

Testimony of
Dr. David B. Muhlhausen

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David B. Muhlhausen, Ph.D.
Senior Policy Analyst
Center for Data Analysis
The Heritage Foundation

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Introduction

My name is David Muhlhausen. I am Senior Policy Analyst in the Center for Data Analysis at The Heritage Foundation. I thank Chairman Russell Feingold, Ranking Member Sam Brownback, and the rest of the subcommittee for the opportunity to testify today. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

While opponents of capital punishment have been very vocal in their opposition, Gallup opinion polls consistently demonstrate that the American public overwhelmingly supports capital punishment.¹ (See Chart 1.) In Gallup's most recent poll, 67 percent of Americans favor the death penalty for those convicted of murder, while only 28 percent are opposed. From 2000 to the most recent poll in 2006, support for capital punishment consistently runs a 2:1 ratio in favor.

Despite strong public support for capital punishment, federal, state, and local officials must continually ensure that its implementation rigorously upholds constitutional protections, such as due process and equal protection of the law. However, the criminal process should not be abused to prevent the lawful imposition of the death penalty in appropriate capital cases.

Alleged Racial in Capital Punishment Sentences

As of December 2005, there were 37 prisoners under a sentence of death in the federal system.² Of these prisoners, 43.2 percent were white, while 54.1 percent were African-American. The fact that African-Americans are a majority of federal prisoners on death row and a minority in the overall United States population may lead some to conclude that the federal system discriminates against African-Americans. However, there is little rigorous evidence that such disparities exist in the federal system.

Under a competitive grant process, the National Institute of Justice awarded the RAND Corporation a grant to determine whether racial disparities exist in the federal death penalty system. The resulting 2006 RAND study set out to determine what factors, including the defendant's race, victim's race, and crime characteristics, affect the decision to seek a death penalty case.³ Three independent teams of researchers were tasked with developing their own methodologies to analyze the data. Only after each team independently drew their own conclusions did they share their findings with each other.

When first looking at the raw data without controlling for case characteristics, RAND found that large race effects with the decision to seek the death penalty are more likely to occur when the defendants are white and when the victims are white.⁴ However, these disparities disappeared in each of the three studies when the heinousness of the crimes was taken into account.⁵ The RAND study concludes that the findings support the view that decisions to seek the death penalty are driven by characteristics of crimes rather than by race. RAND's findings are very compelling because three independent research teams, using the same data but different methodologies, reached the same conclusions.

While there is little evidence that the federal capital punishment system treats minorities unfairly, some may argue that the death penalty systems in certain states may be discriminatory. One such state is Maryland. In May 2001, then-Governor Parris Glendening instituted a moratorium on the use of capital punishment in Maryland in light of concerns that it may be unevenly applied to minorities, especially African-Americans. In 2000, Governor Glendening commissioned University of Maryland Professor of Criminology Ray Paternoster to study the possibility of racial discrimination in the application of the death penalty in Maryland. The results of Professor Paternoster's study found that black defendants who murder white victims are substantially more likely to be charged with a capital crime and sentenced to death.⁶

In 2003, Governor Robert L. Ehrlich wisely lifted the moratorium. His decision was justified. In 2005, a careful review of the study by Professor of Statistics and Sociology Richard Berk of the University of California, Los Angeles, and his coauthors found that the results of Professor Paternoster's study do not stand up to statistical scrutiny.⁷ According to Professor Berk's re-analysis, "For both capital charges and death sentences, race either played no role or a small role that is very difficult to specify. In short, it is very difficult to find convincing evidence for racial effects in the Maryland data and if there are any, they may not be additive."⁸ Further, race may have a small influence because "cases with a black defendant and white victim or 'other' racial combination are less likely to have a death sentence."⁹

The Deterrent Effect of the Death Penalty

Federal, state, and local officials need to recognize that the death penalty saves lives. How capital punishment affects murder rates can be explained through general deterrence theory, which supposes that increasing the risk of apprehension and punishment for crime deters individuals from committing crime. Nobel laureate Gary S. Becker's seminal 1968 study of the economics of

crime assumed that individuals respond to the costs and benefits of committing crime.¹⁰

According to deterrence theory, criminals are no different from law-abiding people. Criminals "rationally maximize their own self-interest (utility) subject to constraints (prices, incomes) that they face in the marketplace and elsewhere."¹¹ Individuals make their decisions based on the net costs and benefits of each alternative. Thus, deterrence theory provides a basis for analyzing how capital punishment should influence murder rates. Over the years, several studies have demonstrated a link between executions and decreases in murder rates. In fact, studies done in recent years, using sophisticated panel data methods, consistently demonstrate a strong link between executions and reduced murder incidents.

