial review. This is especially so in cases when there is even a colorable claim of innocence, and governors have not hesitated to commute death sentences, even when the accused's guilt was never in doubt, when they believe that imposing the sentence would constitute a miscarriage of justice.²⁰

But Garrett's agenda is more radical than simply abolishing the death penalty. He makes it quite clear that life without parole is equally objectionable, if not more so, in his eyes because "life rows have mushroomed in size, dwarfing the population of death rows even at their height." Instead, he favors a justice system based on mercy which is, in turn, premised on "empathy for another person," specifically, the perpetrator of crimes. And not just non-violent crimes. According to Garrett, we "have to embrace mercy for the most serious offenses," and ought to be "willing to shorten prison terms and release" those who commit those offenses. After all, Garrett declares, "This is the land of the free." Under this utopian (some might say Pollyannaish) view of the world, those who have committed heinous crimes will simply be overwhelmed by this gesture of grace, see the light, and go forth into the world and sin no more. But this is a mighty bold and risky gamble in a world where recidivism rates among formerlyincarcerated individuals remain staggeringly high.²¹

In making his case, Garrett implies that in order to be in favor of criminal justice reform, one must be against the death penalty ("the sudden decline in the American death penalty is a social trend that speaks volumes about the present and future of our criminal justice system") and that one will simply not be able to address the former unless and until the latter is abolished ("the death penalty's demise will allow us to focus on remedying" the

ELIZABETH DAVIS & TRACY L. SNELL, CAPITAL PUNISHMENT, 2016 7, BUREAU JUSTICE STATISTICS (Apr. 2018), https://www.bjs.gov/content/pub/pdf/cp16sb.pdf.

¹⁶ Fed. Bureau Investigation, Uniform Crime Report: Crime in the United States 2016 Table 21A (2017), https://ucr.fbi.gov/crime-in-the-u.s-2016/tables/table-21/#overview.

¹⁷ See Death Penalty Info. Ctr., supra note 8. The Supreme Court placed a moratorium on the death penalty in Furman v. Georgia, 408 U.S. 238 (1972), then reinstated it four years later in Gregg v. Georgia, 428 U.S. 153 (1976).

¹⁸ See Matthew Cella & Alan Neuhauser, Race and Homicide in America, by the Numbers, U.S. News (Sept. 29, 2016), https://www.usnews. com/news/articles/2016-09-29/race-and-homicide-in-america-by-the-numbers.

¹⁹ Rachel E. Morgan, Special Report: Race and Hispanic Origin of Victims and Offenders, 2012-15, Bureau of Justice Statistics (Oct. 2017), https://www.bjs.gov/content/pub/pdf/rhovo1215.pdf (see table 4); Tim Wadsworth & Charis Kubrin, Structural Factors and Black Intervacial Homicide: A New Examination of the Causal Process, 42 Criminology 647 (Aug. 2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029081 ("This suggests that economic deprivation leads to more robbery, which, in turn, increases blacks' killings of whites.").

²⁰ See, e.g., Map of Humanitarian Clemencies Granted in the U.S. Since 1976, DEATH PENALTY INFORMATION CTR. (updated July 20, 2018), https://deathpenaltyinfo.org/clemency.

²¹ See Mariel Alper, Matthew R. Durose & Joshua Markman, 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005–2014), Bureau Justice Statistics (May 2018), https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf.

myriad of problems with the current criminal justice system). As a supporter of much of the criminal justice reform movement, color me skeptical. One can focus on remedying the lingering problems with the death penalty without abolishing it, while at the same time addressing some of the problems with our criminal justice system. Indeed, working to remedy some of the problems with death penalty procedures will likely help address some of the problems with the broader criminal justice system.

None of this is to suggest that Garrett does not point to some very legitimate problems with the current death penalty process and the broader criminal justice system. He points to police interrogation and suspect identification techniques that may be unduly coercive or suggestive, and which may result in false confessions and improper out-of-court identifications. Others have also pointed out problems with these techniques.²² And Garrett points to problems with forensics labs, which can be particularly troublesome given the outsized influence that forensic evidence, with its patina of objectivity and irrefutability, can have in the courtroom (a problem that I have also written about).²³ These are certainly areas that call for improvement, but they hardly support the call for abolition of the death penalty on their own.

He also points to some promising developments on the criminal justice reform horizon. For example, Garrett notes the increasing availability of mental health courts which are designed to deal with certain offenders who suffer from severe, untreated mental illnesses that likely precipitated the crimes they committed. These and other diversionary courts, such as drug courts and veterans courts, may reduce recidivism and constitute a more just way of treating certain categories of offenders (whether that should include murderers, of course, is a different matter).

Is the death penalty on its way out? Who knows? Are there sound reasons to support or oppose the death penalty? Of course. This is a serious subject about which reasonable people can and do disagree, and disagree passionately. If you want to join that debate and are looking for an effective opening argument against the death penalty, then this book is for you. If, on the other hand, you are looking for a balanced exposition of a complicated and contentious issue, then keep looking.



²² See, e.g., Brent Snook et al., Reforming Investigative Interviewing in Canada, 52 Canadian J. Criminology & Crim. Just. 215 (2010), http://www.mun.ca/psychology/brl/publications/Snook et al_CJCCJ.pdf; James L. Trainum, How the Police Generate False Confessions: An Inside Look at the Interrogation Room (2016); Lisa Black & Steve Mills, What Causes People to Give False Confessions?, Chi. Tribune (July 11, 2010), http://articles.chicagotribune.com/2010-07-11/news/ct-metforced-confessions-20100711_1_confess-dna-evidence-interrogation.

²³ John Malcolm, Persistent Forensics Lab Problems Undermine Faith in Our Criminal Justice System, Heritage Found. (Jan. 21, 2016), https://www.heritage.org/crime-and-justice/report/persistent-forensics-lab-problems-undermine-faith-our-criminal-justice.