



## People are asking...

### Tough questions about the death penalty

#### **Q: I hear about innocent people being freed from death row. Are they really innocent?**

Contrary to popular belief, it is extremely difficult to have a conviction overturned. For those innocent people lucky enough to be exonerated, it took extraordinary resources outside of the normal channels for the evidence to be heard. Volunteer lawyers, students, family, and friends often had to fight lengthy legal battles to finally have their day in court.

Popular culture plays up the notion that people “get off on a technicality,” but it is more likely that an execution will go *forward* on a technicality – because legal barriers prevented the courts from hearing new evidence, or because a lawyer missed a filing deadline or didn’t make an objection at the right time.

One 2007 execution went forward because a judge decided to close the court at 5pm on the night of the execution, even though past practice was to stay open on execution days to consider final appeals.<sup>1</sup> A 2012 Alabama appeal was almost denied because of a mix-up in the mailroom.<sup>2</sup>

Such “technicalities” should never get in the way of someone getting their fair day in court, but in a case of actual innocence they are downright terrifying. Consider the Missouri case of Joe Amrine. The prosecutor told the judge that even if Amrine was factually innocent, he should be executed because the legal process should not drag on and on. Courts actually *refused* to hear evidence of Amrine’s innocence because they said his original trial lawyer should have known the information – and therefore it didn’t count as “new.” It took 18 years for Amrine to be exonerated and freed.

#### **Q: Is there any evidence that an innocent person has been executed in modern times?**

We simply do not know how many innocent people have been executed in the United States. Death penalty lawyers hardly have enough resources to work on the cases of live clients, much less for those who are no longer living.

But in recent years, several cases have come to light where there is strong evidence of innocence. A 2012 report called “The Wrong Carlos” details the case of Carlos DeLuna, who was executed for a crime that was likely committed by Carlos Hernandez.<sup>3</sup> The two look alike, but at the time of the trial prosecutors claimed that Carlos Hernandez was a made-up phantom, despite his long criminal record. Cameron Todd Willingham was executed for setting fire to his home and killing his three children, but eight different arson experts now say that the forensic testimony used to convict him was based on junk science and that there is no evidence that the fire was set intentionally.<sup>4</sup> And Troy Davis was executed in 2012 after nearly a million people worldwide spoke up that there was too much doubt in the case to proceed.

None of these cases are definitive. It is nearly impossible to prove a negative so long after the fact. And few lawyers can afford to spend time and resources trying to prove the innocence of an executed person when there are so many people with strong claims of innocence still living on death row.

Here is what we do know: 160 people have been exonerated from death rows around the country. In many of those cases, the exoneration came after a long legal battle and thanks to the extraordinary efforts of people working outside the system. One Illinois man, who came within *forty-eight hours* of execution, was freed thanks to the investigative work of undergraduate students at Northwestern University.<sup>5</sup> Any one of the 160 death row exonorees could have just as easily been executed.

**Q: I understand that innocent people were sentenced to death in the past. But now that there's DNA, why doesn't that take care of the problem?**

DNA testing is possible in just five to ten percent of criminal cases.<sup>6</sup> While DNA has uncovered many of the flaws in our nation's death penalty – including incompetent lawyers, misconduct, and more – DNA can't, by itself, solve those problems. Thanks to DNA, we now know that evidence we once thought was reliable can often be wrong, including eyewitness identification, confessions, jailhouse informants, and other forensics.

In most cases, there is simply no DNA to test. They instead must continue to rely on those other kinds of evidence – and those other types of evidence aren't very reliable at all. The National Academy of Sciences (NAS), the nation's premier institution of scientific advisors, have declared that most of the common categories of forensic evidence - including fingerprints, bitemarks, hair, and ballistics – are unreliable in connecting crime scene evidence to specific people.<sup>7</sup>

Even when there is DNA to test, it can be tainted or misused. Innocent people have been convicted of serious crimes on the basis of DNA evidence that was analyzed incorrectly or even fraudulently.<sup>8</sup> Any scientific evidence is only as good as the human beings conducting the tests – and human beings can't be right 100% of the time. Even with scientific advances, there is simply no way to create a death penalty system that always gets it right.

**Q: I agree that we shouldn't execute anyone where there is doubt. What about when we are 100% certain that the defendant is guilty?**

There are many examples of cases that seemed absolutely certain – only for cracks in that certainty to appear later.

Days after being violently raped, Jennifer Thompson-Cannino identified Ronald Cotton as the man responsible. Cotton was given a life sentence, based largely on her testimony. Nine years later DNA testing showed that another man was responsible for the rape and Cotton was innocent. Now Jennifer speaks out against the death penalty across the country. She was 100% certain she had the right guy – and she was wrong.

