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# AN EXAMINATION OF THE DEATH PENALTY IN THE UNITED STATES

## HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

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# AN EXAMINATION OF THE DEATH PENALTY IN THE UNITED STATES

**WEDNESDAY, FEBRUARY 1, 2006**

UNITED STATES SENATE,
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS, OF THE COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 1:34 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Sam Brownback (chairman of the subcommittee) presiding.

Present: Senators Brownback and Feingold.

## OPENING STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Chairman BROWNBACK. The hearing will come to order. I want to thank everybody for joining us here today on an important and sensitive topic. We have got some excellent witnesses coming in front of us to testify today and I deeply appreciate their appearance and the difficulty that it is for them to appear, in some cases here because of personal emotion that is involved.

The Fifth and 14th Amendments to the United States Constitution provide that no person may be deprived of life without due process of law. These provisions contemplate and our history reflects the adoption of the death penalty as a form of criminal punishment. Yet the Eighth Amendment prohibits in undefined terms the use of cruel and unusual punishment. Reading these provisions together, it seems our founding document neither demands nor prohibits capital punishment. Instead, the Constitution generally permits the people to decide whether and when capital punishment is appropriate.

So each generation may, and good citizens should, consider anew the law and facts involving this solemn judgment. I believe America must establish a culture of life. That is my personal belief. It has been one of the guiding principles for me being involved in the legislative process. If use of the death penalty is contrary to the promotion of a culture of life, we need to have a national dialog and hear both sides of this issue. All life is sacred and our use of the death penalty in the American justice system must recognize this central truth.

I called this hearing in order to conduct a full and fair examination of the death penalty in the United States. I believe it is important for lawmakers and the public to be informed about a punishment which, because it is final and irreversible, stirs much debate.

Although most decisions about the death penalty rest with the people and their elected representatives, these decisions are made in the shadow of extensive Supreme Court precedents. For instance, in the 1973 case of *Furman* v. *Georgia*, the Supreme Court invalidated capital punishment nationwide by stating in a brief yet broad opinion that application of the death penalty violated the Eighth and 14th Amendments. Just 4 years later, in *Gregg* v. *Georgia*, the Supreme Court revisited this judgment. The Court held that capital punishment for the crime of murder did not violate these constitutional provisions. Justice Stuart's opinion decided that the Framers contemplated and applied the death penalty and that it was not per se invalid two centuries later.

In the past 30 years, the Supreme Court has dealt with numerous death penalty appeals. Just yesterday, it stayed an execution in Florida and permitted another to go forward in Texas. Occasionally, the Supreme Court has issued more wide-ranging decisions. for example, the Court held in a 2002 case of *Atkins* v. *Virginia* that execution of the mentally disabled constituted cruel and unusual punishment. Similarly, in last year's case of *Roper* v. *Simmons*, the Court invalidated the death penalty for minors. In each of these decisions, the Court found what it deemed to be a popular consensus against the use of death penalty in cases involving mentally disabled or minor defendants.

Aside from these constitutional issues, the Federal and State death penalty systems have inspired many policy arguments, such as whether the use of this punishment deters crime. In the Roper case, the five-Justice majority stated that, quote, "the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." Conversely, my Senate colleague, Senator Kyl, previously has introduced into the Committee record information suggesting that the death penalty may deter crime.

It is my intention to explore in this hearing the various aspects of capital punishment, from the statistics on deterrence to the views of crime victims. It is my hope that by carefully reflecting on America's experience with the death penalty, the people can make informed judgments worthy of the Constitution's faith in future generations. We will hear today from victims and experts on both sides of this debate. I look forward to a robust discussion on this important issue.

[The prepared statement of Senator Brownback appears as a submission for the record.]

On our first panel, we are privileged to have two witnesses, Ms. Vicki Schieber and Mrs. Ann Scott. Both Vicki and Ann are parents who each lost their daughters to senseless acts of violence and who will share their stories and views on the death penalty. I know I speak for everyone on this panel when I say our hearts and our prayers go out to you and to your families and, above all, your children. We greatly appreciate your willingness to come before the Senate and share these tragic stories.

On the next panel, we will take testimony from four experts on capital punishment. First is Professor John McAdams from Marquette University. Professor McAdams has written extensively on

the death penalty and has participated in a number of forums on defending capital punishment.

Next is Stephen Bright, President of the Southern Center for Human Rights. He has written extensively on capital punishment and teaches law at both Harvard and Yale.

To discuss the effectiveness of the death penalty as a deterrent, we will hear from Professor Jeffrey Fagan of Columbia Law School and Professor Paul Rubin from Emory University. Professor Fagan has conducted significant research on the changes in homicide rates over the past few decades. Professor Rubin recently co-authored a study that has been called one of the most comprehensive death penalty studies ever conducted, and I want to thank them for their participation here today.

I enter into this hearing seeking wisdom and seeking information from people that have been around this topic for a long period of time. This has been a long debate in the United States and I want to hear from people that have thought a long time about it and I want to hear from people that have been affected directly by it.

With that, I think we will have an excellent hearing on an important topic.

I want to turn to my colleague, Senator Feingold, who has conducted hearings on this topic in this Subcommittee before and has done an outstanding job on it. He has thought a great deal about this and I respect his opinion on that.

Senator Feingold?

## STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman. I thank you for holding this hearing. I obviously have some opening remarks I would like to make, but I would also like to ask that my full statement be placed in the record.

Chairman BROWNBACK. Without objection.

Senator FEINGOLD. Mr. Chairman, I know that our staffs have worked closely together on this hearing and I very much appreciate your commitment to exploring some of critically important issues related to capital punishment. I am not certain, but I think I may have been the last Chairman of the Subcommittee to hold hearings on the subject of the death penalty, and we have not had chairmen for some time, so I want to give you credit for the conversations we have had about this and for your following through on your idea of having this kind of a hearing to explore this issue. I think it is in the best traditions of the work we do on this Subcommittee.

We have witnesses on both sides of the issue and I thank them for being here and look forward to hearing their views. As you know, Mr. Chairman, I oppose capital punishment, but I do welcome today's discussions and I hope it will help advance the debate on the death penalty that is going on in this country.

In particular, I know it must be difficult for the witnesses on this first panel to share their highly personal experiences, and I, too, appreciate their willingness to provide their valuable and important perspectives on this complex issue. I would also ask, Mr. Chairman, that a written statement from Antoinette Bosco, an-

other mother who suffered a horrible loss when her son and his wife were murdered in 1993, be submitted to the record.

Chairman BROWNBACK. Without objection.

Senator FEINGOLD. Mr. Chairman, across the nation, people are reconsidering capital punishment. Recent polls, jury verdicts, and actions taken by all three branches of government and States across the country reflect the changing attitudes about the death penalty in this country. With advances in DNA technology, numerous exonerations of people on death row, and new revelations that innocent people may have actually been put to death, more and more people are questioning the accuracy and the fairness of the administration of the death penalty. In my view, this trend is a hopeful sign as I believe there continue to be numerous moral, ethical, and legal problems with the death penalty.

Evidence of these changing attitudes can be seen across America. The U.S. Conference of Catholic Bishops recently launched a campaign to end the use of the death penalty. In New York earlier this year, the State's highest court struck down the State's capital punishment statute, which had passed only 10 years earlier, in 1995. And then the legislature declined to reinstate the law, making New York the first State to abandon capital punishment since 1976.

Meanwhile, in Virginia, the death penalty was a key issue in the last gubernatorial election. Tim Kaine, then Lieutenant Governor, has long been personally opposed to the death penalty, although he pledged to enforce the law in Virginia. In the final weeks before the election, his opponent, Jerry Kilgore, began an ad campaign that heavily criticized Kaine's opposition to the death penalty, but Virginians did not take the bait. Despite Kilgore's attack ads, the citizens of Virginia elected Tim Kaine Governor.

I think what happened in Virginia demonstrates how far we have come. The issue can no longer be used as a political grenade. The majority of Americans may not yet oppose the death penalty, but the electorate now understands what a serious issue this is and it recognizes when capital punishment is being exploited for political purposes.

Much more is happening at the State level that has not received nearly as much attention. North Carolina and California recently created commissions to study the administration of the death penalty in their respective States, joining many other States that have already done so. A moratorium on execution remains in place in Illinois, and a court-ordered hold on executions in New Jersey was recently converted into a legislatively enacted moratorium. Others are under consideration in other States.

Many State legislatures have worked to address flaws in their systems or even rejected efforts to reinstate the death penalty. State courts have limited or banned the death penalty, including, I am told, Mr. Chairman, the Kansas Supreme Court, which in 2001 ruled that the State's death penalty law was unconstitutional. That case, *Kansas* v. *Marsh*, was heard in the U.S. Supreme Court in December.

Even in Texas, the State that executes by far the most people every year, a life without parole sentence was recently enacted, giving juries a strong alternative to the death penalty. And Texas

Governor Perry also established a Criminal Justice Advisory Council to review the State's capital punishment procedures.

Many Americans have heard about innocent people ending up on death row and recognize that we cannot tolerate errors when the State is imposing such a final penalty. It is horrific to think that we may have already executed individuals who were, in fact, innocent. It saddens me greatly that information has come to light strongly demonstrating that two men put to death in this country in the 1990s may well have been innocent. That sends chills certainly down my spine, as I am sure it must for all Americans.

Just law year in Missouri, local prosecutors in St. Louis reopened the case of a 1980 murder because the evidence against the man convicted of the crime had fallen apart. That man, Larry Griffin, was sentenced to death and he was executed by the State of Missouri more than 10 years ago. Yet now very serious questions about his guilt are being raised. CNN recently reported that a University of Michigan law professor who researched the case found that the first police officer on the scene now claims the person who testified as an eyewitness gave false testimony. The victim of the shooting, who was never contacted before Mr. Griffin's original trial, stated that the person claiming to be an eyewitness at the original trial was not present at the scene of the crime.

In Texas, a young man named Rubin Cantu was executed in 1993. He was just 17 at the time of the murder for which he was executed. Again in this case, the only eyewitness to the crime has recanted his statement and told the Houston Chronicle that Cantu was innocent. The Houston Chronicle also reported that the judge, prosecutor, head juror, and defense attorney have since realized that, as the newspaper put it, quote, "his conviction seems to have been built on omissions and lies."

Mr. Chairman, I am sure you would agree the potential loss of one innocent life through capital punishment should be enough to force all of us to stop and reconsider this penalty. This case illustrates the grave danger in imposing the death penalty.

In closing, I hope this hearing will help all of us to take a long, hard look at capital punishment. I want to sincerely thank you again, Mr. Chairman, for deciding to hold this hearing and I look forward to hearing from all of our witnesses. Thank you, Mr. Chairman.

Chairman BROWNBACK. Thank you, Senator Feingold. I appreciate that very much and the thoughtfulness you have put into this topic for many, many years.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Chairman BROWNBACK. Dr. Coburn is trapped in another meeting and he wanted me to pass along that he appreciates very much you being here, Mrs. Scott, as a constituent and also is grateful for your willingness to share your story in this circumstance. He would be here, but he is trapped in another session.

With that, I would like to turn the floor over to you, Mrs. Scott, to state your story. We have a time clock that is a bit of a guideline. If you need to go longer, that is fine, but we will run it at 7 minutes and then that will give us a chance to be able to ask some questions then afterwards, if we could. Mrs. Scott.

**STATEMENT OF MRS. ANN SCOTT, TULSA, OKLAHOMA**

Mrs. SCOTT. First of all, I want to thank you for inviting me here. Let me introduce my daughter to you. This is a picture of her that was taken many years ago. She was a fourth-year junior at the University of Oklahoma at the time of her murder. She was studying both elementary education and she minored in music. She played both the flute and the piccolo.

Our daughter, Elaine Marine Scott, age 21, a fourth-year junior studying elementary education at the University of Oklahoma, was brutally beaten, tortured, sexually assaulted, and beaten to death by Alfred Brian Mitchell at the Pilot Recreation Center in Oklahoma City on January 7, 1991. Mitchell had just been released on his 18th birthday from Lloyd Rader Juvenile Detention Center in Sand Springs, Oklahoma.

Elaine was born in Novato, California, a small California town about 30 miles north of San Francisco. She went to school in Novato until the sixth grade, when her father was transferred to Tulsa, Oklahoma, with Safeway Stores. With all the crime and violence that was up and coming in California, we thought that Oklahoma would be a quiet, drug-free State and a great place to raise kids. Well, not quite.

Elaine graduated from Jenks High School with good grades. She played both the flute and the piccolo in the high school marching band and orchestra and she was a good kid. She attended the University of Oklahoma, majoring in elementary education and minoring in music. She worked part-time at Pilot Recreation Center in Oklahoma City with children from poor families.

Unfortunately for Elaine, Alfred Brian Mitchell was not a good kid. Mitchell, who lived in the Pilot Recreation Center neighborhood, was released from Lloyd Rader Juvenile Detention Center on his 18th birthday. He had been locked up there for 3 years for raping a little 12-year-old girl that he dragged off from her bus stop early one morning. The Department of Human Services, DHS, could have kept him for another year, but chose not to because they couldn't help him. They needed his bed for someone that they thought that they could help, and so he came home.

Seventeen days after his release from Lloyd Rader, he beat, tortured, sexually assaulted, and beat our beautiful daughter to death using his fists and a golf club until it broke. He stabbed her in the neck five times with a compass that you would use to make circles with. And finally, he used a wooden coat tree that crushed her skull and sent shards of wood completely through her brain. She never had a chance.

The homicide detectives and the police forensic people did an outstanding job of keeping us informed of everything that was happening as they traced all the evidence and put things together. Mitchell was identified and caught within 24 hours. At first, it was thought that he was just a witness, but as time went on, he was booked for murder, robbery of her car, larceny, and finally for rape.

Our first encounter with Mitchell was at the first preliminary hearing, which was held that February. There he was, smiling and laughing with his family and friends as though he didn't have a care in the world. After three different days of testimony, the judge ruled that the case would go to trial. On leaving the courtroom,

Mitchell told all the news reporters that the prosecutor would have to prove his case. He then got on the elevator, still smiling at the reporters, and was taken away.

In June 1992, the trial finally started after preliminary hearings, many delays because of a lack of funds for expert defense witnesses, and several different dates for motion hearings. Again, and all through the trial, Mitchell smiled and laughed at the news reporters. Even when he was on the witness stand, he never admitted that he and he alone had murdered Elaine. It took the jury one-and-a-half hours to find him guilty of murder, and 2 hours to give him the death penalty.

In 1999, there was an evidentiary hearing at the Federal court, where it was determined that the forensic chemist from the Oklahoma City Police Department had lied on the witness stand. Even though Judge Thompson from the Federal court threw out the rape charges, he upheld the death penalty because the murder itself was so heinous, atrocious, and cruel.

In July of 2000, at the Tenth Circuit Court, the judges overturned the sentence because it was felt by them that the jury might have given Mitchell a lesser punishment if the rape charge had never been presented, and so back to court we went in October of 2002 to redo the sentencing phase of the trial. After 2 weeks of listening to evidence, the case was given to the jury. It took them 5 hours, but they came back with a unanimous verdict and once again gave Mitchell the death penalty. Mitchell, true to form, stood at the elevator waiting to be taken back to prison, turned and gave our oldest son an ear-to-ear grin. He then got on the elevator and was once again taken away.

On October 11, 2005, we finally started the appeals process again with the State Court of Criminal Appeals. We have not as of this date had a decision from them, nor do we know when we will. But we will be ready to continue on and see this through to the end when it comes.

The defense's big argument during the Court of Criminal Appeals hearing was that Judge Susan Caswell was a friend of our son's mother-in-law. David's mother-in-law is Judy Bush, who was the head of Homicide Survivors, a support group in Oklahoma City. Because of her position, she knew all of the judges in Oklahoma City at the district court and therefore she had made friends with Judge Susan Caswell. But this was the defense's big thing at the Court of Criminal Appeals.

Through all of this, Mitchell has never shown any remorse for his actions. If you ask if we seek retribution, yes, we do. Alfred Brian Mitchell was found guilty by two different juries of his peers. He was given the death penalty because of his crime and because it was felt that he would commit more crimes if he were ever, under any circumstances, released. I, me, I want this bully gone. I want him to disappear off the face of this earth. I want him to rot in hell for all of eternity. He is a bad seed that never should have been born. He is an animal, and when you have animals that attack people, you take them to the pound and you have them put away. What this animal has taken from us can never be returned. It has taken a lot of the love and the laughter from our home.

I have had my husband break down and sob in my arms, and I have watched his health, both mental and physical, deteriorate over the years. I have seen Elaine's two brothers struggle with life. David, the oldest, has gone through panic attacks and at times thought that he should be dead because he has outlived his sister and that is not the way it should be. I have watched Elaine's little brother clam up. To this day, Robert still cannot talk about his most favorite person in the whole wide world. His big sister is gone, taken violently from him, and he still can't deal with it. The rest of us, my husband and I, have closed ranks with our children. Even though they have grown and David is married now, we still have become more protective and we are frightened every time that they are out of sight or we don't hear from them.

Will we ever get over the murder of our daughter? Will there ever be any closure for us? I don't think so. Even after Mitchell has been executed, we will still be left with all of our wonderful memories of Elaine and all of the horror that was done to her. But perhaps once he is gone, we will be able to spend more time on the happy memories and less on thinking how her life ended. We will be at Alfred Brian Mitchell's execution. We will not rejoice, because it won't bring Elaine back. But we don't expect that it will. However, the process will finally be over and we will no longer have to spend any time or effort on pursuing justice for our daughter. Perhaps we will finally hear the remorse that so far has not been expressed. But for certain, what it will do is to ensure that he will never be able to hurt anyone ever again, and I hope and pray that you will never have to walk in our shoes.

Thank you.

Chairman BROWNBACK. Thank you, Mrs. Scott, for being here and sharing that testimony with us.

[The prepared statement of Mrs. Scott appears as a submission for the record.]

Chairman BROWNBACK. Ms. Schieber.

**STATEMENT OF VICKI A. SCHIEBER, CHEVY CHASE, MARYLAND**

Ms. SCHIEBER. Chairman Brownback, Senator Feingold, I am very privileged and honored to be here today before you.

I am the mother of a murder victim, Shannon Schieber, who was murdered in the city of Philadelphia in 1998. I am here today speaking also for my husband and my son, Shawn. I am on the board of two organizations that actively work to oppose the death penalty in our country. I am a resident of the State of Maryland and I serve there on the board of the Maryland Citizens Against State Executions, and I am also an officer and on the board of a national nonprofit group called Murder Victims' Families for Human Rights. I am testifying today on behalf of the representatives of families in every State, every State, who have lost a loved one but who have actively been involved in opposing the death penalty.

We believe and have come to believe through our own personal tragedies and experiences that the death penalty does not heal nor will we find closure of that horrible "c" word that we all hate. Killing my daughter's assailant, however, would not honor our daugh-

ter, and, of course, like Ann, certainly I agree would not bring her back. The death penalty does not help to create the kind of society that we want to live in, a society where life is valued and respected. We believe that executions just create another grieving family. It doesn't lessen our own pain. And we are very, very concerned about the conflicted message that we believe the death penalty in our country sends to our children about society's respect for human life. I have a little saying on my refrigerator that many comment on. Why is it that we kill people for killing people when we are taught that killing is wrong?

My husband and I were both born and raised in the Midwest and raised in homes with a deep religious faith. Hatred and revenge were never condoned and we were taught that the ultimate form of hate was the deliberate taking of another person's life. We were taught, as well as we taught our children, that we are our brother's keeper and that human life is sacred and we are here in this life to do something to make a difference.

So in living these principles, we couldn't apply the death penalty to our own daughter's murderer. If they aren't your principles when it is tough, they never were your principles in the first place. We would have had to be complicit in the application of that death penalty once the assailant of the murder of our daughter was apprehended.

So not only have we gone through this terrible, terrible tragedy, but after the person was apprehended, we faced an incredible system in the city of Philadelphia where the district attorney and the prosecutors could not believe that now that this person was apprehended, that we would want to have life without parole, that we did not believe in the death penalty, even though we were very outspoken about it for many years while they sought to find this person. They even at one point said to us, "Didn't you love your daughter? Why wouldn't you want this?" Oh, yes, we loved our daughter. I have to spend just a few minutes telling this incredible gift that we were given.

Our daughter was born and raised in the State of Maryland. She was brilliant and she was beautiful. She was beautiful not only on the outside—there is someone sitting behind you that looks just like her—but she was beautiful on the inside. She was taught to give and share. She had many friends. She was a very kind and caring woman. She had friends of all faiths and of all races and she was involved in so many public and active support groups. The charities that my husband and I were actively involved in, our children served in, too.

She was a straight-A student, went to high school, president of the student body, National Merit Scholar, Presidential Award Scholar, could have picked any school that she wanted to go to college, absolutely brilliant. She went to Duke University and in 3 years earned a triple major in math, economics, and philosophy with a 3.7 grade point average, almost an unheard of thing. She could have chosen any graduate school to go to. She wanted so much to do so much for society. So she had to go to the No. 1 school, very competitive, so she chose the Wharton School of Business, the University of Pennsylvania. At her age of 23, she was ac-

cepted on a full scholarship and stipend to get a Ph.D. in finance and insurance there. She was absolutely a gift.

Well, we didn't know when we moved her to Philadelphia. We talked to the University of Pennsylvania housing department. They said, oh, there is this very safe area. Where would be the best place to have her live? It was just south of Rittenhouse Square in Center City. It was the brownstone where there were about six other graduate students living in the same building. What we didn't know when we moved her into what we thought was a safe neighborhood, after checking everything out, was that there had been a serial rapist operating in that very area, within five or six blocks. All the victims, and there were four rapes and assaults by this same individual in that area within a few months before we moved her there.

So when she was walking home one night, she just thought the guy that was following her was just trying to pick her up. She did not know that these crimes were all there. The police had DNA evidence. they didn't report it to the community because of a terrible practice that not only happened in Philadelphia, but we have learned has happened and is happening in other cities, and that is crimes are downgraded. You can make your city look a lot safer if you don't report all crimes, and sexual assaults are often hard to get away with. You can just tell her, well, you probably had too much to drink or maybe it was your boyfriend. So there were several crimes before our daughter's that didn't get reported, so there was no pattern and nothing given to the community to warn her.

At two o'clock in the morning of May 7, the guy climbed to a second-floor balcony and broke in and murdered her. She screamed for help. A graduate student across the hall called the police. "I heard my neighbor screaming. I heard a choking sound." The police got there very quickly, stayed for five minutes. After knocking on the door, looking around, they said, "Nobody is in there. I don't hear anything," and they left. The 911 call tape we had, it had no equivocation in that person's voice. The police left.

The next day, my son, who was planning to have lunch with her on his way back to his college in Massachusetts, went to the door. The guy across the hall said, "Oh, I heard them. I called 911. I heard them." They pushed her aside and took the door and there he found her, raped, and beaten brutally. What were we going to do now?

We had chosen to honor our daughter in very positive ways. There is a scholarship in her name at Duke. There is a roofing endowment fund, inner-city families trying to rebuild. But we are honoring her to try to abolish the death penalty and help create a society where life is valued, to work to reduce violence rather than perpetuate it and to help improve our seriously, seriously flawed system, one that is racist, arbitrary, and seriously open to abuse.

We believe the current system does not serve victims' families. It focuses attention and vast expenditures on the offenders, but there is no support for our victims. The peace of the families I represent today has given us incredible energy. We are not spending endless efforts in courts pursuing appeals and legal actions. We have pursued life without parole in the cases where we may do that, and at the hearing, the sentencing hearing, the person who

murdered our daughter turned around and said he didn't like the way he was and he asked to be forgiven. Ann did not have that same experience. It is a very, very healing process and I work very hard to talk to the person's family to work with them to help us all heal, because it is a society that is badly in need of it.

And may I take one last example of something that happened just this summer. I have been very honored and privileged to get to travel in many parts of the world. In my husband's job, you get a lot of frequent flyer miles. Our last visit was in the European Union last summer and they were giving a lot of the tour guides descriptions of everything they do there in Europe and comparing them to our country, because most of the people on the tour were Americans. And they said, well, what sort of things do you have to agree to to be here?

"Well," they said, "one of the things that we all have to agree to to be in the EU—you don't have to agree to everything, but you have to not have the death penalty as a punishment for a criminal for a murder or for a serious crime. We do not allow that in this country. And," she says, "but you are Americans. We are the countries that founded you. We are the countries that settled your country. What you are doing is medieval." I was so embarrassed. I was so embarrassed. And that is not the only part of the world that I have been in where people just don't understand what we do in our country. They even know a lot about it. They say it is so seriously flawed. I mean, it depends on what State you commit the crime, whether you are black or white. It depends on a whole horrible system that we hope your work here will somehow have to do to change it.

Finally, I want to give a quote that President Bush gave last night. It caught my eye. "Our country's greatness is not measured in power or luxuries, but by who we are and how we treat one another." I want to be proud of my country, one that has a fair and not a flawed system of justice, and I am going to work the rest of my life to try to abolish that system. I have many opportunities. I speak to many colleges and universities across the country, many groups and informal groups, I have had that honor. It is—I think, 1 day, maybe somebody in that group will be a future Supreme Court Justice, a Senator, or someone that can make a difference in this system, and I do this all in honor of Shannon Schieber.

Thank you very much.

Chairman BROWNBACK. Thank you.

[The prepared statement of Ms. Schieber appears as a submission for the record.]

Chairman BROWNBACK. It is tough to question you ladies. Hopefully, my colleague will have better, more lucid questions. It is just you have such powerful stories and circumstances to talk about.

Mrs. Scott, you talk—and this hearing is about the death penalty and I really do want to hear from people who have been victimized by others. As I take it, really, at the core for you is the issue of closure, of finally getting this resolved and closure with justice. Is that—I mean, when you search your own heart about this and that this is a right and fair thing, that is at the core, would that be correct?

Mrs. SCOTT. Yes and no. I think that my husband and I would possibly consider a life without parole sentence if it truly meant life without parole. In the State of Oklahoma, you can become eligible to have your sentence downgraded from life without parole to a life sentence after serving 15 years.

Chairman BROWNBACK. So you don't trust the system to actually—

Mrs. SCOTT. I don't.

Chairman Brownback [continuing]. Mean life without parole?

Mrs. SCOTT. Absolutely not. Now, because—and when you are given a life without parole sentence in Oklahoma, you are no longer in a maximum, or you do not have to be in a maximum security facility. You can be downgraded to a medium facility, and there are an awful lot of people who escape. There are an awful lot of people who murder one another in medium security. I don't consider it a safe option.

The death penalty, in our case, is a right and proper sentence for the very simple reason that Mitchell had already dragged off a little 12-year-old girl and raped her. When he was through with her, and it was testified to, he told her, "If you tell anyone, I will kill you." Her family was so frightened when he was released from juvenile that they packed up and they moved. Her father was Hispanic, quit a very good welding job that he had in Oklahoma City, moved the family to El Paso, and both he and his wife and I believe one of their sons had to go to work to support the family. But they were frightened enough for Maria that they did that.

Chairman BROWNBACK. So yours is more you don't trust the system and you don't believe the system can keep people safe from a known murderer in it.

Mrs. SCOTT. That is correct, but I truly feel that the death penalty is the right sentence for people like Alfred Brian Mitchell. There is absolutely no remorse on his part. Would he do it again? Absolutely. He had already raped one little girl and had been released after serving his time. When he got around to our daughter, he sexually assaulted her. She lay on the floor, beaten within an inch of her life, and he masturbated on her. He did not want to get caught for rape, and so he masturbated on her and then he beat her to death because he didn't want her to tell. This was how he was going to escape the system.

So what would he do if he was given another bite at the apple? I don't know. I don't want to know. We have no daughters left to give. Who is going to give up their daughter if he is ever released?

Chairman BROWNBACK. Ms. Schieber, answer—and I am not at all pitting you two ladies against each other.

Mrs. SCOTT. Oh, that is OK. We are used to it.

Chairman BROWNBACK. Well, that is not my objective at all, but I honestly—

Mrs. SCOTT. Thank you.

Chairman BROWNBACK. —really want to know from your opinions. Answer her questions about the system not being trustworthy on this or the person getting out and committing this crime and we can't protect society from somebody who has no remorse, no regret, and would appear to be willing to kill again.

Ms. SCHIEBER. Thank you, Senator. I am very concerned about some things about the system, too, but I am a person of—I believe that they have done a very good job in my daughter's assailant's case. When we were discussing all this through the sentencing hearings and everything else, as a part of this system, we wanted the life without patrol in a Federal security system and we wanted him there the rest of his life.

Everyone that was working on this case knew quite clearly that this person, if he ever got out or was let out because of some timed parole system, would go back and do exactly the same thing. He was a sexual predator. There were 14 victims that were known and linked by DNA. Our daughter was the only one murdered, and we believe that was because the police were at the door and he had to strangle her. But he did not go in there intending to do that, to put her to death.

The point about it, though, is he had to be kept in prison for the rest of his life and we were assured that it would be a maximum security prison and that there would be no time limits, that he would not come up for parole, and that was what gave us the peace that that was the right decision. I can understand, listening to some of Ann's concerns, if this was in a State that didn't give those kinds of insurances to the family, that would be very, very hard for me. And, you know, you can understand. That would not change my view personally about the death penalty, but I do believe that the system has to be trusted, and where we see problems and flaws, we need to work to change that.

Chairman BROWNBACK. I have gone over my time. Please feel free to take an equal amount, Senator Feingold.

Senator FEINGOLD. Mr. Chairman, I don't have any questions for the panel but I want to thank both of you again for your moving testimony. I appreciate your coming here to share such highly personal stories. It really makes a person think again and again about this issue. I just think this is an example of where victims' voices are not always heard in this kind of debate and this is the right way to start this hearing, Mr. Chairman. Thank you very much.

Chairman BROWNBACK. Is there anything either of you would like to add additionally on your views on the death penalty or the system?

Mrs. SCOTT. To the best of my knowledge, there has never been anyone who has been executed who was found innocent. There was a case not too long ago, and I can't remember where it was, where they went back and they retested the DNA because everyone was sure that this person was innocent. It came to be that he was not. It was a definite DNA match. Since we have DNA, yes, there have been a number of cases that have been reversed because it was not a DNA match, and for those people, it was a good thing that we had the DNA and I am glad that that was found out.

But yes, as technology has developed and we do have these tools, I cannot see—and with all the safeguards that we have, when we go after appeal and appeal and appeal before the death penalty ever is carried out, I can't see that there are really going to be any mistakes. There has not to this time been anyone who has been executed that has been proven innocent.

Chairman BROWNBACK. Ms. Schieber, anything else?

Ms. SCHIEBER. I support the idea that if we just completely eliminated the system in our country, go back to where we were in our earlier days and listen to many other people and parts of the world, then we are going to start operating with a life without parole if it is appropriate for the sentence that the person is given. If it is appropriate, that would be what would be applied, the life without parole. The death penalty wouldn't exist. You wouldn't have all these costly, long trials, appeals, years and years on death row that are very, very debilitating to the families and to the people in our society.

I think we can do much better use of our money and resources in this country and I hope that the beginning of this whole process of review will happen here with this Committee and I applaud your efforts for these hearings and I hope we go forward in this country with the groundwork you have laid here. Thank you.

Chairman BROWNBACK. Thank you both very much. You will be in my prayers tonight for healing.

Ms. SCHIEBER. That is very important to me.

Chairman BROWNBACK. The next panel is Dr. John McAdams, Professor of Political Science, Marquette University in Milwaukee; Mr. Stephen Bright, President and Counsel, Southern Center for Human Rights; Dr. Paul Rubin, Professor of Economics at Emory University; and Dr. Jeffrey Fagan, Professor of Law and Public Health at Columbia University.

Mr. McAdams, we will start with you. We are going to run the time clock at seven minutes. I would like to hold you to that so we could get to some questions. The swearing in ceremony for the new Justice of the Supreme Court is at four o'clock today and I would like to make it down for that, so I am going to run a bit tighter on timeframe. I don't know if my colleague is as excited as I am about the new Justice on the Supreme Court.

[Laughter.]

Chairman BROWNBACK. He may not be as interested in finishing quite so on time, but it is an historic time and an historic day, so we would like to—and each of your full statements will be included in the record as if presented, so if you would like to summarize, that is perfectly acceptable, as well. The full statement will be included in the record.

Mr. McAdams.

## STATEMENT OF JOHN MCADAMS, PROFESSOR OF POLITICAL SCIENCE, MARQUETTE UNIVERSITY, MILWAUKEE, WISCONSIN

Mr. MCADAMS. There are an easy dozen issues surrounding this and I am going to limit myself to only one. I am used to talking 50 minutes at a time and now I have seven. I am going to address the whole issue of "innocents" on death row and innocents who claim to have been executed.

The key thing to remember about the anti-death penalty activists is that they vastly inflate the number of innocents who have ever been on death row and they make claims of innocents being executed that simply don't survive scrutiny. The sort of canonical list of innocents supposedly put on death row is from the Death Penalty Information Center. When I checked the website Sunday, it

listed 122 people, which sounds appallingly large, but if you analyze it even superficially, you find that it is terribly inflated.

For example, back in 2001, I analyzed the list when it had 95 people on it and by the admission of the Death Penalty Information Center, 35 inmates got off on procedural grounds and another 14 got off because a higher court believed the evidence against them was insufficient. Of course, if the higher court was right, there is an excellent reason to release them, but it is not proof of innocence.

The State of Florida in 2002 noted that there were 24 people on the list from Florida who were supposedly innocents on death row and they appointed the Florida Commission on Capital Crimes that concluded that only four of those 24 cases—in only four of those 24 cases was the factual guilt of the inmate in doubt.

Other examinations have been no more favorable. For example, a liberal Federal district court in a case called Quinones in New York ruled the death penalty unconstitutional, but if you look at that particular case, the court admitted that the Death Penalty Information Center list "may be over-inclusive," and following its own analysis asserted that for 32 people on the list, there was evidence of factual innocence, as opposed to procedural innocence, and Ward A. Campbell, supervising Deputy Attorney General of the State of California, reviewed the list when it had 102 people on it and he concluded that, I am quoting, "it is arguable that at least 68 of the 102 defendants on the list should not be on the list at all. Only 34 released defendants have claims of actual innocence, less than one-half of 1 percent of the 6,930 defendants sentenced to death between 1973 and 2000."

Indeed, staffers of this Committee—it was the minority staff at the time—produced a report on, at that time, I think it was 2002, S. 486, where they did a thorough job of debunking a lot of these claims of actual innocence.

So believing the claims of the anti-death penalty activists about the number of innocents on death row is roughly equivalent to believing the National Rifle Association about how many Americans have saved themselves from serious bodily harm because they own and carry guns, or the claims of NARAL about how many back-alley abortions would result from overturning *Roe* v. *Wade*. Activists tend to inflate the evidence and make it serve their purposes.

