

The Death Penalty in the United States: Strategies for Change

Richard C. Dieter*

Roundtable: World Congress Against the Death Penalty
Paris, February 1, 2007

Introduction

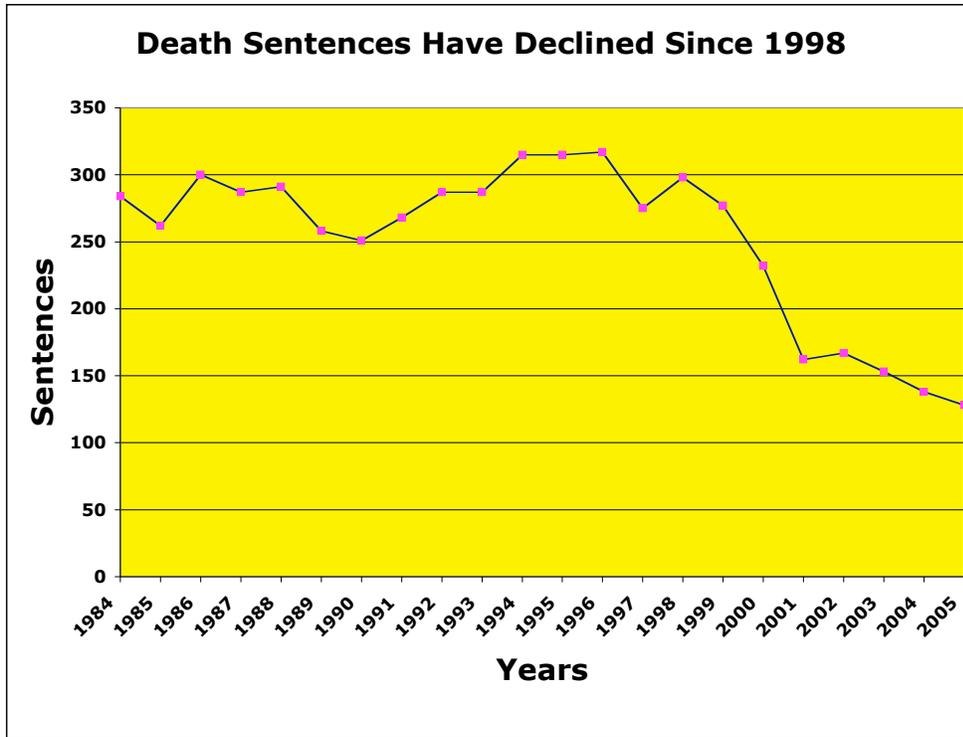
Contrary to many expectations, the use of the death penalty in the U.S. has significantly declined over the past six years. Many believed that the election of a strongly pro-death penalty president and the heightened fear of terrorism would lead to an expansion of capital punishment. However, that has not happened. Executions in 2006 dropped to their lowest level in 10 years as many states grappled with problems related to wrongful convictions and the lethal injection process. The number of death sentences and the size of death row also decreased. And public support for the death penalty has markedly declined.

In 2006, New Jersey became the first jurisdiction to enact a moratorium on executions through legislation. It appointed a study commission to review its capital punishment system, and the commission overwhelmingly recommended the abolition of the death penalty. In Illinois, a moratorium on all executions continued for the seventh year. New York's legislature rejected attempts to re-instate the death penalty, which had been overturned in 2004. North Carolina and California, while not halting executions, recently began legislative studies of their capital punishment systems.

The annual number of death sentences is now at its lowest level in 30 years. The number of death sentences remained steady at about 300 per year in the 1990s, but began to drop in 1999, and has declined almost 60% since then. The Bureau of Justice Statistics recorded 128 death sentences in 2005, down from 138 in 2004. Projections

* Executive Director, Death Penalty Information Center and Adjunct Professor, Catholic University Law School.