Early Research. The rigorous examination of the deterrent effect of capital punishment began with research in the 1970s by Isaac Ehrlich, currently a University of Buffalo Distinguished Professor of Economics.¹² Professor Ehrlich's research found that the death penalty had a strong deterrent effect. While his research was debated by other scholars,¹³ additional research by Professor Ehrlich reconfirmed his original findings.¹⁴ In addition, research by Professor Stephen K. Layson of the University of North Carolina at Greensboro strongly reconfirmed Ehrlich's previous findings.¹⁵

Recent Research. Numerous studies published over the past few years, using panel data sets and sophisticated social science techniques, are demonstrating that the death penalty saves lives.¹⁶ Panel studies observe multiple units over several periods. The addition of multiple data collection points gives the results of capital punishment panel studies substantially more credibility than the results of studies that have only single before-and-after intervention measures. Further, the longitudinal nature of the panel data allows researchers to analyze the impact of the death penalty over time that cross-sectional data sets cannot address.

Using a panel data set of over 3,000 counties from 1977 to 1996, Professors Hashem Dezhbakhsh, Paul R. Rubin, and Joanna M. Shepherd of Emory University found that each execution, on average, results in 18 fewer murders.¹⁷ Using state-level panel data from 1960 to 2000, Professors Dezhbakhsh and Shepherd were able to compare the relationship between executions and murder incidents before, during, and after the U.S. Supreme Court's death penalty moratorium.¹⁸ They found that executions had a highly significant negative relationship with murder incidents. Additionally, the implementation of state moratoria is associated with the increased incidence of murders.

Separately, Professor Shepherd's analysis of monthly data from 1977 to 1999 found three important findings.¹⁹

First, each execution, on average, is associated with three fewer murders. The deterred murders included both crimes of passion and murders by intimates.

Second, executions deter the murder of whites and African-Americans. Each execution prevents the murder of one white person, 1.5 African-Americans, and 0.5 persons of other races.

Third, shorter waits on death row are associated with increased deterrence. For each additional

2.75-year reduction in the death row wait until execution, one murder is deterred.

Professors H. Naci Mocan and R. Kaj Gittings of the University of Colorado at Denver have published two studies confirming the deterrent effect of capital punishment. The first study used state-level data from 1977 to 1997 to analyze the influence of executions, commutations, and removals from death row on the incidence of murder.²⁰ For each additional execution, on average, about five murders were deterred. Alternatively, for each additional commutation, on average, five additional murders resulted. A removal from death row by either state courts or the U.S. Supreme Court is associated with an increase of one additional murder. Addressing criticism of their work,²¹ Professors Mocan and Gittings conducted additional analyses and found that their original findings provided robust support for the deterrent effect of capital punishment.²²

Two studies by Paul R. Zimmerman, a Federal Communications Commission economist, also support the deterrent effect of capital punishment. Using state-level data from 1978 to 1997, Zimmerman found that each additional execution, on average, results in 14 fewer murders.²³ Zimmerman's second study, using similar data, found that executions conducted by electrocution are the most effective at providing deterrence.²⁴

Using a small state-level data set from 1995 to 1999, Professor Robert B. Ekelund of Auburn University and his colleagues analyzed the effect that executions have on single incidents of murder and multiple incidents of murder.²⁵ They found that executions reduced single murder rates, while there was no effect on multiple murder rates.

In summary, the recent studies using panel data techniques have confirmed what we learned decades ago: Capital punishment does, in fact, save lives. Each additional execution appears to deter between three and 18 murders. While opponents of capital punishment allege that it is unfairly used against African-Americans, each additional execution deters the murder of 1.5 African-Americans. Further moratoria, commuted sentences, and death row removals appear to increase the incidence of murder.

The strength of these findings has caused some legal scholars, originally opposed to the death penalty on moral grounds, to rethink their case. In particular, Professor Cass R. Sunstein of the University of Chicago has commented:

If the recent evidence of deterrence is shown to be correct, then opponents of capital punishment will face an uphill struggle on moral grounds. If each execution is saving lives, the harms of capital punishment would have to be very great to justify its abolition, far greater than most critics have heretofore alleged.²⁶

Conclusion

Americans support capital punishment for two good reasons. First, there is little evidence to suggest that minorities are treated unfairly. Second, capital punishment produces a strong deterrent effect that saves lives.

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1 The Gallup Poll, "Death Penalty," at <http://www.galluppoll.com/content/default.aspx?ci=1606> (June 22, 2007).

2 Tracy L. Snell, "Capital Punishment, 2005," Bureau of Justice Statistics Bulletin, U.S. Department of Justice, Office of Justice Programs, December 2006, NCJ 215083.

3 Stephen P. Klein, Richard A. Berk, Laura J. Hickman, eds., Race and the Decision to Seek the Death Penalty in Federal Cases (Santa Monica, CA: RAND Corporation, June 2006).

4 Ibid.

5 Stephen P. Klein, David A. Freedman, and Roger E. Bolus, "A Statistical Analysis of Charging Decisions in Death-Eligible Federal Cases: 1995-2000," pp. 29-56; Richard A. Berk and Yan He, "Race and the Federal Death Penalty," pp. 57-93; and Matthias Schonlau, "Charging Decisions in Death-Eligible Federal Cases (1995-2000): Arbitrariness, Capriciousness, and Regional Variation," pp. 95-124, in Klein, Berk, and Hickman, eds., Race and the Decision to Seek the Death Penalty in Federal Cases.