Another question is, have any innocents been executed? Have any innocents at all been executed? And indeed, anti-death penalty proponents make that claim. Back in the 1980s, a volume by Hugo Adam Bedau and Michael Radelet claimed 23 innocent people executed in the U.S. in the 20th century. They only named one person since the 1970's that they claimed was innocent and had been executed, and their claims—the fellow was named James Adams—their claims about that person were debunked in a Stanford Law Review article that took Bedau and Radelet to task for, quote, "disregard for evidence" and putting a spin on the evidence to support their thesis of Adams' innocence.

Interestingly, if you look at the more sensible death penalty opponents, they won't make strong claims. Let us consider a guy named Barry Scheck, who is co-founder of the Innocence Project. He was in 1998 interviewed by Matt Lauer on the "Today Show" and Lauer asked him a very leading question. Quote, "Since 1976,

486 people have been executed in this country. Any doubt in your mind that we put innocent people to death?" Scheck responded, "Well, you know, I—I think that we must have put to death innocent people, but if you are saying to me to prove it right now, I can't."

Now, there are still claims of innocent people being put to death. We heard from Senator Feingold. I would urge everyone to look at the Death Penalty Information Center website, where there is still—if it hasn't been sanitized as of yet—there is still an essay making claims of innocence from Roger Keith Coleman. And if you just read the essay on the Death Penalty Information Center website, you will come away absolutely convinced that Coleman must be innocent. But Coleman was the guy, you remember, very recently who actually had DNA testing and it proved him guilty. So I would urge everyone to please read that blurb on the Death Penalty Information website, then look at what the DNA evidence found, and I think you will get an idea that if you just believe what death penalty opponents say, you may be misled.

On a personal note, I actually teach a course on the Kennedy assassination and a lot of these claims of innocence remind me of what some conspiracy theorists say to try to get their boy Lee Harvey Oswald off the hook.

Now, death penalty opponents will say that if any who is innocent has been put on death row, that is unacceptable, or certainly if anyone has been executed who is innocent, that is unacceptable. They don't seem to pay a lot of attention to the fact that, quite clearly, a very large number of innocents have been imprisoned. I refer people to the work of the Innocents Project that has found—it has let off at the moment 174 people exonerated on the basis of hard DNA evidence and they admit that they have a huge backlog of other people.

Then there is the question of what the reasonable standard is. Is it reasonable to believe that a sanction of this kind or any public policy can be perfect? We can never fight even a just war without having some innocent casualties. The FDA can never approve a drug without some people dying of a rare and arcane reaction. Standards of perfection simply can't apply to any public policy, and it is unreasonable for death penalty opponents to try to impose it on the death penalty when they wouldn't think of doing so on any other punishment.

Chairman BROWNBACK. Thank you very much. Thanks for the information. We will want to probe some of that in questioning.

[The prepared statement of Mr. McAdams appears as a submission for the record.]

Chairman BROWNBACK. Mr. Bright.

**STATEMENT OF STEPHEN B. BRIGHT, PRESIDENT AND COUNSEL, SOUTHERN CENTER FOR HUMAN RIGHTS, ATLANTA, GEORGIA**

Mr. BRIGHT. Thank you very much, Mr. Chairman. Mr. Chairman, Senator Feingold, I am honored to be here today. I appreciate the opportunity to talk about this. It is a great moral issue in our country today.

In November, the Birmingham, Alabama News issued an editorial opposing the death penalty. It said one reason was because it was committed to a culture of life and that the death penalty in Alabama and throughout our country was not consistent with that culture of life. It quoted Pope John Paul II when he said the dignity of human life must never be taken away, even in the case of someone who has done great evil.

But it went on to say the system is broken, and I would submit, based on my experience in 30 years of handling these cases and looking at it as a teacher, not only is this system broken, it has always been broken. I don't think anybody doubts that before 1972, the way in which the death penalty was used in this country is not something to be proud of, that there was race discrimination, that it was almost exclusively against poor people, that there were perfunctory trials that weren't really trials, and a number of other things, and that it was arbitrary. As Justice Potter Stewart said, being sentenced to death was like being struck by lightning. There was no reason why one person would be sentenced to death and another person would not be. And that is why the court found the death penalty unconstitutional in 1972.

Now, 30 years ago, the court approved a group of statutes from various States that were supposed to fix all those problems and were supposed to end the arbitrariness, supposed to end the discrimination, and so forth, but they failed miserably. One reason may be that it can't be done. the year before Furman, in 1971, the Supreme Court said to try to identify the characteristics of offenders and crimes that call for the death penalty is beyond human capability. Just a year later, basically, we set on a course of trying to do just that, whether it can be done or not.

But nothing in those statutes adopted in 1976, or approved in 1976, do anything about the inadequate representation of poor people. Virtually everyone who gets the death penalty is poor, and anyone who is poor facing a crime is given a court-appointed lawyer. One city in this country sends more people to death than any other, Houston. Three cases where the lawyer slept during the trial. That is a pretty extraordinary example. I am not saying that every lawyer does or that every lawyer is drunk, like the lawyer that represented one of my clients who had to literally be picked up off the floor and was put in jail for the night to sober up and came back the next day and continued the trial. Those are not everyday cases, but the kind of mediocrity, the lack of lawyers that have the resources, the skills, the capability.

We represented a fellow who had been sentenced to death at a trial where he was represented by a collections lawyer and a mortgage lawyer. He gets the death penalty. When he is capably represented, he is acquitted in a very short period of time, Gary Drinkard, and he is a carpenter right now doing good work and is a good citizen of Alabama today.

There is nothing in those statutes that ensure the accuracy of eyewitness identification, nothing that says that every person's memory is reliable, every person who testifies, nothing that says that informants who are often witnesses in these cases testify truthfully.

Mr. Chairman and Senator, last week, a judge California who presided over a death penalty case where a man was sentenced to death wrote a letter to the Governor asking that the sentence be commuted because he is convinced that the informant who testified against that person was not telling the truth when he testified at the trial. And that is the presiding judge of the case, a judge appointed by Governor Reagan to the bench.

There is another part of it, though. The innocence question, I don't have enough time, unfortunately, to talk much about it, but I would make two points. One, whether it is 34 or 134, that is too many. When people are found innocent, like Anthony Porter was, a man who would have been executed, went all the way through trial, appeal, and all the post-conviction review—the only reason Anthony Porter wasn't executed, Senators, is because he was brain damaged and mentally retarded and there was a question about was he competent, did he understand what was going on. Two days before the execution, he gets a stay.

The journalism class at Northwestern proves that he is innocent and gets a statement, a confession from the person who actually did it. He was the third person released, not somebody that just people claim he is innocent, walked out of the prison as innocent, freed by the journalism class at Northwestern. Now, something is not right when the journalism students are getting people out and the legal system is convicting the wrong people.

I think there are a lot of people that we will never know whether they are innocent or not. The DNA cases prove things conclusively. You can look at that DNA profile. You can look at whatever it is, the semen, the blood, whatever, and you can say, that is a match. That is the person. This Roger Coleman case, people have been trying to get that examined for years and it had been fought tooth and nail by the Attorney General's office. If we had done it way back when, we would have known all along.

But take Gary Graham in Texas, sentenced to death, represented by Ron Mock, the famous lawyer, 14 people on death row, operated out of a bar, is one of the worst lawyers in all of Texas, but over and over again, he defended these people, an identification case. Later evidence comes out that there are people who say they were with Graham, other reasons to question it. You will never know. A jury might acquit based on that evidence. They might convict based on that evidence.

The same thing is true of the Cantu case. The same thing is true in some of the other cases that we have heard about. We just don't know whether the people were guilty or not. Our legal system not only is not infallible, it can't sometimes in these cases make the right determination.

But the other point I want to make before I lose all my time is just that there is a second question at the penalty phase. Is this person so beyond redemption that they should be eliminated from the human community? That is not a very good question to pose to 12 people, particularly in the heat of a horrible crime. And how do you make that decision? Is that a theological, is it a moral, is it a legal decision that is being made?

We know that there are many people who are guilty, I will grant you, but who are not people who are appropriate for the death pen-

alty. I have represented many of those people. Many of those people in habeas corpus, as a result of the review through habeas corpus, ultimately, their death sentence was set aside. One works in my office right now. Another comes to my class and talks to my students.

You know, people are very cynical about religious conversion in prison. Billy Moore ran a Bible study group for years on death row in Georgia. He has been out since 1991. He is still running Bible study groups. He is still active in his church. He is supporting a wife and two children, two girls who are both in college. This man was guilty of murder, no question, but he was not somebody who had committed the most heinous murder. It was what usually puts people on death row. Who was the prosecutor in the case? Where was the case prosecuted, because these cases are decided by plea bargains. Is it sought and is it plea bargain? And then the quality of legal representation that was appointed to defend him.

I just last say this. We see in these cases that the death penalty is not essential. It was said over here a moment ago, well, in war, you have some innocent casualties. When the FDA tests drugs, there are going to be a few people who are victims of that testing. But we don't need the death penalty. We have life imprisonment without parole. It can be fixed. Most States, you do not have any chance of parole. Life without parole means life imprisonment without any possibility of parole, just what it says.

Chairman BROWNBACK. Please wrap it up, Mr. Bright.

Mr. BRIGHT. And that is all I am saying, is that we don't have to have the death penalty, and therefore justifying losing innocent people, whether it is 34 or 134, is awfully hard to support.

Thank you very much, Mr. Chairman.

Chairman BROWNBACK. In my early career, I was a court-appointed lawyer at different times and if I had a guy that was innocent that I was appointed to represent, it was, I thought, easy to get him off. I mean, the system worked, I thought, very well. And so when everybody is insulting these court-appointed lawyers, I am a bit personally offended here in the system.

[Laughter.]

Chairman BROWNBACK. But I understand there are other cases involved in this and you make a persuasive point.

[The prepared statement of Mr. Bright appears as a submission for the record.]

Chairman BROWNBACK. Mr. Rubin.

## STATEMENT OF PAUL H. RUBIN, SAMUEL CANDLER DOBBS PROFESSOR OF ECONOMICS AND LAW, EMORY UNIVERSITY, ATLANTA, GEORGIA

Mr. RUBIN. Thank you. Thank you for having me here today. I am an economist and professor of economics and law at Emory University and I am not going to be talking about individuals or people as an economist. I am talking about numbers. I was a co-author of one of the first papers—the first paper, published paper looking at the effects of capital punishment using post-moratorium data. I am going to talk about that paper and several other papers in the literature.

Modern research on the economics of crime began with the work of the Nobel Prize winning economist Gary Becker. One of Becker's arguments was that criminals should respond to incentives, where the major incentive in the criminal justice system is the probability and severity of punishment. Virtually all economists who study crime are now convinced that in the general case, this is true. An increased chance of punishment or a more severe sentence leads to reduced levels of crime. These reductions are not only due to incapacitation, but there is also a deterrent effect from increased severity and increased probability of punishment. When economists applied this argument to capital punishment, there was a political backlash, even though the theoretical grounds for believing it are the same as for any other class of punishments.

The debate in economics began with two papers by Isaac Ehrlich in the 1970s. Ehrlich, a student of Becker's, was the first to study capital punishment's deterrent effect using multi-variant regression analysis. This enabled Ehrlich to separate the effects on murder of many different factors, such as racial and age composition, the population, income, unemployment, and several other things. Ehrlich wrote two papers on capital punishment using different statistical techniques and data. Both of these found significant deterrent effects, about eight homicides deterred per execution, but the data available and the statistical methods meant that many people raised serious questions about his work and there were lots of papers using similar data and different methods and getting different results. Most of these studies suffer from flaws relative to what you can do now because of the data and the statistical methods available.

More recently, there have been 12 econometric or economic studies on capital punishment that have been conducted and published or accepted in refereed journals. Most of these studies used improved data and improved statistical techniques, various forms of multiple regression analysis, panel data analysis, and they look at things including demographics, economic factors, police effort, and so forth. They measured a marginal effect of execution. That is the effect of execution as it actually occurs given the alternatives that actually are available in the State and given that the person has already been convicted and usually sentenced. Virtually all 12 of these studies find a deterrent effect.

As I said, I was co-author of one of the studies which used 20 years of data from all U.S. counties to measure the effect of deterrent effect. Another study uses monthly data from all of the U.S. States to measure the short-term effect of capital punishment. Interestingly enough, this paper by my colleague, Joanna Shepherd, looks at different categories of murder to determine what kinds of murders are deterred by execution and she finds that all types of murders, including crimes of passion, are deterred, and she also finds that murders of both African-Americans and whites are deterred. So people raise racial questions about the implementation of capital punishment. We don't address that, but her work does show that lives of African-Americans are saved by capital punishment.

Another study looks at the Supreme Court moratorium in the 1970s and finds that relaxing this moratorium led to fewer murders.

Other papers use different methods and data, but they all—virtually all—but all of them find a deterrent effect. Usually the numbers in the reported literature are between three and 18 homicides deterred per execution, again, depending on which kind of study you are looking at.

There is one paper that has recently been published in the Stanford Law Review that is critical of some of these studies. The authors find that it is possible to use various statistical manipulations to apparently eliminate some of the deterrent effect that some of the studies have found. Interestingly enough, this paper has not been subject to the scientific refereeing process. It was published in a law review, where the refereeing is done by students. It is in the process of being reexamined and it is hard to know what it will find, but even then, this paper only considers some of the empirical papers and some of the methods used. There are still many other papers that it does not consider that also find deterrent effect.

So I think at this time, we have to say that the weight of the evidence is pretty clearly that there is deterrence. This is what economic theory would predict. It predicts that people respond to incentives. There is no stronger incentive than avoiding being executed. And the weight of the statistical evidence, as it exists now, is consistent with the deterrent effect.

I thank you.

Chairman BROWNBACK. Thank you very much, Dr. Rubin. I look forward to exploring that some more with you, too, in questions.

[The prepared statement of Mr. Rubin appears as a submission for the record.]

Chairman BROWNBACK. Mr. Fagan.

**STATEMENT OF JEFFREY FAGAN, PROFESSOR OF LAW AND PUBLIC HEALTH, COLUMBIA UNIVERSITY, NEW YORK, NEW YORK**

Mr. FAGAN. Thank you, Chairman Brownback, Senator Feingold, for having me here. Professor Rubin has laid the case for deterrence, which has been argued to be now a rationale for the expansion of the use of capital punishment by some advocates. But also, as he noted, a number of other social scientists and scholars challenge the scientific credibility of the new findings and they warn about the moral hazards and practical risks of expanding the use of capital punishment. So I think this lays out some public policy choices that are fairly clear on capital punishment and that they, in part, depend on the accuracy, the reliability, and the certainty of this new social science evidence.

So I want to testify today about some significant errors and flaws that I have found in the work that Professor Rubin has referred to, a paper by John Donahue in the Stanford Law Review, some errors that he has found, and discuss just exactly what the nature of the weakness in the evidence is, and then talk about how that weakness in the evidence can become part of an algebra of public policy to think about how to go forward or not go forward with capital punishment in the future.

We find, in general, not just Professor Donahue's paper but my own work, as well, that the new deterrent studies are fraught with a number of technical and conceptual errors. The data don't speak clearly at all as to whether or not there is an effect, the size of the effect, if there is one, and even the direction of the effect, if there is one.

We find the results are extremely fragile and unstable. When they are subjected to other kinds of analysis, different measurements, different analytic strategies, or whether additional factors are introduced into the models themselves, the results bounce around. Sometimes they are significant, sometimes they are not. The effect sizes go up, the effect sizes go down.

Second, the new studies omit several important factors that are common sense improvement issues or forces that drive down murder rates or drive up murder rates. The most important one is the growing use of life without parole sentences for capital murders. LWOP has the same incapacitative effect as does execution and it has deterrent effects, as well.

The 1978 panel of the National Academy of Sciences found that it was virtually impossible to disentangle deterrence and incapacitation from the social science evidence about deterrent effects. At least 100 executions since Gregg in 1976 were voluntary. These are death row inmates who elected not to fight their execution, and at least some of these persons stated on the record that death was preferable to life in prison. When multiple murderers like Michael Ross in Connecticut said that they prefer execution to life imprisonment, one must seriously ask whether life without parole is not an equally strong, if not stronger, deterrent.

To omit this factor is a very serious bias in the scientific estimates of the deterrent effects of execution. LWOP is a far more frequent sentence today in murder convictions than the death penalty. In States like California, Pennsylvania, and North Carolina, LWOP sentences vastly exceed the number of death sentences that are given. And as we have noted before, Texas now has introduced the possibility of life without parole. In Texas, where much of the effect is concentrated, we suspect that over the next several years, as more LWOP sentences occur there, the Texas effects will begin to be moderated, if not neutralized.

Beyond LWOP, many of the studies have failed to consider incarceration generally. There is one paper by economists Lawrence Katz and Steve Levitt who conclude that there is no deterrent effect from executions, but a very large deterrent effect, a suppression effect on murder, from natural deaths that take place in prisons. They conclude that prison itself, prison conditions, specifically undermine the case for deterrence. In a few studies that actually do compete deterrence with incapacitation, they find that the incapacitation effects are much higher by imprisonment.

Many of the studies just simply don't take into account other factors that we know drive homicides up and down over time. Probably the most significant is drug epidemics. Most of the homicide declines and rises in the U.S. have followed almost lockstep with the rise and fall of drug epidemics over time, and yet drugs are just simply not a part of the equations that are used to estimate deterrent effects.

In our analysis right now at Columbia we are undertaking, we are looking specifically at something that has not been done in the capital punishment literature, which is look at those crimes which are subject to the death penalty, capital murders and things that fall under the felony murder rules. And our preliminary estimates, which we will subject to peer review as good science should be, suggest that the lines are actually flat. There is no deterrent effect whatsoever on capital murders, the kinds of murders that usually evoke a death sentence—robberies, homicides, homicides in the course of sexual assault, killings of police officers, and so on.

When you take the weakness and fragility of the evidence on deterrence and balance it against two other realities of capital punishment, I think it changes the algebra when you start to think about public policy choices involving capital punishment. First, the costs of capital punishment are extremely high. Even in States where prosecutors rarely seek the death penalty, the cost of obtaining convictions and executions in capital cases range from $2.5 to $5 million per case in current dollars—I have cited studies in my testimony where these figures came from—compared to less than $1 million for each killer who is sentenced to life without parole. Local governments bear the burden of these costs, diverting almost $2 million per capital trial from local services—hospitals, health care, police, and so on, causing counties to borrow money or perhaps even raise taxes to finance capital prosecutions.

Next, errors are a reality and they can't be ignored in this calculus. I simply don't accept the idea of collateral damage as something we should consider in the discourse on capital punishment. In our research at Columbia, Professor Jim Liebman and myself—Jim has testified before this Committee, this Subcommittee—we have shown that error rates in capital cases are high. Two-thirds was the figure that we came up with. We think that is a conservative figure, and we designed our study to produce a conservative figure. We have pretty good evidence that in some States, Pennsylvania and Virginia being good examples, the rate of error has climbed since we ended our study in 1995.

These are serious errors. Half the reversals at these stages were for errors that undermined the reliability of the verdict that the defendant committed a capitally aggravated murder. We don't claim innocence, nor do these defendants claim—well, they may claim innocence. We don't think that they are innocent, but we do think that their culpability never rises to the level that our Constitution demands for capital punishment.

We find that 9 percent of the cases that we studied between 1973 and 1995, 9 percent of the retrials following reversals wound up with exonerations, and not for the technical errors of witnesses disappearing. They found the other guy. That is an extraordinarily high rate.

Most important to today's hearing is the fact that errors and deterrence are closely linked. The States that seek and use the death penalty the most are the ones that have the highest reversal rates. An increase in death sentences would increase the error rate and would increase the risks that follow with errors.

In 1978, a distinguished panel appointed by the National Academy of Sciences considered the evidence that Professor Ehrlich of-

fered. It was new and compelling at the time about the deterrent effects of capital punishment. The panel rejected those claims. We are in the middle of the same debate today. There are disagreements among good people, well-meaning social scientists, economists, and legal scholars about this evidence. Many of them now are coming forward after the publications that Professor Rubin has cited and are challenging and rejecting the claims of deterrence, not so much claiming that there is no deterrence, but just simply that the evidence is unreliable for making sound public policy choices.

Chairman BROWNBACK. Please wrap up your testimony, if you could, Dr. Fagan.

Mr. FAGAN. Just let me say very quickly that, in sum, the high costs of the death penalty, the fragility and unreliability of the evidence, the fact that States that execute the most people have the highest error rates, these frame public policy choices that the States have to make and that perhaps we make here in the Federal Government.

If States are going to spend hundreds of millions of dollars trying to buy a small number of executions over the next decade that have uncertain effects on future murders, might we not spend those dollars more effectively to fund additional police detectives, prosecutors, and judges to arrest and incarcerate murderers and other criminals who currently escape any punishment? Thank you.

Chairman BROWNBACK. Thank you very much.

[The prepared statement of Mr. Fagan appears as a submission for the record.]

Chairman BROWNBACK. Just run the time clock, if you are OK with it, at ten minutes to give us a chance to get a little flow of questioning going here, if that is all right, Senator Feingold.

I would like to come back to Dr. Rubin first on this because it is fresh in my mind, I guess, as much as anything. What about the comparison of the deterrent effect of life without parole versus death penalty? Has that comparison been done in some sort of model that is reliable, or can it be done?

Mr. RUBIN. I haven't seen it done. Perhaps Professor Fagan has. As he says, his reports aren't published yet. But what we do and what the studies that I mentioned do is they compare capital punishment with the actual alternatives that exist in the States today. So if States are doing that, then what the studies are finding is relative to what would have happened to that person had he not been executed. So in that sense, they are comparisons. But if States are just adopting them, then we don't have any evidence.

I was on Bill Reilly's show one time and he said, "What about sending people to Alaska, where it is very cold, and making them break rocks?" And I said, well, we don't have evidence on that particular punishment because it hasn't been done, and to the extent that we haven't yet done life without parole, we don't. To the extent that some of the States that are executing people are also doing that, then we have an implicit comparison.

Chairman BROWNBACK. OK. Then let me ask you this one, because this one jumped out at me as a fact, and I am sure you have a thought on this. If this is a deterrent under economic models, and I appreciate your thought on it. I generally tend to think people

react to stimuli that are in their environment and react one way or another. But in States like New York, that have carried out no executions, States like Texas that have carried out the highest rates, and both have experienced roughly the same drops in the murder rates over time. How does the economic model that you put forward explain that, if I have those numbers correct?

Mr. FAGAN. I was under the impression that they have about the same murder rate now, but that Texas has gone down more substantially than New York, but maybe someone else—

Mr. MCADAMS. Texas has declined more than any other State over the course of the 1990s. It is an outlier in terms of the radicalness of the decline.

Mr. RUBIN. With all due respect, Senator—

Chairman BROWNBACK. Let me finish that thought and then I would be happy to engage that. So its rate was substantially higher even than, say, New York, and it has gone down—

Mr. MCADAMS. That is my understanding. I have certainly looked at the data on changes in the 1990s and Texas is an outright outlier. It has been going down all over the nation, but Texas has the sharpest decline over the decade of the 1990s.

Chairman BROWNBACK. Which, Dr. Rubin, you would say this proves the theory—

Mr. RUBIN. No, I actually wouldn't say that, because even in Texas, I think the number of executions is not—you may not pick it up in the gross data. We aren't really looking at gross—I mean, we are looking at gross data, but it is simply per execution. The number—

Chairman BROWNBACK. You don't do it amalgamated the total number. It is just per execution—

Mr. RUBIN. Per execution, so whether—

Chairman BROWNBACK. And you don't know of studies on it on a Statewide basis to look and compare?

Mr. RUBIN. Well, the trends are—the number of people executed is relatively small number to the number of murders, so you could have a statistically significant effect and have lives saved but still not pick it up in gross data over time trends of that sort.

Chairman BROWNBACK. Mr. Fagan?

Mr. FAGAN. I just wanted to respond to the point about New York's homicide rate. New York's homicide rate has declined more than any other homicide rate in the United States since 1991 through 2004. There were no executions during that period. And we have actually done a head-to-head comparison both at the county level, comparing the big cities in Texas with New York City, but also the Statewide comparisons, and it is bigger in New York. We have this in print in our studies. Professor Frank Zimring has a book coming out on the crime decline that shows that New York's crime decline is enormous, far greater by a factor that he counts as almost half compared to any other State in the country.

Mr. MCADAMS. He may be right, because the data I looked at may not have included New York because it had no executions. So I will, to a degree, back off of my statement. The data that I looked at only included States that had at least some executions, so it is conceivable that he is right.

Chairman BROWNBACK. All right. Then we will need to look at that ourselves a little bit further.

Mr. McAdams, I want to give you a chance, and I will give this back and forth, to respond to some of Mr. Bright's statements on his basis of where he comes from, because you took a much narrower focus in the time period and I would like to get your response, if I could.

Mr. MCADAMS. Well, what particularly that he said?

Chairman BROWNBACK. I think he took on four or five different topics within it and you were addressing two of them.

Mr. MCADAMS. Well, he talked about quality of counsel, for example, and I think it is important to understand that States have made a lot of progress in guaranteeing fair trials for people accused of murder and subject to the death penalty, but much less progress in protecting the due process rights of people charged with non-capital murder.

For example, there is an interesting article in the Indiana Lawyer about the situation in Indiana and it is terribly expensive to execute people in Indiana, partly because of endless appeals that are basically dead weight loss that have nothing much to do with justice. But on the other hand, in Indiana, criminal rules require that a death penalty-eligible defendant have two death penalty-certified attorneys paid for at the public dime and they can put in as many hours as they want to, essentially, and bill the State for it. If you are charged with murder and you are not subject to the death penalty, you get a public defender who may have 130, 150 cases a year. They get, for example, routine access to DNA experts, money for investigators, money for mitigation experts, et cetera, OK. This is in Indiana. But that doesn't apply if you are simply charged with non-capital murder in Indiana.

The truth is that, first of all, this is a reason to believe that the death penalty is fairer than alternative punishments. That is to say, we hear a lot about due process when people are subject to the death penalty, but the truth is, it is too easy to put people in jail for life. People who are subject to being put in jail for life should get many more of the protections that people subject to the death penalty get.

Chairman BROWNBACK. Mr. Bright, in your testimony you wrote that capital punishment is not needed to protect society or to punish offenders. Do you feel there ever to be a situation warranting the death penalty in this country?

Mr. BRIGHT. Senator, I don't, no, I mean, for a variety of reasons. I mean, one is just the culture of life reason, that if we are going to respect life and if we are going to set an example for our children, we don't have the death penalty. Even if I didn't feel that way, if I thought philosophically there was no problem with it, the way it works in practice, I find to be so disturbing, and I think, too, we ought to have some humility about our system and just realize what the courts can and can't do. If we are conservative, we know that the government can only do so much, and if people are upset about how the government has mishandled some other things, come down to the courthouse, because unfortunately, there is a very vast number of people being forced into the criminal courts.

I would agree, I think Dr. McAdams and I agree on this point. I think the death penalty is sucking so much of the resources out of the system in some States, the ones that are taking it seriously and are providing counsel, the death penalty counsel and that sort of thing, that it is having an adverse effect on the rest of the criminal justice system, which is already pretty hard up to begin with. So I think that is true.

I think there is a—different States, I think there are some, like you look at New York, New Jersey, some of these States spend a great deal of money on the death penalty. They don't have one execution to show for it, New York after ten years, New Jersey since 1983, your State, 10 years of the death penalty, eight people, 100 death sentences, nobody executed. It is an awful lot of time and money without much at the end, and it does have, I think, an effect on the other cases.

Then there are those cases—or States, excuse me, jurisdictions, where people are not being—I was a court-appointed lawyer, too, by the way, for a long time. There are good and bad court-appointed lawyers. But if you have court-appointed lawyers with high caseloads, low pay, lack of resources, you are going to get what you pay for, and we have that.

And we have had, like in Texas, for example, there have been four people who got executed without any State or Federal review of their case, post-conviction review, because the lawyers didn't even know that there was a statute of limitations, so they missed the statute of limitations. That is pretty bad lawyering. I mean, a medical malpractice case, I mean, just about any kind of case, you should know the statute of limitations, and yet those people weren't even aware that they existed. So that is not good lawyering, and unfortunately, there is a lot of that in these cases.

Chairman BROWNBACK. Senator Feingold?

Senator FEINGOLD. Mr. Chairman, before I start, Professor McAdams shared his views on the exoneree list maintained by the Death Penalty Information Center. I think it would be appropriate, if it is acceptable to you, to allow the Center to provide a written statement in response to his testimony for the record of this hearing, if there is no objection.

Chairman BROWNBACK. To what?

Senator FEINGOLD. To allow them to write a written statement in response to his comments.

Chairman BROWNBACK. I have no objection.

Senator FEINGOLD. Thank you, Mr. Chairman.

Mr. Bright, I was also struck by the Birmingham News editorial that you submitted with your testimony that you mentioned in which the newspaper announced it was changing sides in the debate on capital punishment and could no longer support the death penalty. Another thing that the editorial said is, quote, "it is better to be rich and guilty than innocent and poor," unquote, and you touched on these issues a bit in your statement, but I would like you to talk a little bit more about how a criminal defendants' economic situation affects his access to justice in our system.

Mr. BRIGHT. Thank you, Senator. yes, and I would say Alabama is a classic example of what I was talking to the Chairman about in terms of quality of lawyering. There is no Capital Defender Of-

fice in Alabama. In fact, there are almost no Public Defender Offices in Alabama. Most people who are facing the death penalty there, and this is not just Alabama, in a number of other States, as well, are going to be assigned a lawyer who may, as in the example I gave, be a lawyer who specializes in something other than criminal law, has no idea how to try a death penalty case.

We operate on this fiction that any lawyer can try a death penalty case, that we can appoint a lawyer and they can try the case, which is sort of like saying any chiropractor can do brain surgery, because many of the lawyers are acting in good faith, they are doing the best that they can, they just simply don't know what they are doing because it is not what they do. They do divorces and title searches and those kinds of things. The old adage, you get what you pay for, I think is very true here.

The other point that I would make is just resources. Back in the old days, it may have been we didn't need a lot of expert witnesses, forensic witnesses, that sort of thing. That is not true today, particularly in homicide cases. The defense needs resources.

Georgia put to death a man last year whose lawyer was appointed 36 days before trial and not given a penny. Thirty–6 days later, the case goes to trial. This lawyer is totally unprepared. The client is sentenced to death, and he was put down, tied down and put down last year. That is simply not justice under any stretch of the imagination, no matter how conscientious the lawyer was. I know that lawyer. He didn't want to do a bad job. He couldn't do a good job in those circumstances.

Senator FEINGOLD. Thank you. Professor Fagan, I would like to explore your testimony about the alternative of life without parole. You mentioned the recent studies arguing that capital punishment has a deterrent effect do not take into account the possibility of life without parole. If the studies do not account for the possible deterrent effect of life without parole, how can they accurately predict the deterrent effect of capital punishment?

Mr. FAGAN. Well, the question of predicting deterrence itself is a difficult question. One of the very hard things to do in deterrence research is to actually show that the perceived risk of a defendant is actually internalized, that that person has seen it, they have weighed the consequences, that it factors into their decisions.

Many of the homicides that do occur, even if somebody is cognizant of the risks, are the kinds of homicides that occur that, first of all, might never be subject to a felony murder rule and would be punishable, but certainly would be the kinds where the arousal of the situation with the context, a crime of passion, for example, would neutralize whatever perceived or internalized risk there is.

I think it is very hard to study that kind of risk. I think that it is a black box that is often inferred by the kinds of research that I do and also Professor Rubin does. Very rarely are there direct tests of deterrence. Very rarely is there a connection made between the perceived risk that the defendant expresses and their future behavior. This can be done in artifactual settings that don't approximate the kinds of situations where homicides tend to take place. We can show this in laboratory studies and the like.

We are involved in a study now in Chicago, though, where there actually is a very direct test of deterrence involving gun offenders.

This is through the Department of Justice Project Safe Neighborhoods study, and in Chicago, they actually get all the gun offenders together and put them in a room and they give them two messages. One, if we catch you with a gun, we are going to put you away in prison for 10 years or more. Two, if you need help, we are here to give you help. The room is packed with both probation officers, but also service providers. We are in the process now of doing a survey of the defendants to ask them about this perceived threat, because the numbers are saying very clearly that there is a dramatic decline in all manner of gun violence in the neighborhoods where the project is in effect.

Our studies suggest that where there is a direct measure of deterrence, where the offenders do express that they have been exposed to that deterrent threat, that there is some consequence for their behavior. But we have it—this is not homicide, of course, but we do have some sense that that is the case. We don't have this sense in capital punishment. It is extremely hard to do.

It is extremely hard to do with the LWOP sentences, and I wanted to respond to one comment from Professor Rubin. In the States where both execution and life without parole are available, we don't know the effects of life without parole because it is extremely hard to count the number of sentences. In my testimony, I give some evidence from Pennsylvania, California, a number of other States, about the relative magnitude of people on death row compared to the number of people incarcerated for life without parole and it runs anywhere from six to ten to one. But we don't—we can't, because we can't get an accurate count over a long time period of using the kinds of panel studies that I do and Professor Rubin does that allow us to take that factor into account. So it is a missing factor.

It is like trying to evaluate the Steelers as a team without taking into account their defense and just gauging them on how well their offense is doing. I think we need to know what happens on both sides of the football.

Senator FEINGOLD. A timely analogy.

Let me followup. Professor Fagan, you testimony also explained that the States and local communities pay a higher financial price when an individual is sentenced to death rather than life without parole. Obviously, some people may find that counterintuitive. Could you say a little bit more why capital cases do cost so much more?

Mr. FAGAN. Well, I would actually hope that Mr. Bright would help me on this. In our studies, we have looked—we have been reading the literature. These were studies done, and there was a very comprehensive study done in Florida where they went to each of the county offices and asked them about their allocation of resources for capital cases and they came up with some very strong numbers based on a sample of counties in Florida.

We looked at the expenditures in New York State in the Capital Defender Office, which was funded at a very high level of competence and with a very high standard for effective counsel when New York's death penalty law went into effect in 1995 and we looked at the expenditures there. And so we got a pretty good bounding, an upper and a lower bounding of the cost estimates that

are involved, and to meet constitutional standards for defense, competent counsel, full access to testing, and so on, and for prosecutors to pursue the same set of standards, to prove beyond a reasonable doubt, requires a great deal of resources. These are resources that run—the numbers speak to themselves. They are fairly high.

And in small counties—there was a very interesting article in the Houston Chronicle very recently about how the local prosecutor was bragging about the fact that he had almost unlimited access to public funds to pursue prosecutions. That is not the case in most counties and most counties have to make very difficult tradeoffs between schools, hospitals, infrastructure of all manner, and public defender services and prosecution services in these cases. The risks are then spread around the State often because the county can't afford it. They have to go to the State legislature or to other pools. And so somebody in a remote county that is maybe the other side of the State is paying for prosecution of somebody in the other corner of the State and that prosecution may or may not turn out to be effective and that prosecution may or may not turn out to be reversed, and we find fairly high reversal rates that are fairly consistent.

