

New Jersey Death Penalty Study Commission

Public Hearing

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Testimony of

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INTRODUCTION

Good afternoon. I would like to thank the Chairman, Rev. M. William Howard, Jr., and members of the Commission for this opportunity to present my testimony on the areas of concern raised by the Commission regarding New Jersey's death penalty.

My name is Richard Dieter and I am the Executive Director of the Death Penalty Information Center in Washington, DC, a position I have held for the past 14 years. I am an attorney and an adjunct professor at Catholic University Law School. The Death Penalty Information Center is a non-profit organization whose focus is research and analysis of capital punishment.

I would like to address each of the three questions raised by the Commission from the perspective of a national organization that closely watches the trends and developments related to the death penalty. I will be brief, but I want to assure the Commission that the Death Penalty Information Center and I are at your disposal if further resources or clarification are needed at any time.

I. DOES THE DEATH PENALTY SERVE A LEGITIMATE PENOLOGICAL INTENT SUCH AS DETERRENCE?

The U.S. Supreme Court has repeatedly focused on two key purposes that the death penalty may potentially serve: retribution and deterrence.¹ These purposes should be considered in the overall light of one very important fact: the death penalty in the United States is very rarely applied. It exists primarily as a punishment for the crime of murder, but almost all murders, even the most heinous, are dealt with through the application of a sentence of life imprisonment.

In recent years, there have been about 16,000 murders per year. We currently sentence about 125 people per year to death, and execute less than half that number.² The application of the death penalty to less than 1% of those who commit murder is a

¹ . See generally, *Gregg v. Georgia*, 428 U.S. 153, 183-87 (1976).

² . See U.S. Dept. of Justice, *Capital Punishment 2004*, Bureau of Justice Statistics (2005).

strong indication that this punishment is not seen as a necessary response to this crime. If the death penalty is the only fitting retribution for the crime of heinous murders, or if it is necessary to deter future murders, it would have to be applied far more frequently and uniformly to justify that intent.

Retribution is often presented as justice for the victims and their families. But a punishment that is applied in only a very small percentage of cases of family grief and loss can be highly divisive. It creates a hierarchy among victims, in which almost all will be relegated to the second-class status of life sentences. One solution might be the imposition of the death penalty on a much broader class of defendants. While theoretically possible, the national trends are sharply in the opposite direction. Death sentences, executions, and the size of death row have all been shrinking in recent years.

Deterrence appears to be a more quantifiable factor when measuring the efficacy of capital punishment. However, expert review of this issue over many decades has been, at best, inconclusive. Dr. Jeffrey Fagan of Columbia University, a national expert on deterrence, recently testified before a U.S. Senate Committee hearing on the death penalty presided over by Senators Sam Brownback of Kansas and Russell Feingold of Wisconsin. He concluded that there is no credible evidence that the death penalty deters murder more than a sentence of life without parole. Specifically, he noted that the wide disparities in the results of deterrent studies "are the antithesis of what social scientists and economists demand when considering causal inference: robustness in their conclusions, or consistency across a range of conditions and tests. When the hypothesized deterrent effects of executions are so unstable over time, one must reject a hypothesis of deterrence."³

Other experts have come to the same conclusion. John J. Donohue of Yale Law School and Justin Wolfers of the University of Pennsylvania, writing in a recent edition

³ . Jeffrey Fagan, "DETERRENCE AND THE DEATH PENALTY: RISK, UNCERTAINTY, AND PUBLIC POLICY CHOICES," Testimony to the Subcommittee on the Constitution, Civil Rights and Property Rights, Committee on the Judiciary, U.S. Senate, February 1, 2006 (available from the Death Penalty Information Center).

of the Stanford Law Review, concluded: "Our estimates suggest not just 'reasonable doubt' about whether there is any deterrent effect of the death penalty, *but profound uncertainty*."⁴ The overwhelming majority of experts from the country's leading criminology organizations also concluded that there was insufficient evidence to justify the death penalty on the basis of deterrence.⁵

What is clear is that states that do not use the death penalty have consistently had lower murder rates than states that do use the death penalty. And, while crime rates have dropped around the country, states without the death penalty have had sharper drops than death penalty states.

About 80% of the executions carried out in this country since the death penalty was reinstated in 1976 occurred in the South. Yet, the South has consistently had the highest murder rate of the four geographical regions. The Northeast, which has had less than 1% of the executions, has the lowest murder rate.⁶

II. IS THE PENOLOGICAL INTEREST IN EXECUTING SOME OF THOSE GUILTY OF MURDER SUFFICIENTLY COMPELLING THAT THE RISK OF AN IRREVERSIBLE MISTAKE IS ACCEPTABLE?

