The Death Penalty: America's "Relentless Judicial Machine"

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In early 2000, Jack Lang, a French Socialist parliamentarian and former Minister of Culture, visited Texas. He came not to tout French wine, but to protest the imminent execution of Texas death row inmate Odell Barnes. Barnes, who was then fighting his last legal skirmishes, had become a minor celebrity in France. Monsieur le Ministre, as famous for his silk-en, cunningly-terraced brown hair as for his eventful political career, looked on in evident horror as court after court rejected Barnes’ claims of innocence. “There’s a feeling that [Barnes] has been crushed by a relentless judicial machine, overpowering and unjust,” he intoned. French Prime Minister Lionel Jospin asked then-Governor George W. Bush to grant Barnes clemency in the name of “common values of justice and respect for human dignity and human rights.” Texas authorities ignored these worthy sentiments. (Watch an American trade official lecture French leaders on the need to dismantle their “failed, socialist” welfare states and you will see, to paraphrase P.G. Wodehouse, ice forming on the upper slopes of the audience.)

The worrying thing is, rather, the indifference of the courts to Odell Barnes’ claim of innocence. His volunteer attorneys’ tireless and largely unpaid efforts had undermined the state’s case against him for a ghastly 1989 rape, burglary and murder. However, Barnes had previously convictions for violent crimes, and the case for his innocence was far from airtight. An average citizen would probably have wanted Barnes’ new proof carefully evaluated, even if it didn’t ultimately carry the day. Those who followed the case in the newspapers probably think Barnes’ claims were evaluated, since state and federal courts issued many rulings in Barnes’ last months. However, these decisions did not address the merits of Barnes’ claims; instead, they ruled curtly that Barnes had failed to clear certain procedural hurdles. Dow’s book explains how courts hearing death penalty cases became so indifferent to plausible claims of innocence, and what this indifference says about the health of America’s legal institutions.

The Road to Indifference

DOW, a law professor at the University of Houston, has represented death row inmates in
Texas, Ground Zero of the American death penalty, since 1989. He came to the work not out of opposition to the death penalty, but because he saw that many of those waiting on death row had either poor lawyers or no lawyers at all. His first-hand experience of the damage capital punishment does to the justice system, and to humans, made a death-penalty abolitionist of him.

Judicial indifference to death row inmates’ possible innocence started, paradoxically enough, when the United States Supreme Court adopted the death penalty as a pet project. In 1972, the court held that then-existing death penalty laws violated the Eighth Amendment’s ban on “cruel and unusual” punishment because they were arbitrary. That is, state laws did not adequately distinguish those criminals who received death sentences from equally blameworthy criminals who did not. “These death sentences are cruel and unusual,” Justice Potter Stewart wrote of the cases before the Court, “in the same way that being struck by lightning is cruel and unusual.” At first, many thought the Furman decision, one of the Court’s longest and most complex, had found the death penalty itself inconsistent with the “evolving standards of decency” derived from the Eighth Amendment. Later parsing showed that a majority of Justices had in fact struck a compromise by affirming the constitutionality of capital punishment, but demanding that the states build more order and predictability into the sentencing process.

In the decade after Furman, the Supreme Court ordained four basic reforms. First, the death penalty was reserved only for intentional killings, and restricted to the most heinous of these. Second, trials were split into separate guilt-innocence and punishment phases, allowing the jury to concentrate solely on the life-or-death question. Third, state law had to establish objective and specific “aggravating factors” to help the jury decide which killers could be eligible for a possible death penalty. Finally, the defendant was allowed to present any mitigating evidence relevant to the sentence — mental illness, psychological damage from a troubled childhood, or his subordinate role in the killing. Some called these reforms, which incorporated and expanded on the protections required in ordinary criminal trials, a kind of “super due process” for death penalty trials. In the mid-1980s, after most of the work was done, the Court took a step back, brushed the dust off its hands, and pronounced itself satisfied. It had created a modern, fair death-sentencing system.