Again, it is a choice. It is a choice about how to use public resources and what the consequences and outcomes of those choices are. In our case, we seem to think that you can achieve the same deterrent effect—or we certainly think that the deterrent effects are at least as great by long-term incarceration via LWOP at a far reduced cost.

Senator FEINGOLD. I am glad you made the point about all government costs obviously involve tradeoffs. Just specifically from a public safety perspective, the extra dollars that the capital cases cost could perhaps be spent otherwise on additional police officers and other ways to prevent some horrible crime from being committed in the first place. That is one way we can look at this.

Mr. FAGAN. When Professor Liebman and I did our study, it was fairly clear that the States that use the death penalty the most are the States that seem to have the most inefficient criminal justice systems. Where States have fairly effective clearance rates, where the number of arrests per crime is fairly high, where the number of prosecutions per crime is fairly high, then those States use the death penalty in violent cases and in murders far less often than do States where the clearance rates are very low.

We tended to see capital punishment, therefore, as a compensatory system which was adjusting for the effects of essentially a weak law enforcement and prosecution system. It is a whole lot cheaper to make investments in a law enforcement system that would benefit not just people who were possibly at risk for homicide, but robbery, burglary, car theft, and many other serious crimes.

Senator FEINGOLD. Mr. Chairman, my time is almost up in this round. I will have a few more later.

Chairman BROWNBACK. OK. I just have a couple here.

Mr. Rubin, I want to ask you an off-the-wall question. I am struck by the economic analysis of the death penalty, or, I mean, using that framework. I am used to monetary signals being sent and people reacting to monetary signals, and so when you send

punishment signals, it sounds like the same sort of models. It strikes me as a little odd, but I understand it, and apparently there are some pretty good rationale and basis for being able to use that.

One of the things that I cited in my opening and one of the things that has been most—that I have had the most intellectual pursuit as far as just internally on this is that I desperately believe we need to establish a culture of life in this country, that we really need to celebrate life. Senator Feingold and I have been in spirited debates on what this actually means on one end of the spectrum, on purely innocent life but at very early stages, obviously, the issue of abortion.

And yet we talk about it then on this stage of life and the same discussion and debate enters in then, too, about culture of life and what many would refer to. Well, now this is not purely innocent life as that in the womb. This is a life that in all probability has committed a heinous crime, so people raise that question in the debate about you really can't compare these two.

But could you construct in a sort of economic analysis about whether this does help to establish a culture of life, that celebrates life, if you don't have a death penalty? Is it somehow translatable within the culture writ large or into a narrower State or into a community that you could construct that, because that debate is made, and I am familiar with it from a mental sense, a moral sense, a spiritual sense, but what about from a modeling sense that you work in?

Mr. RUBIN. Well, it is getting a bit far from my work as an economist, but I think two things you might say. One would be that if there is a deterrent effect and if it is significant and if you are net saving lives, then the capital punishment will be consistent with a culture of life in that sense. There was a recent paper in the Stanford Law Review by Professor Cass Sunstein and Adrian Vermeule. Professor Sunstein is in Chicago and is not known as a conservative, but they were saying the same thing, that if there is deterrence, if there is evidence of deterrence, then as a society we might have a moral obligation to undertake capital punishment. So they were making that kind of argument, not at all from a conservative position but just saying, if these studies are correct, then we would have to really consider that.

I guess one could also argue that if you say we treat life as being so valuable and that we are going to punish people who take life, that could also be, in my mind, consistent with a culture of life. But I would be more comfortable with the deterrence argument. If, net, you are saying move lives than you are losing, then it seems to me it is consistent with a culture of life.

Mr. BRIGHT. Could I offer this in response to that, Mr. Chairman?

Chairman BROWNBACK. Yes.

Mr. BRIGHT. To really have a deterrent effect, I mean, we have had an average of 33 death sentences a year in these 30 years. A lot of people think we impose the death penalty all the time. It is actually 1 percent of the murders in this country are punished with death. If we are going to have a deterrent effect, if we are going to stop 18 every time if this is true, which I don't for a reason I will tell you, we are going to have to have a culture of death. I

mean, we are going to have to use the death penalty all the time because the people I have represented over the last 30 years and talked to, they are not watching television. They are not reading the newspaper. They are not paying any attention. Right now in Texas, they have shown that people in Huntsville don't even know when there is an execution taking place in their town.

It would seem to me that any argument—I will let them fight about the statistics, but from a basic fundamental standpoint, you can't be deterred about something you don't know anything about. If you don't know that there has been an execution, you can't be deterred by the execution, and there are only five States that have executed more than 50 people and have carried out about 65 percent of all the executions in the country.

So if that is really true, we would have to have New Hampshire and Kansas and all these other States just executing a lot of people in hopes that people out there would realize that they might get executed if they went there. But to figure that out, you would have to know, well, I am going to get caught, which nobody thinks they are. I am going to get not very good legal representation. I am going to get in one of those jurisdictions where the prosecutor seeks the death penalty, and make a lot of other considerations and calculations that most people that get arrested for murder don't make.

Chairman BROWNBACK. Yes, please, and then I am going to turn the microphone over to Senator Feingold. I don't know if you wanted to go down to the Alito swearing in or not.

[Laughter.]

Senator FEINGOLD. I wished him well last night.

Chairman BROWNBACK. OK, then I am going to let you close the hearing on out after that. Dr. Rubin, you wanted a quick response.

Mr. RUBIN. Just one quick response. It is not too good to look for deterrence by questioning people who have committed the crime. Those are the people who were not deterred. The people who are deterred, if there are people deterred, are people who Mr. Bright would never see because they are people who have not committed the crime. So it is basically a flawed research method to go to criminals and say, "Were you deterred?" No, obviously not. It is the people who are not in jail, who did not commit the crimes, that were deterred and you won't see them.

Mr. MCADAMS. Can I make one quick comment about a culture of life?

Chairman BROWNBACK. Yes.

Mr. MCADAMS. I think it has got to be incoherent unless you distinguish between the innocents and the aggressors. When we and our allies invaded Europe in 1944, were we promoting a culture of life or were we contradicting a culture of life? In spite of the nastiness of any invasion and killing a lot of people, I think, ultimately, we were promoting a culture of life by taking out a Nazi regime that was completely—not only didn't care about life, but actually gloried in killing millions of Jews. So I think sometimes promoting a culture of life can involve some pretty nasty things we have to do, but I think we have to do it sometimes.

Chairman BROWNBACK. I would note that we will keep the record open for a period of 7 days that there may be a submission of addi-

tional questions to witnesses and other materials can be entered into the record.

Senator Feingold?

Senator FEINGOLD. [Presiding.] Thank you, Mr. Chairman. I do thank you again for holding this excellent hearing. Just a couple more questions.

Mr. Bright, let us talk just a bit about the difficulty individuals on death row can face in attempting to prove that they are innocent. Of course, many cases do not have DNA evidence that can definitely prove that a particular person is innocent or guilty, and I know there have been capital cases where new evidence is not unearthed until years after the conviction. In your work, have you experienced procedural barriers to bringing proof of innocence to the attention of a court, and how do we ensure that potentially exculpatory evidence can be brought to a court in a speedy manner?

Mr. BRIGHT. Well, those are the most troubling cases, Senator, where a person is convicted based on the evidence that is available. It may not be very strong evidence. It may be circumstantial evidence, but it is enough to get a conviction. And then years later, some other evidence comes along that undermines that and you don't go back to the jury and retry the case.

There is a case before the Supreme Court right now where a man was convicted in Tennessee and part of the prosecution was there were semen stains on the gown of the victim and the prosecution argued to the jury in closing they were his. Well, now we know from DNA evidence beyond any question they were the husband's. They weren't his. Well, are we going to go back and give him a new trial? No. At least that is what the Sixth Circuit said. We are not going to even give him a hearing on whether or not he gets to have a new trial because of all the barriers that we have added now to habeas corpus review in this country.

But I think that is not an unusual situation, that evidence comes to light later. The Schlup case in Missouri, where the fellow had been convicted and then right before he was to be executed, some guard in a moment of conscience said, "Well, actually, there is a videotape that shows that this fellow was somewhere else in the prison at the time the murder went down, so you had better take a look at it." Now, that was just in the nick of time.

The other part of it is that when you don't have DNA evidence—DNA evidence proves things generally, with a few qualifications, pretty conclusively. The troubling areas are the things like eyewitness identification. We know witnesses make a lot of mistakes, but everybody believes that they are 100 percent right. Informants who are used in these cases who testify, trade their testimony for something else. Unfortunately, one of the reasons a lot of people end up on death row is they don't have anything to trade.

This Rudolph guy who killed a person in Alabama, blew up the bomb at the Olympics, I mean, he could tell them where the dynamite was, so he gets a life sentence, which goes back to my point about this is not essential that we have this because if we did, we would sure give it to him. But he is serving a life sentence because he could trade something away, whereas some other people come along and they can't trade anything away, so they don't have that same opportunity.

Senator FEINGOLD. It is interesting you gave that first example because it was just that kind of example that I asked Judge Alito and could not get a good response to the issue of the rights of a person who is clearly innocent and the process has already run its course, and one of the reasons I couldn't support him and I am not going down to the swearing in. I certainly respect him, but it is a very troubling area.

Professor, did you want to say something?

Mr. FAGAN. Yes. There has been much made about DNA evidence as possibly helping us sort out the guilty from the innocent on capital cases, but I think it is important to note in the over 100 exonerations that have taken place from death row, a very small fraction of those are DNA exonerations.

Senator FEINGOLD. Yes.

Mr. FAGAN. Most of them are exonerations due to new witnesses, new evidence, recanting of testimony, and the like. So to say that DNA is going to solve the problem of innocence is, I think, misleading.

Mr. MCADAMS. Senator, can I say something about this point?

Senator FEINGOLD. Go ahead, especially in light of your home State, as well.

Mr. MCADAMS. Thank you. I do think the death penalty opponents have a bit of a double standard about eyewitness testimony. They are absolutely right that witnesses tend to over-value eyewitness testimony. It is much more frail than witnesses seem to believe. That is endemic to our system of jury trials at every level, death penalty and below. That is a good reason to see that, for example, defense counsel have access and can put on the stand expert witnesses about eyewitness testimony.

However, the claims made by death penalty opponents about how somebody came forward years later to exculpate this particular person, or someone confessed, there are equal problems with that kind of testimony. I can name you one guy, for example, who has confessed to being the grassy knoll shooter in Dallas on November 22, 1963. He is in Statesville Prison in Illinois right now. Another young man confessed that his father was the grassy knoll shooter. Another woman I could name has confessed to being Lee Harvey Oswald's mistress in New Orleans in the summer of 1963. All three confessions, claims, are pretty obviously bogus.

So the frailty of witness testimony not only applies at trial, and they are quite right about that, but it also applies to years later claims that this person has been exonerated because some witness changed their testimony or someone came forward and confessed.

Senator FEINGOLD. But it is only in death penalty cases where the frailty can lead to somebody being executed, right?

Mr. MCADAMS. That is true, except I think there is a fundamental problem here in that we seem to be so transfixed with the death penalty that—well, for example, we are told, in effect, let us save a lot of money by not charging anybody with capital murder and let us just try to put them away for life. Again, some of the costs associated with the death penalty are dead weight loss, appeal after appeal after appeal, where you try to find a judge who will let your person off. As Professor Fagan has shown, if you go through enough judges, eventually, you are likely to find someone.

Others, however, are expenditures that really have something to do with obtaining justice, and I talked about the Indiana case. If you are accused in Indiana of capital murder, you can hire two lawyers. They can bill the State by the hour. You have access to routine DNA testing. You have access to expert witnesses, et cetera. All of that expenditure actually tends to achieve justice.

So what they are saying is let us save money by dumping what would be capital defendants back in a system where we can save a lot of money because they don't get nearly as much due process and nearly as good of defense, and that is what I think is wrong with that argument.

Mr. BRIGHT. Well, I don't think that is right by any—

Senator FEINGOLD. Your comment will be the last one. Go right ahead.

Mr. BRIGHT [continuing]. Stretch of the imagination. I just want to say this. Dr. McAdams has said twice now that the appeals are endless and are dead weight. Let me tell you, there are people who are alive today because Federal judges and the Supreme Court of the United States found on those appeals that they were sentenced to death in violation of the Constitution of the United States. How that is dead weight is beyond me.

And the second thing I would say is with regard to people coming forward, generally what happens is a lawyer comes forward and then finds the witness and brings into the equation the people that should have been there to begin with, and that is where you have the question of what kind of representation do they get at trial and now what is available here and how do you put those two together to try to figure out what happened.

Thank you very much, Senator.

Senator FEINGOLD. Thank you. On behalf of the Chairman and myself and the Committee, we want to thank all of you very much for your testimony. It was an excellent panel.

This concludes the hearing.

[Whereupon, at 3:25 p.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

[Additional material is being retained in the Committee files.]

# SUBMISSIONS FOR THE RECORD

## TESTIMONY FOR ABOLISHING THE DEATH PENALTY IN THE UNITED STATES

Antoinette Bosco
Brookfield, CT

I am the mother of murder victims, opposed to the death penalty.

In August 1993, I got the word that my son John and his wife Nancy had been murdered in their Montana home. It turned out that the killer was 18-year old Joseph "Shadow" Clark, the son of the people from whom they had just bought their home. After confessing to this horrible crime, he faced the death penalty.

The day I got the news of the brutal murders, I learned a new definition of torment. My beloved son and his beautiful wife were dead at the hand of someone I could only believe to be, at that moment, an agent of Satan.

I found myself screaming, sometimes aloud, sometimes with silent cries tearing at my insides. I tormented myself, wanting to know who was the faceless monster that had brought such permanent, unrelenting pain into my family. I wanted to kill him with my own hands. I wanted him dead.

But that feeling also tormented me, for I had always been opposed to the death penalty. I felt now I was being tested on whether my values were permanent, or primarily based on human feelings and expediency.

It was when I went to Montana and stood in that room of death with two of my sons that I was overpowered with a sense of the evil I felt there. In that room, I was able to grasp truth again, that unnatural death at the hands of another is always wrong, except in a clear case of self-defense. The state is no more justified in taking a life than is an individual. Killing can't be "sanitized" by calling it "official" and "legal." I and my

family were relieved when Shadow Clark took a plea bargain, and thus avoided the death penalty. He is now serving a life sentence. He has written to me from his prison cell, asking forgiveness. His latest letter arrived on January 25, 2006, and he writes: "Not a day goes by that is free from the pain of what I did. I was a very foolish kid and I truly regret my actions."

I've heard all the arguments for the death penalty and I don't dismiss these lightly. You can't arrive at opposition to this form of punishment with blinders on. When it hits you personally, the anger and pain of your loss makes you want to tear apart that person who stole your loved one and your happiness. But does this do any good in the long run? And should we be in the business of killing people? We have the right, and the responsibility, to punish, and I believe murderers should be given life, confined away from society, without parole. But executions? Never. It is only a delusion to believe that one's pain is ended by making someone else feel pain.

I have long reflected on what Supreme Court Justice Harry A.Blackmun wrote in the mid-90's, that nearly "twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, and despite the effort of the states and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discriminations, caprice and mistake."

That well expresses why I urge our nation to abolish the death penalty. Thank you.

*Antoinette Bosco, author of "Choosing Mercy, A Mother of Murder Victims Pleads to End the Death Penalty" (Orbis Books)*

*Statement of*

**STEPHEN B. BRIGHT**

**Southern Center for Human Rights**
83 Poplar Street, N.W., Atlanta, GA 30303
(404) 688-1202 sbright@schr.org
www.schr.org

**Yale Law School**
P.O. Box 208215
New Haven, CT 06520-8215
203/ 432-7430 stephen.bright@yale.edu

*regarding*

# The Death Penalty

*before the*

SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

February 1, 2006

MR. CHAIRMAN and members of the subcommittee, thank you for this opportunity to discuss the use of capital punishment in our nation today.

This is a most appropriate time to assess the costs and benefits of the death penalty. Thirty years ago, in 1976, the Supreme Court allowed the resumption of capital punishment after declaring it unconstitutional four years earlier in *Furman v. Georgia*. Laws passed in response to *Furman* were supposed to correct the constitutional defects identified in 1972. However, 30 years of experience has demonstrated that those laws have failed to do so.

The death penalty is still arbitrary. It's still discriminatory. It is still imposed almost exclusively upon poor people represented by court-appointed lawyers. In many cases the capabilities of the lawyer have more to do with whether the death penalty is imposed than the crime. The system is still fallible in deciding both guilt and punishment. In addition, the death penalty is costly and is not accomplishing anything. And it is beneath a society that has a reverence for life and recognizes that no human being is beyond redemption.

Many supporters of capital punishment, after years of struggling to make the system work, have had sober second thoughts it. Justice Sandra Day O'Connor, who leaves the Supreme Court after 25 years of distinguished service, has observed that "serious questions are being raised about whether the death penalty is being fairly administered in this country" and that "the system may well be allowing some innocent defendants to be executed."[1] Justices Lewis Powell and Harry Blackmun also voted to uphold death sentences as members of the court, but eventually came to the conclusion, as Justice Blackmun put it, that "the death penalty experiment has failed."[2]

*The Birmingham News* announced in November that after years of supporting the death penalty it could no longer do so "[b]ecause we have come to believe Alabama's capital punishment system is broken. And because, first and foremost, this newspaper's editorial board is committed to a culture of life." The editorial is appended to this statement.

The death penalty is not imposed to avenge every murder and – as some contend – to bring "closure" to the family of every victim. There were over 20,000 murders in 14 of the last 30 years and 15,000 to 20,000 in the others. During that time, there have been just over 1000 executions – an average of about 33 a year. Sixteen states carried out 60 executions last year. Twelve states carried out 59 executions in 2004, and 12 states put 65 people to death in 2003.

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1. "Justice O'Connor Expresses New Doubts About Fairness of Capital Punishment," *Baltimore Sun*, July 4, 2001, page 3A.

2. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). *See also* John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* 451 (1994) (quoting Justice Powell after his retirement saying that the death penalty "reflect[s] discredit on the law").

Moreover, the death penalty is not evenly distributed around the country. Most executions take place in the South, just as they did before *Furman*. Between 1935 and 1972, the South carried out 1887 executions; no other region had as many as 500. Since 1976, the Southern states have carried out 822 of 1000 executions; states in the Midwest have carried out 116; states in the west 64 and the Northeastern states have carried out only four. The federal government, which has had the death penalty since 1988, has executed three people. Only one state, Texas, has executed over 100 people since 1976. It has executed over 350.

Further experimentation with a lethal punishment after centuries of failure has no place in a conservative society that is wary of too much government power and skeptical of government's ability to do things well. We are paying an enormous cost in money and the credibility of the system in order to execute people who committed less than one percent of the murders that occur each year. The death penalty is not imposed for all murders, for most murders, or even for the most heinous murders. It is imposed upon a random handful of people convicted of murder – often because of factors such the political interests and predilections of prosecutors, the quality of the lawyer appointed to defend the accused, and the race of the victim and the defendant. A fairer system would be to have a lottery of all people convicted of murder; draw 60 names and execute them.

Further experimentation might be justified if it served some purpose. But capital punishment is not needed to protect society or to punish offenders. We have not only maximum security prisons, but "super maximum" prisons where prisoners are completely isolated from guards and other inmates, as well as society.

## I. THE DEATH PENALTY IS ARBITRARY AND UNFAIR

Justice Potter Stewart said in 1972 that the death penalty was so arbitrary and capricious that being sentenced to death was like being struck by lightning. It still is. As was the case in 1972, there is no way to distinguish the small number of offenders who get death each year from the thousands who do not. This is because prosecutorial practices vary widely with regard to the death penalty; the lawyers appointed to defend those accused are often not up to the task of providing an adequate defense; differences between regions and communities and the resulting differences in the composition of juries; and other factors.

### A. Prosecutorial discretion and plea bargaining

Whether death is sought or imposed is based on the discretion and proclivities of the thousands of people who occupy the offices of prosecutor in judicial districts throughout the nation. (Texas, for example, has 155 elected prosecutors, Virginia 120, Missouri 115, Illinois 102, Georgia 49, and Alabama 40). Each prosecutor is independent of all the others in the state.

The vast majority of all criminal cases – including capital cases – are decided not by juries, but through plea bargains. The two most important decisions in any capital case are the prosecutor's – first, whether to seek the death penalty and, second, if death is sought, whether to agree to a lesser punishment, usually life imprisonment without any possibility of parole, instead of the death penalty as part of a plea bargain.

The practices of prosecutors vary widely. They are never required to seek the death penalty. Some never seek it; some seek it from time to time; and some seek it at every opportunity. Some who seek it initially will nevertheless agree to a plea bargain and a life sentence in almost all cases; others will refuse a plea disposition and go to trial. In some communities, particularly predominantly white suburban ones, the prosecutor may get a death sentence from a jury almost any time a case goes to trial. In other communities – usually those with more diverse racial populations – the prosecutors often find it much more difficult, if not impossible, to obtain a death sentence. Those prosecutors may eventually stop seeking the death penalty because of they get it so seldom. And regardless of the community and the crime, juries may not agree to a death sentence. Timothy McVeigh's co-defendant, Terry Nichols, was not sentenced to death by either a federal or state jury for his role in the bombing of the federal building in Oklahoma City that caused 168 deaths.

Without being critical of any of person or community and without questioning the motives of any of them, it is clear that there is not going to be consistent application of the death penalty when prosecutors operate completely independent of one another.

Because of different practices by prosecutor, there are geographical disparities with regard to where death is imposed within states. Prosecutors in Houston and Philadelphia have sought the death penalty in virtually every case where it can be imposed. As a result of aggressive prosecutors and inept court-appointed lawyers, Houston and Philadelphia have each condemned over 100 people to death – more than most states. Harris County, which includes Houston, has had more executions in the last 30 years than any state except Texas and Virginia.

Whether death is sought may depend upon which side of the county line the crime was committed. A murder was committed in a parking lot on the boundary between Lexington County, South Carolina, which, at the time, had sentenced 12 people to death, and Richland County, which had sent only one person to death row. The murder was determined to have occurred a few feet on the Lexington County side of the line. The defendant was tried in Lexington County and sentenced to death. Had the crime occurred a few feet in the other direction, death penalty almost certainly would not have been imposed.

There may be different practices even within the same office. For example, an Illinois prosecutor announced that he had decided not to seek the death penalty for Girvies Davis after Davis' case was reversed by the state supreme court. However, while the case was

pending, a new prosecutor took office and decided to seek the death penalty for Davis. He was successful and Davis was executed in 1995.[3]

As a result of a plea bargain, Ted Kaczynski, the Unabomber, who killed three, injured many others, and terrified even more by mailing bombs to people, avoided the death penalty. Serial killers Gary Leon Ridgway, who pleaded guilty to killing 48 women and girls in the Seattle area, and Charles Cullen, a nurse who pleaded guilty to murdering 29 patients in hospitals in New Jersey and Pennsylvania, also avoided the death penalty through plea bargains, as did Eric Rudolph, who killed security guard in Birmingham and set off a bomb that killed one and injured many more at the 1996 Olympics. Rudolph was allowed to plead and avoid the death penalty in exchange for telling the authorities where he hid some dynamite in North Carolina. Others avoid the death penalty by agreeing to testify for the prosecution against the other(s) involved in the crime.

Although some serial killers are sentenced to death, most of the men and women on death rows are there for crimes that, while tragic and fully deserving of punishment, are less heinous that the examples mentioned above as well as many other cases in which death was not imposed.

### B. Representation for the accused

Once a prosecutor decides to seek death, the quality of legal representation for the defendant can be the difference between life and death. A person facing the death penalty usually cannot afford to hire a attorney and is at the mercy of the system to provide a court-appointed lawyer. While many receive adequate representation (and often are not sentenced to death as a result), many others are assigned lawyers who lack the knowledge, skill, resources – and sometime even the inclination – to handle a serious criminal case. People who would not be sentenced to death if properly represented are sentenced to death because of the incompetent court-appointed lawyers.

For example, Dennis Williams was convicted twice of the 1978 murders of a couple from Chicago's south suburbs and sentenced to death. He was represented at his first trial by an attorney who was later disbarred and at his second trial by a different attorney who was later suspended. Williams was later exonerated by DNA evidence. Four other men sentenced to death in Illinois were represented by a convicted felon who was the only lawyer in Illinois history to be disbarred twice.

A dramatic example of how bad representation can be is provided by this description from the *Houston Chronicle* of a capital trial:

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3. *See People v. Davis*, 579 N.E.2d 877 (Ill. 1991).

> Seated beside his client – a convicted capital murderer – defense attorney John Benn spent much of Thursday afternoon's trial in apparent deep sleep.
>
> His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.
>
> Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the Nov. 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.
>
> When state District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial.
>
> "It's boring," the 72-year-old longtime Houston lawyer explained . . .
>
> Court observers said Benn seems to have slept his way through virtually the entire trial.[4]

This sleeping did not violate the right to a lawyer guaranteed by the United States Constitution, the trial judge explained, because, "[t]he Constitution doesn't say the lawyer has to be awake." On appeal, the Texas Court of Criminal Appeals rejected McFarland's claim that he was denied his right to counsel over the dissent of two judges who pointed out that "[a] sleeping counsel is unprepared to present evidence, to cross-examine witnesses, and to present any coordinated effort to evaluate evidence and present a defense."[5] Last year, the Court reaffirmed its opinion.[6]

George McFarland was one of at least three people sentenced to death in Houston at trials where their lawyers slept. Two others were represented by Joe Frank Cannon. One of them, Carl Johnson, has been executed. Cannon was appointed by Houston judges for forty years to represent people accused of crimes in part because of his reputation for hurrying through trials like "greased lightening," and despite his tendency to doze off during trial.[7] Ten of Cannon's clients were sentenced to death, one of the largest numbers among Texas

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4. John Makeig, "Asleep on the Job: Slaying Trial Boring, Lawyer Says," *Houston Chronicle*, Aug. 14, 1992, at A35.

5. *McFarland v. State*, 928 S.W.2d 482 (Tex. Cr. App. 1996).

6. *Ex parte McFarland*, 163 S.W.3d 743 (Tex. Cr. App. 2005).

7. Paul M. Barrett, "Lawyer's Fast Work on Death Cases Raises Doubts About System," *Wall Street Journal*, Sept. 7, 1994, at A1.

attorneys. Another notorious lawyer appointed to defend capital cases in Houston had 14 clients sentenced to death.

The list of lawyers eligible to handle capital cases in Tennessee in 2001, circulated to trial judges by the state Supreme Court, included a lawyer convicted of bank fraud, a lawyer convicted of perjury, and a lawyer whose failure to order a blood test let an innocent man languish in jail for four years on a rape charge. Courts in other states have upheld death sentences in cases in which lawyers were not aware of the governing law, were not sober, and failed to present any evidence regarding either guilt-innocence or penalty. One federal judge, in reluctantly upholding a death sentence, observed that the Constitution, as interpreted by the U.S. Supreme Court, "does not require that the accused, even in capital cases, be represented by able or effective counsel."[8]

The Supreme Court has said that the death penalty should be imposed "with reasonable consistency, or not at all."[9] That is simply not happening.

## II. THE COURTS ARE FALLIBLE

Innocent people have been wrongfully convicted because of poor legal representation, mistaken identifications, the unreliable testimony of people who swap their testimony for lenient treatment, police and prosecutorial misconduct and other reasons. Unfortunately, DNA testing reveals only a few wrongful convictions. In most cases, there is no biological evidence that can be tested. In those cases, we must rely on a properly working adversary system – in which the defense lawyer scrutinizes the prosecution's case, consults with the client, conducts a thorough and independent investigation, consults with experts, and subjects the prosecution case to adversarial testing – to bring out all the facts and help the courts find the truth. But even with a properly working adversary system, there will still be convictions of the innocent. The best we can do is minimize the risk of wrongful convictions. And the most critical way to do that is to provide the accused with competent counsel and the resources needed to mount a defense.

The innocence of some of those condemned to die has been discovered by sheer happenstance and good luck. For example, Ray Krone, was convicted and sentenced to death in Arizona based on the testimony of an expert witness that his teeth matched bite marks on the victim. During the ten years that Krone spent on death row, scientists developed the

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8. *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

9. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

ability compare biological evidence recovered at crime scenes with the DNA of suspects. DNA testing established that Krone was innocent.[10]

The governor of Virginia commuted the death sentence of Earl Washington to life imprisonment without parole in 1994 because of questions regarding his guilt. Were it not for that, Washington would not have been alive six years later, when DNA evidence – not available at the time of Washington's trial or the commutation – established that Washington was innocent and he was released.[11]

Poor legal representation led to a death sentence for Gary Drinkard, who spent five years on Alabama's death row for a crime he did not commit. At his trial, he was represented by one lawyer who did collections and commercial work and another who represented creditors in foreclosures and bankruptcy cases. The case was reversed on appeal for reasons having nothing to do with the quality of his representation. Our office joined with an experienced criminal defense lawyer from Birmingham and represented him at his retrial. After all the evidence was presented, including the testimony of the doctor, the jury acquitted Drinkard in less than two hours.

Evidence of innocence has surfaced at the last minute and only because of volunteers who found it. Anthony Porter, sentenced to death in Illinois, went through all of the appeals and review that are available for one sentenced to death. Every court upheld his conviction and sentence. As Illinois prepared to put him to death, a question arose as to whether Porter, who was brain damaged and mentally retarded, understood what was happening to him. Just two days before he was to be executed, a court stayed his execution for a mental examination. After the stay was granted, a journalism class at Northwestern University and a private investigator examined the case and proved that Porter was innocent. They obtained a confession from the person who committed the crime. Porter was released, becoming the third person released from Illinois's death row after being proven innocent by a journalism class at Northwestern.[12]

There has been some argument over how many innocent people have been sentenced to death and whether any have been executed. We do not know and we cannot know. If DNA evidence had not been available to prove Ray Krone's innocent, if Earl Washington had been executed instead of commuted to life, if Gary Drinkard had not received a new trial,

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10. Henry Weinstein, "Arizona convict freed on DNA tests is said to be the 100th known condemned U.S. prisoner to be exonerated since executions resumed," *Los Angeles Times* April 10, 2002.

11. Brooke A. Masters, "Missteps On Road To Injustice: In Va., Innocent Man Was Nearly Executed," *Washington Post*, Dec. 1, 2000, at A1.

12. Jon Jeter, "A New Ending to an Old Story," *Washington Post*, Feb. 17, 1999, at C1; Don Terry, "DNA Tests and a Confession Set Three on a Path to Freedom in 1978 Murders," *N.Y. Times*, June 15, 1996, at A6.

and if Anthony Porter was not mentally impaired and the journalism class had not come to his rescue, all would have been executed and we would never know to this day of their innocence. Those who proclaim that no innocent person has ever been executed would continue to do so, secure in their ignorance.

With regard to the quibbling over how many people released from death rows have actually been innocent, even one innocent person being convicted of a crime and sentenced to death or a prison term is one too many. "Close enough for government work" is simply not acceptable when life and liberty are at stake. Regardless of how one counts and what one counts, we know that an unacceptable number of innocent people have been convicted in both capital and non-capital cases.

There is nothing wrong with looking at the system as it really is and with a little humility about what it is capable of. There are cases – many of them – in which the criminal courts have correctly determined that a person is guilty. There are others where it is clear the system was wrong because the innocence of those convicted has been conclusively established though DNA evidence or other compelling proof. There are also cases in which it is virtually impossible to tell for sure whether a person is guilty or innocent. There is no DNA evidence or other conclusive proof. The case depends upon which witness the jury believes. Or new facts come to light after the trial. It is impossible to know what the jury's verdict would have been if it had considered those facts.

We want to believe that our judges and juries are capable of doing the impossible – determining the truth in every instance. And in most instances, they can determine the truth. But cases that depend upon eyewitness identification, forensic evidence from a crime laboratory with shoddy practices like those that have come to light in Houston and Oklahoma City, the testimony of a co-defendant, who claims the defendant was the primary person, or the cellmate who claims the defendant admitted committing the crime to him, or there is inadequate defense for the accused, there is a serious possibility of an error. Just last week, a judge who presided over a capital case in California in which death was imposed wrote to the governor urging clemency for the defendant because the judge believes the sentence was based on false testimony from a jailhouse informant.[13]

Often overlooked is the jury's verdict with regard to sentence – whether to condemn the person to die or sentence him to a long prison sentence – which is as important as its verdict on guilt. The decision of the legal system to bring about the deliberate, institutionalized taking of a person's life is surely a determination that the person is so beyond redemption that he or she should be eliminated from the human community. But that determination is quite often erroneous.

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13. Henry Weinstein, "Judge Requests Clemency for Killer He Condemned," *Los Angeles Times*, Jan. 18, 2006, p. 1.

I have seen many people who were once condemned to die but are now useful and productive members of society. One of them, Shareef Cousin, works in our office. He was sentenced to death when he was 16 years old. However, it turned out that he was not guilty of the murder for which he was sentenced to death. We are tremendously impressed with him. He is a hard worker; someone we have found we can count on. He is applying to colleges. He is very serious about getting in to college and will be a very serious student.

But it is not just the innocent. William Neal Moore spent 16 ½ years on Georgia's death row for a murder he committed in the course of a robbery. He had eight execution dates and came within seven hours of execution on one occasion. His death sentence was commuted to life imprisonment in 1990 and a year later he was paroled. He comes to the law schools and speaks to my classes every year. He was very religious while in prison, and he is has remained every bit as religious in the 15 years he has been out. He met and married someone with two daughters and has been a good father. Both girls are in college. He has judgment and maturity now that he did not have when he committed the crime.

I can give you many more examples like these of people who were condemned to die but who have clearly demonstrated that they were more than the worst thing they ever did.

## III. PEOPLE WHO KILL ARE NOT DETERRED

The scholars will address whether a punishment that is imposed in less than one percent of murder cases serves as a deterrent to murder. I offer no statistics, only a few observations from over 30 years of dealing with the people who are supposedly being deterred.

In my experience, these are not people who assess risks, plan ahead and make good judgments. They would not have committed their crimes if they thought they were going to be caught, regardless of the punishment. But they don't expect to get caught so they don't even get to the question of what punishment will be inflicted. Why would anyone commit a crime – for example, murder and robbery to get money to buy drugs – if they thought that instead of enjoying the drugs in the free world they would be spending the rest of their life in prison or even years in prison?

Even if they get to the issue of punishment – I cannot imagine how they process the information. A large portion of the people who end up on death rows are people with very poor reading skills. They don't read the newspaper or watch the news or listen to public radio. When they are assessing the risk of getting executed, are they supposed to consider that nationally they have a one percent chance of getting the death penalty if they are caught and convicted? Or are they to consider whether they are in one of the 12 to 16 states that has carried out a death sentence in the last three years? How much of a deterrent can it be in the

states that have two or three people on their death rows and have carried out one or two executions over 30 years? Are they deterred if they are in New Hampshire, which has a death penalty law but has never imposed it? How do they learn that New Hampshire has a death penalty law? Do states that have not carried out any executions or have carried out just a few need to carry out more in order to deter, or can they benefit from executions in other states?

The more routine executions become, the less media coverage they get. How are people supposed to find out about executions and be deterred if they are not getting any media coverage?

