

Testimony of

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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.

Testimony on the Death Penalty<sup>1</sup>

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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."<sup>2</sup>

The most widely publicized list of "innocents" is that of the Death Penalty Information Center (DPIC). As of January, 2003, it listed 122 people.<sup>3</sup> 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.<sup>4</sup>

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<sup>5</sup> the factual guilt of these inmates in doubt.

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."<sup>6</sup> 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.<sup>7</sup>

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 an excellent reason to 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.<sup>8</sup> 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, however.

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 century, 23 were innocent.<sup>9</sup> 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 Radelet produced only one case since the early 1960s where they claimed an innocent man had been executed -- that of one James Adams<sup>10</sup>. 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."<sup>11</sup> 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.<sup>12</sup>

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?" Schenk 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."<sup>13</sup>

Nothing stops death penalty opponents from making all sorts 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. McCoy. He threatened to do the same to Ms. Horn.<sup>14</sup>

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.<sup>15</sup> 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 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 Schenk's book *Actual Innocence* lists 10 supposedly innocent defendants, of whom only 3 were sent to death row.<sup>16</sup>

Currently, the Innocence Project website lists 174 persons who have been exonerated on the basis of hard DNA evidence.<sup>17</sup> But the vast majority was not sentenced to death. In fact, only 15 death row inmates have been exonerated due to DNA evidence.<sup>18</sup>

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.<sup>19</sup> 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, is quite unbalanced, with it being relatively cheap and easy to sentence someone to life imprisonment but excessively expensive to have them executed.

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.<sup>20</sup>

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 receive 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.<sup>21</sup>

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 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.<sup>22</sup>

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 are 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.<sup>23</sup>

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 intraracial and not interracial, this translates into a system that lets black murders off far more easily than white murderers.<sup>24</sup>

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.<sup>25</sup> Since these murders produced only three death sentences (all imposed 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.

<sup>27</sup> Bowers, William J., "The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes," *The Journal of Criminal Law & Criminology*, 74-3: 1067 (1983) 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.<sup>26</sup> There were many limitations to Blumstein's study, including failure to control for aggravating circumstances, and a research design that 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: under punish 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 lesser charge - and more likely to be convicted for first degree murder than defendants who killed blacks.<sup>27</sup> 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.<sup>28</sup>

Leigh Bienen and her colleagues, in their study of New Jersey homicides examined the 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 than cases involving either black or Hispanic victims.<sup>29</sup>

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.<sup>30</sup>

In sum, the system is relatively lenient toward those who kill blacks, and that leniency extends to decisions that would continue to advantage those defendants 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 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.