Dow disagrees. “Lightning,” Dow argues, “is still striking in America, and it is striking human beings.” Dow’s argument focuses mainly on the retrenchment that began in the Supreme Court’s jurisprudence in the mid-1980s. Perhaps believing that the “super due process” laws had made death penalty trials much more reliable, the Court began drastically circumscribing appeals courts’ ability to review death sentences. The retrenchment has had the most fateful consequences in the federal courts. Because federal judges are more experienced and more insulated from political pressure than state court judges, they were the last, best hope for death row inmates whose constitutional rights had been violated at trial.

Now, Dow writes, those courts have “become an abomination because they have ceased caring about the law.” Many no longer publish their “shameful” opinions, and more and more federal judges no longer “endeavor to separate their political inclinations from their analysis of Eighth Amendment doctrinal claims.” Harsh words, but not empty ones. Throughout Ex-
executed on a Technicality, Dow shows us federal courts violating basic rule-of-law tenets, including the injunction to treat like cases alike, grant each side an orderly and thorough hearing, and to provide a clear, public explanation for the court’s decision. More fundamentally, federal appeals courts have largely abandoned condemned inmates who maintain their innocence of the crime. This abandonment wasn’t easy; it took the courts years of effort and bitter controversy to set up the procedural hurdles that now screen them from this question. To show how the hurdles work, Dow describes several cases in which the courts simply “quit paying attention to the question of whether an innocent man was sentenced to die.”

One example is Gary Graham, whose 2000 execution drew reporters from all over the world to Texas. At Graham’s 1981 Houston trial for the killing of Bobby Grant Lambert, Graham’s lawyers were so inexperienced — or irresponsible, or lazy — that they did almost no independent investigation. They didn’t even notice, for instance, that a ballistics report in the police file showed the gun Graham was arrested with was not the murder weapon. The next set of lawyers, appointed by the court to file Graham’s state court appeals, did no better. Dow summarizes the state of play after this appeal: “[t]he state of Texas had given Graham several sets of lawyers, and none had done what he or she was supposed to do. Graham may as well have been representing himself.” Graham finally reached federal court, and lawyers who thoroughly re-investigated his case and cast his guilt into doubt. Witnesses who were known to Graham’s previous lawyers, but who had never been interviewed by them, were adamant that Graham was not the man they saw at the crime scene. However, the crucial trial eyewitness against Graham remained unbowed, and Graham was guilty of a string of violent crimes before and after the Lambert killing. Like Barnes, Graham ended up in the “gray zone” between guilt and innocence.

You might think courts were invented precisely to resolve complex legal disputes like those presented by Graham’s case. However, no court ever did so. This fact was far more important than the celebrity-studded circus that attended Graham’s appeals, but explaining it was too complicated for most media outlets. To understand why the courts never decided the fundamental issue of Graham’s innocence, you must understand how the rules governing death penalty appeals work. These rules are driven by fear of drawn-out, “piecemeal” litigation: think death row lawyers rushing from court to court with some new affidavit, argument, or expert analysis, throwing so much sand in the gears that the machine stops grinding completely. To forestall these tactics, courts require lawyers to make all their objections and argument as early as practicable in the trial or appeal. If the inmate’s lawyer discovers something later in the game (say, after the case has left state court and entered federal court), he has to show good reason for the delay. If the court finds that a “reasonably diligent” lawyer could have made the claim earlier, complex procedural doctrines with sinister-sounding names like “procedural default” and “successor bar” come into play, and prevent the court from even considering the new evidence or legal claim.

The rules may seem harsh and technical, but if you had to run a complex, multilayer judicial system, you’d probably come up with something similar — especially for death penalty cases, since these prisoners have an obvious interest in stretching out their appeals. The problem is not the rules themselves, but the fact that they don’t have exceptions. Take an inmate whose state court lawyer did the bare minimum during state-level post-conviction appeals, and missed an important fact or argument. More experienced or committed lawyers join the case during later federal court appeals and discover the fact. The new lawyers cannot point to the inadequate work done by the previous lawyer as an excuse. The rule is simple: if some lawyer
could have found out the fact or made the argument in state court, then you cannot bring it up later in federal appeals. The fact that your state court lawyer dropped the ball only because he was overworked or inexperienced doesn’t matter. That is the first trap, and it snaps shut on dozens of prisoners — including ones on death row — every day.