This question essentially asks: if society is obtaining some benefit from the death penalty, does that benefit outweigh the risk of executing an innocent person? As discussed above, the benefits to society from the death penalty lack strong empirical support and are thrown into doubt by the infrequency with which the death penalty is used.

Is there a risk that the death penalty could result in the execution of an innocent person? Supreme Court Justice Antonin Scalia recently wrote that such a risk always exists and should be acknowledged: "Like other human institutions, courts and juries

⁴ . John Donohue & Justin Wolfers, "Uses and Abuses of Empirical Evidence in the Death Penalty Debate," 58 STAN. L. REV. 791 (2005) (emphasis added).

⁵ . See M. Radelet and R. Akers, "Deterrence and the Death Penalty: The Views of the Experts" (1995).

⁶ . See generally, the yearly FBI Uniform Crime Reports. Statistics also available at <http://www.deathpenaltyinfo.org> under "Deterrence."

are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly."⁷

There is increasing and credible evidence that such a mistake has already been made, not once, but numerous times. Investigations by the *Chicago Tribune*, the *Houston Chronicle*, and the NAACP Legal Defense Fund have uncovered four cases over the past two years where it appears an innocent person was executed.⁸ Three of these cases were in Texas and one was in Missouri.

None of these cases involved DNA evidence. Hence, it is difficult to demonstrate conclusively that the defendants were innocent. But the degree of error that has been shown to exist in the criminal justice system, especially since the advent of DNA testing, strongly implies that mistakes were being made in non-DNA cases as well.

We do have strong empirical evidence that the risk of executing innocent people is high. Since 1973, 123 death row inmates have been exonerated and freed following a reversal of their convictions.⁹ These are not simply cases in which the defendant's sentence was reduced and he was later released. Nor are these cases where a subjective judgment was made that the defendants were probably innocent, even though they were found guilty. Rather, in all 123 cases, the justice system reviewed the cases after a death sentence had been imposed and concluded that each person could not even be convicted of the slightest offense and they were set free. For every eight individuals who have been executed since 1973, one person has been exonerated and freed from death row. That ratio reflects a terrible record and amply demonstrates the risk of error in the death penalty system.

⁷. *Kansas v. Marsh*, 2006 U.S. Lexis 5163, at p.16 (Scalia, J., concurring).

⁸. See T. Shaw, "Wrong on Wrongful Executions," *Washington Post*, July 2, 2006.

⁹. For a list of these cases and the criteria for including a case on the list, see Death Penalty Information Center, <http://www.deathpenaltyinfo.org> under "Innocence."

III. IS THE DEATH PENALTY CONSISTENT WITH EVOLVING STANDARDS OF DECENCY?

From a national perspective, the death penalty is losing its grip on society. The clear national trend is away from a broad use of capital punishment: since the year 2000 there has been a 60% drop in death sentences, a 40% decline in executions, and a decrease in the size of death row. Public support has also dropped since its high point in 1994 to its lowest point in the past 27 years. In public opinion polls, there has been an upward trend in support for life-without-parole sentences as a substitute for the death penalty.

The reasons for this sharp decline in the use of the death penalty are varied. Certainly, the large number of innocent defendants who have walked off death row has shaken confidence in the death penalty system. Concurrently, states have adopted life-without-parole sentences to ensure that some inmates are never released.

Many states have taken steps to curtail or modify their death penalty systems. Illinois has had a moratorium on the death penalty for over 6 years. Maryland imposed a temporary moratorium in 2002. New York elected not to restore its death penalty after its statute was overturned by the courts in 2004. In a number of states, all executions are on hold because of challenges to the lethal injection process. North Carolina and California have recently instituted legislative studies of their death penalty systems. Many other states and the federal government have also recently studied their death penalty process. Of course, New Jersey itself has imposed a moratorium on the death penalty and has convened these hearings.

Our standards of decency are not only reflected in our pulling back as a country from the death penalty, but also in the statements and actions of our respected leaders. The almost universal response from the medical community when asked to participate in lethal injections has been a categorical no. The American Bar Association has called for a national moratorium on the death penalty. Many of our religious leaders, including most recently the Catholic Church and the United Methodists, have renewed

their strong opposition to the death penalty. Leading civil rights groups have also had a long distaste for capital punishment.

Ultimately, standards of decency cannot be quantified and will be judged by the representatives of the people. Former Justice William Brennan, a son of New Jersey, recognized long ago that decency is a deeper concept than any number can represent. Justice Brennan was most eloquent in his concurring opinion in *Furman v. Georgia*, in which the death penalty was struck down in 1972. "The state," he wrote, "even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity."¹⁰ He found the death penalty to be thoroughly lacking in human dignity, an affront to society's standards of decency, and hence unconstitutional. This Commission faces a similar judgment.

If I can be of any assistance to you, either by answering questions now, or by providing further information, please call on me.

¹⁰ . *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring).