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The Slow Demise of Capital Punishment

By THE EDITORIAL BOARD

More states are coming to recognize that the death penalty is arbitrary, racially biased and prone to catastrophic error. Even those that have not abolished capital punishment are no longer carrying it out in practice.

In 2013, Maryland became the sixth state to end capital punishment in the last six years. Eighteen states and the District of Columbia have abolished the penalty, and it is dormant in the federal system and the military. Thirty states have had no executions in the last five years.

As it becomes less frequent, the death penalty also becomes more limited to an extremely small slice of the country, and therefore all the more arbitrary in its application. All 80 death sentences in 2013 came from only about 2 percent of counties in the entire country, and all 39 executions — more than half occurred in Texas and Florida — took place in about 1 percent of all counties, according to a new report by the Death Penalty Information Center. Eighty-five percent of all counties have not had a single execution in more than 45 years.

Public support for the death penalty — an important factor in the Supreme Court's consideration of its constitutionality — is at its lowest level in four decades, and 40 percent of people surveyed by Gallup say they do not believe it is administered fairly. Surely that is due in part to the hundreds of exonerations based on DNA testing — including 18 death-row inmates — which continue to reveal irreparable failures throughout the system.

Of course none of this matters to, say, Troy Davis or Cameron Todd Willingham, both of whom were executed in recent years despite deep doubts about their guilt. Nor is it of much use to the 3,100 people still sitting on death row around the country.

The argument is not that all of these people are innocent, or that they deserve to be released. Most would be justly imprisoned for most if not all of their life. But the death penalty as applied in America now — so thoroughly dependent on where the defendant lives and how much money he can spend on his defense — violates the constitutional guarantees of due

process and equal protection, and no longer can overcome the Eighth Amendment's ban on cruel and unusual punishments.

The dishonor and shame of capital punishment are further highlighted by the current shortage of lethal-injection drugs, a "crisis" resulting from the refusal of European drug makers to provide them for executions. As a result, states that use lethal injection have turned to unregulated compounding pharmacies, and have even passed laws to hide the identity of those pharmacies and the chemical makeup of the drugs. This only underscores the fact that when it comes to the death penalty, the United States is virtually alone in the Western world.

In a 1994 case, Justice Harry Blackmun wrote: "I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies." How long must we wait before a majority of justices agree?

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