The second trap relates to innocence. Let’s say our hypothetical prisoner has to admit that his earlier lawyers didn’t raise the issue when they should have, causing a “procedural default.” However, his new lawyers have found evidence that shows he is probably innocent. Surely, the prisoner asks, you can’t cite some dry procedural rule to deny my claim? “Yes we can,” the courts have replied in many cases. Vindicating innocence is an important goal of the criminal justice system, but that’s what we have trials for. The longer you wait after your trial to show us your supposedly vital new evidence, the more likely it is we will not let you into court. If we recognized an exception for every late-comer with some story of his innocence, the exceptions would quickly swallow the rule.

Graham was caught in both traps. His federal court lawyers had to admit that his previous lawyers hadn’t been “diligent,” creating a procedural default. The reason for their lack of diligence was not important, since Graham, in any event, had no right to a lawyer during these late-stage appeals. Finally, Graham’s new lawyers could not use his claims of possible innocence to get around the default. They tried anyway, launching a nearly seven-year performance of procedural kabuki in which Graham bounced back and forth between state and federal courts. When he was finally executed, his appeals had produced reams of densely technical rulings, but no court had ever convened a hearing to sift his claims of innocence. “No court would look at the evidence because the evidence had been there all along.”

Dow describes a legal system, in short, in which judicial efficiency can trump plausible claims of innocence. This is a legal system that will surely put an innocent person to death one day. Perhaps it has already done so, as recent investigative reporting from Texas and Missouri suggests.

**Cracks in the Edifice**

**The fact that an innocent person will inevitably be executed is a convincing and honest argument against the death penalty. However, Dow warns, the simple version of this argument can become a distraction: “How many people on death row are innocent? How many innocent people have been executed? These questions are impossible to answer. What we can say with certainty is that people are convicted on the basis of fallible testimony. And people are sentenced to death on the basis of baseless predictions.”** Exoneration of innocent inmates — as well as executions in gray-zone cases like Barnes and Graham — should be used to turn attention to underlying structural failings. Barry Scheck and Peter Neufeld, the lawyers behind the original Innocence Project in New York, did just this in their 2000 book *Actual Innocence: Five Days to Execution, and Other Dispatches From the Wrongly Convicted.*

Both Dow and the authors of *Actual Innocence* treat questionable executions and near-miss exonerations as a symptom of an underlying disease. Scheck and Neufeld’s diagnosis is a broken criminal justice system, and Dow agrees. Dow goes further, though, to argue that the death penalty itself is doing some of the breaking, by undermining the rule of law. Unlike some of his academic colleagues, Dow still harbors a lawyer’s innate belief in the constraining
and ennobling force of law. Fundamental to the 
rule of law is that the state, not aggrieved vic-
tims or mobs, has the exclusive right to respond
to violent crime. Only when the state exercises 
this monopoly without fear or favor can there 
be equal justice before law: “None of us cares 
equally about all crimes. The state, however, is 
supposed to.” This principle, Dow argues, can-
not be squared with decisions like the Supreme 
Court’s 1991 decision in Payne v. Tennessee, 
which permitted murder victims’ relatives to 
testify about the victim during the punishment-
phase trial of the convicted killer. A state which 
explicitly allows a defendant’s fate to hang on 
the availability and eloquence of the victim’s 
relatives, Dow claims, has given up an unquali-
fied claim to the status of impartial arbiter.

Death penalty cases also cause other, less 
apparent cracks in the edifice of legality, which 
Dow patiently extracts from incrustations of 
doctrine and procedure. He describes, for ex-
ample, a series of cases from South Carolina 
involving a question of key practical importance: 
when a jury decides a defendant’s punishment, 
should they be told that if they sentence him to 
life in prison instead of execution, he will never 
become eligible for parole? The Supreme Court 
ruled that due process required the jury to be 
told this fact, even when state law ordinarily 
rulled parole issues off-limits to the jury. As Dow 
details, the South Carolina Supreme Court then 
openly defied the Supreme Court’s decision. 
Deploying wearisome bits of pettifoggery, the 
state court somehow exempted every new case 
from the scope of the Supreme Court’s rule.
Tired of making its original point over and over, 
the Supreme Court seems on the verge of sim-
ply letting the lower court’s interpretation stand, 
even though the high court should obviously 
be calling the shots.