Ray Krone was given a death sentence after forensic experts said that bitemarks on a victim matched his and proved he was guilty. Krone was sentenced to death. It took ten years before DNA evidence exonerated him. Bitemark evidence has since been largely discredited by the National Academy of Sciences.

In Maryland a death sentence can only be imposed in cases where there is biological evidence, a videotape that links a defendant to a murder, or a videotaped confession. This is the narrowest death penalty in the nation but a report by 39 legal experts and former prosecutors outlined numerous cases of innocence where the restrictions would not have helped. And the extra procedures involved has made Maryland's death penalty trials longer and more complicated, which prolongs the pain for the families of murder victims and adds even more costs to an already expensive system.<sup>9</sup>

**Q: You say that the appeals often don't find the mistakes even though some people have been on death row for 20 years. What are all the appeals for if they're not catching the innocent people?**

The legal process is a thicket of statutes, precedents, and rules that take years to navigate. One may assume that each appeal is considering a key piece of evidence or substantive mistake in a case. In reality, many of these appeals are actually simply about process: whether the evidence should be looked at, which court should hear it, which procedural rule applies, how the issue should be raised, etc. Dozens of hearings and legal briefs may be required in several layers of courts before a single one even agrees to review the mistake or hear the new evidence.

**Q: I've heard about people sentenced to life who are later released from prison. Does life without parole really exist?**

Life without parole means what it says: the offender stays behind bars for the rest of his or her life, with no chance of ever being paroled. Life without parole sentences are different from "life" sentences, which do provide the option for parole. Some people have said that life without parole is really a "death sentence by incarceration" for that reason.

Many states didn't begin using life without parole until recently. Today, every state in the country except for Alaska now offers life without parole as an option.

**Q: You say the death penalty takes longer and is more expensive than any other sentence. If we repeal the death penalty, would the extra costs and time transfer to the next highest sentence?**

No. The death penalty isn't longer or more expensive because it's the "highest" sentence. It's longer and more expensive because it's irreversible. And it's the only punishment in the U.S. that is irreversible. That's why the Courts have long held that "death is different." In other words, while capital punishment comes under intense scrutiny and is subject to frequent tinkering and refining, other sentences don't receive that kind of oversight.

Even in life without parole cases, for example, a single lawyer is considered sufficient (death penalty cases require two because they are much more complicated), and juries don't have to be screened for their

opposition to incarceration the way they do with the death penalty. The penalty phase of a death penalty case simply doesn't exist for non-death penalty cases. None of these requirements would apply to other types of cases, even if the death penalty were off the table.

The experiences of states without the death penalty confirm this. New York eliminated the death penalty in 2007 and left life without parole as the highest sentence. In the years since then, life without parole cases have been treated more like second degree murder cases than death penalty cases. There have been no new procedures or extended appeals put into place.

In Massachusetts, which also has no death penalty, lawyers are certified, screened, and paid in the same way whether the case is a first or second degree murder case. Both life without parole and second degree murder cases take about the same length of time, and about ten times less than the estimated time of a death penalty case in Maryland, for example. Even when life without parole cases get appealed in these states, the results are similar to other murder cases. The appeals are not taken as seriously as death penalty appeals, they are shorter, there are fewer of them, and they have a much smaller success rate.<sup>9</sup>

### **Q: You say that the death penalty is neither "swift nor certain." Isn't death the most certain there is?**

It may seem that way, but death is actually the *least* certain penalty there is. Historically, more than two-thirds of all death sentences are reversed at some point in the process for serious error. The vast majority of those cases are then re-sentenced to something other than death, like life without parole.<sup>10</sup> Meanwhile, every phase of the process, from trial and sentencing to appeals and reversals, means the offender's name is splashed all over newspapers and television and surviving families must relive their pain through the media, the courts, and in the public spotlight.

Most other sentences can begin instantly – the day the defendant leaves the courtroom. They fade from the front pages and into irrelevance from the public arena. Surviving loved ones are no longer tied to the person who committed the murder. The court process is over and the struggle to rebuild their lives can begin.

### **Q: Why should the taxpayers have to pay for incarcerating someone for years on end? Isn't it cheaper just to put someone to death?**

In actuality taxpayers get stuck with a much greater tab when the death penalty is an option. The death penalty process is more complicated because a life is on the line. But the system's finality, complexity, and length drive costs through the roof, diverting precious resources from crime prevention, victims' services, and other community needs.