Beyond that, is the potential murderer going to take into account the likelihood of being assigned a bad court-appointed lawyer, of being tried before an all-white jury instead of a racially diverse jury, and other factors which will increase his chances of getting the death penalty?

The people I have encountered who committed murder do not have the information and many are not capable of going through a reasonable consideration of it if they had it. Many people who commit murder suffer from schizophrenia, bi-polar disorder, major brain damage or other severe mental impairments. They may have a very distorted sense of reality or may not even be in touch with reality.

Finally, if death were a deterrent, it would surely deter gang members and drug dealers. They see death up close. Killings over turf and in retaliation for other killings make death very real. It is summary and there are no appeals. They see brothers and friends killed; go to funerals. They have much greater likelihood of getting death on the streets than in the courts. But, it does not change their behavior.

## IV. THE COST IS NOT JUSTIFIED

There is a growing recognition that it is just not worth it. A Florida prosecutor let a defendant plead guilty to killing five people because a sentence of life imprisonment without parole would bring finality. The *Palm Beach Post* observed "The State saves not only the cost of a trial; the victims' relatives – who supported the deal – do not have to relive the horror. The state will save more by avoiding years of appeals; . . . Most important, [the defendant] never again will threaten the public."[14]

New York spent more than $170 million on its death penalty over a ten year period, from 1995 to 2005, before its Court of Appeals declared its death penalty law

14. *Palm Beach Post*, December 16, 2004 (editorial).

unconstitutional. During that time, the state did not carry out a single execution. Only seven persons were been sentenced to death – an average of less than one a year – and the first four of those sentences were struck down by the New York Court of Appeals on various grounds. The speaker of the state's assembly remarked, "I have some doubt whether we need a death penalty. . . . We are spending tens of millions of dollars [that] may be better spent on educating children." He also pointed out that the state now has a statute providing for life imprisonment without parole that ensures those convicted of murder cannot go free.

Similarly, Kansas did not carry out any executions between 1994, when it reinstated the death penalty, and 2004 when the state supreme court ruled it unconstitutional. Kansas had eight people under sentence of death, six from one county.

New Jersey, which just declared a moratorium on executions, has spent $253 million on its death penalty since 1983. It has yet to carry out an execution and has only ten people on its death row. In other words, the state has spent a quarter of a billion dollars over 23 years and has not carried out a single execution. Michael Murphy, a former prosecutor for Morris County, remarked, "If you were to ask me how $11 million a year could best protect the people of New Jersey, I would tell you by giving the law enforcement community more resources. I'm not interested in hypotheticals or abstractions, I want the tools for law enforcement to do their job, and $11 million can buy a lot of tools."

These are states which made every effort to do it right. It is also possible to have death on the cheap. A number of states have done this. Capital cases may last as little as a day and a half. Georgia recently executed a man who was assigned a lawyer – a busy public defender – just 37 days before his trial and denied any funds for investigation or expert witnesses. But this completely undermines confidence in the courts and devalues life.

## V. CONCLUSION

Supreme Court Justice Arthur Goldberg said that the deliberate institutionalized taking of human life by the state is the greatest degradation of the human personality imaginable. It is not just degrading to the individual who is tied down and put down. It is degrading to the society that carries it out. It coarsens the society, takes risks with the lives of the poor, and diminishes its respect for life and its belief in the possible redemption of every person. It is a relic of another era. Careful examination will show that the death penalty is not serving any purpose in our society and is not worth the cost.

## A death penalty conversion

*Birmingham News*
November 6, 2005 (editorial)

> "The dignity of human life must never be taken away, even in the case of someone who has done great evil." – Pope John Paul II

In his last moments of life, John Peoples smiled, lifted a thumb toward his brother Gerry and said a few final words: "I hope I've handled everything ... with dignity."

Peoples lay his head back on the gurney. A chaplain knelt beside him and held his hand. Peoples' lips moved along with the chaplain's prayer.

Then, the state of Alabama killed him.

As the first drugs entered his veins, Peoples gasped twice and went still. For the next 15 minutes, as more poisons flowed into his body, the color of life slowly drained from his face.

Peoples was put to death for murdering Paul and Judy Franklin and their 10-year-old son, Paul Jr. Prosecutors said he killed the Franklins in 1983 to get their red Corvette. Authorities couldn't determine how Paul Franklin died. Judy Franklin and Paul Jr. were beaten to death with a rifle.

The family's loved ones and friends waited 22 years to see Peoples die for his crime. Their long wait for justice ended Sept. 22 at 6:27 p.m. Peoples was the 737th person the state of Alabama has executed – the 10th by lethal injection.

"I think we do it as dignified and humane as you can execute a person," said Grantt Culliver, the warden of Holman Correctional Facility and, as such, the state's executioner. "There's no glory in it. It's a matter of law."

It's a matter of law that deeply troubles *The News*' editorial board. After decades of supporting the death penalty, the editorial board no longer can do so. Today and over the next five days, we will explain our change of mind and heart.

We know that many of our readers, including families and friends of murder victims, will disagree. We acknowledge we cannot grasp the profound grief experienced by those who lose loved ones in senseless, savage killings. We well understand some crimes are so great that those who commit them don't deserve to live in the free world ever again, and that some don't deserve to live at all. Yet we can no longer in good conscience continue to advocate the death penalty in Alabama.

**A broken system:**

Why? Because we have come to believe Alabama's capital punishment system is broken. And because, first and foremost, this newspaper's editorial board is committed to a culture of life.

Put simply, supporting the death penalty is inconsistent with our convictions about the value of life, convictions that are evident in our editorial positions opposing abortion, embryonic stem-cell research and euthanasia. We believe all life is sacred. And in embracing a culture of life, we cannot make distinctions between those we deem "innocents" and those flawed humans who populate Death Row.

Faith tells us we all are imperfect, but we're not beyond redemption. We believe it's up to God to say when a life has no more purpose on this Earth.

We are not turning soft on crime. Remember, the alternative to the death penalty is not leaving predators free to kill again. The alternative to execution is life in prison without any chance, ever, for parole. That is enough to protect the public.

"We don't have to execute people to prove we are outraged about a crime," said Bryan Stevenson, executive director of the Equal Justice Initiative of Alabama, a Montgomery nonprofit group that defends Death Row inmates.

Even people who embraced the death penalty in the past are having second thoughts. One is George Ryan, the Republican former governor of Illinois who commuted all the death sentences in his state after a string of exonerations. Another is U.S. Sen. Rick Santorum, a conservative Republican from Pennsylvania who has expressed growing reservations about the nation's use of the death penalty. "I still see it as potentially valuable," he said, "but I would be one to urge more caution than I would have in the past."

Some of the most poignant reflections on the issue came from the late Pope John Paul II, who shifted Catholic Church teaching on the death penalty and spoke pointedly against capital punishment.

"The new evangelization calls for followers of Christ who are unconditionally pro-life, who will proclaim, celebrate and serve the Gospel of life in every situation. A sign of hope is the increasing recognition that the dignity of human life must never be taken away, even in the case of someone who has done great evil," the pope said in 1999.

No doubt, some sincerely believe executing killers shows reverence for the lives of victims. But how much regard does a society hold for life if it uses the death penalty in a haphazard fashion? This is a crucial question - and one that must matter to Alabamians.

**Many misgivings:**

While a strong majority of Alabamians support capital punishment in theory, a number of them have misgivings about the death penalty in practice. More than seven in 10 Alabamians strongly support capital punishment, according to a July survey of 863 people by the Alabama Education Association's Capital Survey Research Center.

Yet almost six in 10 among those polled say they want the death penalty halted while the state studies questions of fairness and reliability. Only 47 percent believe the death penalty is applied fairly in Alabama, according to the poll. But the most troubling number is this: Eighty percent of those polled think the state could execute someone who is not guilty.

There is plenty of reason to fear that possibility. In the past dozen years, five men have walked free from Alabama's Death Row - not because they escaped, but because juries acquitted them in new trials or prosecutors dropped charges. Across the nation, more than 120 people have been released from Death Row, some of them having come harrowingly close to being executed.

A startling number of death penalty cases are also overturned because of errors in the prosecution and trial. A massive study in 2000 by Columbia University Law School professors put the national error rate for capital cases at 68 percent and at 77 percent in this state. Incompetent defense lawyers, prosecutors suppressing evidence, misinstruction of juries, and biased judges and jurors led to most reversals, the study found.

Two professors at John Jay College attacked the Columbia figures because the study made no distinction between errors on conviction and sentencing. Even as they estimated a national error rate of 27 percent for conviction, they noted Alabama's conviction reversals during the study period were higher than 60 percent.

Then-Attorney General Bill Pryor criticized the Columbia study because it covered the years 1973 to 1995, but did not take into account cases from 1995 through 2000. During those years, Pryor wrote, "so-called" error rates for each phase of the capital process ranged from 3 percent to 14 percent. But he reported error rates only from each phase of the process, and not the overall error rate, which would be much higher.

When possibly innocent lives are at stake, even Pryor's figures are too high.

Some say overturned cases are a sign the system works, or that it shows how much scrutiny death penalty cases receive. That's true, to a point. But it should be no comfort to death penalty supporters that in the process leading to execution, mistakes are so common.

*Birmingham News* editorial
November 6, 2005

As a result of these kinds of questions, some states have halted executions and/or embarked on serious studies about the death penalty. More than a dozen states either have done or are doing death penalty studies, said Richard Dieter, executive director of the Death Penalty Information Center in Washington, D.C. California is among those just launching a broad review of the death penalty, he said.

**Commuting sentences:**

The most noted example is Illinois. In 2000, a series of exonerations led then-Gov. Ryan, a supporter of capital punishment, to declare a moratorium on executions, create a study commission and ultimately commute the sentences of all 167 people facing the death penalty in his state.

The moratorium remains in place, and Illinois lawmakers have since passed a number of the reforms recommended by Ryan's commission on capital punishment. Among other things, the state limited the number of crimes that result in a death sentence, improved police procedures, created pretrial hearings to determine the credibility of jailhouse informants, and established a method for courts to toss out death sentences in the interest of "fundamental justice."

At the heart of what has happened in Illinois and elsewhere - including Alabama - are disturbing questions about the fallibility of our justice system.

Cases where inmates have been convicted and later cleared challenge long-held notions about the reliability of eyewitness identification, the use of jailhouse snitches and, in some cases, the integrity of police and prosecutors. These cases highlight other problems as well, such as incompetent and/or inadequate legal defense, and the role race plays.

While these questions apply to all criminal cases, they are particularly troubling in death penalty cases where mistakes can go, literally, to the grave. At the very least, we should be assured the ultimate punishment is inflicted fairly and accurately. That's not the case.

Alabama has one of the nation's broadest capital punishment laws, allowing the death penalty for 18 varieties of murder. Despite the sizable number of murders that qualify, only a fraction end up with a death sentence.

The factors that determine which cases end with death are arbitrary. The prestige and wealth of defendants, the quality of their defense, even the race of their victims can play into the outcome of a case. While blacks are far more likely to be murder victims, the overwhelming number of murders that lead to a death sentence involve victims who are white.

Many other problems exist.

Before the U.S. Supreme Court ruled it unconstitutional in 2002, Alabama had condemned and executed killers who were mentally retarded. Before the high court struck down the execution of juvenile offenders this year, the state had sent people to Death Row for crimes they committed when they were as young as 16. In addition, some inmates who have been executed and others still on Death Row have had histories of serious mental illnesses.

**Hit-or-miss lawyers:**

Even when capital defendants are mentally sound, they are usually poor. This means they can't afford to hire their own lawyers or mount a vigorous defense. They rely largely on court-appointed attorneys who make less than the going rate and whose skills can be hit-or-miss.

"It's better to be rich and guilty than innocent and poor," said Richard Jaffe, a criminal defense lawyer in Birmingham who has represented a number of capital defendants.

As important as a strong defense is to anyone accused of a crime, it's decidedly more important for those charged with capital crimes. It's not just that the stakes are so high, but emotions are, too. The most heinous crimes often create a public

outcry that may tempt police and prosecutors to take shortcuts. These are the cases where people may be most at risk for a wrongful conviction.

And yet, 70 percent of those on Alabama's Death Row were convicted when defense lawyers were capped at $1,000 in pay for out-of-court work - a critical stage of any defense that should involve hundreds of hours of investigation, legwork and legal preparation.

But at least the state has some system for providing for the legal defense, however spotty, of death penalty defendants at trial. There is no such system of assuring lawyers for defendants for the crucial second and third round of appeals where miscarriages of justice are most often uncovered. These cases are spread out largely among a small collection of nonprofit defense firms and volunteer lawyers. Some defendants luck out with great appeals lawyers; others have missed filing deadlines for appeals because they had no lawyer at all. Who gets a thorough and top-notch review on appeals is mostly a matter of chance.

Despite these problems, Alabama Attorney General Troy King said, "We have a system that works as well as any in the world."

At the end of the day, we grant King this: Most of those on Death Row indeed are guilty. They committed vicious crimes, terrorizing old people, even children. They cut precious lives short and forever altered the lives of grieving survivors.

"Those victims have had the most horrible things happen to them, and we speak for them," said Talladega County District Attorney Steve Giddens.

**Profound sorrow:**

We hear the profound sorrow in the voices of those left behind, people like Judy Franklin's brother Bill Choron and his wife, Gail, who in September went to Holman to watch John Peoples die.

The Chorons believe Peoples died an easy death compared to his victims. "It's not easy to watch a man die," Gail Choron said after witnessing Peoples' last breath. "But it's not easy to think about what he did to deserve this death."

The Equal Justice Initiative's Stevenson argues the question is not whether these killers merit the state's ultimate punishment.

"The question has to be not whether they deserve to die," he said. "The question is, do we deserve to kill?"

*The News* 'editorial board strongly believes the answer to that question is no.

OPENING STATEMENT OF SENATOR SAM BROWNBACK

HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS:
"AN EXAMINATION OF THE DEATH PENALTY IN THE UNITED STATES"

FEBRUARY 1, 2006

The Fifth and Fourteenth Amendments to the U.S. Constitution provide that no person may be deprived of life without due process of law. These provisions contemplate, and our history reflects, the adoption of the death penalty as a form of criminal punishment. Yet the Eighth Amendment prohibits in undefined terms the use of cruel and unusual punishment. Reading these provisions together, it seems our founding document neither demands nor prohibits capital punishment. Instead, the Constitution generally permits the People to decide whether and when capital punishment is appropriate.

So each generation may – and good citizens should – consider anew the law and facts involving this solemn judgment. I believe America must establish a culture of life. If use of the death penalty is contrary to promoting a culture of life, we need to have a national dialogue and hear both sides of the issue. All life is sacred, and our use of the death penalty in the American justice system must recognize this truth.

I called this hearing in order to conduct a full and fair examination of the death penalty in the United States. I believe it is important for lawmakers and the public to be

informed about a punishment which, because it is final and irreversible, stirs much debate.

Although most decisions about the death penalty rest with the People and their elected representatives, these decisions are made in the shadow of extensive Supreme Court precedents. For instance, in the 1973 case of Furman v. Georgia, the Supreme Court invalidated capital punishment nationwide by stating, in a brief yet broad opinion, that application of the death penalty violated the Eighth and Fourteenth Amendments. Four years later, in Gregg v. Georgia, the Supreme Court revisited this judgment. The Court held that capital punishment for the crime of murder did not violate these constitutional provisions. Justice Stewart's opinion decided that the Framers contemplated and applied the death penalty, and that it was not per se invalid two centuries later.

In the past thirty years, the Supreme Court has dealt with numerous death penalty appeals. Just yesterday, it stayed an execution in Florida, and permitted another to go forward in Texas. Occasionally, the Supreme Court has issued more wide-ranging decisions. For example, the Court held in the 2002 case of Atkins v. Virginia, that execution of the mentally disabled constituted cruel and unusual punishment. Similarly, in last year's case of Roper v. Simmons, the Court invalidated the death penalty for minors. In each of these decisions, the Court found what it deemed to be a popular consensus against use of the death penalty in cases involving mentally disabled or minor defendants.

Aside from these constitutional issues, the federal and state death penalty systems have inspired many policy arguments, such as whether use of this punishment deters crime. In the Roper case, the five-Justice majority stated that "The absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." Conversely, my Senate colleague, Senator Kyl, previously has introduced into the Committee record information suggesting that the death penalty may deter crime.

It is my intention to explore in this hearing the various aspects of capital punishment, from the statistics on deterrence to the views of crime victims. It is my hope that by carefully reflecting on America's experience with the death penalty, the People can make informed judgments worthy of the Constitution's faith in future generations.

We will hear today from victims and experts on both sides of this debate. I look forward to a robust discussion on this important issue. On the first panel, we are privileged to have two witnesses, Ms. Vicki Schieber and Mrs. Ann Scott. Both Vicki and Ann are parents who each lost their daughters to senseless acts of violence, and who will share their stories and views on the death penalty. I know I speak for everyone on this panel when I say our hearts and prayers go out to you, your families, and above all your children. We greatly appreciate your willingness to come before the Senate and share your tragic stories.

On the next panel, we will take testimony from four experts on capital punishment. The first is Professor John McAdams from Marquette University. Professor McAdams has written extensively on the death penalty and has participated in a number of forums defending capital punishment. Next is Stephen Bright, president of the Southern Center for Human Rights. He has written extensively on capital punishment, and teaches law at both Harvard and Yale. To discuss the effectiveness of the death penalty as a deterrent, we will hear from Professor Jeffrey Fagan of Columbia Law School and Professor Paul Rubin from Emory University. Professor Fagan has conducted significant research on the changes in homicide rates over the past few decades. Professor Rubin recently co-authored a study that has been called one of the most comprehensive death penalty studies ever conducted. I thank you for your participation today and look forward to hearing from each of you.

Richard C. Dieter
EXECUTIVE DIRECTOR

1101 Vermont Avenue N.W.
Suite 701
Washington, D.C. 20005
Phone: (202) 289-2275
FAX: (202) 289-7336
email: dpic@deathpenaltyinfo.org
Internet: www.deathpenaltyinfo.org

# DEATH PENALTY INFORMATION CENTER

February 7, 2006

Hon. Sam Brownback
Chairman
Subcommittee on the Constitution,
Civil Rights & Property Rights
613 Hart Senate Office Building
Washington, DC 20510

Hon. Russell D. Feingold
Ranking Member
Subcommittee on the Constitution,
Civil Rights & Property Rights
807 Hart Senate Office Building
Washington, DC 20510

Dear Senators Brownback, Feingold, and Members of the Committee:

Thank you for the opportunity to supplement the record of the recent hearing on the death penalty that was conducted by your Subcommittee on February 1, 2006. The hearing provided an excellent exploration of some of the key issues in the death penalty debate. In order for the record to accurately reflect the facts on this important matter, I would like to offer the following statement to clarify part of what was presented at the hearing:

## SUPPLEMENTARY STATEMENT FOR THE RECORD

My name is Richard Dieter and I am the Executive Director of the Death Penalty Information Center (DPIC), a position I have held since 1992. The Center is a non-profit organization that conducts research and issues reports and analyses on capital punishment in the United States.

During the hearing on the death penalty before this Subcommittee, one of the witnesses, John McAdams of Marquette University, used much of his time in an effort to cast doubt on the importance of the innocence issue generally. A particular focus of his criticism was DPIC's list of innocent people who have been freed from death row. I believe that Prof. McAdams' criticism is based upon a fundamental misunderstanding of the nature and purpose of this list. Hence, his criticism was misdirected and may have been misleading to the Subcommittee.

## DPIC'S INNOCENCE LIST

The origin of the Innocence List was a request that DPIC received from Rep. Don Edwards of California in 1993. Rep. Edwards was then the Chairman of the House Subcommittee on Civil and Constitutional Rights, and he asked DPIC to

BOARD OF DIRECTORS Anthony Amsterdam David J. Bradford David Bruck Phoebe C. Ellsworth George Kendall John R. MacArthur Michael G. Millman Diann Rust-Tierney Christina Swarns Ronald J. Tabak

assess the risk that innocent people might be sentenced to death or executed under the death penalty system in the U.S. We prepared a draft report on this issue that resulted in the publication of a Staff Report of the Subcommittee later that year. As part of that report, we included a list of individuals who had been on death row and who subsequently had their convictions overturned. In almost all of 48 cases listed, the end result was a retrial in which the defendant was acquitted, or the dropping of all charges by the prosecution.

In preparing this list, we relied to some extent on the research of others, but we sought to apply a conservative and objective definition of innocence. We chose not to include cases in which researchers—or any other individuals who are not authorized by the justice system to make definitive *legal* judgments regarding guilt or innocence--had subjectively decided that the defendant was probably innocent. Rather, we elected to accept the judgments rendered by the official justice system itself, applying its traditional, legally prescribed procedures and criteria for determining *guilt or* innocence, and to restrict DPIC's role simply to recording the history of those judgments.

## SUBSEQUENT YEARS

In the years since that initial report, DPIC has continued to maintain this list, which has now grown to 122 individuals. In the original Staff Report, a handful of cases were included that were outside the criteria that we deemed appropriate for this list. Those cases were clearly identified as exceptions in the Staff Report. In our continuation of the list, DPIC elected not to add cases that were outside our criteria, and eventually we dropped even the original exceptional cases in the Staff Report from our list. The criteria for inclusion on the list are clearly stated in our subsequent published reports on this issue (1997 and 2004) and on our Web site. Those criteria are:

> Cases involving former death row inmates who have since 1973:
>
> a. Been acquitted of all charges related to the crime that placed them on death row, or
> b. Had all charges related to the crime that placed them on death row dismissed by the prosecution, or
> c. Been granted a complete pardon based on evidence of innocence.

In his testimony, Prof. McAdams chose to use another definition of innocence and then criticized our list for not meeting his definition. His definition is not stated with any clarity, but as I understand it, is premised on the notion that someone who has been charged with a crime, formally tried on the charges, and acquitted of each and every charge at trial is not thereby established to be "innocent." Instead, such a person must *additionally* pass some subjective test of "actual innocence" set by his or her prosecutors or by special pleaders advocating this or that criminal-justice policy in the forum of public opinion. If these self-appointed judges determine that the person is *probably* guilty--despite an official determination that there is not enough legal proof to meet the time-

honored standard of "beyond a reasonable doubt"--then that person is not "innocent" and should not be included on DPIC's list.

This, of course, is a different criterion than we have used. It would, undoubtedly, produce a different list. Prof. McAdams is free to set out his criteria more clearly and assemble such a list. What he should not do is insist that our list conform to his definition. For DPIC to get involved in such subjective second-guessing and vague judgments would surely leave us open to claims of bias, and it would not have provided the kind of objectivity that we believed Rep. Edwards' Subcommittee desired.[1]

Further, we believe that it is a mistake to maintain that innocence (or guilt) can be established in some absolute sense through a re-evaluation of the facts surrounding a crime by a group of people with a vested interest in the outcome of this determination. Such "absolute judgments" have been proven wrong in many cases in recent years as a result of advances in DNA technology. But even where they have not been proven wrong, such an extra requirement to a person's status of innocence is contrary to our long traditions and constitutional principles. The bedrock principle that a person is innocent until proven guilty beyond a reasonable doubt is the individual's protection in our society against the unchecked power of the state to diminish a person's status through mere suspicion. And when formal charges have been brought and have been definitively resolved by an acquittal, dismissal, or pardon based upon the application of that bedrock principle, neither DPIC nor Prof. McAdams can properly insist that the person is "really" guilty notwithstanding.

Thus, I believe Prof. McAdams' criticism of DPIC's list is misdirected. If there are people on our list that do not meet *our* criteria, he, or others, should inform us and, if appropriate, we will remove them. We do not claim infallibility.

## THE RISK OF WRONGFUL EXECUTIONS

I believe that Prof. McAdams' testimony was also potentially misleading in that he implies that our justice system's traditional way of determining guilt and innocence is irrelevant in evaluating the risks associated with the death penalty. Can anyone doubt that our justice system should forbid the execution of the 122 people on DPIC's list? These are people who were originally convicted and sentenced to die but who were later found not guilty of the crimes in question when all of the available evidence was reexamined by the authorities authorized to pass final judgment on the matter. And because their cases illustrate the risk that just such people could have been executed but for a variety of fortuitous circumstances, we must acknowledge the existence of that risk and of the profound challenges that it poses to the use of the death penalty. If we are to have the death penalty, the absolute minimum criterion for its use certainly

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[1]. In a subsequent letter, Chairman Edwards thanked DPIC on behalf of his Subcommittee for this objectivity: "This document and the Center's other reports serve as the basic reference materials for objective, relevant data on the death penalty." Letter from Don Edwards, Subcommittee on Civil and Constitutional Rights, Oct. 22, 1993 (on file with DPIC).

should be that the defendant has been found guilty of the crime. These 122 cases since 1973 represent the most minimally stated risk of miscarriages of justice in these life and death decisions. The actual risk is probably far greater.

I believe that Prof. McAdams' testimony was misleading in a number of other regards as well. In criticizing the work of DPIC, he cited the case of *United States v. Quinones*, a federal death penalty case, implying that the judge in this case discounted the value of DPIC's list. Just the contrary is true.

In a pre-trial ruling, the District Judge declared the federal death penalty unconstitutional because it posed an unacceptable risk of executing the innocent.[2] The judge based his finding of risk to a large extent on the work and research of the Death Penalty Information Center. The prosecution had offered a similar critique to that proffered by Prof. McAdams in its attempt to dissuade the judge from reaching his conclusion.

With respect to DPIC's Innocence List, the court considered the arguments of both sides and noted:

> This is not to say, however, that there is any basis for the Government's contention that the data and case summaries set forth in the DPIC website (as opposed to DPIC's interpretations of those data and summaries) are unreliable. See Govt. Mem. 34-35. Upon review of the substantial record provided by the parties, the Court is satisfied that the DPIC employs, as it attests (see Def. Mem. Ex. A), reasonably strict and objective standards in listing and describing the data and summaries that appear on its website.

*United States v. Quinones*, 205 F. Supp.2d 256, 265 n. 10 (D.C.N.Y. 2002).

In citing a smaller number of cases of innocence than appeared on DPIC's list, the judge was not rejecting any cases for inaccuracies. Rather he was restricting his analysis for the sake of argument to the past decade (DPIC's list runs from 1973), and to cases that the *Quinones* defendants, in a legal memorandum collecting non-DNA cases, "correctly intuited satisfy the Court's conservative criterion of prisoners who were 'released on grounds of factual innocence.'" *Id.* at n. 11.

## THE FLORIDA COMMISSION

As another source for his criticism of DPIC's list, Prof. McAdams offered a review of Florida's innocence cases by the Florida Commission on Capital Cases. This Commission, like Prof. McAdams, viewed itself as gifted with the wisdom to deny the innocence of individuals who had been acquitted at re-trial or where the prosecution had dropped all charges. But more to the point of its credibility of its review, this Commission, without consulting or obtaining permission from

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[2]. This decision was later reversed on appeal on legal rather than factual grounds. See *United States v. Quinones*, 313 F.3d 39 (2d Cir. 2002).

DPIC, copied our list, *added* cases that were never on our innocence list,[3] and then proceeded to criticize the *inclusion of these very cases*. This is not only misleading, it calls into question the credibility of their entire endeavor.

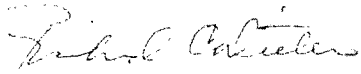
Ironically, the chair of the commissioner claimed--while he was campaigning for Florida Attorney General--that DPIC's innocence list was politically motivated. Moreover, he came to an even more sweeping conclusion, unsubstantiated by the Commission's report, regarding all of those on Florida's current death row: "Number one, the system is not broken. Number two, there are no innocent people *on death row*. And Number three, the people who use these 23 cases as a reason to call for a moratorium are making a political statement."[4] Following this, two more people were released from Florida's death row, their convictions reversed and all charges dismissed by the prosecution.

## CONCLUSION

There are other areas, such as his discussion of the case of Roger Coleman, in which I believe Prof. McAdams inaccurately described the work of DPIC, and more importantly, distorted the problem that the cases of innocence present to our system of capital punishment. I would be happy to provide the Subcommittee with further information about these matters.

The many instances of wrongful convictions in capital cases raise profound questions for this Committee and for the American people. For every 8 people we have executed since the reinstatement of the death penalty, we have found 1 person who should not even have been convicted, much less executed. Any human system is fallible, but when it comes to life and death we must require a much higher level of reliability.

Thank you for this opportunity to supplement the record.



Richard C. Dieter
Executive Director

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[3]. See Florida Commission on Capital Cases: Case Histories, June 20, 2002, at Appendix (adding the cases of Sonia Jacobs and Joseph Spaziano under DPIC's logo as "Cases of Innocence," even though DPIC has never included these cases in its list.

[4] Associated Press, "State Senator Says Review of Cases Finds No Innocence," June 20, 2002 (emphasis added).

# 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**

**Jeffrey Fagan**
**Columbia Law School**

Chairman Brownback, Senator Feingold, and Honorable members of the Subcommittee, thank you for inviting me to testify before you today on this most urgent topic. This is an important moment historically in the debate on capital punishment, both in the states and the nation. New developments in social science and law have rekindled the debate on the effectiveness of the death penalty as a deterrent to murder. Both legal scholars and social scientists have transformed this new social science evidence into calls for more executions that they claim will save lives.[1] Others challenge the scientific credibility of these new studies,[2] and warn about the moral hazards and practical risks of capital punishment.[3] Thus, public policy choices on capital punishment

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[1] Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. —, (2005). *See, also*, Richard Posner, The Economics of Capital Punishment, http://www.becker-posner-blog.com/archives/2005/12/the_economics_o.html#trackbacks (visted December 18, 2005); Gary Becker, More on the Economics of Capital Punishment, http://www.becker-posner-blog.com/archives/2005/12/more_on_the_eco.html#trackbacks (visited December 18, 2005).

[2] John Donohue & Justin Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 58 STAN. L. REV. 791 (2005) (reviewing the main study cited by Sunstein and Vermeule and finding "the empirical support for the proposition that the death penalty deters . . . to be quite weak"). *See, also*, Richard Berk, *New Claims About Executions and General Deterrence: Déjà vu All Over Again?*, 2 J. EMP. L. STUD. 303 (2005).

[3] Carol S. Steiker, No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty, 58 Stan. L. Rev. ___ (2005) (responding to claim of the "moral requirement" of Sunstein and Vermeule by stating that "...executions constitute a distinctive moral wrong (purposeful as opposed to non-purposeful killing), and a distinctive kind of injustice (unjustified punishment)" and concluding that ... "acceptance of 'threshold' deontology in no way requires a commitment to capital punishment even if ...deterrence is proven").

may depend on the accuracy, reliability and certainty of this new social science evidence. I appear today to discuss significant errors and flaws that seriously undermine the new social science claims about deterrence, and render moot calls for a vigorous new application of the death penalty. The risks of error in capital punishment, the suspect evidence of its effectiveness as a deterrent, and its high costs that foreclose local investments in basic state and local services, are critical dimensions of public policy choices facing the states and the nation on how to punish those who commit the worst crimes.

***Qualifications***

I am a professor of law and public health at Columbia University. My research has examined the administration of the system of capital punishment in the U.S., and also changes in homicide rates in American cities over the past three decades. I received my PhD from The University at Buffalo, State University of New York, where I was trained in econometrics, statistics, and engineering. I am also a Fellow of the American Society of Criminology, and Vice Chair of the Committee on Law and Justice of the National Research Council. Among other courses, I teach Law and Social Science to Columbia's law students. My research and writing has been supported by federal research agencies and private foundations. I frequently publish in peer-reviewed journals, and I serve on the editorial boards of several peer-reviewed journals. I have served on numerous government advisory committees and scientific review boards. I have also received research grants and fellowships from numerous government agencies and private foundations.

***Summary***

Recent studies claiming that executions reduce murders have fueled the revival of deterrence as a rationale to expand the use of capital punishment. Such strong claims are not unusual in either the social or natural sciences, but like nearly all claims of strong causal effects from any social or legal intervention, the claims of a "new deterrence" fall apart under close scrutiny. These new studies are fraught with numerous technical and conceptual errors: inappropriate methods of statistical analysis, failures to consider all the relevant factors that drive murder rates, missing data on key variables in key states, the tyranny of a few outlier states and years, weak to non-existent tests of concurrent effects of incarceration, statistical confounding of murder rates with death sentences, failure to consider the general performance of the criminal justice system, artifactual results from truncated time frames, and the absence of any direct test of deterrence. These studies fail to reach the demanding standards of social science to make such strong claims, standards such as replication, responding to counterfactual claims, and basic comparisons with other causal scenarios. Social scientists have failed to replicate several of these studies, and in some cases have produced contradictory results with the same data, suggesting that the original findings are unstable, unreliable and perhaps inaccurate. This evidence, together with some simple examples and contrasts including the experience in my state of New York, suggest extreme caution before concluding that there is new evidence that the death penalty deters murders.

The costs of capital punishment are extremely high. Even in states where prosecutors infrequently seek the death penalty, costs of obtaining convictions and executions in

capital cases range from $2.5 to $5 million dollars per case (in current dollars), compared to less than $1 million for each killer sentenced to life without parole. Local governments bear the burden of these costs, diverting $2 million per capital trial from local services – hospitals and health care, police and public safety, and education – or infrastructure repairs – roads and other capital expenditures – and causing counties to borrow money or raise local taxes. The costs are often transferred to state governments as "risk pools" or programs of local assistance to prosecute death penalty cases, diffusing death penalty costs to counties that choose not to use – or have no need for -- the death penalty in capital cases.

The high costs of the death penalty, the unreliable evidence of its deterrent effects, and the fact that the states that execute the most people also have the highest error rates[4], create clear public policy choices for the nation. If a state is going to spend $500 million on law enforcement over the next two decades, is the *best* use of that money to buy two or three executions or, for example, to fund additional police detectives, prosecutors, and judges to arrest and incarcerate murderers and other criminals who currently escape any punishment because of insufficient law-enforcement resources?

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[4] James Liebman, Jeffrey Fagan, Valerie West, & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973 – 1995*, 78 TEXAS LAW REVIEW 1839 (2000) (showing that 68% of all death sentences since *Furman v. Georgia* were reversed either on direct appeal, state direct appeal, or federal habeas review; most – 82% – of those reversed were re-sentenced to non-capital punishments, 7% were exonerated, and the remainder were re-sentenced to death); *see also* Brian Forst, BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES, 201-04 (2004) (noting that the errors in these cases were the result of misidentification of witnesses, prosecutorial or police misconduct, incompetent defense counsel, prejudicial instructions by judges, and biased jury selection procedures); James Liebman et al., *A Broken System, Part I: Error Rates in Capital Cases, 1973-1995* (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/ ; James Liebman et al., *A Broken System Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* (2002), *available at* http://www2.law.columbia.edu/ brokensystem2/report.pdf.

Also, most states rarely use the death penalty,[5] and both death sentences and executions have declined sharply over the past five years, even as murder rates have declined nationally. We cannot expect the rare use of the death penalty to have a deterrent effect on already declining rates of murder. Justice White noted long ago in *Furman v. Georgia* that when only a tiny proportion of the individuals who commit murder are executed, the penalty is unconstitutionally irrational: a death penalty that is almost never used serves no deterrent function, because no would-be murderer can expect to be executed. Accordingly, a threshold question for state legislatures across the country is whether their necessary and admirable efforts to avoid error and the horror of the execution of the innocent won't --- after many hundreds of millions of dollars of trying --- burden the state with a death penalty that will be overturned again because of this additional constitutional problem?

## I. Introduction

Since 1996, more than a dozen studies have been published claiming that the death penalty has a strong deterrent effect that can prevent anywhere from three to 18 homicides.[6] But this is not a new claim. In 1975, Professor Isaac Ehrlich published an influential article saying that during the 1950s and 1960s, each execution averted eight murders.[7] Although Ehrlich's research was a highly technical article prepared for an audience of economists, its influence went well beyond the economics profession.

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[5] See, Richard Berk, New Claims about Executions and Deterrence, *supra* note 2.
[6] A list of these studies is appended to this testimony.
[7] Isaac Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 AMERICAN ECONOMIC REVIEW 397 (1975); Isaac Ehrlich, Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence, 85 JOURNAL OF POLITICAL ECONOMY 741 (1977)

Ehrlich's work was cited in *Gregg v. Georgia*[8], the central U.S. Supreme Court decision restoring capital punishment. No matter how carefully Ehrlich qualified his conclusions, his article had the popular and political appeal of a headline, a sound bite and a bumper sticker all rolled into one. Reaction was immediate: Ehrlich's findings were disputed in academic journals such as the *Yale Law Journal*[9], launching an era of contentious arguments in the press and in professional journals.[10] In 1978, an expert panel appointed by the National Academy of Sciences issued strong criticisms of Ehrlich's work.[11] Over the next two decades, economists and other social scientists attempted (mostly without success) to replicate Ehrlich's results using different data, alternative statistical methods, and other twists that tried to address glaring errors in Ehrlich's techniques and data. The accumulated scientific evidence from these later studies also weighed heavily against the

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[8] *Gregg v Georgia*, 428 U.S. 153 (1976)

[9] See Editor's Introduction, Statistical Evidence on the Deterrent Effect of Capital Punishment, 85 *Yale Law Journal* 164 (1975); David C. Baldus & James W.L. Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE LAW JOURNAL 170 (1975); William J. Bowers & Glenn L. Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE LAW JOURNAL 187 (1975); Isaac Ehrlich, Deterrence: Evidence and Inference, 85 *Yale Law Journal* 209 (1975).

[10] See, for critiques of Ehrlich's work, Michael McAleer & Michael R. Veall, *How Fragile are Fragile Inferences? A Re-Evaluation of the Deterrent Effect of Capital Punishment*, 71 REVIEW OF ECONOMICS AND STATISTICS 99 (1989); Edward E. Leamer, *Let's Take the Con out of Econometrics*, 73 AMERICAN ECONOMIC REVIEW 31 (1983); Walter S. McManus, *Estimates of the Deterrent Effect of Capital Punishment: The Importance of the Researcher's Prior Beliefs*, 93 JOURNAL OF POLITICAL ECONOMY 417 (1985); Jeffrey Grogger, The Deterrent Effect of Capital Punishment: An Analysis of Daily Homicide Counts, 85 *Journal of the American Statistical Association* 295 (1990).
See, for support and extensions of Ehrlich's work, Stephen A. Layson, *Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence*, 52 SOUTHERN ECONOMIC JOURNAL 68 (1985); James P. Cover & Paul D. Thistle, Time Series, Homicide, and the Deterrent Effect of Capital Punishment, 54 *Southern Economic Journal* 615 (1988). George A. Chressanthis, *Capital Punishment and the Deterrent Effect Revisited: Recent Time-Series Econometric Evidence*, 18 JOURNAL OF BEHAVIORAL ECONOMICS 81 (1989).

[11] See Lawrence R. Klein, Brian Forst, & Victor Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, pp. 336-60 in Alfred Blumstein, Jacqueline Cohen and Daniel Nagin (eds), Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates. Washington, DC: National Academy of Sciences (1978)

claim that executions deter murders.[12]

The new deterrence studies analyze data that span a 20 year period since the resumption of executions following the U.S. Supreme Courts decisions in *Furman v Georgia*[13] and *Gregg v. Georgia.*[14] The claims of these new studies are far bolder than the original wave of studies by Professor Ehrlich and his students.[15] Some claim that pardons, commutations, and exonerations cause murders to increase.[16] One says that even murders of passion, among the most irrational of lethal acts, can be deterred.[17] Another says that the deterrent effects of executions are so powerful that it will reduce robberies and even some non-violent crimes.[18] Thus, the deterrent effects of capital punishment apparently are limitless, leading some proponents to offer execution as a cure-all for everyday crime.[19]

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[12] Id. See, also, William C. Bailey, *Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment*, 36 CRIMINOLOGY 711 (1998); Jon Sorenson, Robert Wrinkle, Victoria Brewer, & James Marquart, *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 CRIME & DELINQUENCY 481 (1999).
[13] *Furman v. Georgia*, 408 U.S. 238 (1972)
[14] *Gregg v Georgia*, 428 U.S. 153 (1976)
[15] Joanna Shepherd, an author of several studies finding a deterrent effect, has recently argued before Congress that recent research has created a "strong consensus among economists that capital punishment deters crime," going so far as to claim that "[t]he studies are unanimous." Terrorist Penalties Enhancement Act of 2003: Hearing on H.R. 2934Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary, 108th Cong. 10-11 (2004), available at http://judiciary.house.gov/media/pdfs/ printers/108th/93224.pdf.
[16] *See, for example*, H. Naci Mocan and R. Kaj Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, 46 JOURNAL OF LAW AND ECONOMICS 453 (2003).
[17] Joanna M. Shepherd, Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment, 33 JOURNAL OF LEGAL STUDIES 283 (2004).
[18] Zhiqiang Liu, Capital Punishment and the Deterrence Hypothesis: Some New Insights and Empirical Evidence, 30 EASTERN ECONOMIC JOURNAL 237 (2004)
[19] Id.

**II. Less Than Meets the Eye**

The bar is very high when science makes such causal claims.[20] Professors Leigh Epstein of Washington University and Gary King of Harvard University have written an important article that articulates the standards for making causal inferences in law and social policy.[21] Their standards are consistent with the demands of science generally, and reflect a consensus on causal inference that durably exists in the highest halls of science, including, for example, the National Academy of Science, the Institute of Medicine, the National Institutes of Health, and the American Association for the Advancement of Science.[22] These standards are neither technical nor mysterious. Rather, they reflect just a bit of common sense: the ability to replicate the original work under diverse conditions by an independent researcher, the use of measures and methods that avoid biases from inaccurate "yardsticks" and faulty "gauges," the ability to tell a simple and persuasive causal story, and the testing and rejection of competing causal factors. These hallmarks of science have been recognized by the U.S. Supreme Court in a series of cases that demand that scientific evidence meet these very high yet commonsense standards for science.[23]

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[20] See, Christopher Winship and Martin Rein, *The Dangers of 'Strong' Causal Reasoning in Social Policy*, 36 SOCIETY 38 (July/August 1999); Michael E. Sobel, *An Introduction to Causal Inference*, 24 SOCIOLOGICAL METHODS &RESEARCH 353 (1996); Richard A. Berk and David A. Freedman, *Statistical Assumptions as Empirical Commitments*, in T.G. Blomberg and S. Cohen (eds.), Punishment and Social Control (2nd ed.) 235 (2003); Paul A. Rosenbaum, Observational Studies (1995).
[21] Lee Epstein and Gary King, *The Rules of Inference*, 69 UNIVERSITY OF CHICAGO LAW REVIEW 1 (2002).
[22] See, for examples, Lee Epstein and Gary King, Creating an Infrastructure for the Creation, Dissemination, and Consumption of High-Quality Empirical Research, 53 THE JOURNAL OF LEGAL EDUCATION 311 (2003)
[23] *Daubert v Merrill Pharmaceuticals,* 509 US 579 (1993); *Kumho Tire Co v Carmichael*, 526 US 137 (1999); *General Electric Co. v. Joiner*, 522 US 136 (1997).

A close reading of the new deterrence studies shows quite clearly that they fail to touch this scientific bar, let alone cross it. Consider the following:

- All but one of the new studies lump all forms of murder together, claiming that all are equally deterrable. But logic tells us that some types of murder may be poor candidates for deterrence, such as crimes of passion or jealousy. Yet the one study that looked at specific categories found that "domestic" homicides are more deterrable than others,[24] a claim that flies in the face of six decades of theory, research and facts on homicide[25] and especially murders of spouses and intimates.[26] Some homicide offenders simply are not responsive to threats of punishment.[27] It also belies the empirical fact that "domestic" or intimate partner homicides have been declining steadily since the early 1970's,[28] at a steady pace, regardless of fluctuations in the number of executions since capital punishment was reinstated following *Gregg*.

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[24] Joanna M. Shepherd, *Murder of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 JOURNAL OF LEGAL STUDIES 283 (2004).

[25] See, Franklin Zimring and Gordon Hawkins, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA (1997).

[26] Kenneth Polk, WHEN MEN KILL SCENARIOS OF MASCULINE VIOLENCE (1994). See, also, Jeffrey Fagan and Angela Browne, "Violence toward Spouses and Intimates: Physical Aggression between Men and Women in Intimate Relationships," in UNDERSTANDING AND PREVENTING VIOLENCE, VOL.3 ( A.J. Reiss, Jr., & J.A. Roth, eds.) 115 (1994).

[27] Jack Katz, SEDUCTIONS OF CRIME: THE MORAL AND SENSUAL ATTRACTIONS OF DOING EVIL (1988) (describing "stone cold killers" who are insensitive to punishment threats, and whose homicides can only be described as the pursuit of domination and pleasure). *See, also*, Richard B. Felson & Henry J. Steadman, *Situational Factors in Disputes Leading to Criminal Violence*, 21 CRIMINOLOGY 59-60 (1983); David F. Luckenbill, *Criminal Homicide as a Situated Transaction*, 25 SOCIAL PROBLEMS 176 (1977); Richard B. Felson, *Impression Management and the Escalation of Aggression and Violence*, 45 SOCIAL PSYCHOLOGY QUARTERLY 245 (1982); David F. Luckenbill & Daniel P. Doyle, *Structural Position and Violence: Developing a Cultural Explanation*, 27 CRIMINOLOGY 422-23 (1989); William Oliver, THE VIOLENT SOCIAL WORLD OF BLACK MEN 138-40 (1994).

[28] See, e.g., Laura Dugan, Daniel Nagin and Richard Rosenfeld, Explaining the Decline in Intimate Partner Homicide: The Effects of Changing Domesticity, Women's Status, and Domestic Violence Resources, 3 HOMICIDE STUDIES 187 (1999) (attributing the two-decades-long decline in the intimate partner homicide rate in the U.S. as a function of three factors that reduce exposure to violent relationships: shifts in marriage, divorce, and other factors associated with declining domesticity; the improved economic status of women; and increases in the availability of domestic violence services).

- The studies produce erratic and contradictory results, and some find that there is no deterrent effect that can be attributed to executions.[29] For example, one of the studies shows that executions are as likely to produce an increase in homicides in states following execution as there are states where there seems to be a reduction in homicides.[30] Moreover, depending on the year, some states exhibit "brutalization" effects from executions in some periods and deterrent effects in others.[31] A constitutional and moral regime of capital punishment cannot tolerate such inconsistency in one of its bedrock theoretical and constitutional premises. Moreover, such inconsistencies 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.
- Many of the same processes that produce murder rates also produce death sentences and executions,[32] so that determining the marginal causal effects of the death penalty is difficult. More important, the models used in most of the current studies conflate these effects by including homicide, social structure, death sentences and executions in the same model. This is what social scientists would decry as a "specification error": the piling on of correlated predictors – social

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[29] Lawrence Katz, Steven D. Levitt, & Ellen Shustorovich, *Prison Conditions, Capital Punishment, and Deterrence*, 5 AMERICAN LAW AND ECONOMICS REVIEW 318 (2003).
[30] Joanna M. Shepherd, Deterrence versus Brutalization: Capital Punishment's Differing Impacts Among States, 104 MICHIGAN LAW REVIEW 203 (2005).
[31] Id.
[32] Andrew Gelman, James S. Liebman, Valerie West and Alex Kiss, A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 209 (2004).

forces, homicides and executions – can defeat efforts to reliably estimate the effects of capital punishment or any other correlated set of predictors on murder rates.[33] These errors in modeling, a general sources of bias caused by multicollinearity and endogeneity, inflates regression results and undermines the reliability of estimates of deterrent effects.

- At the same time, many of these studies fail to account for a variety of explanations for the rise and fall of murders over time. For example, the current crop of studies ignores the contemporaneous and severe effects of drug epidemics on homicide rates,[34] and also on broader social conditions that elevate homicide rates.[35] In addition, many of the social structural factors that explain and predict homicide rates – demographic composition, concentrated poverty – at the state level also predict death sentencing rates.[36] A similar omission is the effect of firearms on murders. Nearly all of the increase and decline in the U.S. in

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[33] *See*, e.g., Lauren J. Krivo & Ruth D. Peterson, The Structural Context of Homicide: Accounting for Racial Differences in Process, 65 AMERICAN SOCIOLOGICAL REVIEW 547 (2000); Kenneth C. Land et al., Structural Covariates of Homicide Rates: Are There Any Invariances Across Time and Social Space?, 95 AMERICAN JOURNAL OF SOCIOLOGY 922, 922-32 (1990). See generally Robert J. Sampson & Janet H. Lauritsen, Individual-, Situational-, and Community-Level Risk Factors, in UNDERSTANDING AND PREVENTING VIOLENCE, VOL. 3 (A.J. Reiss, Jr. & J.A. Roth eds.) 1 (1994).

[34] See, e.g., Jeffrey Grogger and Michael Willis, The Emergence of Crack Cocaine and the Rise in Urban Crime Rates, 82 REVIEW OF ECONOMICS AND STATISTICS 519 (2000); Graham Ousey and Matthew Lee, Examining the conditional nature of the illicit drug market-homicide relationship: A partial test of the theory of contingent causation, 40 CRIMINOLOGY 73 (2002); Daniel Cork, Examining Space-Time Interaction in City-Level Homicide Data: Crack Markets and the Diffusion of Guns Among Youth, 15 JOURNAL OF QUANTITATIVE CRIMINOLOGY 379 (1999); Eric Baumer et al., The Influence of Crack Cocaine on Robbery, Burglary, and Homicide Rates: A Cross- City, Longitudinal Analysis, 33 JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY 316 (1998).

[35] Roland Fryer, Paul Heaton, Steven Levitt and Kevin D. Murphy, Measuring the Impact of Crack Cocaine, Working Paper, Harvard University Department of Economics, http://post.economics.harvard.edu/faculty/fryer/papers/fryer_heaton_levitt_murphy.pdf (visited December 20, 2005).

[36] *See*, Liebman et al., A Broken System, Part II, *supra* note 4; Gelman et al., *supra* note 3.2 .

homicides since 1985 was in gun homicides.[37] Yet none of the studies take into account the flat secular trend of decline in non-gun homicides since the early 1970s, none accounts for gun availability, and none control for the complex interaction of drug epidemics with gun violence.[38]

- All the studies fail to control for autoregression, which is the tendency of trends in longitudinal or time series data to be heavily influenced by the trends in preceding years.[39] In other words, the thing that tells us most about what the murder rate will be next year is what is was last year. Failing to account for autoregression leads to underestimates of standard errors that seriously bias results and give a misleading picture of precision. For example, ignoring autocorrelation means that each year in a longitudinal panel of years is treated as a separate case with no ties to similar cases. In fact, powerful social, economic and legal forces influence state homicide rates, and these forces operate dynamically over time and change at a relative slow pace. Statistically and conceptually, it is unlikely that effects of extremely rare events such as executions can influence these large forces, and in turn deflect trends that are so heavily influenced by their own history and context.[40] A change in statistical modeling techniques to account for the strong

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[37] See, e.g., Philip J. Cook and John H. Laub, The Unprecedented Epidemic in Youth Violence," 24 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH – YOUTH VIOLENCE 27 (1998); *See, also,* Jeffrey Fagan, Franklin Zimring, and June Kim, *Declining Homicide in New York: A Tale of Two Trends*, 88 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 1277 (1998); Zimring and Hawkins, CRIME IS NOT THE PROBLEM, *supra* note __.

[38] *See, e.g.*, Eric Baumer, et al., supra note 33; *See, also,* Alfred Blumstein, *Youth violence, guns, and the illicit-drug industry,* 86 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 10 (1995).

[39] *See, e.g.*, William Greene, ECONOMETRIC ANALYSIS (5th edition) (2003)

[40] Richard Berk, *New Claims about Executions and General Deterrence: D'ej'a Vu All Over Again?* JOURNAL OF EMPIRICAL LEGAL STUDIES (forthcoming, 2005). See, also, Badi H. Baltagi, Econometric Analysis of Panel Data (2001); Badi H. Baltagi and Q. Li , *Testing AR(1) Against MA(1) Disturbances In An Error Component Model.* 68 JOURNAL OF ECONOMETRICS 133 (1995).

year-to-year correlation of murder rates over time produces dramatic changes in the statistical significance and effect size of executions on murder rates.[41] Such instability in the coefficients under varying measurement and analytic conditions should be a serious warning sign to those who would embrace the new deterrence evidence.

- There are few statistical controls for the general performance of the criminal justice system, specifically clearance rates for violent crimes. Some of the studies control for punishment, such as imprisonment rates, but not for the ability of local law enforcement to identify homicide offenders or high rate offenders generally. Accordingly, it is hard to evaluate the deterrent effects of execution without first knowing the clearance rate for homicides. Decades of research confirms that such efficiency in homicide detection and apprehension would be a more effective deterrent than poorly publicized and infrequent executions. These important but omitted variables are potential sources not just of errors in these analyses, but they produce misleading results.[42]
- The studies ignore large amounts of missing data in important states such as Florida. Most of the studies rely on the same data, a compilation of death sentences published by the Bureau of Justice Statistics of the U.S. Department of Justice, and the published homicide rates from the Federal Bureau of

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[41] Jeffrey Fagan, Death and Deterrence Redux: Science, Alchemy and Causal Reasoning on Capital Punishment, — OHIO ST. J. CRIM. L.— (forthcoming 2006).
[42] *See, e.g.*, Mocan and Gittings, *supra* note 9, reporting significant negative effects on deterrence for the homicide arrest rate. *See*, also, Katz et al., *supra* note 28.

Investigation.[43] Yet the FBI's data for Florida is missing in these national archives for four years in the 1980s and another four years in the 1990s. By simply leaving out these states, the results are most likely to be heavily biased. The studies fail to investigate alternate data sources that might fill in important gaps in annual homicide rates.[44] For example, when a complete homicide victimization data set from the National Center for Health Statistics is substituted for the incomplete FBI homicide data in the Mocan and Gittings dataset and regression programs, model results change dramatically and the magnitude of a putative deterrent effect is reduced by nearly half.[45]

- The studies avoid any direct tests of deterrence. They fail to show that murderers are aware of executions in their own state, much less in far-away states, and that they rationally decide to forego homicide and use less lethal forms of violence. A few studies measure newspaper accounts of executions,[46] but no one knows the newspaper reading habits or television viewing preferences of murderers. Moreover, the extension of traditional rational choice theories to would-be murderers faces several conceptual and real challenges. Numerous studies that directly examine the reactions of individuals to punishment threats consistently show the limits of the assumptions of rationality that underlie deterrence,

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[43] See, Michael D. Maltz, The Effect of NIBRS Reporting on Item Missing Data in Murder Cases, 8 HOMICIDE STUDIES 193 (2004).
[44] Michael Maltz, Bridging Gaps in Police Crime Data (NCJ 176365), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/bgpcd.pdf (visited November 12, 2005). In some specifications with these data, the deterrent effect becomes insignificant.
[45] See, Jeffrey Fagan, *Science, Ideology and the Illusion of Deterrence, supra* note __.
[46] Joanna M. Shepherd, *Brutalization, supra* note 30.

especially in the case of aggression or violence.[47] Many violent offenders have cognitive, organic and neuropsychological impairments, making it even more unlikely that they are aware of executions.[48] Others are prone to exponential discounting ("hyperdiscounting") of risks, especially the threat of punishments and short-term harms, as well as the inflation of potential rewards of crime.[49]

- Death sentences are rare, as are executions; they are a product of the jurisprudence that recognizes "death is different" and should therefore be reserved for only the most heinous murders.[50] Many states have narrowly tailored capital punishment laws that constrain the number and types of homicides that are eligible for the death penalty. However, there is no evidence that these extremely rare events would be deterrable. Consider, for example, the imposition of the death penalty for persons who kill law enforcement officers. Assuming rationality, for the moment, such rare events are unlikely to influence decision processes by motivating would-be killers to adjust to these punishment threats.[51]

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[47] *See*, for an overview, Francisco Parisi and Vernon Smith, Introduction, in THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR (Francisco Parisi and Vernon Smith, eds.) (2005).

[48] See, e.g, , Adriane Raine et al., Reduced prefrontal and increased subcortical brain functioning assessed using positron emission tomography in predatory and affective murderers, 16 BEHAVIORAL SCIENCES AND THE LAW 319 (1998); L. Gatzke, Adriane Raine, et al., Temporal lobe EEG deficits in murderers not detected by PET, JOURNAL OF NEUROPSYCHIATRY AND CLINICAL NEUROSCIENCES *(in press);* Dorothy Otnow Lewis, Ethics Questions Raised by the Neuropsychiatric, Neuropsychological, Educational, Developmental, and Family Characteristics of 18 Juveniles Awaiting Execution in Texas, 32 JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW 408 (2004); Dorothy Otnow Lewis, Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States, 145 AMERICAN JOURNAL OF PSYCHIATRY 584 (1988).

[49] Gary Becker, Kevin M. Murphy and Michael Grossman et al., The Economic Theory of Illegal Goods: The Case of Drugs. NBER Working Paper 10976, available at http://www.nber.org/papers/w10976 (visited January 14, 2006).

[50] Hugo Adam Bedau, DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT 55-59 (1987); Jeffrey Abramson, Death is Different and the Role of the Capital Jury, 2 OHIO STATE J. CRIM. L. 117 (2004).

[51] See, e.g., Paul Slovic, Howard Kunreuther and Gilbert White, Decision Processes, Rationality and Adjustment to Natural Hazards, in PERCEPTION OF RISK (Paul Slovic, ed,) 1 (2000).

Assassinations of law enforcement officers are rare events. The FBI reported that 52 police officers were feloniously killed in 2003.[52] Most of these deaths occurred in states and regions that more frequently use capital punishment: 28 occurred in the South, 13 in the West, and 8 in the Midwest. In the northeast, where most states do not have a valid death penalty statute or, if so, rarely use it, there were 3 assassinations of law enforcement officers in 2003. Evidently, the threat of execution has little influence on lethal assaults on police officers.

- Efforts to replicate the results of several of these studies have revealed their unreliability and instability. In one study, Professors John Donohue and Justin Wolfers[53] re-analyzed several datasets with several corrections: (1) using alternate model specifications to address autocorrelation, (2) correcting computational errors and coding anomalies,[54] and (3) subjecting the analyses to further tests using different samples of states, counties and years. They conclude that "...the existing evidence for deterrence is surprisingly fragile, and even small changes in specifications yield dramatically different results..... Our estimates suggest not just "reasonable doubt" about whether there is any deterrent effect of the death penalty, but profound uncertainty.....[W]hether one measures positive or negative effects of the death penalty is extremely sensitive to very small changes in econometric specifications"[55]

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[52] FBI, Uniform Crime Reports, LEOKA files, various years.
[53] John Donohue & Justin Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, supra note 2.
[54] Two of the datasets, one from Mocan and Gittings and a second from Shepherd, used unconventional methods to address recurring problems of missing data and instances where some calculations required division by zero. In each case, Donohue and Wolfers made appropriate corrections.
[55] Donohue and Wolfers, supra note 2 at 836.

- I obtained similar results analyzing the Mocan and Gitting dataset, correcting for: (a) biased coding of missing data[56], (2) replacement of missing cases (years with no murders) with true zero values, (3) use of alternate measures of homicide from national death registry data[57] to avoid missing data problems in the Department of Justice data from Florida and other states, (4) alternate model specifications that accounted for autoregression, and (5) model controls to isolate the effects of Texas, a state that accounts for more than one third of all executions. The analyses produced unstable results that varied in the size of the putative deterrent effect, with unstable levels of statistical significance. In about half of the 15 alternate analyses, there was no evidence of a statistically significant deterrent effect.
- An analysis of executions and murders by Professor Richard Berk also challenges the accuracy of the claims of deterrence.[58] Professor Berk also undertook alternate specifications, including one test that shows that nearly all of the presumed deterrent effects are confined to one state – Texas – and only for a handful of years when there were more than five executions. No other state has reached that rate of executions in a single year, and it is highly unlikely that any will in the future. The general conclusions in the new deterrence studies are heavily influenced by these few outlier observations.[59] In fact, Berk shows that

[56] Cases that were missing due to division by zero were recoded to .99 by Mocan and Gittings, instead of coding these cases to a value closer to zero. I recoded them to .01.
[57] Data were obtained from the National Center for Health Statistics.
[58] Richard Berk, *supra* note 2.
[59] *Id.* Not only are executions clustered in Texas, but most states in most years have no executions, a statistical burden that none of the new deterrence studies competently address. To address this problem statistically, one must first estimate a model that explains which states have any executions, and then a

eliminating Texas eliminates any hint of deterrence from the relationship between execution and homicide.[60] It would be a grave error to generalize from the Texas data to any other state. Professor Berk states that ..."it would be bad statistics and bad social policy" to generalize from 1% of the data to the remaining 99%. He concludes that "for the vast majority of states for the vast majority of years there is no evidence for deterrence" and that even for the remaining 1%, "credible evidence for deterrence is lacking"[61].

- Perhaps most important, the studies fail to take into account the deterrent effects of Life Without Parole sentences (LWOP). LWOP has the same incapacitative effect as does execution. For a few death row inmates, it has a deterrent effect: at least 100 executions since *Gregg* were "voluntary" – death row inmates who elected to not fight their execution, and at least some of these persons explicitly said that death was preferable to life in prison. When multiple murderers like

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second model to show the factors that predict the frequency of its use. Such models are called "hurdle" regressions. *See, e.g.*, Christopher J. Zorn, *An Analytic and Empirical Examination of Zero-Inflated and Hurdle Poisson Specifications*, 26 SOCIOLOGICAL METHODS AND RESEARCH 368 (1998). *See, also*, Yin Bin Cheung, *Zero-Inflated Models for Regression Analysis of Count Data: A Study of Growth and Development*, 21 STAT. IN MED. 1461, 1462-67 (2002). Statistical methods that fail to account for this two part process will produce unreliable and inflated results. There have been 965 executions from 1976 to June 2004, more than one in three (340) have occurred in Texas. One consequence of these data patterns is that computing deterrent effects based on a simple average would be deceptive. Even a simple estimate – there are 38 death penalty states, each with a valid law in effect for an average of 20 years since *Gregg* – suggests that on average, there is fewer than one execution per year per state. Since Texas accounts for more than one in three executions, the median state-year average is quite a bit lower. In Mocan and Gittings, *supra* note 9, for example, executions range from 0 to 18, with 859 of the 1000 over the 21 years (86%) equal to 0. As a result, the median is also 0. There are 78 values (8%) equal to 1. There are but 11 values (1%) larger than 5, ranging from 7 to 18 executions. Obviously, the distribution is highly skewed, and the mean is dominated by a few extreme values. Most states in most years execute no one.

[60] *See*, Berk, *Id.*

[61] *Id* at 328.

Michael Ross in Connecticut now say they prefer execution to life in prison, one must ask whether life without parole isn't a stronger deterrent than death.[62]

LWOP is a more frequent sentence in murder convictions today, far more frequent than death sentences. For example, there were 137 LWOP sentences in Pennsylvania in 1999, compared to 15 death sentences.[63] In 2000, there were 121 life sentences, compared to 12 death sentences.[64] In California, there were 3,163 inmates serving life without parole on February 29, 2004, compared to 635 on death row.[65] In North Carolina, when the state passed a law allowing capital murderers to plead guilty to first-degree murder and receive a sentence of life without parole rather than go to trial and risk the death penalty, death sentences fell from an average of 18.5 from 1999-2001 to seven in 2002, six in 2003, and four in 2004.[66] Analyses of the National Judicial Reporting Program in 2002 shows that LWOP sentences were more than three times more frequent in murder cases than were death sentences, and nearly 10 times more common than

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[62] See, e.g., Court TV, *Died Willingly*, available at http://www.crimelibrary.com/serial_killers/predators/michael_ross/8.html?sect=2. See, also, Gene Warner, The Death Penalty Debate Goes On, BUFFALO EVENING NEWS, July 11, 2005, at A1 (quoting convicted murderer Michael Grinnell on the deterrent effects of his LWOP sentence in New York's Attica prison).
[63] Annual Statistical Report, Pennsylvania Department of Corrections, 1999, available at: http://www.cor.state.pa.us/stats/lib/stats/ASR1999.pdf (visited January 18, 2005).
[64] Annual Statistical Report, Pennsylvania Department of Corrections, 2000, available at: http://www.cor.state.pa.us/stats/lib/stats/Annual%20Report%202000.pdf (visited January 18, 2005).
[65] California Department of Corrections, Facts and Figures, Third Quarter 2004, available at http://www.corr.ca.gov/CommunicationsOffice/facts_figures.asp (visited January 18, 2005). Fewer than 100 of the LWOP sentences were "Three Strikes Convictions." See, Franklin Zimring et al., Punishment and Democracy: Three Strikes and You're Out in California (2003).
[66] North Carolina News and Record, November 7, 2005

executions.[67] And Texas, where more than one execution in three takes place and where the locus of deterrent effects is thought to reside, had no life without parole statute until the 2005 legislative session. For that large and influential state, tests of the deterrent effects of execution are biased and unrepresentative of the norms in the states, and consequently, there has been no valid test of the incapacitative effects of LWOP compared to the death penalty.[68]

- The omission by researchers of this critical alternate and competing explanation for the decline in murder rates in California and other states is a fatal flaw in most of these studies. Integrating the potential effects of LWOP is critically important to fully understand "deterrence" and to compare the effects of incarceration to executions. Moreover, by examining declines in homicide rates in California, Texas and New York, since each state's peak homicide rate in the early 1990's, one can see the strong effects of such incapacitative sentences on murder rates. For example, in New York, a state with no death penalty until April 1995, 143 LWOP sentences from 1995 through 2004 and no executions, homicide rates declined over the next decade by 65.5% since the peak in 1990.[69] In comparison, homicide rates in Texas, a state that until last year did not permit juries to

[67] U.S. Dept. of Justice, Bureau of Justice Statistics. NATIONAL JUDICIAL REPORTING PROGRAM, 2002: [UNITED STATES] [Computer file]. Compiled by U.S. Dept of Commerce, Bureau of the Census. ICPSR04203-v1. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [producer and distributor], 2005-04-01.
[68] Texas Penal Code § 12.31, effective September 1, 2005.
[69] There have been 10 additional LWOP sentences in 2005, a year in which the murder rate in New York City and State are headed to new 50-year lows, despite the absence of executions and a declining incarceration rate.

sentence capital defendants to life without parole, declined by 61.4% since its peak rate in 1991.[70]

- Recent research suggests the importance of incapacitation – via efficient policing and effective use of imprisonment – in reducing rates of some crimes in recent panel studies identifying the sources of the nation's decline in crime.[71] Indeed, the only new deterrence study to directly test imprisonment patterns, by economists Lawrence Katz and colleagues, shows no deterrent effect from executions, but some type of suppression effect on murder from the rate of natural deaths in prison.[72] And, Mocan and Gittings find far larger (and statistically significant) effects for both incarceration and homicide arrests than for "deterrence," but they call no attention to this important finding.

The 1978 National Research Council Panel on Research on Deterrence and Incapacitation[73] noted the complex relationship between deterrence and incapacitation, and showed the difficulty of separating the effects of each. To claim deterrence when there are simultaneous incapacitation effects from LWOP is a particular type of social science error, that of omitted variable bias.[74] The omission of this alternate and competing explanation for the decline in murder

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[70] See, Uniform Crime Reports, Federal Bureau of Investigation, U.S. Department of Justice, various years.
[71] Steven D. Levitt, Why Do Increased Arrest Rates Appear to Reduce Crime: Deterrence, Incapacitation, or Measurement Error? 36 ECONOMIC INQUIRY 353 (1998).
[72] Lawrence Katz, Steven D. Levitt, & Ellen Shustorovich, *Prison Conditions, Capital Punishment, and Deterrence*, 5 AMERICAN LAW AND ECONOMICS REVIEW 318 (2003).
[73] Alfred Blumstein, Jacqueline Cohen and Daniel Nagin (eds), Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates (1978)
[74] Omitted variable bias occurs when a regression estimate of a parameter does not have the appropriate form and data for other parameters that may also influence the observed phenomenon. See, http://economics.about.com/cs/economicsglossary/g/omitted.htm.

rates in most death penalty states obscures and inflates the effects of deterrence when no other explanation is included in the estimating models. Integrating the potential effects of LWOP is critically important to fully understand "deterrence" and to compare its effects to incapacitation effects on murder rates.

The central mistake in the enterprise of the new deterrence research is the attempt to make causal inferences from a very flawed and limited set of observational data. One cannot treat these data as an experiment, where all the competing influences are ruled out by randomly assigning states to specific conditions.[75] Murder is a complex and multiply-determined phenomenon, with cyclical patterns for over 40 years of distinct periods of increase and decline that are not unlike epidemics of contagious diseases.[76] There is no reliable, scientifically sound evidence that pits execution against a robust set of competing explanations to identify whether it can exert a deterrent effect that is uniquely and sufficiently powerful to overwhelm these consistent and recurring epidemic patterns in homicide. This new body of empirical work, based on infrequent capital punishment that is geographically spread across a large nation with little publicity and omits numerous competing but untested explanations of homicide changes, fails to provide a reliable, much less a dispositive, test of deterrence of murder.

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[75] *See, e.g.*, Franklin E. Zimring, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT (2003). See, also, Richard A. Berk, *Knowing When to Fold 'Em: An Essay on Evaluating the Impact of CEASEFIRE, COMSTAT, and EXILE*, CRIMINOLOGY AND PUBLIC POLICY (2005, in press); Paul R. Rosenbaum, Observational Studies (1995).

[76] *See, e.g.*, Malcolm Gladwell, The Tipping Point (2nd ed.) (2001); Eric Monkkonen, MURDER IN NEW YORK CITY (2003); Jeffrey Fagan and Garth Davies, *The Natural History of Neighborhood Violence*, 20 JOURNAL OF CONTEMPORARY CRIMINAL JUSTICE *127(*2004).