This is not to say that lower courts never 
openly defy higher ones in other legal domains, 
but they seem to do so regularly in death pen-
alty cases. Liberal courts like the Ninth Circuit 
stretch precedent in the defendant’s favor; more 
conservative courts, like South Carolina’s Su-
preme Court, stretch it in the opposite direc-
tion. Only in death penalty cases, it seems, are 
judges so tempted to substitute their sense of 
“what’s right” for a rule they don’t agree with, 
and no temptation is more inimical to equal 
justice before law.

There is, however, little concern about this 
state of affairs outside the ranks of death-pen-
alty lawyers, for a few reasons. First, the legal 
context is complex. It takes ages to explain to a 
non-specialist why all those court opinions that 
seemed to be addressing Gary Graham’s inno-
cence claims never actually did so. Second, the 
people who stumble during the freakish obstacle-
course of death penalty appeals are almost al-
ways unpleasant fellows, often guilty killers.

Consider the amazing legal odyssey of Billy 
Vickers. This is not a story of innocence; Vickers 
was a Kray–like dynamo of criminal energy. Yet 
the Fifth Circuit Court of Appeals’ treatment 
of Vickers, Dow maintains, shows “indifference, 
even hostility to the rule of law.” After his ini-
tial appeals had been denied and his execution 
was approaching, Vickers returned to court to 
argue that the drug mixture used to execute 
Texas inmates would cause him to die in con-
scious pain while paralyzed and thus unable to 
vocalize the agony he was enduring. The claim 
could not be unambiguously proven, for obvi-
ous reasons, but was not frivolous. The Ameri-
can Veterinary Association has, for instance, 
cited these concerns when it recently banned 
the use of a similar mixture to put down dogs. 
As Vickers’ execution approached, the Supreme 
Court had closely divided on this issue in other 
cases. It had also recently agreed to decide a 
related case that would require it to review the 
constitutionality of lethal injection procedures. 
Vickers cited this case law and medical research 
in an appeal filed with a three-judge panel of 
the Fifth Circuit Court of Appeals a few days 
before his scheduled lethal injection.

The court waited until the very day of 
Vickers’ execution, which was to take place
shortly after 6 p.m. The court finally decided the appeal at 3:30 p.m. Although it denied the appeal, the panel noted that the Supreme Court was simultaneously considering a similar claim, and that Vickers’ evidence was “stronger than that which has supported prior complaints of this nature.” This is judicial code for “you may have a point here, but we are bound by our prior decisions. Try your luck in a higher court.” Vickers’ lawyers instantly appealed the decision to the entire nineteen-member Fifth Circuit Court of Appeals, a procedure called en banc review that is reserved for questions of special importance.

Vickers and his lawyers waited for a ruling. Six o’clock came and went. The State of Texas had a valid death warrant for Vickers and was now entitled to execute him at any time. However, as the hours dragged on, the court neither stayed the execution nor decided the appeal. Vickers waited in the holding cell near the execution chamber. Finally, just after eight p.m., a clerk informed the parties that the court would “take no further action” that day. The judges were going home. Vickers had no stay of execution, and wasn’t going to get one, because the Fifth Circuit could not be bothered to resolve his case. After tense haggling, the lawyers on both sides and the prison warden agreed not to execute Vickers that night, but Vickers was not informed of this fact until hours later.

But the legal system was not finished demonstrating how little it cared about an orderly resolution of Vickers’ claims. Months later, after his execution was rescheduled, Vickers filed another appeal raising not only the same issue as before (since Texas had not changed its execution protocol), but also a new one: whether Vickers’ mock-execution should be taken as sufficient prior punishment. “In ordinary English,” Dow explains, “the state had intention-
The lower courts had no choice but to chuck these gleaming dolphins into the fearful procedural processor along with the squirming mass of tuna.

Everyone now agrees that there was a report in the police file that showed not only that the detective knew Fierro’s parents had been arrested, but also that he told Fierro this fact. The prosecutor who tried Fierro now says that had he known that Fierro’s confession was coerced, he would have dropped the case against him.