Study after study has found that *death penalty cases cost up to 10 times more than comparable non-death penalty cases*. The most rigorous cost study in the country found that a single death sentence in Maryland costs almost \$2 million more. Maryland spent \$186 million extra to carry out just five executions.<sup>12</sup> In California, a 2011 study showed that death penalty cases are 20 times more expensive. That state has spent over \$4 billion on the death penalty since 1978.<sup>13</sup>

## **Q: Would the death penalty be cheaper if we just shortened the appeals process?**

No. Much of the extra costs in death penalty cases are incurred during the initial trial. Death penalty trials are among the most complicated and time-consuming cases a court faces. They involve more lawyers, more witnesses, more experts, a longer jury selection process, more pre-trial motions, an entirely separate trial to determine the sentence, and countless other expenses – *racking up exorbitant costs even before a single appeal is filed*. Moreover, these costs are incurred *even in cases where the prosecutor sought the death penalty but the jury chose a different punishment*.

Many of the extra costs are legally mandated to reduce the risk of executing an innocent person. And even these safeguards are not enough – at least 160 people have been exonerated from death row after waiting years or *decades* for the truth to come out. Cutting appeals would virtually guarantee that some of these innocent men and women would be dead today, executed for crimes they did not commit.

## **Q: My state has not studied the cost of the death penalty. How can we know that our death penalty costs us more?**

More than 15 studies in as many states have found that death penalty cases are more than 10 times more expensive than comparable non-death penalty cases. No state cost study has found the death penalty to be cheaper.

These studies come from all kinds of states – those that use the death penalty a lot like Texas and Florida, those that use it very little like Maryland and Kansas, and those in the middle like Tennessee and California. There is no reason to believe that a study in any other state will find they somehow manage to do it any cheaper.

## **Q: Even if the death penalty does cost more, can you put a price on justice?**

There is no price on justice. But the question of the cost of the death penalty isn't about counting dollars. It's about counting lives. For every dollar we spend on a broken death penalty system, we are taking money away from criminal justice programs that would actually prevent crime and keep us safer.

It has long been said that a budget is a moral document, because the choices we make about how to spend our precious resources are a reflection of what we think is important as a society.

Paying for the death penalty means choosing a failed policy that makes irreversible mistakes, monopolizes our courts, and delays justice for families of murder victims. Our resources are finite, so that choice is made at the expense of proven gang prevention programs, desperately needed grief counseling and financial assistance to families of murder victims, training or better equipment that would keep police officers safer, proper staffing that would keep our prisons safer, evidence-based crime prevention programs that would keep our neighborhoods safer, and many other things that would not only save lives, but also improve lives.

**Q: You say the death penalty is “arbitrary” and “unfair.” What does that mean? If someone committed a crime isn’t it *fair* that they are punished?**

The U.S. Supreme Court has said that if the death penalty is applied arbitrarily, it cannot be applied at all. Yet in reality, the system is little better than a lottery: an accomplice gets death while the person who actually pulled the trigger is sent to prison; a convenience store robbery gone awry results in execution, while a methodical serial killer gets a life sentence; two equivalent crimes occur on different sides of the county line – one sentenced to die, the other to prison. Such disparities are the norm, not the exception. Factors like geography, access to a decent lawyer, race, and even gender can often determine who lives and who dies.

**Q: You say the death penalty has failed because of all the innocent people who’ve been freed. Why don’t the reversals mean the system is working?**

A system that finds serious error in seven out of every 10 sentences can hardly be described as “working.” A high reversal rate means higher costs for the state and painful delays for victims’ families. It is also a red flag that something is terribly wrong with the system.

The 160 innocent people who were sentenced to die and later released had to fight long legal battles before the truth was finally heard. In many cases luck was a big factor in their release – another crime that happened to reveal the person actually responsible, for example, or even journalism students uncovering evidence as part of a class project. Those exonerated will tell you they were not freed because of the system, they were freed in spite of it.

**Q: The death penalty is so infrequently used in my state, why is there a pressing need to repeal it?**

As long as the death penalty is an option, there is a real and unacceptable risk of executing an innocent person. Plus, a death penalty that is so rarely used is little more than a cruel hoax on victims’ families, who are promised one punishment at the time their loved one is killed but often will never see an execution take place. And a death penalty that is virtually never used is just another name for life without parole – at an exorbitantly greater cost.

**Q: Death penalty opponents often say that capital punishment isn’t a deterrent to crime while proponents say it is. Which is it?**

There is no evidence that the death penalty deters crime any more or less than other harsh punishments like life in prison without parole.

