

Statement of Kent Scheidegger  
Legal Director, Criminal Justice Legal Foundation  
Before the United States Senate Committee on the Judiciary  
Subcommittee on the Constitution  
Hearing on the Report of the Illinois Commission on Capital Punishment  
June 12, 2002

I thank the subcommittee for the opportunity to testify today. The correct identification and sufficient punishment of murderers is a matter of the greatest importance. Indeed, there is no more important function of the state governments than the protection of their citizens from murder. The performance of this function while also protecting the wrongly accused deserves the closest attention and greatest care. Regrettably, there has been a great deal of misleading information circulating on the subject of capital punishment, so I welcome the opportunity to make at least a start at getting the truth out today.

The focus of today's hearing is on the actual guilt or innocence of the defendant. This change of focus is most welcome and long overdue. For three decades, the American people have suffered inordinate delays and exorbitant expense in extended litigation over issues which have nothing to do with guilt, which are not in the Constitution as originally enacted and understood, and which often involve sentencing policy decisions of dubious merit. Congress should certainly be concerned with further reducing the already small possibility of conviction of the innocent, whether the penalty be death or life in prison. At the same time, it should take care not to exacerbate, and if possible to reduce, the interminable delays and erroneous reversals that are presently the norm in that vast majority of capital cases that involve no question whatever of the identity of the perpetrator. I suggest that the Congress set a national goal of reducing to four years the median time from sentence to execution and establish a standing commission to periodically review the system and recommend changes to achieve that goal. Four years is more than sufficient to weed out the very few cases of real doubt of identity, but short enough that the American people would finally have the benefits of effective death penalty system: justice for the worst murders, certainty the murderer will not kill again, and the life-saving deterrent effect of such a system.

The specific topic of today's hearing is the Report of the [Illinois] Governor's Commission on Capital Punishment.<sup>1</sup> Regrettably, that report shows little of the balance needed for this important topic. Particularly disturbing is the summary manner in which the report dismisses deterrence.<sup>2</sup> While the subject has long been controversial and will likely remain so, the flurry of recent studies finding a deterrent effect cannot be brushed off. A sophisticated

---

1. Cited below as "Commission Report."

2. Commission Report at 69.

econometric analysis at Emory University estimated that each execution saves 18 innocent lives.<sup>3</sup> Another study at the University of Colorado estimated a lower but still very substantial 5 to 6 fewer homicides for each execution.<sup>4</sup> Even using the lowest of these figures, a national moratorium would kill hundreds of innocent people each year. Indeed, a study at the University of Houston estimated that a temporary halt in executions in Texas to resolve a legal question cost over 200 lives in a single state.<sup>5</sup> There are, of course, other studies to the contrary. Even so, any public official considering a halt to or severe restriction of capital punishment must consider the very substantial possibility that such an action will result in the deaths of a great many innocent people.

One of the commission's recommendations is to narrow the scope of offenses eligible for capital punishment. Some amount of narrowing is indeed in order, but the drastic limitations in the report are not justified by any concerns with actual innocence. In particular, the recommendation that murder of the rape victim by a rapist no longer be a capital offense should be rejected out of hand. This is the kind of case where the deterrent effect is most needed, since without capital punishment the rapist is looking at a long prison sentence whether he kills the victim or not. It is also the kind of case where DNA is most likely to eliminate any doubt of identity.

On a positive note, the report does acknowledge that many of the reversed judgment in capital cases are "based on legal issues that had little to do with the trial itself," and are often the result of new rules created by the state and federal supreme courts after the trial.<sup>6</sup> This is an important fact for the Congress to consider when it is confronted with misleading statistics of the so-called "error rate" in capital cases. A pair of heavily publicized reports by a well-known opponent of capital punishment, Professor James Liebman, and others, defined as "serious error" every case where a judgment was reversed for a reason other than a nullification of the death penalty statute.<sup>7</sup> By this definition, the case of *Booth v. Maryland*<sup>8</sup> was infected by the "serious

- 
3. Dezhbakhsh, Rubin, and Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-moratorium Panel Data, Emory University Dept. of Economics Working Paper 01-01 (Jan. 2001), [http://userwww.service.emory.edu/~cozden/dezhbakhsh\\_01\\_01\\_cover.html](http://userwww.service.emory.edu/~cozden/dezhbakhsh_01_01_cover.html); see also Rubin, Study: Death penalty deters scores of killings, Atlanta Journal-Constitution (Mar. 13, 2002) (copy attached).
  4. Mocan and Gittings, Pardons, Executions, and Homicide, NBER Working Paper 8639 (December 2001), <http://econ.cudenver.edu/mocan/papers/deathpenalty1007.pdf>.
  5. Cloninger and Marchesini, Execution and Deterrence: A Quasi-Controlled Group Experiment, 33 Applied Economics 569, 575 (2001).
  6. Commission Report at 9.
  7. J. Liebman, et al., A Broken System, Part II, p. 22 (2002).
  8. 482 U.S. 496 (1987).

error” of permitting a victim impact statement, which we now know was not error at all. The report also cites as “serious error” the case of *Francis v. Franklin*,<sup>9</sup> in which the trial judge gave an instruction on malice which, at the time of the trial, had been expressly approved in a Supreme Court precedent as a correct statement of the law,<sup>10</sup> but was disapproved after the trial.