Long before any of this was known, Fierro’s state court appeals, routine affairs filed by average lawyers, had meandered through the state courts. Fierro finally got a new team of more committed attorneys who understood the importance of the police report. If the report had been found earlier, Fierro would almost certainly be a free man. But the legal landscape had changed in the intervening years. As in the Graham and Barnes cases, the law, as applied to Fierro, declared the crucial issue to be not whether the police report warranted a new trial, but rather whether, back in 1979, Fierro’s trial lawyers had an appropriate excuse for not having discovered it. Since the lawyers barely remember the two-decade-old trial, they may never be able to answer this frustratingly abstruse — yet life-or-death — question.

If Fierro loses, he has no chance of judicial review of his possible innocence. Fierro probably doesn’t realize this, though, since the twenty-six years he’s spent on death row have driven him insane. Dow describes a prison interview in which Fierro rambles nonsensically and, eventually, refuses to speak to his lawyers, instead playing with a piece of paper and occasionally screaming. Dow ended the interview and called for the guards to take Fierro back to his cell. “When the guards came to get him,” Dow reports, “they were laughing.” The effect of years of filing futile arguments over side issues while your client slips into insanity can be gauged by Dow’s conclusion.

rect the unintended consequences of its procedural rulings, or those consequences actually weren’t so unintended. A turning point came with the 1991 Supreme Court decision of Coleman v. Thompson, in which the Court threw out death row inmate Roger Keith Coleman’s claims on the grounds that his previous lawyers, inexperienced in the niceties of Rule 5:9(a) of the Virginia Supreme Court, had filed Coleman’s state court post-conviction appeal one day late. The outrage in Justice Blackmun’s dissent smoldered through the legalese: “the Court today continues its crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims.”

Yet it was only a dissent. The majority carried the day, and added yet more “petty procedural barriers” in later rulings. The 1996 passage of the Antiterrorism and Effective Death Penalty Act not only cemented all the Supreme Court’s barriers into law, but also added a few new ones. One of these is the rule, only hinted at in previous Court decisions, that provides that an inmate who can absolutely demonstrate his innocence will be barred from court if his previous lawyers could have brought that proof before the court earlier, but did not do so.

This outcome is no mere theoretical possibility. In perhaps the most powerful chapter of the book, Dow describes how his client Cesar Roberto Fierro landed in this position. At his 1980 El Paso murder trial, Fierro said he had confessed the crime only because he’d been told that the notoriously corrupt Juarez (Mexico) police, acting on the request of El Paso investigators, had arrested his parents. The El Paso detective in charge testified during trial that he knew of no such arrest, and that Fierro’s confession was voluntary. The detective was lying.
I used to think Fierro would walk out of prison because I thought it was quite likely that he is innocent. Now I hope he is not. I hope I was wrong and that he committed the murder, because the alternative is that he has spent the last twenty-five years of his life going insane in a sixty-square-foot cell for a crime he had nothing to do with.

**Where Can Abolitionists Turn?**

Dow’s book is not a polemic, but it states a powerful and subtle case against the death penalty. It also contains a lawyer’s advice to those working to abolish capital punishment. First, Dow dashes hopes that the Supreme Court will abolish capital punishment wholesale through a court decision (as, for instance, the South African Supreme Court did in 1995). Dow writes of the *Furman* decision that it “exuded an almost haughty sense that the Court had at last dealt a decisive blow to a barbaric punishment.” Once American voters grasped that the Supreme Court had not abolished capital punishment, though, they moved from scorn and bewilderment to action. Popular support for capital punishment soared. Legislators in over 30 states revised their death penalty laws to comply with *Furman* faster than you could say “evolving standards of decency.”

To Dow, *Furman’s* temporary suspension of the death penalty signaled not the beginning of the end of capital punishment, but rather a wave of retrenchment and reaction. With exceptions like Justice Harry Blackmun, who concluded in 1994 that no amount of further “tinker[ing] with the machinery of death” could fix capital punishment, state and federal judges have now accepted the will of the people. Even judges who personally oppose capital punishment lack either the institutional power or the will to take a step like Blackmun’s. Until public opinion changes dramatically, the issue of whether capital punishment itself is constitutional is off limits.