If the death penalty deterred, one would expect the South – where executions are frequent, to have

lower murder rates than other regions, and for states with the death penalty to be safer than those states without. In fact, the opposite is true. Regions with the most executions also have the highest murder rates.<sup>14</sup> And states without the death penalty actually have lower murder rates than those with the death penalty.<sup>15</sup>

This isn't surprising: to the extent someone with a deadly weapon in a rage is going to be deterred from anything, the real prospect of spending a lifetime in prison is at least as persuasive as the small chance of getting executed. There is simply no correlation between murder rates and the death penalty, and nearly two-thirds of Americans and 88% of criminalologists agree that the death penalty is not an effective deterrent.<sup>16</sup>

A recent batch of studies have come out claiming that the death penalty does deter. These studies have come under intense attack in the research world for their faulty methods, missing data, misleading categorization, and a host of other problems that make the data completely unreliable.

In 2012, the National Research Council reviewed all of the deterrence studies from all sides of the issue and found there was no credible evidence that the death penalty deters murder.<sup>17</sup>

### **Q: Don't we owe it to murder victims and their families to execute the person who took their loved one away?**

People who have experienced the trauma of losing a loved one to murder deserve to see the person responsible for the crime held accountable, as swiftly and surely as possible. They also deserve to have as much support rebuilding their lives as possible. The death penalty provides neither of those things.

It prolongs pain for victims' families, dragging them through an agonizing and lengthy process that holds out the promise of an execution at the beginning but often results in a different sentence in the end. Meanwhile, it showers scarce resources on a few cherry-picked cases while real needs of the vast majority of victims' families, such as specialized grief counseling, financial assistance, and ongoing support, are ignored.

### **Q: Do we need the death penalty to keep someone who already has a life sentence from killing again in prison?**

No. In fact, the death penalty has nothing to do with prison safety. Proper staffing, equipment, programming, and classification are the keys to making prisons safe and preventing prison murder.

People serving life sentences have *more* incentive than others to follow prison rules, because they must make prison their homes for life. Breaking the rules can jeopardize the few privileges they can secure in the prison world, and they must stay on the good side of guards who will control their every move until the day they die. For those few individuals who do break rules, corrections officers will tell you that it is always possible to make life more difficult for an inmate – including isolation, which can be much more agonizing than the prospect of an execution.

## **Q: Do we need the death penalty to protect police officers?**

No. The death penalty has not been shown to save the lives of law enforcement. In fact, more than twice the number of police officers were killed in the South from 2002-2011 than any other region in the country, even though the South is home to the majority of executions in the U.S.<sup>18</sup>

The best way to keep police officers safe is to ensure proper staffing, equipment, and training to officers and to implement crime prevention programs that work. The death penalty is a distraction from those concrete needs, diverting millions of law enforcement dollars that could be used to keep police and the public safe.

Law enforcement agree that the death penalty is ineffective at reducing violent crime. A full 99% of police chiefs said that other changes such as reducing drug abuse or improving the economy were more important than expanding the death penalty in reducing violent crime.<sup>19</sup>

## **Q: What about the most heinous crimes? Do we need a special punishment for the “worst of the worst”?**

All murders are heinous. Reserving a punishment for the “worst of the worst” murders implies that other murders are ordinary. There is no such thing as an “ordinary” murder for the grieving family left behind. The death penalty necessarily divides families from those worthy of a death penalty case and those who are not. It elevates certain victims’ lives above others. Many families of murder victims feel these kinds of distinctions are disrespectful.

## **Q: Do we need to keep the death penalty for terrorists?**

No. In fact, the death penalty can actually *impede* the fight against terrorism. It can make martyrs out of people who committed acts of terrorism (some of whom sought to die for their acts anyway) and make it easier recruit more people to their cause. Many of our international allies have refused to extradite people accused of terrorism to the United States because of our death penalty system, preventing us from prosecuting or even interrogating them. And finally, executing people convicted of terrorism sends these individuals to their grave with a wealth of intelligence that could one day help prevent other terrorist plots.

Terrorism is not an ordinary crime that can be addressed with standard law enforcement tools and resources at the local level. It requires a complex solution that integrates law enforcement with intelligence, defense, diplomacy, and foreign policy considerations. The death penalty often gets in the way of the effort to balance these considerations, especially at the state level.

## **Q: Do prosecutors need the death penalty to secure plea bargains?**

Using death as a billy club to secure plea bargains is not only unnecessary, it’s dangerous. The threat of death increases the risk of convicting the innocent. There are documented cases of innocent people confessing to crimes they did not commit simply to avoid a death sentence. They often spent years in



prison before the truth was uncovered. This is why many prosecutors believe it is unethical to use the death penalty to force a plea.