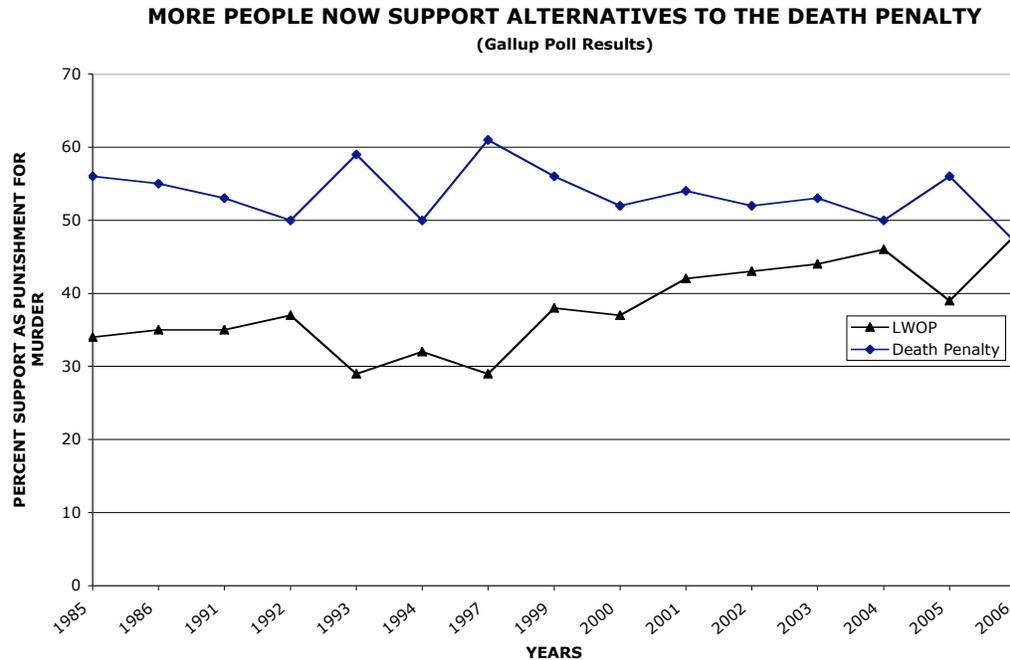
based on partial returns for 2006 indicate that the number of death sentences will be even lower for that year. Even in Texas, death sentences have dropped 65% in the past 10 years.



The 53 executions in 2006 was the lowest number since 1996, when there were 45. Lethal injection litigation temporarily halted some executions. If that controversy is resolved, executions could increase in 2007. Nevertheless, executions are down 45% since their highpoint in 1999. (Slide) The size of death row also decreased in 2006, continuing an annual decline that began in 2000 after 25 years of steady increases. (Slide) A sign of the death penalty's isolation even within the U.S. is that 83% of those executed in 2006 were from the South; none were from the Northeast. (Slide)

Overall, public support for the death penalty remained about the same in 2006 compared to 2005, but has dropped from 80% support in 1994. Gallup Polls in 2006 indicated that two-thirds of the American public supports the death penalty for murder. However, for the first time in the 20 years that Gallup has tested support for the death penalty against a sentence of life without parole, more people chose life without parole as the proper punishment for murder (48% to 47%). (Slide) Virtually every state in the

country now employs a sentence of life without parole, a significant change from 20 years ago.



Other Significant Developments

There are other signs that the American public is shifting on the death penalty. In the past, it was difficult for a candidate in many death penalty states to be elected if he or she opposed the death penalty. A position against capital punishment put a candidate immediately on the defensive. That stereotyping has changed, and now the death penalty itself is often on the defensive. This past election saw a number of candidates elected who publicly challenged the death penalty. Governors in Maryland, Massachusetts, and Wisconsin were elected in 2006 despite opposing the death penalty. In Illinois, voters re-elected a governor who has continued the moratorium established by Gov. George Ryan. They joined other governors such as those in Virginia and New Jersey, who oppose capital punishment.

The Supreme Court, too, has taken important steps to restrict the death penalty in the past six years, overturning years of precedence. In 2002 in *Atkins v. Virginia*, the Court struck down the practice of allowing those with mental retardation to be

executed. In 2005 in *Roper v. Simmons*, they took the same step with respect to juvenile offenders. (In both instances, the Court made reference to input from the international community.) The Court has also reversed a number of cases because of ineffective counsel, and sent Texas cases back repeatedly for re-sentencing and re-trials.



REASONS FOR THE CHANGE

Why have these changes happened? One reason is that the issue of innocence has had a profound impact on the death penalty debate in the United States in recent years. Since 1973, one hundred and twenty-three people have been exonerated and freed from death row. About half of these exonerations took place in the past ten years. (Slide) Many other people not on death row have been freed from prison through newly discovered DNA evidence, also in the past decade. Professor Baumgartner will offer some very interesting research and insights into the impact of innocence on the death penalty, so I want to focus on some of the other reasons for change.

But before leaving the issue of innocence, I think it is important to note that innocence is connected to many other issues, such as costs, the quality of representation, and the public's preference for the sentence of life-without-parole. The issue of innocence is important because its effect is not only felt when the innocent go free, but also in every case to which reforms are applied. The impact of this issue is not that it

only leads people to the obvious conclusion that we should not execute the innocent, but also that it draws them into questioning the death penalty itself. When an inmate like Anthony Porter, who was freed from death row in Illinois in 1999 primarily through the investigative work of a group of journalism students, is exonerated, the question arises: "How did that happen?" The answers vary with each case, but consistent themes run through these miscarriages of justice: faulty eyewitness identifications, ineffective counsel, withheld evidence, and false confessions. As a result, innocence cases have sparked a series of reforms that affect every death penalty prosecution and many non-death penalty cases, as well. For example, some states have adopted standards for capital representation, lifted unreasonable caps on compensation, and allowed the admission of new evidence arising after conviction. Moreover, many jurors are demanding a higher degree of proof of guilt before they are willing to impose a death sentence.

