

Summary of Issues in the Debate on the Death Penalty

Criminal Justice Legal Foundation – March 2009

Deterrence: The weight of evidence indicates that the death penalty does deter some murders and save innocent lives where it is actually enforced. In that case, a vote against the death penalty is a vote to kill innocent people to save the guilty. According to Nobel laureate Gary Becker, “the frequently stated claim that these studies prove that capital punishment does not deter *is clearly false.*”¹

Cost: Repeal of capital punishment is being sold to legislatures in many states on the claim it would save large amounts of money.² These claims are wildly overstated.

Trial Costs: The threat of the death penalty causes some murderers to plead guilty when offered a life sentence, reducing the trial cost in these cases to zero. Without the death penalty, there is no incentive to waive trial and receive a life sentence. Pleas with life or long sentences are *four times* as common in states with the death penalty.³ Studies citing the higher cost of the fewer cases that actually go to a capital trial ignore or fail to adequately account for this offset.⁴ Without the death penalty, these additional cases must either (1) go to trial, at large expense, or (2) be plea bargained to a sentence allowing the killer to get out at some point in the future. Option (1) means there would be greatly reduced cost savings from repeal, possibly none at all. Option (2) means those savings will be bought with innocent human lives when some of those killers kill again.

Death Row Costs: A large part of the claimed cost of the death penalty is the cost of keeping prisoners on death row for decades.⁵ That cost can be dramatically reduced by reform of the appeal process so that a typical case goes from sentence to execution in 5 years. *Virginia has done it,*⁶ and other states can also. The escalating cost of health care for geriatric inmates is largely eliminated if most sentences are carried out within a few years.

Discrimination: The opponents’ own studies show that the racial discrimination of greatest concern – that black murderers would receive death sentences when white murderers would get life for the same crime – has been negated. For example, the widely cited University of Maryland study says, “In sum, we have found *no evidence* that the race of the defendant matters in the processing of capital cases in the state.”⁷

The statistic that the death penalty is imposed less often when a black person is the victim is the result of local choice, not discrimination. The disparity disappears when examined county by county. The counties where more black people live tend to elect prosecutors who seek the penalty less often and tend to form juries that impose it less often. This effect is local democracy and jury of the vicinage working as designed, not racial discrimination.⁸

Innocence: The claim that 130 people formerly on death row have been proved innocent is a discredited *fraud*. Innocence is not required to get on that list, only the reversal of a conviction (often on procedural grounds) and the inability of the prosecution to get a second conviction, usually many years after the crime and sometimes with essential evidence suppressed.⁹

References:

1. Gary Becker, Further Comments on Capital Punishment (2005), The Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2005/12/further_comment_1.html
2. E.g., John Roman et al., The Cost of the Death Penalty in Maryland (Urban Institute 2008), http://www.urban.org/UploadedPDF/411625_md_death_penalty.pdf
3. Kent Scheidegger, The Death Penalty and Plea Bargaining to Life Sentences (working paper), (CJLF 2009), <http://www.cjlf.org/papers/wpaper09-01.pdf>
4. E.g., Roman, note 2 above (ignoring the issue completely); California Commission on the Fair Administration of Justice, Report and Recommendations on the Administration of the Death Penalty in California (2008), pp. 80-81 (briefly noting the effect only for life-without-parole cases, ignoring the effect in the much larger number of straight life cases).
5. See note 4.
6. Data provided by Virginia Attorney General's Office, personal communication, Feb. 12, 2008; see also Scheidegger, note 3 above, p. 15, n. 4.
7. Raymond Paternoster, et al., An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction (2003), p. 26, <http://www.newsdesk.umd.edu/pdf/exec.pdf>
8. Kent Scheidegger, Smoke and Mirrors on the Death Penalty, *Engage*, 4(2), 41-45, <http://www.cjlf.org/deathpenalty/DPenaltyRace.pdf>
9. Ward Campbell, Exoneration Inflation, *Journal of the Institute for the Advancement of Criminal Justice*, 2, 49-63 (2008), <http://www.iacj.org/PDF/IACJJournalIssue2.pdf>