6 Raymond Paternoster and Robert Brame, An Empirical Analysis of Maryland's Death Sentence System with Respect to the Influence of Race and Legal Jurisdiction, Department of Criminology, University of Maryland, 2003.

7 Richard Berk, Azusa Li, and Laura J. Hickman, "Statistical Difficulties in Determining the Role of Race in Capital Cases: A Re-analysis of Data from the State of Maryland," Journal of Quantitative Criminology, Vol. 21, No. 4 (December, 2005), pp. 365-390.

8 Ibid., p. 386.

9 Ibid., p. 381.

10 Gary S. Becker, "Crime and Punishment: An Economic Approach," Journal of Political Economy, Vol. 76, No. 2 (1968), pp. 169-217.

11 Paul H. Rubin, "The Economics of Crime," in Ralph Andreano and John J. Siefried, eds., The Economics of Crime (New York: John Wiley and Sons, 1980), p. 13. Originally published in Atlantic Economic Review, Vol. 28, No. 4 (1978), pp. 38-43.

12 Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," *American Economic Review*, Vol. 65, No. 3 (1975), pp. 397-417, and Isaac Ehrlich, "Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence," *Journal of Political Economy*, Vol. 85 (August, 1977), pp. 741-788.

13 William J. Bowers and Glenn L. Pierce, "The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment," *Yale Law Journal*, Vol. 85 (1975), pp. 187-208; Stephen A. Hoenak and William C. Weiler, "A Structural Model of Murder Behavior and the Criminal Justice System," *American Economic Review*, Vol. 70, No. 3 (1980), pp. 327-341; Edward Leamer, "Let's Take the Con out of Econometrics," *American Economic Review*, Vol. 73, No. 1 (March 1983), pp. 31-43; and Peter Passell and John Taylor, "The Deterrent Effect of Capital Punishment: Another View," *American Economic Review*, Vol. 67, No. 3 (June 1977), pp. 445-451.

14 Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: Reply," *American Economic Review*, Vol. 67, No. 3 (June 1977), pp. 452-458, and Isaac Ehrlich, "Sensitivity Analysis of the Deterrence Hypothesis: Let's Keep the Econ in Econometric," *Journal of Law and Economics*, Vol. 42 (April 1999), pp. 455-487.

15 Stephen K. Layson, "Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence," *Southern Economic Journal*, Vol. 52, No. 1 (1985), pp. 68-89.

16 The panel data sets used in these recent studies consist of observations of the 50 states or all United States counties over many time periods, usually years and months. Panel data sets allow social scientists to separate the effect of capital punishment from other socioeconomic and policy factors to ascertain the influence of executions on murder incidents.

17 Hashem Dezhbakhsh, Paul H. Rubin, and Joanna M. Shepherd, "Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data," *American Law and Economics Review*, Vol. 5, No. 2 (2003), pp. 344-376.

18 Hashem Dezhbakhsh and Joanna M. Shepherd, "The Deterrent Effect of Capital Punishment: Evidence from a 'Judicial Experiment,'" *Economic Inquiry*, Vol. 44, No. 3 (2006), pp. 512-535.

19 Joanna M. Shepherd, "Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment," *Journal of Legal Studies*, Vol. 33 (June 2004), pp. 283-321.

20 H. Naci Mocan and R. Kaj Gittings, "Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment," *Journal of Law and Economics*, Vol. 46, No. 2 (2003), pp. 453-478.

21 John Donahue III and Justin Wolfers, "Uses and Abuses of Empirical Evidence in the Death Penalty Debate," *Stanford Law Review*, Vol. 58, No. 3 (2006), pp. 791-846.

22 Naci H. Mocan and R. Kaj Gittings, "The Impact of Incentives on Human Behavior: Can We Make It Disappear? The Case of the Death Penalty," *National Bureau of Economic Research Working Paper No. 12631*, October 2006.

23 Paul R. Zimmerman, "State Executions, Deterrence, and the Incidence of Murder," *Journal of Applied Economics*, Vol. 7, No. 1 (May 2004), pp. 163-193.

24 Paul R. Zimmerman, "Estimates of the Deterrent Effect of Alternative Execution Methods in the United States: 1978-2000," *American Journal of Economics and Sociology*, Vol. 65, No. 4 (October 2006), pp. 909-941.

25 Robert B. Ekelund, Jr., John D. Jackson, Rand W. Ressler, and Robert D. Tollison, "Marginal Deterrence and Multiple Murders," *Southern Economic Journal*, Vol. 72, No. 3 (2006), pp. 521-541.

26 Cass R. Sunstein and Adrian Vermeule, "Is Capital Punishment Morally Required? The

Relevance of Life-Life Tradeoffs," AEI-Brookings Joint Center for Regulatory Studies Working Paper No. 05-06, March 2005, p. 42.