Many other factors besides innocence likely contributed to the decline in the use of the death penalty, including the wider use of life-without-parole sentencing. When the Supreme Court struck down the death penalty in 1972, there were about 600 people on death row. All of the inmates' death sentences were reduced to life sentences, and in almost every case that meant that the inmate would be eligible for parole at some point. Today, that is no longer true.

Thirty-seven of the 38 death penalty states now employ a sentence of life-without-parole. Texas was the most recent state to make this change, having done so in 2005. In addition, 11 of the 12 states without the death penalty also have this sentence, as does the federal government and the military courts. Because of a series of Supreme Court rulings, juries in death penalty cases are now being told that they have the option of sentencing an inmate to life without parole instead of death. And public opinion polls indicate that people prefer this alternative.

Prosecutors also know that juries may be more hesitant to impose the death penalty because of the mistakes that have been made in the past and because of the availability of life-without-parole sentences. Hence, they may be more willing to accept plea bargains to life sentences, or decline to seek the death penalty in the first place.

Many states are requiring higher standards for defense counsel, which may be another factor in prosecutors seeking the death penalty less, and in juries opting for life sentences. A more careful and well-defended death penalty case often means that it will be more expensive at the trial level, thus providing additional incentive to the state to look for alternatives to the death penalty.

Finally, the decline in the use of the death penalty in the U.S. is part of a clear international trend away from capital punishment. More countries are abandoning the death penalty and Americans are aware of this development. The debate over the significance of international law at the Supreme Court level has been intense, but the majority of the Court appears willing to consider parallel developments in other countries when deciding cases. Judges and the public travel abroad frequently and often hear the opinions of others about the U.S. death penalty. While not decisive, these influences carry weight in a country that has always considered itself to be a protector of human rights.

NEW VOICES

One of the most encouraging and powerful trends over the past ten years has been the emergence of "new voices" challenging the death penalty. Many highly respected officials, such as Sam Milsap, whom you will be hearing from shortly, who have had personal experience with capital cases, have courageously come forward to offer new perspectives on the death penalty. For a long time in the U.S., the death penalty debate was a polarized standoff between opponents and proponents. Certain groups like the ACLU were expected to object to every execution, and other groups, like victims and police officers, were expected to just as forcefully applaud the execution. Today, criticism of the death penalty is coming from many quarters.

Supreme Court Justices, such as Justice Sandra Day O'Connor and John Paul Stevens, have been sharply critical of the death penalty. William Sessions, the former head of the FBI, Janet Reno, the former U.S. Attorney General, Pope John Paul II, along with prominent authors, sports figures, and legislators who voted repeatedly for the death penalty have spoken up because of the glaring injustices of capital punishment.

And thanks to such groups as Murder Victims Families for Human Rights, those who have had someone in their family murdered are also speaking out in numbers not seen before. They are saying that the death penalty does not serve them well at all.

STRATEGIES

The sharp decline in death penalty use in the U.S. and the reasons for this dramatic shift should directly affect those who wish to challenge the death penalty in the future. The public's profound doubts about the death penalty are based on practical concerns. No one, including supporters of the death penalty, want to see innocent people executed. Almost no one justifies drunk or sleeping lawyers defending those facing execution.

And few believe that a death penalty that is applied rarely and freakishly does any good for society. But convincing people that these practical problems exist, especially in the midst of the news about a recent horrendous crime, is a difficult undertaking. We need to emphasize the common ground that we have with those who support the death penalty, returning often to the issue of innocence. We need to work in all parts of the educational process, in schools, churches, on the Internet, and through the media to reach every segment of the population with the message that the death penalty is seriously flawed.

The trends of fewer death sentences and executions will not just continue on their own. There are too many counter-influences, such as the expanding use of the federal death penalty, and the proliferation of politicians who always seize on the next brutal crime to promote their agenda with the death penalty. A lot will depend on the next generation, who may see the death penalty as outmoded, as a cumbersome, costly, and as an untenable government program undeserving of their hard-earned dollars. If they oppose the death penalty because it is morally wrong, so much the better. But if they are willing to say that this punishment has outgrown its usefulness, that we have better alternatives, and that it is time for the U.S. to join most of its allies, then tremendous progress will have been made.