Judge's Ill-Timed Ruling Invites Irrationality in Public's Views About Capital Punishment

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RETHINK DEATH PENALTY

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By ADAM GERSHOWITZ

TEXAS JUSTICE

TATE District Judge Kevin Fine sparked controversy recently when he ruled that the death penalty was unconstitutional under Texas law. Although he subsequently rescinded his ruling, the damage was done. By overstepping his powers, Fine gave death penalty advocates exactly what they were looking for: another example of a “judicial activist” working to block the public’s desire to enforce capital punishment.

When voters hear that a low-level judge has moved to strike down capital punishment, they are likely to conclude that judges micromanage every aspect of death penalty cases and provide careful oversight to guarantee that no innocent people will be executed in Texas. Nothing could be further from the truth.

Appeals in death penalty cases almost never focus on whether the defendant is innocent or whether he or she deserves to die. Rather, appellate judges are obligated to spend their time looking at more mundane process issues, such as whether jury selection was properly conducted or whether the prosecution complied with its discovery obligations and shared necessary information with the defense.

Even if Fine eventually moves to forbid prosecutors from seeking the death penalty in his court, that ruling will be promptly appealed and immediately reversed. If his objective was to throw a wrench into the machinery of death row, his actions actually produced the opposite result. Ultimately, his impulsive ruling will harm those who are seeking to end the death penalty, and it will prevent the public from having a real discussion about whether it makes sense to continue to have capital punishment in the state of Texas.

The problem with capital punishment is not that it is unconstitutional. If it were, how could dozens of federal and state judges have allowed Texas to execute 450 people over the past 30 years? The real problem with the death penalty is that it is a terrible public policy that the voters of Texas should reject. Most people are familiar with the standard arguments:

- Innocent people have been executed and likely will continue to be sentenced to death on rare occasions.
- The death penalty is racially discriminatory, such that killing a white person is more likely to get you the death penalty than killing a minority victim.
- Poor defendants are more likely to be sentenced to death than wealthy ones.
- If you commit your crime in a populous county, you are more likely to be executed because those counties have the money to navigate the expensive death penalty process.

All these arguments about unfairness to defendants are true, yet the public has not been swayed by any of them. And Texas continues to lead the nation in executions.

Perhaps in these economic times, death penalty critics should instead focus on how the death penalty is harmful to taxpaying, law-abiding citizens. The enormous costs of capital punishment actually drain resources that could be better used to lock up other dangerous criminals and make society safer.

But be forewarned: District attorneys and other elected officials will counter that the costs of capital punishment are irrelevant and that money "has no effect on how other criminal offenses are prosecuted." Perhaps they even believe that. But it’s not remotely true.

Under long-standing rules required by the Supreme Court of the United States, the process for trying death penalty cases is long and complicated. Even if we eliminated appeals altogether — as some death penalty proponents suggest — capital cases would still be far more costly and time-consuming than ordinary criminal cases. Proper jury selection alone can take up to a month in a capital case. That means multiple prosecutors (not to mention publicly funded defense attorneys, court staff and a judge) will spend weeks handling a single death penalty case rather than working on other serious crimes. The prosecutors who are working on death penalty cases could instead be meeting with...
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a robbery victim from another case, preparing for trial against a rapist or poring over evidence that could put an arsonist behind bars.

To put matters simply, the criminal justice system is a zero-sum world. Resources spent trying to execute a handful of people are resources not being spent on other crimes.

Perhaps that is what the citizens of Texas want. If so, then Pine and other judges must respect that.

But it is long past time to have a serious conversation about how criminal justice resources should be allocated. And local judges who breezily declare the death penalty unconstitutional only delay that discussion.

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