These are serious flaws and omissions in a body of scientific evidence that render it unreliable, and certainly not sufficiently sound evidence on which to base laws whose application leads to life-and-death decisions. The omissions and errors are so egregious that this work falls well within the unfortunate category of junk science. To accept it uncritically invites errors that have the most severe human costs.

**III. The Costs of Capital Trials**

The high costs of capital cases, from trial to execution, dramatically raise the stakes in the gamble on deterrence-based policies. A review of cost estimates across the country in the past decade shows that the trial, incarceration and execution of a capital case costs from $2.5 to $5 million dollars per inmate (in current dollars), compared to less than $1 million for each killer sentenced to life without parole.[77] Examples abound. In North Carolina, a 1993 study showed that *per execution* costs were $2.16 million greater than the costs of non-capital murder cases that produced life sentences.[78] Florida, for example, spent between $25 million and $50 million more per year on capital cases than

[77]See, e.g., Aaron Chambers, *Resources a Concern in Death Penalty Reform*, Chi. Daily L. Bull., Apr. 24, 1999, at 19, available in Westlaw, News Library, CHIDLB file (estimating that a capital case costs $5.2 million from pretrial proceedings to execution); Margot Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS LAW REVIEW. 1268, 1268-70 (1985); Samuel R. Gross, *The Romance of Revenge: Capital Punishment in America*, 13 STUDIES IN LAW, POLICY & SOCIETY 71, 78 (1993) (reporting a $3.2 million cost per execution in Florida, and Kansas' rejection of the death penalty because of the cost); Paul W. Keve, *The Costliest Punishment—A Corrections Administrator Contemplates the Death Penalty*, FEDERAL PROBATION, Mar. 1992, at 11; Duncan Mansfield, *The Price of Death Penalty? Maybe Millions*, A.P. Newswires, Mar. 26, 2000, available in Westlaw News Library, APWIRES file (estimated $1 to $2 million cost per Tennessee execution); David Noonan, *Death Row Cost Is a Killer: Capital Cases Can't Be Handled Fairly and Affordably, Critics Claim*, N.Y. Daily News, Oct. 17, 1999, at 27, available in 1999 WL 23488045 (giving cost of prosecuting and defending New York capital cases at the trial phase, in a period during which only five capital sentences were imposed (from 1994 to 1999 as $68 million); A. Wallace Tashima, *A Costly Ultimate Sanction*, The Los Angeles Daily J., June 20, 1991 (cost per execution to California taxpayers is $4 to $5 million).

[78] See, e.g., Philip J. Cook & Donna B. Slawson, *The Costs of Prosecuting Murder Cases in North Carolina*, 1993.

it would if all murderers received life without parole.[79] The Indiana Legislative Services Agency estimated that had the state sentenced its death row population to life without parole, Indiana taxpayers would have been spared approximately $37.1 million.[80] The excessive costs of capital trials and executions have led Gerald Kogan, Chief Justice to the Florida Supreme Court, to ask Florida citizens to "...seriously reconsider whether the death penalty is a truly viable remedy for first degree murder."[81] In Tennessee, the State Comptroller reported in 2004 that death penalty trials cost an average of 48% more than the average cost of trials in which prosecutors seek life imprisonment.[82] And in Kansas, a 2003 study by the state legislature estimated cost of a death penalty case was 70% more than the cost of a comparable non-death penalty case.[83]

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[79] S.V. Date, "*The High Price of Killing Killers*", Palm Beach Post, Jan. 4, 2000, at 1A. Based on the 44 executions in Florida from 1976 to 2000, the state has spent $51 million *per year* more on death penalty cases beyond what it would cost to obtain sentences of life without parole. The Post's figure was derived using estimate of how much time prosecutors and public defenders at the trial courts and the Florida Supreme Court spend on extra work needed in capital cases. It accounts also for the time and effort expended on defendants who are tried but convicted of a lesser murder charge and whose death sentences are overturned on appeal as well as those handful of condemned inmates who are actually executed.

[80] Kelly Lucas, "*Death Penalty is Fair and Proportionate*," THE INDIANA LAWYER, Nov. 21, 2001.

[81] Martin Dyckman, "*Death Penalty Repair*," St. Petersburg Times, Dec. 7, 1997 at 1D. Chief Justice Kogan noted that the Florida Supreme Court spends approximately half of its time devoted to death penalty cases, "an inordinate amount of time...when there is so much out there that affects the average citizen much more."

[82] John G. Morgan, *Tennessee's Death Penalty: Costs and Consequences* (2004), available at http://www.comptroller.state.tn.us/orea/reports/deathpenalty.pdf

[83] Legislative Post Audit Committee, Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections (2003), available at http://www.kslegislature.org/postaudit/audits_perform/04pa03a.pdf.
Death penalty case costs were counted through to execution (median cost $1.26 million). Non-death penalty case costs were counted through to the end of incarceration (median cost $740,000).

These extreme cost differentials for capital cases reflect the longer duration of capital trials.[84] These higher costs are generated by the high rate of reversals and retrials in capital cases, estimated at 68% in two recent studies by researchers at Columbia University[85]. Most of these defendants are sentenced to something less than death.[86] Thus, when these post-trial review costs are factored in, the average *per execution* cost is nearly $24 million dollars per prisoner, compared to $1 million for each inmate serving a sentence of life without possibility of parole.[87]

The burden of these costs are borne by local governments, diverting $2 million per capital trial from local services – hospitals and health care, police and public safety, and education -- or causing counties to borrow money or raise taxes, or diverting costs from

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[84] See, e.g., Philip J. Cook & Donna B. Slawson, *The Costs of Prosecuting Murder Cases in North Carolina*, 1993; Margot Garey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS. LAW REVIEW 1221, 1257 (1985).

[85] James Liebman, Jeffrey Fagan, Valerie West, & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973 – 1995*, 78 TEXAS LAW REVIEW 1839 (2000) (showing that 68% of all death sentences since *Furman v. Georgia* were reversed either on direct appeal, state direct appeal, or federal habeas review; most – 82% – of those reversed were re-sentenced to non-capital punishments, 7% were exonerated, and the remainder were re-sentenced to death); *see also* Brian Forst, BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES, 201-04 (2004) (noting that the errors in these cases were the result of misidentification of witnesses, prosecutorial or police misconduct, incompetent defense counsel, prejudicial instructions by judges, and biased jury selection procedures); James Liebman et al., *A Broken System, Part I: Error Rates in Capital Cases, 1973-1995* (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/ ; James Liebman et al., *A Broken System Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* (2002), *available at* http://www2.law.columbia.edu/ brokensystem2/report.pdf.

[86] Liebman et al., *Capital Attrition, id.*

[87] *See* S.V. Date, *The High Price of Killing Killers*, Palm Beach Post, Jan. 4, 2000, at 1A, available in 2000 WL 7592885. *See also* Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts, With Their Lives at Stake*, Chi. Trib., Nov. 15, 1999, at N1, available in 1999 WL 2932352 ("in Illinois, the resources rallied on appeal often dwarf those summoned to keep a defendant off Death Row in the first place"); Armstrong & Mills, *Justice Derailed*, *supra* note 33, at N1 (discussing the "staggering" costs of capital case reversals and exonerations in Illinois: "Taxpayers have not only had to finance multimillion-dollar settlements to wrongly convicted Death Row inmates—[Dennis] Williams alone received $13 million from Cook County—but also have had to pay for new trials, sentencing hearings and appeals in more than 100 cases where a condemned inmate's original trial was undermined by some fundamental error.").

capital expenditures such as roads and other infrastructure.[88] The estimated increase in taxes and expenditures for capital trials from 1983-99 was more than $5.5 billion, borne by small and large counties alike.[89] The high costs to counties for death penalty cases has forced them to seek help from state legislatures, persuading them in some cases to create "risk pools" or programs of local assistance to prosecute death penalty cases. This has the net effect of diffusing death penalty costs to counties that choose not to use – or have no need for – the death penalty in capital cases.

*Implications for the Nation*

What do the experiences and cost burdens in other states forecast for the future? New York's recent experience may be the most appropriate example to anticipate the costs of a system of capital trials and punishment in the future. In the New York paradigm, before the New York State Court of Appeals invalidated New York's death penalty law in 2004 in *People v LaValle*[90], death sentences were rare and there were no executions.[91] As usual, things cost more in New York, but the lessons can be generalized to other states and communities. Between 1995 and 2004, New York spent about $200 million on the death penalty with *no* executions.[92] Of the 442 first-degree murder cases

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[88] See, e.g., Katherine Baicker, *The Budgetary Repercussions Of Capital Convictions*, 4 ADVANCES IN ECONOMIC POLICY AND ANALYSIS, No.1, Article 6 (2004).
[89] *Id* at 13.
[90] 3 N.Y.3d 88, 783 N.Y.S.2d 485 (June 24, 2004).
[91] Compared to states like Texas, Alabama, Pennsylvania and California, New York had relatively careful trial and appellate procedures. See, Liebman et al., *Capital Attrition, supra* note 63, and Liebman et al., *A Broken System Part II, supra* note 63. The New York model mixed high costs and low numbers of both death verdicts and executions. When New York's statute was invalidated in 2004 in *LaValle*, no executions were within a *decade* of occurring because of state and federal review proceedings that still remained to be exhausted.
[92] Gene Warner, "The Death Penalty Debate Goes On," BUFFALO EVENING NEWS, July 11, 2005, at A1.

decided in New York while the death penalty statute was in effect, 153 were sentenced to life without parole.[93]

For most states to hold to this approach, the state would have to incur the same extremely high monetary costs.[94] Given the procedural and substantive restrictions in the proposed statute, there would be no more than one or two death sentences each year statewide. Given the pace of appeals, we would anticipate no more than two or three executions total in the next *15 to 20 years.* The expected cost to the State over that 20-year period would be at a minimum $100 million in current dollars --- or about $50-75 million per execution --- beyond what it would cost the State to rely on life without parole.[95] There may be a relatively low risk of executing innocent people – but only because of the low probability that *anyone* would be executed.

These cost estimates suggest a critical policy question that should guide the state legislatures as they debate the future of capital punishment. First, if a state is going to spend $500 million on law enforcement over the next two decades, is the *best* use of that money to buy two or three executions -- along with a dozen or two *initial* capital prosecutions that are most likely to end up in *non*-capital plea bargains and jury verdicts, and a predictable 10 court reversals, retrials, and lesser sentences for every execution? Does a state gain more public safety by spending half a billion dollars or more to execute two or three of the state's murderers during that period or, for example, by funding

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[93] *Id.*
[94] The proposed use of DNA and other forensic testing in each case will increase costs above the estimates in other state where these tests are less common.
[95] The emphasis on scientific testing of DNA and other evidence in the proposed bill will raise these costs even higher, especially given the necessity for high reliability in lab standards.

additional police detectives, prosecutors, and judges to arrest and incarcerate the murderers, rapists, and robbers who currently escape any punishment because of insufficient law-enforcement resources?

**IV. Conclusion**

The threshold question for the future of capital punishment goes to the heart of the role of deterrence in American capital punishment law and joins with the problematics of cost. In 1972, in *Furman v. Georgia*,[96] the U.S. Supreme Court reversed every capital statute in the country. Its decision was fragmented among several opinions, but the clearest was Justice White's:

> "...that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system. It is perhaps true that no matter how infrequently those convicted of rape or murder are executed, the penalty so imposed is not disproportionate to the crime and those executed may deserve exactly what they received. It would also be clear that executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime. But when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death or so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked.
>
> Most important, a major goal of the criminal law -- to deter others by punishing the convicted criminal -- would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others. For present purposes I accept the morality and utility of punishing one person to influence another. I accept also the effectiveness of punishment generally and need not reject the death penalty as a more effective deterrent than a lesser punishment. *But common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct*

[96] 408 US 238 (1972)

> *and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted* (emphasis added). "[97]

When only a tiny proportion of the individuals who commit murder are sentenced to death, capital punishment is unconstitutionally irrational because it serves no identifiable penal function. A death penalty that is almost never used serves no deterrent function because no would-be murderer can expect to be executed. Nor can a rarely used death penalty serve a declarative or symbolic function to express the punishment society deems appropriate for murder, because that crime will almost never lead to that penalty. The lesson of *Furman* will once again haunt the present day reality of the 38 states that statutorily authorize capital punishment and raise critical constitutional concerns. Accordingly, a threshold question for the states and the nation is whether the necessary and admirable efforts to avoid error and the horror of the execution of the innocent won't – after many hundreds of millions of dollars of trying – burden the state with a death penalty that will be overturned because of this inevitable constitutional problem?

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[97] *Id* at 311

**Statement of U.S. Senator Russ Feingold**
**Senate Judiciary Subcommittee on the Constitution, Civil Rights & Property Rights**
**Hearing on "An Examination of the Death Penalty in the United States"**

**February 1, 2006**

Mr. Chairman, I want to thank you for holding this hearing. I know that our staffs have worked closely together on this, and I very much appreciate your commitment to exploring some of the critically important issues related to capital punishment. We have witnesses on both sides of the issue, and I thank them for being here and look forward to hearing their views. As you know, Mr. Chairman, I oppose capital punishment. But I welcome today's debate and hope that it will help advance the debate over the death penalty that is going on in this country.

In particular, I know it must be difficult for the witnesses on the first panel to share their highly personal experiences, and I appreciate their willingness to provide their valuable and important perspectives on this complex issue.

Mr. Chairman, we recently passed a disturbing milestone in this country. One morning just a few months ago in North Carolina, Kenneth Lee Boyd was put to death by lethal injection. Mr. Boyd's was the one thousandth execution since the death penalty was reinstated in 1976. While a jury decided that his guilt was not in doubt, confidence in the death penalty increasingly is.

Across the Nation, people are reconsidering capital punishment. Recent polls, jury verdicts, and actions taken by all three branches of government in States across the country reflect the changing attitudes about the death penalty in this country. Americans are increasingly concerned about the use of this final punishment.

With advances in DNA technology, numerous exonerations of people on death row, and new revelations that innocent people may have actually been put to death, more and more people are questioning the accuracy and fairness of the administration of the death penalty. In addition, more and more people have qualms about the very concept of state-sponsored executions. In my view, this trend is a hopeful sign, as I believe there continue to be numerous moral, ethical and legal problems with the death penalty.

According to a series of Gallup polls, opposition to the death penalty has grown from 13 percent of Americans in 1995 to 30 percent in October of 2005. Think about that. In just 10 years, we went from a vast majority of Americans supporting the death penalty, to nearly one-third now opposing it. That is the highest level of opposition since capital punishment was reinstated almost 30 years ago. And a CBS News poll from April 2005 indicates that when people were asked whether they prefer the death penalty or life without parole for individuals convicted of murder, only 39 percent supported the death penalty.

Evidence of the changing attitudes about the death penalty can be seen across America. The U.S. Conference of Catholic Bishops last year launched a campaign to end the use of the death penalty. In New York last year, the State's highest court struck down the State's capital punishment statute, which had passed only 10 years earlier in 1995. The legislature then declined to reinstate the law, making New York the first state to abandon capital punishment since 1976. That is a remarkable sign of progress.

Meanwhile, in Virginia, the death penalty was a key issue in the last gubernatorial election. Tim Kaine, then the Lieutenant Governor, has long been personally opposed to the death penalty, although he pledged to enforce the law in Virginia. In the final weeks before the election, his opponent Jerry Kilgore began an ad campaign that heavily criticized Kaine's opposition to the death penalty. Kilgore strongly supports capital punishment and during the campaign he said he would push to expand its use in Virginia. But when Kilgore went after Kaine on the death penalty, Virginians did not take the bait. Despite Kilgore's attack ads, the citizens of Virginia elected Tim Kaine, and he became Virginia's Governor in January.

I think what happened in Virginia demonstrates how far we have come. This issue can no longer be used as a political grenade. A majority of Americans may not yet oppose the death penalty, but the electorate understands what a serious issue this is, and it recognizes when capital punishment is being exploited for political purposes.

Yet another example of the seriousness with which citizens and politicians alike are treating this issue is former Virginia Governor Mark Warner's recent commutation of the sentence of Robin Lovitt to life in prison. Mr. Lovitt was convicted of robbery and murder and sentenced to death, but before he had exhausted all judicial remedies, a court employee destroyed the physical evidence in his case – the very evidence that Lovitt said would exonerate him if subjected to new advanced DNA analysis. Under Virginia law, the Commonwealth must keep all physical evidence until the defendant has exhausted all posttrial remedies. Although former Governor Warner is a death penalty supporter, he decided that he simply could not put a man to death when the State itself had destroyed that man's chance to possibly prove his innocence. As Governor Warner put it, the case "require[d] executive intervention to reaffirm public confidence in our justice system." In his 4 years as Governor, this was the first time Governor Warner granted a clemency petition to a death row inmate.

On the other side of the country, there was a great deal of public debate as Governor Schwarzenegger considered a clemency petition for Stanley Tookie Williams late last year. Williams was a founding member of the Crips gang and was convicted of four murders in 1981. During his years in prison, however, Williams, by all accounts, worked to turn his life around. He denounced gang violence, tried to keep kids out of gangs, and even helped broker peace deals between rival gangs. Governor Schwarzenegger denied

clemency and refused to commute Mr. Williams' death sentence to life without parole. The State of California put Mr. Williams to death on December 13, 2005.

Much more is happening at the State level that has not received nearly as much attention. North Carolina and California recently created commissions to study the administration of the death penalty in their respective States, joining many other states that have already done so. A moratorium on executions remains in place in Illinois, and a court-ordered hold on executions in New Jersey was recently converted into a legislatively enacted moratorium. Others are under consideration in other States. Many State legislatures have worked to address flaws in their systems or even rejected efforts to reinstate the death penalty. State courts have limited or banned the death penalty, including the Kansas Supreme Court, which in 2001 ruled that State's death penalty law unconstitutional. That case, Kansas v. Marsh, was heard in the U.S. Supreme Court in December. Even in Texas, the State that executes by far the most people every year, a life-without-parole sentence was recently enacted, giving juries a strong alternative to the death penalty. And Texas Governor Perry also established a Criminal Justice Advisory Council to review the State's capital punishment procedures.

These signs of progress have coincided with critical new restraints imposed by the Supreme Court, which in recent years has issued two key rulings that limited the application of the death penalty. In 2002, the Court held in Atkins v. Virginia that applying the death penalty to mentally retarded defendants constituted cruel and unusual punishment in violation of the Eighth Amendment. And just this year, in Roper v. Simmons, the Court made the same decision with regard to individuals who commit crimes before their eighteenth birthday. Capital punishment for mentally retarded defendants and juveniles is now unconstitutional in the United States.

Mr. Chairman, as I mentioned before, there are many reasons people are questioning the death penalty in ever-increasing numbers. A common concern is that innocent people end up on death row, and we cannot tolerate errors when the state is imposing such a final penalty. More than 120 people on death row have been exonerated and released. Think about that. Just over one thousand people have been executed in the era of the modem death penalty, while a number equaling 12 percent of those executed have been exonerated. Those are disturbing odds.

Even more horrific is the prospect that we have already executed individuals who were, in fact, innocent. It saddens me greatly that information has come to light strongly demonstrating that two men put to death in this country in the 1990s may well have been innocent. That sends chills down my spine, as I'm sure it must for any American.

Just last year in Missouri, local prosecutors in St. Louis reopened the case of a 1980 murder because the evidence against the man convicted of the crime had fallen apart. That man, Larry Griffin, was sentenced to death, and he was executed by the State of

Missouri more than 10 years ago. Yet now, 25 years after the crime and more than 10 years after his execution, very serious questions about his guilt are being raised. CNN recently reported that a University of Michigan law professor who researched the case found that the first police officer on the scene now claims the person who testified as an eyewitness gave false testimony. A victim of the shooting, who was never contacted before Mr. Griffin's original trial, stated that the person claiming to be an eyewitness at the original trial was not present at the scene of the crime. Samuel Gross, the Michigan law professor who supervised the new investigation of the case that led to the St. Louis Circuit Attorney's decision, was quoted as saying with regard to this man's innocence: "There's no case that I know of where the evidence that's been produced in public is as strong as what we see here."

The second case is from Texas, where a young man named Ruben Cantu was executed in 1993. He was just seventeen at the time of the murder for which he was executed. Again, in this case, the only eyewitness to the crime has recanted his statement, and told the Houston Chronicle that Cantu was innocent. The Houston Chronicle also reported that the judge, prosecutor, head juror, and defense attorney have since realized that, as the newspaper put it, "his conviction seems to have been built on omission and lies."

The loss of just one innocent life through capital punishment should be enough to force all of us to stop and reconsider this penalty. These cases illustrate the grave danger in imposing the death penalty. Whatever new evidence might come to light, there's no way to remedy this final penalty.

Mr. Chairman, I know that many people in this country say that it doesn't matter what other countries do or say, that we should not look abroad for ideas. But the fact is that attitudes are changing around the world about capital punishment, and the United States is in poor company internationally on this issue. We are the only Western democracy ranked in the top ten countries in executions in 2004. And increasingly, other countries are rejecting capital punishment. Over the past 10 years, according to Amnesty International, an average of three countries per year has abolished the death penalty.

In closing, I urge all of us to take a long, hard look at capital punishment. Years of study have shown that the death penalty does little to deter crime, and that defendants' likelihood of being sentenced to death depends heavily on whether they are rich or poor, and what race their victims were. We have experienced again and again the risks, and realities, of innocent people being sentenced to death. I believe that is it wrong for the State to put people to death, especially when we can punish offenders by sentencing them to life without parole. It is heartening to see so many people reconsidering the death penalty, and it is my hope that in time we will end it in the United States.

## Capital Punishment and Homicide
### Sociological Realities and Econometric Illusions

*Skeptical Enquirer* Magazine, July 2004

Does executing murderers cut the homicide rate or not? Comparative studies show there is no effect. Econometric models, in contrast, show a mixture of results. Why the difference? And which is the more reliable method?

By Ted Goertzel

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I have inquired for most of my adult life about studies that might show that the death penalty is a deterrent, and I have not seen any research that would substantiate that point.
-- Attorney General Janet Reno, January 20, 2000

All of the scientifically valid statistical studies—those that examine a period of years, and control for national trends—consistently show that capital punishment is a substantial deterrent.
-- Senator Orrin Hatch, October 16, 2002

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It happens all too often. Each side in a policy debate quotes studies that support its point of view and denigrates those from the other side. The result is often that research evidence is not taken seriously by either side. This has led some researchers, especially in the social sciences, to throw up their hands in dismay and give up studying controversial topics. But why bother doing social science research at all if it is impossible to obtain accurate and trustworthy information about issues that matter to people?

There are some questions that social scientists should be able to answer. Either executing people cuts the homicide rate or it does not. Or perhaps it does under certain conditions and not others. In any case, the data are readily available and researchers should be able to answer the question. Of course, this would not resolve the ethical issues surrounding the question, but that is another matter.

So who is right, Janet Reno or Orrin Hatch? And why can they not at least agree on what the data show? The problem is that each of them refers to bodies of research using different research methods. Janet Reno's statement correctly describes the results of studies that compare homicide trends in states and countries that practice capital punishment with those that do not. These studies consistently show that capital punishment has no effect on homicide rates. Orrin Hatch refers to studies that use econometric modeling. He is wrong, however, in stating that these studies all find that capital punishment deters homicide. In fact, some of them find a deterrent effect and some do not.

But this is not a matter of taste. It cannot be that capital punishment deters homicide for comparative researchers but not for econometricians. In fact, the

comparative method has produced valid, useful, and consistent findings, while econometrics has failed in this and every similar area of research.

The first of the comparative studies of capital punishment was done by Thorsten Sellin in 1959. Sellin was a sociologist at the University of Pennsylvania and one of the pioneers of scientific criminology. He was a prime mover in setting up the government agencies that collect statistics on crime. His method involved two steps: "First, a comprehensive view of the subject which incorporated historical, sociological, psychological, and legal factors into the analysis in addition to the development of analytical models; and second, the establishment and utilization of statistics in the evaluation of crime" (Toccafundi 1996).

Sellin applied his combination of qualitative and quantitative methods in an exhaustive study of capital punishment in American states. He used every scrap of data that was available, together with his knowledge of the history, economy, and social structure of each state. He compared states to other states and examined changes in states over time. Every comparison he made led him to the "inevitable conclusion . . . that executions have no discernable effect on homicide rates" (Sellin 1959, 34).

Sellin's work has been replicated time and time again, as new data have become available, and all of the replications have confirmed his finding that capital punishment does not deter homicide (see Bailey and Peterson 1997, and Zimring and Hawkins 1986). These studies are an outstanding example of what statistician David Freedman (1991) calls "shoe leather" social research. The hard work is collecting the best available data, both quantitative and qualitative. Once the statistical data are collected, the analysis consists largely in displaying them in tables, graphs, and charts which are then interpreted in light of qualitative knowledge of the states in question. This research can be understood by people with only modest statistical background. This allows consumers of the research to make their own interpretations, drawing on their qualitative knowledge of the states in question.

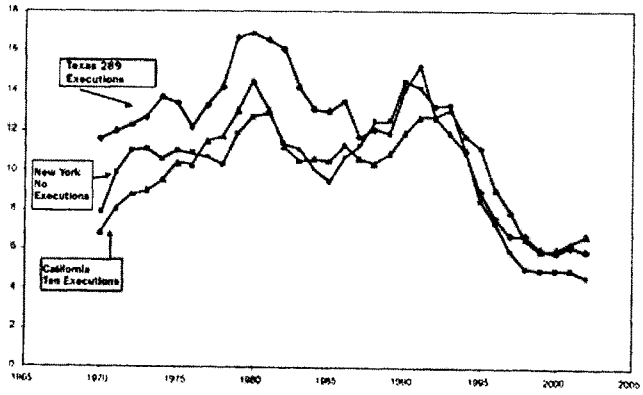


Figure 1: Homicide rates per 100,000 population in Texas, New York, and California.

Figure 1 is an example of the kind of chart Sellin prepared, using recent data. The graph compares homicide rates per 100,000 population in Texas, New York, and California. From 1982 to 2002, Texas executed 239 prisoners, California ten, and New York none. The trends in homicide statistics are very similar in all three states, all of which follow national trends. These states were chosen arbitrarily, but data for other states are readily available. If you prefer to compare Texas to Oklahoma, Arkansas, or New Mexico, the data are readily available in back issues of the Statistical Abstract of the United States and Uniform Crime Reports. The results will be much the same.

Hundreds of comparisons of this sort have been made, and they consistently show that the death penalty has no effect. There have also been international comparative studies. Archer and Gartner (1984) examined fourteen countries that abolished the death penalty and found that abolition did not cause an increase in homicide rates. This research has been convincing to most criminologists (Radelet and Akers n.d.; Fessenden 2000), which is why Janet Reno was told that there was no valid research linking capital punishment to homicide rates.

The studies that Orrin Hatch referred to use a very different methodology: econometrics, also known as multiple regression modeling, structural equation modeling, or path analysis. This involves constructing complex mathematical models on the assumption that the models mirror what happens in the real world. As I argued in a previous Skeptical Inquirer article (Goertzel 2002), this method has consistently failed to offer reliable and valid results in studies of social problems where the data are very limited. Its most successful use is in making predictions in areas where there is a large flow of data for testing. The econometric literature on capital punishment has been carefully reviewed by several prominent economists and found wanting. There is simply too little data and too many ways to manipulate it. In one careful review, McManus (1985, 417) found that: "there is much uncertainty as to the 'correct' empirical model that should be used to draw inferences, and each researcher typically tries dozens, perhaps hundreds, of specifications before selecting one or a few to report. Usually, and understandably, the ones selected for publication are those that make the strongest case for the researcher's prior hypothesis."

Models that find deterrence effects of capital punishment often rely on rather bizarre specifications. In a rigorous and comprehensive review Cameron (1994, 214) observed that, "What emerges most strongly from this review is that obtaining a significant deterrent effect of executions seems to depend on adding a set of data with no executions to the time series and including an executing/non-executing dummy in the cross-section analysis . . . there is no clear justification for the latter practice."

In less technical language, the researchers included a set of years when there were no executions, then introduced a control variable to eliminate the nonexistent variance. The other day upon the stair, they saw some variance that wasn't there. It wasn't there again today, thank goodness their model scared it away. Not all the studies rely on this particular maneuver, but they all depend on techniques that demand too much from the available data.

Since there are so many ways to model inadequate data, McManus (1985, 425) was able to show that researchers whose prior beliefs led them to structure their models in different ways would obtain predictable conclusions: "The data analyzed are not

sufficiently strong to lead researchers with different prior beliefs to reach a consensus regarding the deterrent effects of capital punishment. Right-winger, rational-maximizer, and eye-for-an-eye researchers will infer that punishment deters would-be murderers, but bleeding-heart and crime-of-passion researchers will infer that there is no significant deterrent effect."

## The Mythical World of Ceteris Paribus

Econometricians inhabit the mythical land of Ceteris Paribus, a place where everything is constant except the variables they choose to write about. Ceteris Paribus has much in common with the mythical world of Flatland in Edwin Abbot's (1884) classic fairy tale. In Flatland everything moves along straight lines, flat plains, or rectangular boxes. In Flatland, statistical averages become mathematical laws. For example, it is true that, on the average, tall people weigh more than short people. But, in the real world, not every tall person weighs more than a shorter one. In Flatland knowing someone's height would be enough to tell you their precise weight, because both vary only on a straight line. In Flatland, if you plotted height and weight on a graph with height on one axis and weight on the other, all the points would fall on a straight line.

Of course, econometricians know that they don't live in Flatland. But the mathematics works much better when they pretend they do. So they adjust the data in one way or another to make it straighter (often by converting it to logarithms). Then they qualify their remarks, saying "capital punishment deters homicide, ceteris paribus." But when the real-world data diverge greatly from the straight lines of Flatland, this can lead to bizarre results.

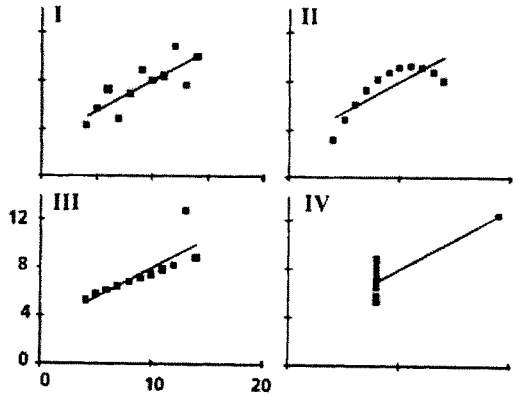


Figure 2: Anscombe's Quartet (by J. Randall Flannigan)

Statistician Francis Anscombe (1973) demonstrated how bizarre the Flatland assumption can be. He plotted four graphs that have become known as Anscombe's Quartet. Each of the graphs shows the relationship between two variables. The graphs are very different, but for a resident of Flatland they are all the same. If we

approximate them with a straight line (following a "linear regression equation") the lines are all the same (figure 2). Only the first of Anscombe's four graphs is a reasonable candidate for a linear regression analysis, because a straight line is a reasonable approximation for the underlying pattern.

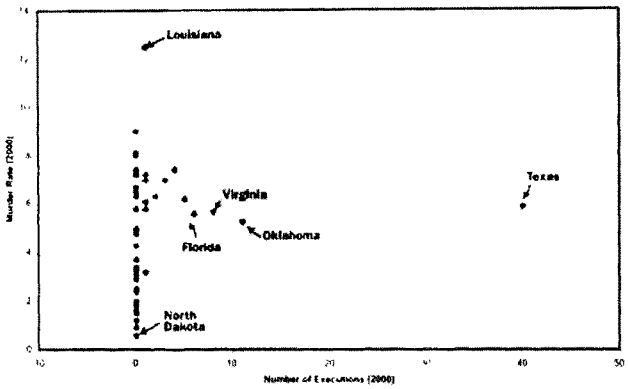


Figure 3: Executions and murder rates in the United States.

The data on capital punishment and homicide, when plotted in figure 3, look a lot like Anscombe's fourth quartet. Most of the states had no executions at all. One state, Texas, accounts for forty of the eighty-five executions in the year shown (the patterns for other years are quite similar). An exceptional case or "outlier" of this dimension completely dominates a multiple regression analysis. Any regression study will be primarily a comparison of Texas with everywhere else. Multiple regression is simply inappropriate with this data, no matter how hard the analyst tries to force the data into a linear pattern.

Unfortunately, econometricians continue to use multiple regression on capital punishment data and to generate results that are cited in Congressional hearings. In recent examples, Mocan and Gittings (2001) concluded that each execution decreases the number of homicides by five or six while Dezhbaksh, Rubin, and Shepherd (2002) argued that each execution deters eighteen murders. Cloninger and Marchesini (2001) published a study finding that the Texas moratorium from March 1996 to April 1997 increased homicide rates, even though no increase can be seen in the graph (figure 1). The moratorium simply increased homicide in comparison to what their econometric model said it would have otherwise been. Of all the econometric myths, the wildest is this: We know what would have been.

Cloninger and Marchesini concede that "studies such as the present one that rely on inductive statistical analysis cannot prove a given hypothesis correct." However, they argue that when a large number of such studies give the same result, this provides "robust evidence" which "causes any neutral observer pause." But if McManus is correct that econometricians are likely to specify models to fit their preconceptions, then if many of them reach the same conclusion it may just mean that they have the same bias. Actually, there are a variety of biases among econometricians, which is why there are almost as many on one side as on the other of this issue. In response to Ehrlich's (1975) initial econometric study, other econometricians using the same

data included Yunker (1976), who found a stronger deterrent effect than Ehrlich, and Cloninger (1977), who supported his findings. But Bowers and Pierce (1975), Passel and Taylor (1977), and Hoenack and Weiler (1980) found no deterrence at all.

Econometricians often dismiss the kind of comparative research that Thorsten Sellin did as crude and unsophisticated when compared to their use of complex mathematical formulas. But mathematical complexity does not make for good social science. The goal of multiple regression is to convert messy sociological realities into math problems that can be resolved with the certainty of mathematical proof. Econometricians believe they can control for the myriad variables that affect homicide rates, just as a chemist eliminates impurities to see how two chemicals interact in their pure form. But they cannot convert the real world into a Flatland, so they use statistical adjustments to compensate. With these adjustments, they claim to answer the Ceteris Paribus question: If everything else were equal, what would the relationship between capital punishment and homicide be?

It would be handy for social scientists if we lived in a Flatland where everything else was equal and questions could be answered with a few calculations. But multivariate statistical analysis does not answer real-world questions such as, "does Texas, with a high execution rate, have a lower homicide rate than similar states?" or "did the homicide rate go down when Texas began executing people, compared to trends in other states that did not?" Instead, it answers the question, "If we use the latest, most sophisticated statistical methods to control for extraneous variables, can we say that the death penalty deters homicide rates other things being equal?" After decades of effort by many diligent researchers, we now know the answer to this question: There are many ways to adjust things statistically, and the answer will depend on which one is chosen. We also know that of the many possible ways to specify a regression model, each researcher is likely to prefer one that will give results consistent with his or her predispositions.