Reversals such as these should not lower our confidence in the trial process in the slightest. They represent the cost to society of the fallibility of the review process and of the process of shaping the law by retroactive judicial decision rather than by prospective legislation. In the field of capital punishment, both of these costs have been enormous, and any legislation in the field should consider ways to reduce them.

Another disappointing aspect of the commission report was that it passed on some reforms that would have benefitted both sides. Recommendation 72, to postpone postconviction review until after the direct appeal,<sup>11</sup> is a step in the wrong direction.

The capital appeals bar has apparently decided that an attack on the trial lawyer is mandatory in every capital case, regardless of the actual quality of representation. Given that this challenge is inevitable, the discovery and hearing should begin in the trial court immediately after sentence, while everyone involved is still available and still remembers what was done and why. Furthermore, defense lawyers who have not yet moved on to another stage of their careers will still have an interest in defending their reputations, and are more likely to do so rather than falling on their professional swords, which is a problem in this area. The few who actually do fail to provide adequate representation can be identified, not assigned new cases, and possibly be required to refund the fee that they did not earn.

The commission’s report is addressed to reforms to be made at the state level. Indeed, much of the report is simply cheerleading for reforms that have already been made.<sup>12</sup> The question arises, as a matter of federalism, what changes the Congress should make in state criminal law and procedure, and whether it has the constitutional authority to make them. Certainly any attempt by Congress to dictate the eligibility criteria for state capital punishment laws would raise serious constitutional doubts.

This suggests an incentive arrangement for states to enact whatever reforms Congress decides are necessary to further improve the accuracy of the guilt determination. Consistent with the new focus on actual innocence, I suggest that the incentive be reduced litigation on issues which have nothing whatever to do with that accuracy. In 1995, Senator Kyl proposed a limit on

---

9. 471 U.S. 307 (1985).

10. *Agnew v. United States*, 165 U.S. 36, 52 (1897).

11. Commission Report at 169-170.

12. See, e.g., Recommendation 60, Commission Report at 138-139 (“supporting” a change made a year ago).

federal habeas review along the lines of that in effect in the District of Columbia. The Senate decided not to adopt that limit for habeas generally, but a similar limit on claims affecting solely the penalty phase and not the guilt determination should be considered. In states which adopt the guilt-phase reforms that Congress decides are necessary and which provide a full and fair review of claims affecting only the penalty phase, the latter issues would not be second-guessed on federal habeas. Given our experience with federal court obstruction of the incentive arrangement in the Antiterrorism and Effective Death Penalty Act of 1996,<sup>13</sup> I also suggest that the authority to decide whether a state qualifies for the incentive be vested in the United States Attorney General, and not in the courts.

Thank you for your attention. I will be glad to answer any questions at this time and to work with the committee on any specific proposals for legislation.

---

13. See 28 U.S.C., Title 254.

## Study: Death penalty deters scores of killings

By PAUL H. RUBIN

Executions are always controversial, and there are always debates about whether states should use the death penalty. But this debate cannot proceed rationally unless we fully understand the advantages and disadvantages of execution.

The conventional wisdom among criminologists had been that executions do not provide any deterrence. This was challenged by the economist Isaac Ehrlich in two papers in the 1970s. These studies have themselves subsequently been challenged.

Two colleagues and I have recently re-examined this issue. We used statistical techniques and data that were unavailable when Ehrlich and his critics performed their analyses. In particular, we used "panel data" techniques, a form of statistical regression analysis that is more powerful than others. We have also used much more comprehensive and complete data. We have used data on all 3,054 counties in the United States for the 1977-96 period. Others had used state data or national data, but such data is more subject to error.

Use of this data enables us to statistically "control" for the effects of most factors that influence homicide rates. That is, we adjust for the effects of age, race and other demographic characteristics of the population, unemployment, population density, other crime rates, general sentencing "toughness," NRA membership, and police- and prison-related variables. The use of panel techniques also enables us to adjust for factors idiosyncratic to each county and for any national time trends in homicide rates.

We essentially predict for each county for each year the number of homicides, and show the effect of executions on the actual number. Our analysis is thus the most comprehensive in the literature and addresses virtually all of the criticisms aimed at Ehrlich's work.

One important factor in measuring the deterrent effect is the perception by the criminal of the probability of execution. Because there are ambiguities in measuring this variable, and because there are remaining statistical questions, we examine 48 separate variants of our general hypothesis. In 45 of these, we find a statistically significant and important deterrent effect.

One conservative version of our model finds that each execution deters an average of 18 homicides, with a range of between 8 and 28 murders deterred by each execution. Other variants find even larger numbers of prevented murders.

One criticism of capital punishment is that it is applied in a racially biased manner. We do not examine this issue. But it is important to note that, while African-Americans are disproportionately involved in homicides as perpetrators, they are also disproportionately involved as victims. Department of Justice figures show that African-Americans are victims in about one-half of the murders, and in 1999, for example, homicide victimization rates per 100,000 persons were 3.5 for whites and 20.6 for blacks.

Thus, any deterrent effect of capital punishment is likely to provide substantial benefits to members of the African-American community.

We as a society might decide that we want to eliminate capital punishment. But this should be an informed decision, and should consider both the costs and benefits of executions. Our evidence is that there are substantial benefits from executions and, thus, substantial costs of changing this policy.

**Paul H. Rubin** is professor of economics and law at Emory University. Hashem Dezhbakhsh and Joanna Mehlhop Shepherd were co-authors of the research on which this is based.