If judges will not take the lead, where else can abolitionists turn? Not to Jack Lang, that much is certain. Lang comes from the Continent, a place where political elites can declare certain policy matters, such as the death penalty, fit only for expert decision. Professor Roger Hood, in his study of the death penalty, observes that “[i]n France, Germany, the United Kingdom, and Canada, abolition of the death penalty took place even though a majority of popular opinion was opposed to [abolition]. These countries have since held steadfastly to the view — despite strong differences of opinion — that popular sentiment alone should not determine penal policy, that task being the responsibility of elected representatives exercising their own judgment.” When judges and ministers in these nations quietly disappeared the death penalty as an issue of live public debate, journalists in the quality press went along by avoiding sensationalistic crime reporting and denying a broad forum to pro-death-penalty voices. Of course, there are calls to reintroduce the death penalty in these countries, but they are either ignored or criticized (often with reference to the appalling practices of the Americans), and the proposals never come close to being enacted.

Lang believes American public officials could stop the relentless judicial machine, if they only felt strongly enough, but he badly underestimates the extent to which popular opinion influences criminal justice policy in the United States. And he is not alone; in a recent study of French views of the American death penalty, French political scientist Denis Lacorne observed that French commentators, although well-acquainted with the (often luridly sentimentalized) life stories of individual death row inmates, know nothing of the political and social context in which executions take place. Americans, unlike Europeans, can influence criminal-justice policy and want to do so. “The death penalty lives on” in the United States, Lacorne exclaims, “simply because it is the will of the people!” And, as Dow’s book shows, the will of the people, while rarely acknowledged, hangs like a brooding omnipresence over death-penalty adjudication.
Thus, abolitionists will just have to wean the people from the needle, one suspicious red-state voter at a time. This is no mean feat. For reasons which might strike a French intellectual as atavistic or nonsensical, most Americans want the state to have the option of executing murderers. Public support for capital punishment in the United States rarely dips below 65 percent, and generally perches in the mid-70s. It’s at this point that some abolitionists might, like Brecht, indulge a fleeting wish to “dissolve the people and elect another.” As some abolitionists are quick to note, support for the death penalty drops as low as 45 percent when poll respondents are asked to choose between execution and the alternative punishment of life in prison; or if you require them to assume that innocent people will be executed despite all precautions. These numbers do provide some comfort to abolitionists, as does the fact that recent coverage of death row exonerations has dented support for the death penalty. However, the sort of tectonic public-opinion shift that would open up new maneuvering room for judges and politicians has yet to arrive. A policy supported by a strong core of 45 percent of the people is no-brainer, because capital punishment is actively opposed by a much smaller percentage (generally in the high teens). A politician does the math: “If I endorse the death penalty, I reassure two or three people and alienate one; if I oppose it, it’s the reverse.”

The death penalty will be with us until this equation changes. Because Dow’s lively narrative is interrupted by the technical discussions he needs to make his points, his book won’t have much of an effect on mass opinion. It does, however, make a detailed and persuasive argument that the death penalty cannot be administered in accordance with the standards of due process an advanced society should demand. And, perhaps, not-so-advanced societies. In Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776–1865, Louis P. Masur traces the glorious careers of American criminal-justice reformers such as Dr. Benjamin Rush, who traveled post-Revolutionary America to argue that the terrors of the guillotine and gallow were best left in the Old World. Back then, progressive Frenchmen admired our reforming zeal. The Duc de Rochefoucauld-Liancourt, a nobleman exiled to Philadelphia in the aftermath of the French Revolution, observed in 1796: “[T]he attempt at an almost entire abolition of the punishment of death, and the substitution of a system of reason and justice, to that of bonds, ill-treatment, and arbitrary punishment, was never made but in America.” If America ever reclaims this reforming heritage, it will be because witnesses like Dow kept confronting voters and policymakers with the true moral costs of every execution.

NOTES
4. The Supreme Court opinion says Coleman’s appeal was three days late, but in his sober and authoritative account of the Coleman case, May God Have Mercy: A True Story of Crime and Punishment, John C. Tucker argues the margin was even narrower.