It is time to abandon the illusion that mathematics can convert the real world into the mythical land of Ceteris Paribus. Social science can provide valid and reliable results with methods that present the data with as little statistical manipulation as possible and interpret it in light of the best qualitative information available. The value of this research is shown by its success in demonstrating that capital punishment has not deterred homicide.

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# About the Author

Ted Goertzel is a professor of sociology, Sociology Department, Rutgers University, Camden, NJ 08102. E-mail: goertzel@camden. rutgers.edu.

**Senate Judiciary Committee**
**Subcommittee on the Constitution, Civil Rights and Property Rights**
**An Examination of the Death Penalty in the United States**
**February 1, 2006**

**Written Statement for the Record**

**Jennifer Daskal**
**Advocacy Director, U.S. Program**
**Human Rights Watch**

In 2005, the United States executed the 1000th person since the death penalty was reinstated in 1976. This infamous event failed to pay heed to either the declining public support for the death penalty or the overwhelming evidence of the arbitrariness and discrimination and fallibility of state and federal criminal justice systems in applying the death penalty.

Human Rights Watch has long opposed the death penalty as an inherently cruel and degrading punishment that violates international norms of human rights. Now, more and more, Americans are agreeing. Support for the death penalty is at its lowest level since the 1970s. According to an October 2005 Gallup Poll, over the last ten years public support for the death penalty has dropped significantly, from 80% in 1994 to 64% in 2005. A June 2004 Gallup Poll expanded on this question, finding that when life without parole is an option, support for the death penalty drops to only 50%.[1]

Human Rights Watch believes that it is time for the United States to finally adopt the position taken by every other Western democracy, and abolish the death penalty. Arbitrariness, unfairness, and racial bias continue to plague the death penalty, highlighting the necessity of its abolition.

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[1] Death Penalty Information Center, "Gallup Poll Reports Lowest Death Penalty Support in 27 Years,", at http://www.deathpenaltyinfo.org/article.php?did=1599&scid=64; Moore, David, "Public Divided Between Death Penalty and Life Imprisonment Without Parole," Gallup News Service, June 2, 2004, at http://www.deathpenaltyinfo.org/article.php?scid=23&did=1029.

**Fallibility of the Criminal Justice System (Evidence of Innocence)**

More than 120 people have been released from death row since 1976 due to evidence of their innocence.[2] In response to a large number of DNA-based exonerations, Illinois imposed a moratorium on the death penalty in 2000; New York and Kansas have also suspended use of the death penalty.[3] Most recently, public concern motivated the New Jersey legislature to impose a moratorium on the use of the death penalty until a commission can report on its use in the state.[4]

When the United States moves forward with executions in the face of persistent evidence of error, it erodes public confidence in the fundamental fairness of the criminal justice system. Just this year, a *Houston Chronicle* investigative reporter uncovered evidence indicating that when Texas executed Ruben Cantu in 1993, it executed an innocent young man. His formerly silent co-defendant has since signed an affidavit saying that Cantu was not with him during the time of the killing, and the lone eyewitness to the crime recently recanted his story, saying that he was pressured by the police into accusing Cantu. No physical evidence ever linked Cantu to the killing; potential alibi witnesses were never presented; and even the former district attorney who made the decision to charge Cantu with a capital offense now says that he never should have sought the death penalty.[5]

**Racial Bias**

Racial bias continues to permeate the death penalty system. Notably, while African Americans make up just 13 percent of the population, they account for 42 percent of current death row inmates.[6] Racial bias affects all levels of the system, from the decision to pursue the death penalty to the decision to impose the death penalty. Eighty percent of the federal death penalty cases from 1995-2000 involved minority defendants; and in 48% of those cases the defendant was African American.[7] Moreover, black offenders who kill white victims remain much more likely to receive a death sentence than black offenders who kill black victims.[8]

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[2] The Death Penalty Information Center, "Innocence and the Death Penalty," Jan. 2006, at http://www.deathpenaltyinfo.org/article.php?did=412&scid=6.

[3] Weinstein, Henry, "Death Sentences Show Decline Nationwide: When They Have The Option, Jurors Prefer A Sentence of Life Without Parole, Experts Say," L.A.TIMES, Dec. 22 2005.

[4] Human Rights Watch, "U.S.: New Jersey Suspends Death Penalty" (Jan. 16, 2005), at http://hrw.org/english/docs/2006/01/17/usdom12437.htm; Post, Leonard, "More States Review Death Penalty Laws," *National Law Journal*, Vol. 27:69 (Jan. 16 2006).

[5] Olsen, Lisa, "The Cantu Case: Death and Doubt: Did Texas Execute an Innocent Man?," THE HOUSTON CHRONICLE, Nov. 21, 2005.

[6] McKinnon, Jesse, *The Black Population in the United States: March 2002*, U.S. Census Bureau, Current Population Reports, Series P20-541, Washington, DC (2003); Bonczar, Thomas L. Snell, Capital Punishment, 2004 , U.S. Dept. of Justice, Bureau of Justice Statistics, Nov. 13 2005, at http://www.ojp.usdoj.gov/bjs/pub/press/cp04pr.htm.

[7] Department of Justice, *The Federal Death Penalty System A Statistical Survey (1988-2000)*, Sept. 12, 2000.

[8] Pierce, Glenn L and Michael L. Radelet, "The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides 1990-1999," *Santa Clara Law Review* (Santa Clara: 2005); Raymond

**Economic Bias**

Most defendants in capital cases are poor and unable to afford their own attorneys. In all too many cases, the attorneys appointed to represent them are overworked, inexperienced, and unwilling or unable to mount a vigorous defense of their clients.[9] A 2001 report on the death penalty system in Washington state found that 20% of the 84 death row defendants in that state were represented by lawyers who were later suspended, arrested or disbarred.[10] The shortage of capable court-appointed lawyers to handle the complexities of a death penalty case means that poor individuals are often deprived an effective defense.[11]

**Geographic Bias**

The location of the crime is also a significant factor in determining the likelihood of receiving the death penalty. The majority of federal death penalty cases derive from a very small section of the country, with 42% originating from only five out of 94 federal districts in the country.[12] Defendants in Texas are more likely to be sentenced to death than defendants in any other state, with defendants in Virginia next in line.[13] Prosecutors in certain counties are far more likely to seek the death penalty than their counterparts elsewhere – meaning that the imposition of the death penalty can come down to the arbitrary designation of a county line.[14]

**Mental Illness and the Death Penalty**

In 2002, the Supreme Court issued a landmark opinion outlawing the death penalty for people with mental retardation.[15] Yet, mentally ill individuals continue to be subject to the death penalty. A recent study of the 1000 persons executed since the death penalty was reinstated in 1976 indicates that approximately ten percent suffered from serious mental illness or impairment at the time they committed their crime.[16] These are individuals who, like those suffering from mental retardation, suffer from limitations that

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Paternoster and Robert Brame, "An Empirical Analysis Of Maryland's Death Sentencing System With Respect To The Influence Of Race And Legal Jurisdiction" (University of Maryland: Jan. 7, 2003).

[9] Lewis, Anthony, "The Silencing of Gideon's Trumpet," N.Y.TIMES MAGAZINE, April 20, 2003.

[10] Olsen, Lise, "Series on Inadequacy of Death Penalty Defense," SEATTLE POST-INTELLIGENCER, Aug. 6-8, 2001.

[11] Crystal, Nix Hines, "Lack of Lawyers Blocking Appeals in Capital Cases," N.Y. TIMES, July 5, 2001.

[12] Department of Justice, *The Federal Death Penalty System A Statistical Survey (1988-2000)*, Sept.12 2000.

[13] The Death Penalty Information Center, "Facts About the Death Penalty," Jan. 2006, at http://www.deathpenaltyinfo.org/FactSheet.pdf.

[14] *See, e.g.*, Montgomery, Lori, "Maryland Questioning Local Extremes on Death Penalty," WASH. POST, May 12, 2002.

[15] Atkins v. Virginia, 536 U.S. 304 (2004).

[16] Amnesty International, *United States of America: The Execution of Mentally Ill Offenders*, Jan. 31, 2006, at http://web.amnesty.org/library/index/ENGAMR510032006.

diminish their culpability. Moreover, they are all too often deprived of any treatment for their illness during the many years they remain on death row.[17]

**International Human Rights Norms**

The United States ranks only behind China, Iran, and Vietnam in the number of executions on annual basis -- countries responsible for other serious human rights violations condemned by the State Department. The Council of Europe has banned the death penalty in all of its 36 member states, and abolition of the death penalty is now a precondition for joining the European Union.[18]

International human rights law, as codified in the International Covenant on Civil and Political Rights clearly favors the abolition of capital punishment, although it does not categorically prohibit it.[19] The United Nations Commission on Human Rights has passed numerous resolutions affirming its opposition to the death penalty; in its 2003 resolution on "The Question of the Death Penalty," the Commission stated that the "abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights."[20]

Human Rights Watch opposes capital punishment in all circumstances. It is time for the United States to align itself with human rights promoters, rather than human rights denigrators, and abolish this barbaric form of punishment.

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[17] *See* Human Rights Watch, "Ill-Equipped: U.S. Prisons and Offenders with Mental Illness" (2003) , at http://www.hrw.org/reports/2003/usa1003/index.htm

[18] European Union, "EU Policy And Action On The Death Penalty," at http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm

[19] International Covenant on Civil and Political Rights (ICCPR), at: http://www.ohchr.org/english/law/ccpr.htm; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), at: http://www.ohchr.org/english/law/cat.htmm. The United States ratified the ICCPR in 1992 and CAT in 1994. *See* http://www.ohchr.org/english/countries/ratification/.

[20] United Nations Commission on Human Rights, "The Question of the Death Penalty," Res. 2003/67 (April 2003).

# Testimony on the Death Penalty[1]

by John McAdams

Marquette University

U.S. Senate Judiciary Subcommitee on the Constitution, Civil Rights, & Property Rights

Dirksen Senate Office Building

February 1, 2006

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[1] This testimony draws heavily on various articles published by this witness, including "Death Penalty Resurgence," *The State of Corrections: Proceedings of the American Correctional Association, 2003*, and "Racial Disparity and the Death Penalty," *Law and Contemporary Problems*, Autumn, 1998.

There are a huge number of issues that relate to the merits of the death penalty as a punishment, including deterrence, the moral justice of the punishment, the cost of the imposition of the sanction, and even (implausibly) what policies European nations have.

But I'm going to concentrate, given the limited time I have, on two issues that I think are key: the issue of "innocents" convicted and sent to death row, and the issue of racial disparity in the application of the punishment.

How Many Innocents on Death Row?

One of the most compelling arguments against the death penalty, at least of one accepts the claims of the death penalty opponents at face value, is the claim that a great many innocent people have been convicted of murder and put on death row. Liberal Supreme Court Justice John Paul Stevens, just to pick one case out of hundreds, told the American Bar Association's Thurgood Marshall Award dinner that "That evidence is profoundly significant, not only because of its relevance to the debate about the wisdom of continuing to administer capital punishment, but also because it indicates that there must be serious flaws in our administration of criminal justice."[2]

The most widely publicized list of "innocents" is that of the Death Penalty Information

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[2] "Stevens Voices Doubts About Death Penalty," *Chicago Daily Law Bulletin*, August 8, 2005.

Center (DPIC). As of January, 2003, it listed 122 people.[3] That sounds like an appallingly large number, but even a casual examination of the list shows that many of the people on it got off for reasons entirely unrelated to being innocent. Back in 2001, I analyzed the list when it had ninety-five people on it. By the admission of the Death Penalty Information Center, thirty-five inmates on their list got off on procedural grounds. Another fourteen got off because a higher court believed the evidence against them was insufficient. If the higher court was right, this would be an excellent reason to release them, but it's far from proof of innocence.[4]

Interestingly, prosecutors retried thirty-two of the inmates designated as "innocent." Apparently prosecutors believed these thirty-two were guilty. But many whom prosecutors felt to be guilty were not tried again for a variety of reasons, including the fact that key evidence had been suppressed, witnesses had died, a plea bargain was thought to be a better use of scarce resources, or the person in question had been convicted and imprisoned under another charge.

More detailed assessments of the "Innocents List" have shown that it radically overstates the number of innocent people who have been on death row. For example, the state of Florida had put on death row 24 inmates claimed, as of August 5, 2002, to be innocent by the DPIC. The resulting publicity led to a thorough examination of the twenty-four cases by the Florida Commission on Capital Crimes, which concluded that in only four of the twenty-four cases was

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[3] http://www.deathpenaltyinfo.org/innoc.html

[4] John McAdams.. 2001. It's good, and We're Going to Keep It: A Response to Ronald Tabak. *Connecticut Law Review*. 33(3): 828-831.

the factual guilt of these inmates in doubt.[5]

Examinations of the entire list have been no more favorable. For example, a liberal federal district judge in New York ruled, in *United States v. Quinones,* that the federal death penalty is unconstitutional. In this case, the court admitted that the DPIC list "may be over-inclusive" and, following its own analysis, asserted that for thirty-two of the people on the list there was evidence of "factual innocence."[6] This hardly represents a ringing endorsement of the work of the Death Penalty Information Center. In academia, being right about a third of the time will seldom result in a passing grade.

Other assessments have been equally negative. Ward A. Campbell, Supervising Deputy Attorney General of the State of California reviewed the list in detail, and concluded that:

> . . . it is arguable that at least 68 of the 102 defendants on the List should not be on the list at all – leaving only 34 released defendants with claims of actual innocence – less than ½ of 1% of the 6,930 defendants sentenced to death between 1973 and 2000.[7]

There is, of course, a degree of subjectivity in all such assessments. The presence of "reasonable doubt" does not make a person factually innocent (although it's a excellent reason to

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[5] http://www.floridacapitalcases.state.fl.us/Publications/innocentsproject.pdf

[6] 205 F. Supp. 2d 256; 2002 U.S. Dist. LEXIS 11631

[7] http://www.prodeathpenalty.com/DPIC.htm

acquit them), and circumstances might conspire to make a factually innocent person appear to even an objective observer to be guilty "beyond a reasonable doubt." The key thing to remember is that the numbers produced by DPIC are "outliers" – grossly inflated. Indeed, staffers of this very committee have pretty much dismantled the DPIC list.[8]

Taking at face value the claims of the activists is about as bad as taking at face value the claims of the National Rifle Association about the number of Americans who save themselves from bodily harm because they own and carry guns, or the claims of NARAL about how many "back alley abortions" would result from overturning *Roe v. Wade*.

Have Any Innocents Been Executed?

Worse than putting an innocent person on death row (only to have him later exonerated) would be to actually execute an innocent person. But death penalty opponents can't point to a single innocent person known to have been executed for the last 35 years. They do make claims, howver.

In the 1980s, two academics who strongly opposed the death penalty (Hugo Adam Bedau and Michael Radelet) claimed that of 7,000 people executed in the United States in the 20th

[8] MINORITY VIEWS ON S. 486, Senate Judiciary Committee, 2002. Archived at: http://mcadams.posc.mu.edu/blog/MINORVIEWS.PDF.

century, 23 were innocent.[9] This doesn't seem like a large number, especially when we remember that most of the cases they claimed were from an era when defendants had many fewer due process rights than they do today, when police forces and prosecutors were much less well-trained and professional than they are today, and when the media was less inclined to take an "advocacy" role in claimed cases of injustice.

Indeed, Bedau and Redelet produced only one case since the early 1960s where they claimed an innocent man had been executed -- that of one James Adams[10]. But even this one case was quite weak. Steven J. Markman and Paul G. Cassell, in a *Stanford Law Review* article, took Bedau and Radelet to task for "disregard of the evidence," and for putting a spin on the evidence that supported their thesis of Adams' innocence. Markman and Cassell concluded that there is, "no persuasive evidence that any innocent person has been put to death in more than twenty-five years."[11] In response, Bedau and Radelet admitted to the *Chronicle of Higher Education* that (in the words of the Chronicle's reporter) "some cases require subjective analysis simply because the evidence is incomplete or tainted." They admitted this was true of all 23 cases that they reported.[12]

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[9] Bedau, Hugo Adam and Michael Radelet. 1992. *In Spite of Innocence*. Boston: Northeastern University Press.

[10] Op. cit. pp. 5-10.

[11] Markman, Steven J. and Paul G. Cassell. 1988. Protecting the Innocent: A Response to the Bedau-Radelet Study. *Stanford Law Review*. 41: 121-160.

[12] Managhan, Peter. 1993. Scholars' Research on Executions Adds Fuel to Death-Penalty Debate. *The Chronicle of Higher Education*. January 27: A8.

The most sober death penalty opponents have apparently given up claiming solid evidence of any innocent person executed in the modern era. Indeed Barry Scheck, cofounder of the Innocence Project, was featured speaker at the Wrongfully Convicted on Death Row Conference in Chicago (November 13-15, 1998), and was interviewed by the "Today Show." Schenk was asked by Matt Lauer, "Since 1976, 486 people have been executed in this country. Any doubt in your mind that we've put to death innocent people?" Scheck responded "Well, you know, I – I think that we must have put to death innocent people, but if you're saying to me to prove it right now, I can't."[13]

Nothing stops death penalty opponents from making all sort of claims about innocent people being executed. But in the rare cases when their claims can actually be tested, they turn out to be false. Consider, for example, the case of Roger Keith Coleman, who was tried for a rape/murder, and finally executed by the State of Virginia in 1992. An essay still on the site of the Death Penalty Information Center discusses the case at considerable length, and clearly leaves the impression that Coleman must be innocent. After attacking all the evidence against Coleman, the essay claims that "official misconduct that has left the case against Roger Coleman in shreds" and goes on to claim:

> . . . there is dramatic evidence that another person, Donney Ramey, committed the murder. For one thing, a growing number of women in the neighborhood have reported being sexually assaulted by Ramey in ways strikingly similar to the attack on Wanda McCoy. For another, one of these rape victims, Teresa Horn, has courageously signed an affidavit stating that Ramey told her he had killed Mrs.

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[13] "Today Show", November 13, 1998, transcript accessed via Lexis-Nexis.

McCoy. He threatened to do the same to Ms. Horn.[14]

Someone reading the Death Penalty Information Center website, and lacking due skepticism toward the assertions there, would doubtless conclude that Coleman was innocent. Unfortunately, the State of Virginia allowed DNA testing of key evidence in 2005, using technology unavailable in 1992, and proved decisively that Coleman was in fact guilty as charged.[15] The credibility of anti-death penalty activists when making claims of innocence – whether for those on death row or those who have been executed – is tenuous at best.

How Many Innocents on Death Row are Acceptable?

At this point, death penalty opponents will argue that it doesn't matter if their numbers are inflated. Even if only 20 or 30 innocent people have been put on death row, they will say, that is "too many" and calls for the abolition of the death penalty. If even one innocent person is executed, they claim, that would make the death penalty morally unacceptable.

This kind of rhetoric allows the speaker to feel very self-righteous, but it's not the sort of thinking that underlies sound policy analysis. Most policies have some negative consequences, and indeed often these involve the death of innocent people – something that can't be shown to

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[14] Michael Kroll, "Killing Justice: Government Misconduct and the Death Penalty" Death Penalty Information Center. http://www.deathpenaltyinfo.org/article.php?scid=45&did=529 (Last consulted, January 29, 2006).

[15] "Test confirms guilt of Virginia man executed in 1992," Reuters dispatch, January 12, 2006.

have happened with the death penalty in the modern era. Just wars kill a certain number of innocent noncombatants. When the FDA approves a new drug, some people will quite likely be killed by arcane and infrequent reactions. Indeed, the FDA kills people with its laggard drug approval process. The magnitude of these consequences matters.

Death penalty opponents usually implicitly assume (but don't say so, since it would be patently absurd) that we have a choice between a flawed death penalty and a perfect system of punishment where other sanctions are concerned.

Death penalty opponents might be asked why it's acceptable to imprison people, when innocent people most certainly have been imprisoned. They will often respond that wrongfully imprisoned people can be released, but wrongfully executed people cannot be brought back to life. Unfortunately, wrongfully imprisoned people cannot be given back the years of their life that were taken from them, even though they may walk out of prison.

Perhaps more importantly, it's cold comfort to say that wrongfully imprisoned people can be released, when there isn't much likelihood that that will happen. Wrongful imprisonment receives vastly less attention than wrongful death sentences, but Barry Scheck's book *Actual Innocence* lists 10 supposedly innocent defendants, of whom only 3 were sent to death row.[16] Currently, the Innocence Project website lists 174 persons who have been exonerated on the

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[16] Dwyer, Jim, Peter Neufeld, and Barry Scheck. 2000. *Actual Innocence*. New York: Doubleday.

basis of hard DNA evidence.[17] But the vast majority were not sentenced to death. In fact, only 15 death row inmates have been exonerated due to DNA evidence.[18]

There is every reason to believe that the rate of error is much lower for the death penalty than for imprisonment. There is much more extensive review by higher courts, much more intensive media scrutiny, cadres of activists trying to prove innocence, and better quality counsel at the appeals level (and increasingly at the trial level) if a case might result in execution. Consider the following quote from an article about how prosecutors in Indiana are tending more and more to ask for life imprisonment and not the death penalty because of the cost of getting an execution:

> Criminal rules require a capital defendant to have two death penalty certified attorneys, which, if the defendant is indigent, are paid for on the public dime. Other costs that might be passed onto taxpayers are requirements that the accused have access to all the tools needed to mount a fair defense, including mitigation experts, investigators, and DNA experts. Because the stakes are so high in a death penalty case, the courts believe a defendant is entitled to a super due process.[19]

The cost of getting a death penalty is *too high* in some ways (seemingly endless appeals). But in other ways lesser penalties are *too cheap* (lacking good lawyers, DNA testing, etc.). The system, in fact, it quite unbalanced, with it being relatively cheap and easy to sentence someone to life imprisonment but excessively expensive to have them executed.

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[17] http://www.innocenceproject.org/index.php (Last consulted January 29, 2006).

[18] Death Penalty Information Center, http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 (Last consulted January 29, 2006).

[19] Ron Browning, "State mirrors national numbers showing fewer capital cases," *The Indiana Lawyer*, December 1, 2004.

But until some balance is restored, the death penalty will remain the fairest penalty we have. Balance will be achieved by ending "dead weight loss" in administering the death penalty (further limiting the number of appeals), while working for more substantive justice where lesser sanctions are at issue.

## Playing the Race Card

Death penalty opponents tend to inhabit sectors of society where claiming "racial disparity" is an effective tactic for getting what you want. In academia, the media, the ranks of activist organizations, etc. claiming "racial disparity" is an excellent strategy for getting anybody who has qualms about what you are proposing to shut up, cave in, and get out of the way. Unfortunately, this has created a hot-house culture where arguments thrive that carry little weight elsewhere in society, and carry little weight for good reasons.

Consider the notion that, because there is racial disparity in the administration of the death penalty, it must be abolished. Applying this principle in a consistent way would be unthinkable. Suppose we find that black robbers are treated more harshly than white robbers? Does it follow that we want to stop punishing robbers? Or does it follow that we want to properly punish white robbers also? Nobody would argue that racial inequity in punishing robbers means we have to stop punishing robbers. Nobody would claim that, if we find that white neighborhoods have better police protection than black neighborhoods that we address the inequity by withdrawing police protection from *all* neighborhoods. Or that racial disparity in

mortgage lending requires that mortgage lending be ended. Yet people make arguments exactly like this where capital punishment is concerned.

A further problem with the "racial disparity" argument – and one underlining the fundamental incoherence of the abolitionist's thinking – is the fact that there are two versions of it, both widely bandied around, and *they are flatly contradictory.* I have elsewhere described these as the "mass market" and the "specialist" versions of the racial disparity thesis.[20]

The mass market version is the easiest to understand, since it relies on the notion that racist cops, racist prosecutors, racist judges, and racist juries will be particularly tough on black defendants. Jessie Jackson, never one to pass up an opportunity to nurse a racial grievance, has expressed this view as follows:

> Numerous researchers have shown conclusively that African American defendants are far more likely to received the death penalty than are white defendants charged with the same crime. For instance, African Americans make up 25 percent of Alabama's population, yet of Alabama's 117 death row inmates, 43 percent are black. Indeed, 71 percent of the people executed there since the resumption of capital punishment have been black.[21]

In a more scholarly vein, Leigh B. Bienen has claimed:

> There is a whole other dimension with regard to arguments that the death penalty is "racist." The death penalty and the criminal justice system is an institutional

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[20] "Racial Disparity and the Death Penalty," *Law and Contemporary Problems*, 61:4 (Autumn 1998), pp. 153-170.

[21] Rev. Jesse Jackson, Legal Lynching: Racism, Injustice, and the Death Penalty. New York (1996): Marlowe & Company, p. 100. In other passages, Jackson admits that the situation is more complex.

> system controlled by and dominated by whites, although the recipients of punishment, including the recipients of the death penalty, are disproportionately black. The death penalty is a symbol of state control and it is a symbol of white control over blacks, in fact and in its popular and sensationalist presentations. Black males who present a threatening personae and a defiant personae are the favorites of those administering the punishment, including the overwhelmingly middle-aged white male prosecutors who are running for election or retention or re-election and find nothing gets them more votes than demonizing young black men. By portraying themselves as punishers and avengers of whites who are the "victims" of blacks, prosecutors get a lot of political support.[22]

Thus Bienen adds another element to the mix: a racist public whose bias is translated by those paragons of political incorrectness, middle-aged white males, into harsh punishments for blacks.

The problems of this view a numerous, but I'll discuss only the most important one: it's empirically just flat wrong. A whole raft of relatively sophisticated studies of the death penalty have been done, and findings of bias against black defendants are rare. Indeed, they are so few that they seem to illustrate the point that if you run a huge number of statistical "coefficients," a few will turn up as "significant" when in fact nothing is there.[23]

What the studies do show is a huge bias against black *victims*. Offenders who murder black people get off much more lightly than those who murder whites. Since the vast majority of murders are *intra*racial and not *inter*racial, this translates into a system that lets black murders

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[22] American Bar Association, *Focus on Law Studies*, Spring 1997, "Unedited Death Penalty Forum," http://www.abanet.org/publiced/focus/unedit.pdf (Last consulted January 29, 2006).

[23] John C. McAdams, "Racial Disparity and the Death Penalty," *Law and Contemporary Problems*, 61:4 (Autumn 1998), p. 162.

off far more easily than white murderers.[24]

This is clearly unjust, but it leaves open the question of whether the injustice should be remedied by executing nobody at all, or rather executing more offenders who have murdered black people.

Even more relevant is the question: would doing away with the death penalty improve the situation? Here, as elsewhere, death penalty opponents assume that the choices are a flawed death penalty and a pristine system of criminal justice for every other punishment. But the data don't support that.

Scholars who study the death penalty often study several decisions in the process that might theoretically lead to execution. What they almost invariably find is large-scale bias in these earlier decisions, *including decisions that would continue to be made if the death penalty were abolished.* One particularly interesting study (although pre-Furman) was done by Zimring, Eigen, and O'Malley, and dealt with 245 persons arrested for homicide in Philadelphia in 1970. Of these, 170 were eventually convicted of some charge. Sixty-five percent of defendants who killed a white got either life imprisonment or a death sentence, while only 25 percent of those who killed a black did.[25] Since these murders produced only three death sentences (all imposed

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[24] McAdams, "Racial Disparity. . . " pp. 156-159.

[25] Zimring, F.E., J. Eigen, and S. O'Malley, "Punishing Homicide in Philadelphia: Perspectives on the Death Penalty," *University of Chicago Law Review*, 43 (1976): 227-252.

on blacks who killed whites), most of the apparent racial unfairness involved life imprisonment, not execution. Blumstein, in a study of the racial disproportionality of prison populations, found that in 1991 blacks were *underrepresented* among prisoners convicted of murder.[26] There were many limitations to Blumstein's study, including failure to control for aggravating circumstances, and a research design what leaves possible racial discrimination in arrests entirely out of account. But his results strongly imply that the system does for imprisonment what it does with regard to executions: underpunish those who kill blacks.

William J. Bowers, as we have already discussed, found that defendants who killed whites were more likely to be indicted for first degree murder – rather than a lessor charge – and more likely to be convicted for first degree murder than defendants who killed blacks.[27] Along similar lines Radelet, in a study of indictments for murder in Florida, found that 85 percent of the killers of white victims were indicted for first-degree murder, while only 53.6 percent of the killers of black victims were.[28]

Leigh Bienen and her colleagues, in their study of New Jersey homicides examined the

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[26] Alfred Blumstein, "Racial Disproportionality of U.S. Prison Populations Revisited," *University of Colorado Law Review*, 64: 743-760. See especially page 751. Note that Blumstein's 1979 data did not show this disproportionality.

[27] Bowers, William J., "The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes," *The Journal of Criminal Law & Criminology*, 74-3: 1067 (1983)

[28] Michael L. Radelet, "Racial Characteristics and the Imposition of the Death Penalty," *American Sociological Review*, 46(1981): 918-927. See page 922. This figure applies only to "nonprimary" homicide cases – those in which the victim and the defendant did not know each other.

issue of whether a particular case is plea bargained, or whether it goes to trial. Cases involving white victims were found to go to trial more often that cases involving either black or Hispanic victims.[29]

One particularly interesting study involved prosecutors' decisions to "upgrade" or "downgrade" a homicide. An "upgrade" involved a prosecutor making a charge of a felony connected with the homicide when no such felony was mentioned in the police report. On the other hand, cases were said to be "downgraded" when the police report indicated the commission of a felony, but the prosecutor's charge did not mention it. A statistical model which controlled for the circumstances of the crime and of the offender showed that white victim murders were more likely to be upgraded than black victim murders.[30]

In sum, the system is relatively lenient toward those who kill blacks, and that leniency extends to decisions that would continue to advantage those defendents who have killed blacks even in the absence of the death penalty. All of this makes perfect sense. If the system is biased toward punishing those who murder whites, it is implausible indeed that decisions leading up to sentencing are made with strict racial fairness, and only the imposition of a death sentence is racially biased. If people want to punish those who murder whites more harshly than those who

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[29] Leigh Bienen, Neil Alan Weiner, Deborah W. Denno, Paul D. Allison, and Douglas Lane Mills, "The Reimposition of Capital Punishment in New Jersey: the Role of Prosecutorial Discretion." *Rutgers Law Review*, 41 (1988): 27-372. See p. 226.

[30] M.L. Radelet and G.L. Pierce, "Race and Prosecutorial Discretion in Homicide Cases," *Law and Society Review* 19(1985): 587-521.

murder blacks, this is likely to be reflected in prosecutors' decisions to move ahead with a case, in decisions about whether to plea-bargain, in the allocation of staff to a particular case, in the decision to indict on more or less serious charges, and in jury verdicts. Even in sentencing, abolition of the death penalty only narrows the range of possible punishments, rather than eliminating it. While not all decision points have been studied equally well, theoretically the pervasive undervaluing of the lives of black victims ought to be reflected everywhere there is discretion.

## Conclusion

It cannot be stressed too strongly that we do not face the choice of a defective system on capital punishment and a pristine system of imprisonment. Rather, nothing about the criminal justice system works perfectly. Death penalty opponents give the impression that the death penalty is uniquely flawed by the simple expedient of dwelling on the defects of capital punishment (real and imagined) and largely ignoring the defects in the way lesser punishments are meted out.

The death penalty meets the expectations we can reasonably place on any public policy. But it can't meet the absurdly inflated standards imposed by those who are culturally hostile to it. But then, no other policy can either.

**Statistical Evidence on Capital Punishment and the Deterrence of Homicide**

Written Testimony for the Senate Judiciary Committee on the Constitution, Civil Rights, and Property Rights
February 1, 2006

Paul H. Rubin[1]
Samuel Candler Dobbs Professor of Economics and Law
Emory University
Atlanta GA 30322
prubin@emory.edu

**I. Introduction and Summary**

Recent research on the relationship between capital punishment and homicide has created a consensus among most economists who have studied the issue that capital punishment deters murder. Early studies from the 1970s and 1980s reached conflicting results. However, recent studies have exploited better data and more sophisticated statistical techniques. The modern refereed studies have consistently shown that capital punishment has a strong deterrent effect, with each execution deterring between 3 and 18 murders. This is true even for crimes that might seem not to be deterrable, such as crimes of passion. (There is some evidence from unrefereed studies that have not been scientifically evaluated that is inconsistent with this generally accepted claim.)

I proceed as follows. Part II explains my qualifications. Part III discusses early research on whether capital punishment deters crime. Part IV describes modern studies, and Part V is a brief summary.

**II. My Background and Qualifications.**

I am the Samuel Candler Dobbs Professor of Economics and Law at Emory University in Atlanta and editor in chief of *Managerial and Decision Economics*. I am a Fellow of the Public Choice Society and former Vice President of the Southern Economics Association, and associated with the Independent Institute, the Progress and Freedom Foundation, and the American Enterprise Institute. I have been Senior Staff Economist at President Reagan's Council of Economic Advisers, Chief Economist at the U.S. Consumer Product Safety Commission, Director of Advertising Economics at the Federal Trade Commission, and vice-president of Glassman-Oliver Economic Consultants, Inc., a litigation consulting firm in Washington. I have taught law and economics at the University of Georgia, City University of New York, VPI, and George Washington University Law School.

[1] Joanna Shepherd was a major contributor to this testimony.

I have written or edited seven books, and published over one hundred articles and chapters on economics, law, regulation, and evolution in journals including the *American Economic Review, Journal of Political Economy, Quarterly Journal of Economics, Journal of Legal Studies, Journal of Law and Economics*, the *Yale Journal on Regulation*, and *Human Nature*, and I sometimes contribute to the *Wall Street Journal* and other leading newspapers. My work has been cited in the professional literature over 1400 times. I have consulted widely on litigation related matters and have been an advisor to the Congressional Budget Office on tort reform. I have addressed numerous business, professional, policy and academic audiences.

I received my B.A. from the University of Cincinnati in 1963 and my Ph.D. from Purdue University in 1970. Much of my research has been on statistical analysis of legal issues, including the economics of crime. I was a co-author of the first published paper examining the deterrent effect of capital punishment using data from the period after the moratorium on executions: Hashem Dezhbakhsh, Paul H. Rubin, and Joanna M. Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 American Law and Economics Review 344 (2003).

**III. Early Literature on Capital Punishment and Deterrence.**

The initial participants in the debate over the deterrent effect of capital punishment were psychologists and criminologists. Their research was either theoretical or based on comparisons of crime patterns in states with and without capital punishment. However, because they did not use multiple-regression statistical techniques, the analyses were unable to distinguish the effect on murder of capital punishment from the effects of other factors.[2]

The modern economic study of crime began with Gary Becker's famous paper on the economics of crime.[3] The analysis of this paper indicated that criminals should be expected to respond to incentives, including the threat of punishment. Isaac Ehrlich was the first economist to test this theory for the particular case of capital punishment and homicide in two papers in 1975 and 1977.[4] Ehrlich was the first to study capital punishment's deterrent effect using multivariate regression analysis. In contrast to earlier methods, this approach allowed Ehrlich to separate the effects of many different factors on murder. Ehrlich also examined the general deterrent effect of increased severity and probability with respect to prison and other non-capital punishments, and also found a deterrent effect.[5] These results have been much less controversial even though the theoretical basis for the analysis was the same as for capital punishment.