Many cases are resolved by plea bargains – whether or not the death penalty is on the table. Life and death are too important to be used as a bargaining chip – and the evidence suggests that guilty pleas are frequent even without such coercion.

## **Q: What is a moratorium on executions? How is it different from repealing the death penalty?**

A moratorium is like a time-out on executions for a certain period of time. Often a moratorium is put in place while the death penalty's many problems are studied and addressed. The only thing on hold during a moratorium is the actual execution – no one is removed from death row and prosecutors are free to seek death sentences.

Many states use the death penalty infrequently. But execution gaps – even if they are indefinite – do not provide any mechanism for addressing the death penalty's flaws. If the state did suddenly resume executions, innocent people would *still* be at risk and the process for determining sentencing would *still* be arbitrarily and unfairly applied.

And even if the state never resumes executions, this kind of limbo creates other problems. The death penalty system would continue to drag victims' families through the agonizingly long and complicated process, promising an execution that would probably never happen. Millions would be wasted pursuing death sentences that would never be carried out. And thousands of hours of court and law enforcement time would be spent chasing executions instead of solving scores of other crimes.

Taking a break from executions is not a permanent solution. The only way to address the death penalty's serious flaws is to end it.

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- <sup>1</sup> Judge Sharon Keller of the Texas Court of Criminal Appeals, was eventually reprimanded by the State Commission on Judicial Conduct for her role in the execution of Michael Wayne Richards.
  - <sup>2</sup> Supreme Court Justice Samuel A. Alito Jr. described what had happened to death row inmate Corey Maples as “a veritable perfect storm of misfortune.”
  - <sup>3</sup> James Liebman et al, “Los Tocayos Carlos.” <http://www3.law.columbia.edu/hrlr/lrc/>.
  - <sup>4</sup> David Grann, “Trial by Fire. Did Texas Execute an Innocent Man?” *The New Yorker*, September 7, 2009.
  - <sup>5</sup> Anthony Porter – see Death Penalty Information Center for more details on the case.
  - <sup>6</sup> “Non-DNA Exonerations,” Innocence Project. <http://www.innocenceproject.org/know/non-dna-exonerations.php>.
  - <sup>7</sup> National Research Council of the National Academies, “Strengthening Forensic Science in the United States: A Path Forward,” 2009.
  - <sup>8</sup> See, for example, the cases of Josiah Sutton, Timothy Durham, and Gilbert Alejandro.

- <sup>9</sup> “Maryland’s Death Penalty. Still Here, Still Unfair. More Arbitrary and Costly.” Maryland Citizens Against State Executions, 2012.
- <sup>10</sup> James S. Liebman et al, “A Broken System: Error Rates in Capital Cases, 1973-1995,” Columbia Law School Journal, 2000.
- <sup>11</sup> Jonathan Gradess, “The Cost of the Death Penalty in Maryland,” Testimony before the Maryland Commission on Capital Punishment, 2008.
- <sup>12</sup> John Roman et al, “The Cost of the Death Penalty in Maryland,” Urban Institute, 2008. <http://www.urban.org/url.cfm?ID=411625>.
- <sup>13</sup> Judge Arthur L. Alarcon and Paula M. Mitchell, “Executing the Will of the Voters?: A roadmap to mend or end the California legislature’s multi-billion dollar death penalty debacle,” 44 Loyola of Los Angeles Law Review S41, Special Issue, 2011.
- <sup>14</sup> Murder rates based on the years 2001 to 2011. FBI’s Uniform Crime Reports, cited by the Death Penalty Information Center.
- <sup>15</sup> Murder rates based on the years 1991 to 2011. FBI’s Uniform Crime Reports, cited by the Death Penalty Information Center.
- <sup>16</sup> Michael Radelet and Traci Lacock, “Do Executions Lower Homicide Rates? The Views of Leading Criminologists,” *Journal of Law and Criminology*, 2008. General public’s views taken from Gallup poll, 2011. 64% of those polled say the death penalty is not a deterrent.
- <sup>17</sup> National Research Council of the National Academies, “Deterrence and the Death Penalty,” 2012.
- <sup>18</sup> Law enforcement murder rates based on the years 2002-2011. “Law Enforcement Officers Feloniously Killed, Table 1,” FBI Uniform Crime Report, 2011.
- <sup>19</sup> National Survey of Police Chiefs Report in “Smart on Crime.” Death Penalty Information Center. <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf>.