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[2] For example, J.T. Sellin, J. T., The Death Penalty (1959); H. Eysenck, Crime and Personality (1970).

[3] Gary Becker, "Crime and Punishment: An Economic Analysis," 76 Journal of Political Economy 169 (1968).

[4] Isaac Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 Am. Econ. Rev. 397 (1975); Isaac Ehrlich, Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence, 85 J. Pol. Econ. 741 (1977)

[5] Isaac Ehrlich, Participation in Illegitimate Activities: A Theoretical and Empirical Investigation 81 The Journal of Political Economy No. 3 (May, 1973), pp. 521-565.

Ehrlich's 1975 paper examined U.S time-series data for the period 1933-1969. Time-series data are data for one unit (for Ehrlich, for the entire U.S.) over several time periods. He tested the effect on national murder rates of deterrent variables (the probabilities of arrest, conviction, and execution), demographic variables (population, fraction of nonwhites, fraction of people age 14-24), economic variables (labor force participation, unemployment rate, real per capita permanent income, per capita government expenditures, and per capita expenditures on police), and a time variable. He found a statistically significant negative relationship between the murder rate and execution rate, indicating a deterrent effect. Specifically, he estimated that each execution resulted in approximately seven or eight fewer murders.

Ehrlich's 1977 paper studied cross-sectional data from the fifty states in 1940 and 1950. That is, instead of his first paper's approach testing how the total U.S. murder rate changed across time as the execution rate changed, Ehrlich explored the relationship during a single year between each of the states' execution rates and their murder rates. Cross-sectional data are data from several units (here, the fifty states) for one time period (1940 or 1950).

Again, Ehrlich used multivariate regression analysis to separate the effect on murder of different factors. He included deterrent variables (probabilities of conviction and execution, median time spent in prison, and a dummy variable distinguishing executing states from non-executing states), demographic variables (state population, urban population, percent of nonwhites, and percent of people age 15-24 and 25-34), and economic variables (median family income and percent of families with income below half of the median income). The results indicated a substantial deterrent effect of capital punishment on murder.

Ehrlich's finding generated substantial interest in econometric analysis of capital punishment and deterrence. The papers that immediately followed Ehrlich used his original data (1933-1969 national time-series or 1940 and 1950 state level cross section) and variants of his econometric model. Many found a deterrent effect of capital punishment, but others did not. For example, using Ehrlich's data, all of the following found a deterrent effect: Yunker; Cloninger; and Ehrlich and Gibbons.[6] In contrast, Bowers and Pierce; Passel and Taylor; and Hoenack and Weiler find no deterrence when they use the same data with alternative statistical specifications.[7] Similarly, McAleer and Veall; Leamer; and McManus, find no deterrent effect when different variables are included over the same sample period.[8] Finally, Black and Orsagh find mixed results depending on the cross-section year they use.[9]

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[6] James A. Yunker, Is the Death Penalty a Deterrent to Homicide? Some Time Series Evidence, 5 Journal of Behavioral Economics 45 (1976); Dale O. Cloninger, Deterrence and the Death Penalty: A Cross-Sectional Analysis, 6 Journal of Behavioral Economics 87 (1977); Isaac Ehrlich & Joel Gibbons, On the Measurement of the Deterrent Effect of Capital Punishment and the Theory of Deterrence, 6 Journal of Legal Studies 35 (1977).

[7] W. J. Bowers & J.L. Pierce, The Illusion of Deterrence in Isaac Ehrlich's work on Capital Punishment, 85 Yale Law Journal 187 (1975); Peter Passell & John B. Taylor, The Deterrent Effect of Capital Punishment: Another View, 67 American Economic Review 445 (1977); Stephen A. Hoenack & William C. Weiler, A Structural Model of Murder Behavior and the Criminal Justice System, 70 American Economic Review 327 (1980).

[8] Michael McAleer & Michael R. Veall, How Fragile are Fragile Inferences? A Re-Evaluation of the Deterrent Effect of Capital Punishment, 71 Review of Economics and Statistics 99 (1989); Edward E. Leamer, Let's Take the Con out of Econometrics, 73 American Economic Review 31 (1983); Walter S.

In the late 1980s and 1990s, a second-generation of econometric studies extended Ehrlich's national time-series data or used more recent cross-sectional data. As before, some papers found deterrence while others did not. For example, Layson, and Cover and Thistle use an extension of Ehrlich's national time-series data, covering up to 1977.[10] Although Layson finds a significant deterrent effect of executions, Cover and Thistle correct for data flaws -- nonstationarity -- and find no deterrent effect. Chressanthis employs national time-series data covering 1966 through 1985 and finds a deterrent effect.[11] In contrast, Grogger uses daily data for California during 1960-1963 and finds no deterrent effect.[12]

However, most of the early studies—both the first wave and the second generation—suffered from fundamental flaws: they suffered important data limitations because they used either national time-series or cross-section data.

Using national time-series data created a serious aggregation problem. Any deterrence from an execution should affect the crime rate only in the executing state; one state's high execution rate would not be expected to change the rate in nearby states, where the first state's laws and courts lack criminal jurisdiction. Aggregation dilutes such distinct effects, creating "aggregation bias." For example, suppose that the following happens concurrently: the murder rate in a state with no executions randomly increases at the same time that the murder rate drops in a state with many executions. Aggregate data might incorrectly lead to an inference of no deterrence; the aggregate data, with the two states lumped together, would show an increase in executions leading to no change in the murder rate.

Cross-sectional studies also suffer serious problems. Most importantly, they preclude any consideration of what happens to crime, law enforcement, and judicial processes over time. Cross-section data also prevent researchers from controlling for jurisdiction-specific characteristics that could be related to murder, such as greater urban density in some states.

Several authors expressed similar data concerns with time-series and cross-section data and called for new research using panel data, as I now discuss.[13]

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McManus, Estimates of the Deterrent Effect of Capital Punishment: The Importance of the Researcher's Prior Beliefs, 93 Journal of Political Economy 417 (1985).

[9] T. Black & T. Orsagh, New Evidence on the Efficacy of Sanctions as a Deterrent to Homicide, 58 Social Science Quarterly 616 (1978).

[10] Stephen A. Layson, Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence, 52 Southern Economic Journal 68 (1985); James P. Cover & Paul D. Thistle, Time Series, Homicide, and the Deterrent Effect of Capital Punishment, 54 Southern Economic Journal 615 (1988).

[11] George A. Chressanthis, Capital Punishment and the Deterrent Effect Revisited: Recent Time-Series Econometric Evidence, 18 Journal of Behavioral Economics 81 (1989).

[12] Jeffrey Grogger, The Deterrent Effect of Capital Punishment: An Analysis of Daily Homicide Counts, 85 J. of the American Statistical Association 295 (1990).

[13] See, e.g., Samuel Cameron, A Review of the Econometric Evidence on the Effects of Capital Punishment, 23 Journal of Socio-Economics 197 (1994) and K.L. Avio, Capital Punishment, in *The New Palgrave Dictionary of Economics and the Law* (Peter Newman, ed. 1998).

## IV. Modern Studies of Capital Punishment's Deterrent Effect.

Most recent studies have overcome the fundamental problems associated with national time-series and cross-section data by using panel-data techniques. Panel data are data from several units (the fifty states or all U.S. counties) over several different time periods; that is, panel data follow a cross-section over time. For example, a panel dataset might include data on each of the fifty states, or even on each U.S. county, for a series of years. These improved data allow researchers to capture the demographic, economic, and jurisdictional differences among U.S. states or counties, while avoiding aggregation bias. Furthermore, panel data produce many more observations than cross-section or time-series data, enabling researchers to estimate any deterrent effect more precisely. In addition to enjoying the benefits of panel data, recent studies have access to more recent data that make conclusions more relevant for the current environment.

Using improved data and more sophisticated regression techniques, twelve refereed papers have been published or are forthcoming in the economics literature. Their conclusion is unanimous: all of the modern refereed papers find a significant deterrent effect.

I now briefly discuss the modern research in the economics literature from the past decade. I group the papers into those that use panel-data techniques and those using other techniques. (I was co-author of one paper, and my colleague Joanna Shepherd was author or co-author of several more.) I then discuss two papers which have been published in journals that do not subject papers to the refereeing process.

### A. Modern Papers using Panel-Data Techniques.

1. Hashem Dezhbakhsh, Joanna Shepherd , and I examine whether deterrence exists using county-level panel data from 3,054 U.S. counties over the period 1977 to 1996.[14] This is the only study to use county-level data, allowing us to estimate better the demographic, economic, and jurisdictional differences among U.S. counties that can affect murder rates. Moreover, the large number of county-level observations extends the empirical tests' reliability.[15] We find a substantial deterrent effect; both death row sentences and executions result in decreases in the murder rate. A conservative estimate is that each execution results in, on average, 18 fewer murders. Our main finding, that capital punishment has a deterrent effect, is robust to many different ways of performing the statistical analysis[16] and several ways of measuring the probability of an execution. For example, we find the same results if we use state instead of county data.

[14] Hashem Dezhbakhsh, Paul H. Rubin, and Joanna M. Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 American Law and Economics Review 344 (2003).

[15] Technically, it extends the analysis' degrees of freedom, increases variability, and reduces colinearity among variables.

[16] The deterrent effect remains with different choices of functional form (double-log, semi-log, or linear), sampling period, endogenous vs. exogenous probabilities, and level vs. ratio specification of the main variables.

2. In another paper, Joanna Shepherd uses state-level, monthly panel data from 1977-1999 to examine two important questions in the capital punishment literature.[17] First, she investigates the types of murders deterred by capital punishment. Some people in the debate on capital punishment's deterrent effect believe that certain types of murder are not deterrable. They claim that murders committed during interpersonal disputes, murders by intimates, or unplanned crimes of passion are not intentionally committed and are therefore nondeterrable. She finds that the combination of death row sentences and executions deters all types of murders: murders between intimates, acquaintances, and strangers, crime-of-passion murders and murders committed during other felonies, and murders of both African-American and white people.[18] She estimates that each death row sentence deters approximately 4.5 murders and that each execution deters approximately 3 murders. In this paper she also finds that that shorter waits on death row increase deterrence. Specifically, one extra murder is deterred for every 2.75-years reduction in the death-row wait before each execution.

3. Hashem Dezhbakhsh and Joanna Shepherd use state-level panel data from 1960-2000 to examine capital punishment's deterrent effect.[19] This is the only study to use data from before, during, and after the 1972-1976 Supreme Court moratorium on executions. The study advances the deterrence literature by exploiting an important characteristic that other studies overlooked: the quasi-experimental nature of the Supreme Court moratorium. First, they perform before-and-after moratorium comparisons by comparing the murder rate for each state immediately before and after it suspended or reinstated the death penalty. These before-and-after comparisons are informative because many factors that affect crime—e.g., law enforcement, judicial, demographic, and economic variables—change only slightly over a short period of time. In addition, the moratorium began and ended in different years in different states. Considering the different start and end dates, the duration of the moratorium varied considerably across states, ranging from four to thirty years. Observing similar changes in murder rates immediately after the same legal change in different years and in various states provides additional evidence of the moratorium's effect on murder. The before-and-after comparisons reveal that as many as 91 percent of states experienced an increase in murder rates after they suspended the death penalty. In about 70 percent of the cases, the murder rate dropped after the state reinstated the death penalty. They supplement the before-and-after comparisons with time-series and panel-data regression analyses that use both pre- and postmoratorium data. These estimates suggest that both adopting a capital statute and exercising it have strong deterrent effects.[20]

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[17] Joanna M. Shepherd, Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment, 33 Journal of Legal Studies 283 (2004).

[18] Intimates are defined as spouses, common-law spouses, parents, children, siblings, in-laws, step-relations, and other family. Crime-of-passion murders include lovers' triangles, murders by babysitters, brawls under alcohol, brawls under drugs, arguments over money, other arguments, and abortion-murders (abortions performed during the murder of the mother).

[19] Hashem Dezhbakhsh and Joanna M. Shepherd, The Deterrent Effect of Capital Punishment: Evidence from a "Judicial Experiment," (Emory University Working Paper, 2003; forthcoming, Economic Inquiry, 2006).

[20] We also confirm that our results hold up to changes in our choice of regressors, estimation method, and functional form. The deterrent variables' coefficients are remarkably consistent in sign and significance across 84 different regression models. In addition, we verify that the negative relationship between the death penalty and murder is not a spurious finding. Before-and-after moratorium comparisons and

4 and 5. Two papers by FCC economist Paul Zimmerman find a deterrent effect.[21] Zimmerman uses state-level panel data from 1978 to 1997 to examine the relationship between state execution rates and murder rates. In a second paper, he employs state-level panel data from 1978-2000 to examine which execution methods have the strongest deterrent effects. In both papers, Zimmerman finds a significant deterrent effect of capital punishment. He estimates that each execution deters an average of 14 murders and that executions by electrocution have the strongest impact.

6. H. Naci Mocan and R. Kaj Gittings use state-level panel data from 1977 to 1997 to examine the relationship between executions, commutations, and murder.[22] Again, the authors find a significant deterrent effect; they estimate that each execution deters an average of 5 murders. Their results also indicate that both commuting death-row prisoners' sentences and removing them from death row cause increases in murder. Specifically, each commutation results in approximately five extra murders and each removal from death row generates one additional murder.

7. Another recent paper by Lawrence Katz, Steven D. Levitt, and Ellen Shustorovich uses state-level panel data covering the period 1950 to 1990 to measure the relationship between prison conditions, capital punishment, and crime rates.[23] They find that the death rate among prisoners (a proxy for prison conditions) has a significant, negative relationship with overall violent crime rates and property crime rates. As expected, the execution rate has no statistically significant relationship with overall violent crime rates (which consist mainly of robbery and aggravated assault rates) and property crime rates; that is, executions have no effect on non-capital crimes. In several estimations, both the prison death rate and the execution rate are found to have significant, negative relationships with murder rates. The deterrent effect of executions is especially strong in the estimations that control for the economic and demographic differences among states.[24]

**B. Modern Papers Using Other Techniques**

8. Instead of a panel-data study, Dale O. Cloninger and Roberto Marchesini conduct a portfolio analysis in a type of controlled group experiment: the Texas unofficial moratorium on executions during most of 1996.[25] They find that the moratorium appears to have caused additional homicides and that murder rates significantly decreased after the moratorium was lifted.

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regressions reveal that the death penalty does not cause a decrease in property crimes, suggesting that the deterrent effect is not reflecting general trends in crime.

[21] Paul R. Zimmerman, Estimates of the Deterrent Effect of Alternative Execution Methods in the United States: 1978-2000, American Journal of Economics and Sociology (forthcoming); Paul R. Zimmerman, State Executions, Deterrence, and the Incidence of Murder, Journal of Applied Economics (forthcoming).

[22] H. Naci Mocan and R. Kaj Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, 46 Journal of Law and Economics 453 (2003).

[23] Lawrence Katz, Steven D. Levitt, & Ellen Shustorovich, Prison Conditions, Capital Punishment, and Deterrence, 5 American Law and Economics Review 318 (2003).

[24] The authors' accompanying commentary focuses on other aspects of their results.

[25] Dale O. Cloninger & Roberto Marchesini, Execution and Deterrence: A Quasi-Controlled Group Experiment, 35 Applied Economics 569 (2001).

9. Harold J. Brumm and Dale O. Cloninger use cross-sectional data covering 58 cities in 1985 to distinguish between criminals' perceived risk of punishment and the ex-post risk of punishment measured by arrest rates, conviction rates, or execution rates.[26] They find that the perceived risk of punishment, including the probability of execution, is negatively and significantly correlated with the homicide commission rate.

10. James A. Yunker tests the deterrence hypothesis using two sets of post-moratorium data: state cross-section data from 1976 and 1997 and national time-series data from 1930-1997. [27] He finds a strong deterrent effect in the time-series data that disappears when the data are limited to the 1930-1976 period. Therefore, he concludes that postmoratorium data is critical in testing of the deterrence hypothesis.

11 and 12. Two other papers, one by Isaac Ehrlich and Zhiqiang Liu and the other by Zhiqiang Liu, use Ehrlich's original state-level, cross-section data.[28] The study by Ehrlich and Liu offers a theory-based sensitivity analysis of estimated deterrent effects and finds that executions have a significant deterrent effect. Liu's study uses switching regression techniques in estimations that take into account the endogenous nature of the status of the death penalty. He also finds a strong deterrent effect.

**C. Unrefereed Papers**

One paper in the Michigan Law Review by Joanna Shepherd looks at data by states.[29] She finds a "threshold effect." States that have executed more than approximately nine murderers exhibit deterrence; in states that have executed fewer persons, there is either no effect or a "brutalization effect," indicating that capital punishment has led to an increase in the number of murders. Overall, capital punishment has led to a net saving of lives. More lives could be saved if states with few executions either ceased executions or alternatively, if they pursued capital punishment more vigorously. While this paper was not published in a refereed journal, it was presented at several universities and posted for comments at online services such as SSRN.

[26] Harold J. Brumm and Dale O. Cloninger, Perceived Risk of Punishment and the Commission of Homicides: A Covariance Structure Analysis, 31 Journal of Economic Behavior and Organization 1 (1996).
[27] James A. Yunker, A New Statistical Analysis of Capital Punishment Incorporating U.S. Postmoratorium Data, 82 Social Science Quarterly 297 (2002).
[28] Isaac Ehrlich & Zhiqiang Liu, Sensitivity Analysis of the Deterrence Hypothesis: Lets Keep the Econ in Econometrics, 42 Journal of Law and Economics 455 (1999); Zhiqiang Liu, Capital Punishment and the Deterrence Hypothesis: Some New Insights and Empirical Evidence, Eastern Economic J. (forthcoming)
[29] Joanna M. Shepherd, "Deterrence versus Brutalization: Capital Punishment's Differing Impacts among States," 104 Michigan Law Review November 2005, 203-255.

A recent paper in the Stanford Law Review questions some of these studies.[30] This paper purports to show that the estimates of a deterrent effect are "fragile" and can be changed by statistical manipulation. The results of this paper have not been evaluated by competent scholars; the Stanford Law Review, like all law reviews, is edited by students who have no particular competence in econometrics. Moreover, Professors Wolfers and Donohue chose not to make their paper available online through a service such as SSRN or the BE Press, so that the scholarly community did not have access to their analysis before it was published. Steps are in process to generate such an analysis, but at this point the weight of evidence must be interpreted as finding a deterrent effect. Moreover, although Professors Donohue and Wolfers had access to all of the papers mentioned in this testimony, they chose to comment on only some of these papers.

**V. Summary**

The literature is easy to summarize: almost all modern studies and all the refereed studies find a significant deterrent effect of capital punishment. Only one study questions these results. To an economist, this is not surprising: we expect criminals and potential criminals to respond to sanctions, and execution is the most severe sanction available.

[30] John J. Donohue and Justin Wolfers, "Uses and Abuses of Empirical Evidence in the Death Penalty Debate," 58 Stanford Law Review 789.

Statement on the Death Penalty
Submitted by:

Vicki A. Schieber
Chevy Chase, Maryland

To:
U. S. Senate Judiciary Committee
February 1, 2006

In loving memory of:
**Shannon J. Schieber**
**August 8, 1974 – May 7, 1998**

I am the mother of a murder victim and I serve on the board of directors of Murder Victims' Families for Human Rights (MVFHR), a national non-profit organization of people who have lost a family member to murder or state execution and who oppose the death penalty in all cases. There are MVFHR members in every state.

Discussions of the death penalty typically focus on the offender, the person convicted of murder. My focus, and the focus of those whom I am representing through this testimony, is on the victims of murder and their surviving families.

Losing a beloved family member to murder is a tragedy of unimaginable proportions. The effects on the family and even on the wider community extend well beyond the initial shock and trauma. The common assumption in this country is that families who have suffered this kind of loss will support the death penalty. That assumption is so widespread and so unquestioned that a prosecutor will say to a grieving family, "We will seek the death penalty in order to seek justice for your family." A lawmaker introduces a bill to expand the application of the death penalty and announces that he is doing this "to honor victims." A politician believes that she must run on a pro-death penalty platform or risk being labeled soft on crime and thus unconcerned about victims.

As a victim's family member who opposes the death penalty, I represent a growing and for the most part under-served segment of the crime victim population. Along with the other members of MVFHR, I have come to believe that the death penalty is not what will help me heal. Responding to one killing with another killing does not honor my daughter, nor does it help create the kind of society I want to live in, where human life and human rights are valued. I know that an execution creates another grieving family, and causing pain to another family does not lessen my own pain.

My daughter Shannon was 23 when she was murdered in 1998 by a serial rapist in Philadelphia. Shannon had grown up in Maryland, graduated from Duke University, and was finishing her first year of graduate school at the Wharton School of Business. Shannon was home by herself, up late studying for her final exams, when the assailant pried open a balcony door on her second floor apartment and attacked her as she was preparing to take a bath. We would ultimately learn that in the same neighborhood, this assailant had broken into at least four other apartments and sexually assaulted single white female residents in the 11 months prior to Shannon's death. Although the Philadelphia police

now claim they had linked the prior four cases, they had not warned the community of the danger that lurked there for young women like our daughter. It was not until some nine months after Shannon was dead that the police would notify the community that she was killed by a serial attacker who might still be prowling in their neighborhood. He would attack again in August 1999 in Philadelphia. Although it took the Philadelphia Police more than 17 months to successfully process the DNA evidence in these various cases, all six were ultimately linked. They had all lived within six blocks of each other.

From late August 1999 until late September 2001, we would hear nothing more of this stalker, rapist, and murderer. Then it was announced that a DNA link had been made between Shannon's case and a series of sexual assaults that had taken place in Fort Collins, Colorado during the spring and summer of 2001. The assailant struck again in early April 2002 in Fort Collins. Following their own leads, those provided to them by the Philadelphia police and even outside entities including an intelligence unit at the U.S. State Department, Fort Collins police arrested Troy Graves on April 23, 2002. Ultimately he pled guilty to assaulting, raping, and killing Shannon. He also pled guilty to 13 other sexual assaults in the two state crime sprees.

My husband and I were both raised in homes with a deep-seated religious faith. We were both raised in households where hatred was never condoned and where the ultimate form of hate was thought to be the deliberate taking of another person's life. The death penalty involves the deliberate, premeditated killing of another human being. The death certificate of an executed person lists the cause of death as homicide. In carrying forward the principles with which my husband and I were raised, and with which we raised our daughter, we cannot in good conscience support the killing of anyone, even the murderer of our own daughter, if such a person could be imprisoned without parole and thereby no longer a danger to society.

No one should infer from our opposition to the death penalty that we did not want Shannon's murderer caught, prosecuted, and put away for the remainder of his life. We believe he is where he belongs today, as he serves his prison sentence, and we rest assured that he will never again perpetrate his sort of crime on any other young women. But killing this man would not bring our daughter back. And it was very clear to us that killing him would have been partly dependent on our complicity in having it done. Had we bent to this natural inclination, however, it would have put us on essentially the same footing as the murderer himself: willing to take someone else's life to satisfy our own ends. That was a posture we were not willing to assume.

In my work with Murder Victims' Families for Human Rights, I have come to know several survivors of people who have been put to death by execution. Seeing the effects of an execution in the family, particularly the effects on children, raises questions for me about the short- and long-term social costs of the death penalty. What kind of message do we convey to young people when we tell them that killing another human being is wrong but then impose the death penalty on someone with whom they have some direct or indirect relationship? Isn't there the possibility that the imposition of the death penalty sends a conflicted message about our society's respect for life? Isn't it possible that the potentially biased application of the death penalty in certain racial contexts distorts the fundamental principles on which this nation was founded? Isn't it possible that the bitterness that arises out of this causes more social problems than it solves?

I remember when, back in 2001, then-Attorney General John Ashcroft decided that family members of the Oklahoma City bombing victims should be allowed to witness the execution of Timothy McVeigh on closed-circuit television. His argument was that the experience would "meet their need for closure." The word *closure* is invoked so frequently in discussions of victims and the death penalty that victims' family members jokingly refer to it as "the c word." But I can tell you with all seriousness that there is no such thing as closure when a violent crime rips away the life of someone dear to you. As my husband and I wander through the normal things that we all do in our daily lives, we see constant reminders of Shannon and what we have lost. Killing Shannon's murderer would not stop the unfolding of the world around us with its constant reminders of unfulfilled hopes and dreams.

Indeed, linking closure for victims' families with the execution of the offender is problematic for two additional reasons: first, the death penalty is currently applied to only about one percent of convicted murderers in this country. If imposition of that penalty is really necessary for victims' families, then what of the 99% who are not offered it? Second, and even more critical from a policy perspective, a vague focus on executions as the potential source of closure for families too often shifts the focus away from other steps that could be taken to honor victims and to help victims' families in the aftermath of murder.

We have chosen to honor our daughter by setting up several memorials in her name – a scholarship at Duke University, and an endowment fund to replace roofs on inner city homes through the Rebuilding Together program in poor sections of our community, to name two. We also believe that we honor her

by working to abolish the death penalty, because, for my husband and for me, working to oppose the death penalty is a way of working to create a world in which life is valued and in which our chief goal is to reduce violence rather than to perpetuate it.

Many of my colleagues within Murder Victims' Families for Human Rights have chosen to work for the prevention of violence, through a variety of means. From my perspective, this is the way to be pro-victim.

Following a departmental audit, we learned that in the period prior to Shannon's murder, the Philadelphia police department had been systematically classifying reported sexual assaults and rapes as non-crimes because they did not want the actual level of crime in the city to show up on their federal crime reporting statistics. We are convinced this practice contributed to Shannon's murder. Prior to Shannon's attack, two of the four woman who were attacked by the same assailant had their complaints classified as non-crimes, despite DNA evidence supporting their claims. Yet when the assailant was arrested, the DA, Lynne Abraham, publicly demanded the death penalty in Shannon's case – the only one of the 14 linked cases in which there was a murder. The DA publicly criticized our opposition to the death penalty before a plea bargain with the assailant was reached; she again criticized us after the final sentencing in Shannon's case.

We firmly believe that if the district attorney in Philadelphia had really been out to stop crimes like the one Shannon suffered, seeking disciplinary action against the police involved in the systematic downgrading of reported sexual assaults and rapes in order to hide from the public the extent such crimes would have been far more effective than seeking the death penalty for an assailant already sentenced to life in prison without parole for his crimes in Colorado.

We must move beyond vague sentiments about being tough on crime and seeking justice for victims and look closely at what actions would truly prevent violence or help victims heal in the aftermath of violence. Among the policy changes that Murder Victims' Families for Human Rights recommends in this arena are:

- Remove time limits on victims' access to resources, such as victim's support and victim's compensation.
- End discrimination against victims' family members who have lost loved ones to murder and oppose the death penalty. Amend the Victims of

Crime Act to recognize and validate the position of survivors of murder victims who oppose the death penalty. Current federal and state statutes that predicate the rights and privileges of victims upon the approval of prosecuting authorities lead to a two-tiered system of victims -- those who support the death penalty are good victims; those who do not are suspect.

- Require periodic audits and reviews of law enforcement agencies to assure that they are properly coding and investigating reported crimes in the communities in accordance with the Universal Crime Code and publicly reporting the results of these audits.
- Finally, create a new paradigm about crime that establishes as a goal an aspiration for healing, for both individuals and society. When the focus is on healing for the victims, instead of blind retribution against perpetrators, we truly honor the meaning of justice.

Testimony of Ann Scott

United States Senate

Committee on the Judiciary

Subcommittee on the Constitution, Civil Rights, and Property Rights

Hearing on "An Examination of the Death Penalty in the United States".

February 1, 2006

# ***ELAINE MARIE SCOTT***

**1967 - 1991**

Our daughter Elaine Marie Scott, age 21 and a fourth-year junior studying Elementary Education at the University of Oklahoma, was brutally beaten, tortured, sexually assaulted, and beaten to death by Alfred Brian Mitchell at the Pilot Recreation Center in Oklahoma City, Oklahoma, on January 7, 1991. Mitchell had just been released on his 18th birthday from Lloyd Rader Juvenile Detention Center in Sand Springs, Oklahoma.

Elaine was born in Novato, California, a small California town about 30 miles north of San Francisco. She went to school in Novato until the 6th grade when her father was transferred to Tulsa with Safeway Stores. With all the crime and violence that was up and coming in California, we thought that Oklahoma would be a nice, quiet, drug-free state, and a great place to

raise kids. Well, not quite.

Elaine graduated from Jenks High School with good grades. She played both the flute and piccolo in the High School Marching Band and Orchestra and was a good kid. She attended the University of Oklahoma, majoring in Elementary Education and minoring in Music. She worked part time at the Pilot Recreation Center in Oklahoma City with children from poor families.

Unfortunately for Elaine, Alfred Brian Mitchell was **not** a good kid. Mitchell, who lived in the Pilot Recreation Center neighborhood, was released from Lloyd Rader Juvenile Detention Center on his 18th birthday. He had been locked up for three years for raping a little 12-year-old girl that he dragged off from her bus stop one morning. The Department of Human Services (DHS) could have kept him for another year but chose not to because they couldn't help him, and they needed his bed for someone that could be helped. So, home he came.

Seventeen days after his release from Lloyd Rader, he beat, tortured, sexually assaulted and beat our beautiful daughter to death using his fists, and then a golf club until it broke. He stabbed her in the neck five times with a compass that you would use to make circles with, and finally used a

wooden coat-tree that crushed her skull and sent shards of wood completely through her brain. She never had a chance.

The homicide detectives and police forensic people did an outstanding job of keeping us informed of everything that was happening as they traced all the evidence and put everything together. Mitchell was identified and caught within 24 hours. At first it was thought that he was just a witness, but as time went on he was booked for murder, robbery of her car, larceny and finally for rape.

Our first encounter with Mitchell was at the preliminary hearing. There he was, smiling and laughing with his family and friends as though he didn't have a care in the world. After three different days of testimony, the judge ruled that the case would go to trial. On leaving the courtroom, Mitchell told all the news reporters that the prosecutor would have to prove his case. He then got on the elevator, still smiling at the reporters and was taken away.

In June of 1992, the trial finally started after Preliminary Hearings, many delays because of a lack of funds for defense expert witnesses, and several different dates for motions hearings. Again, and all through the trial, Mitchell smiled and laughed for the news reporters. Even when he was on

the witness stand, he never admitted that he and he alone had murdered Elaine. It took the jury 1½ hours to find him guilty of murder, and about 2 hours to give him the Death Penalty.

In 1999 there was an evidentiary hearing at the federal court where it was determined that the forensic chemist from the Oklahoma City Police Department had lied on the witness stand. Even though Judge Thompson from the federal court threw out the rape charges, he upheld the death penalty because the murder was heinous, atrocious and cruel. In July of 2000 at the 10th Circuit Court, the judges overturned the sentence because it was felt by them that the jury might have given Mitchell a lesser punishment if the rape charge had never been presented. So back to court we went in October of 2002, to redo the sentencing phase of the trial. After two weeks of listening to evidence, the case was given to the jury. It took them 5 hours, but they also came back with a unanimous verdict and once again gave Mitchell the Death Penalty. Mitchell, true to form, stood at the elevator waiting to be taken back to prison, turned and gave our oldest son David an ear-to-ear grin.

On October 11, 2005, we finally started the Appeals process again with the state Court of Criminal Appeals. We have not, as of this date, had a decision from them, nor do we know when we will. But we will be ready to

continue on and see this through to the end when it comes.

Through all of this, Mitchell has never shown any remorse for his actions. If you ask if we seek retribution, yes, we do. Alfred Brian Mitchell was found guilty by two different juries of his peers. He was given the Death Penalty because of his crime and because it was felt that he would commit more crimes if he were ever, under any circumstances, released. I, me, want this bully gone. I want him to disappear off the face of this earth. I want him to rot in Hell for all of eternity. He is a bad seed that never should have been born. He is an animal, and when you have an animal that attacks people, you take it to the pound and have it "put away". What this animal has taken from us cannot ever be returned. He has taken a lot of the love and laughter from our home.

I have had my husband break down and sob in my arms; and I have watched his health, both mental and physical, deteriorate over the years. I have seen Elaine's two brothers struggle with life. David the oldest, has gone through panic attacks and at times thought that he should be dead because he has outlived his sister and that is not the way it should be. I have watched Elaine's little brother Robert "clam up". To this day he still cannot talk about his most favorite person in the whole wide world. His big sister is gone, taken violently from him and he still can't deal with it. The rest of us,

my husband and I, have "closed ranks" with our children. We have become more protective and frightened every time that they are out of sight.

Will we ever get over the murder of our daughter? Will there ever be any closure for us?

I don't think so. Even after Mitchell has been executed, we will still be left with all of our wonderful memories of Elaine --- and all of the horror that was done to her. But perhaps once he is gone, we will be able to spend more time on the happy memories, and less time thinking about how her life ended. WE WILL be at Alfred Brian Mitchell's execution -- we will not rejoice, because it won't bring Elaine back. But we don't expect that it will. However the process will finally be over and we will no longer have to spend any time or effort on pursuing justice for our beautiful daughter. Perhaps we will finally hear the remorse that so far has never been expressed. For certain, what it will do is insure that he won't ever be able to hurt another little girl again.

I hope and pray that you will never have to walk in our shoes.

House of Representatives
STATE OF OKLAHOMA

**OPIO TOURE**
**Democratic Floor Leader**
**District 99**

February 7, 2006

Chairman Sam Brownback
United States Senate Subcommittee on the
Constitution, Civil Rights & Property Rights
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Brownback:

I understand that during some of the testimony at the February 1, 2006, hearing on the death penalty, there was confusion about the possible penalties for capital murder in Oklahoma. I offer clarification for the record. In 1987, Oklahoma law was amended to provide for three possible penalties for capital murder: death, life without possibility of parole, and life with the possibility of parole. A sentence of life without the possibility of parole means just that. In fact, no one who has received that sentence has been released or become parole eligible since its enactment. Under recent legislation requiring offenders to serve 85% of their sentences, someone sentenced to life with the possibility of parole must serve 37.5 years before seeking parole.

Confusion on this point is understandable. It can take some time for the public to accept that a sentence withholding the possibility of parole does indeed mean precisely what it says.

In recent years, Oklahoma has responded to the problem of serious crimes committed by juveniles who pose a threat of danger to the community by enacting additional legislation. Under the Youthful Offender Act, enacted effective January 1, 1998, individuals between fifteen and seventeen years old can receive full adult sentences for their crimes upon certain findings. Also, even if the adult sentence provisions are not used or not applicable, youthful offenders can be held in the juvenile system until they are 20, then "bridged over" into an adult facility for up to a total of ten (10) years.

I hope this clarifies Oklahoma law in the relevant areas.

Sincerely,

Representative Opio Toure
Democratic Floor Leader
House District 99

*Room 546 - State Capitol - 2300 N. Lincoln Boulevard*
*Oklahoma City, OK 73105-4885 (405) 557-7393 (405) 557-7480 (fax)*