

THE DEATH PENALTY IN 2008: YEAR END REPORT

Death Penalty Information Center
December 2008

Marginalization of the Death Penalty Deepens With 95% of Executions in the South

Economic Concerns Bog Down Capital Punishment System

Death Penalty Statistics	2008	2007	1999
Executions*	37	42	98
New Inmates Under Death Sentence**	111	115	284
Death Row population (as of Jan. 1)^	3,309	3,350	3,549
Percentage of executions by region:			
South (35 executions)	95%	86%	75%
Midwest (2)	5%	12%	12%
West (0)	3%	2%	12%
Northeast (0)	0%	0%	1%
TEXAS (18)	49%	62%	36%
Public Support for Death Penalty (Gallup Poll)	64%	69%	71%
Exonerations			
In 2008	4		
Since 1973	130		
Executions Since 1976	1136		
Texas	423		
Virginia	102		
Oklahoma	88		
*As of Dec. 10, 2008, with no more executions scheduled this year.			
**1999 and 2007-Bureau of Justice Statistics; 2008-DPIC research - through Dec. 5, 2008.			
^NAACP Legal Defense Fund, "Death Row USA"			

Executions resumed in 2008 after a *de facto* moratorium was effectively lifted by the Supreme Court following its decision upholding lethal injection. But only the South returned to regular executions, accounting for 95% of executions carried out in the country in 2008. Almost half of the executions were in Texas. In some states, such as California, Maryland, Delaware and North Carolina, the lethal injection issue remains unsettled, and no executions occurred.

The 37 executions this year marked a 14-year low and continued a downward trend after executions peaked at 98 in 1999. Last year there were 42 executions. New death sentences also remained at their 30-year low. The Bureau of Justice

Statistics recently released their count of death sentences for 2007. The 115 sentences in 2007 was the lowest number since the death penalty was reinstated in 1976. In 2008, DPIC's research estimates 111 new death sentences, another decrease in a downward trend that began at the start of this decade. Overall, the annual number of death sentences has dropped by about 60% since the 1990s, when it was close to 300.

Since executions had been on hold for almost eight months (Sept. '07-April '08) as the Supreme Court considered the lethal injection issue, it was expected there could be a surge of executions in 2008, depending on the Court's decision in *Baze v. Rees*. When the Court upheld Kentucky's lethal injection process in *Baze*, many execution dates were set. However, stays of execution were frequent as the traditional problems with the death penalty returned. Only 9 states carried out executions in 2008, and only one of those was outside of the south – Ohio.

The latest Gallup Poll (October 2008) indicated that the public still supports the death penalty in theory. Support for capital punishment was 64%, a decline from the 69% support in 2007. The high point for endorsement of the death penalty came in 1994, when 80% supported it. When the death penalty is compared with practical alternatives such as a sentence of life in prison with no parole, support is much lower, with most polls indicating public support for true life sentences to be equal to or greater than support for the death penalty.

Stays of Executions and Exonerations Illustrate Problems

Over 25 executions were stayed as courts grappled with such issues as mental illness, possible innocence, and ineffective representation in capital cases. Two of the cases in which stays were granted illustrate how close some defendants come to execution even when egregious legal problems exist. Troy Davis came within hours of execution in Georgia despite an international outcry for review. His death seemed imminent when the Supreme Court allowed a stay to expire without granting a hearing on his innocence claim. Seven of the witnesses who testified against Davis have recanted their testimony, and some say another man, one of the witnesses who did not recant, has admitted to the crime. The U.S. Court of Appeals for the 11th Circuit granted a stay to review his claim and may rule on whether execution of a convicted person with strong evidence of innocence violates the constitution.

In Texas, Charles Hood also repeatedly came close to execution despite evidence the prosecutor and the judge at his original trial had earlier engaged in an intimate relationship. Numerous legal ethicists declared such a conflict of interest compromised the death sentence and should have been revealed. Nevertheless, Hood was belatedly granted a stay only to permit the Texas Court of Criminal Appeals to review his mental capacity claim.



Exonerations and Commutations

Innocence remains the most compelling issue for many people as they consider their position on the death penalty. Four more inmates were freed from death row in 2008, bringing the total

number of exonerations since 1973 to 130. All charges were dismissed against Kennedy Brewer in Mississippi and Michael Blair in Texas after the two men were cleared through DNA testing. Charges against Levon Jones and Glenn Chapman in North Carolina were dismissed on other grounds. In Jones's case, the state's star witness, Lovely Lorden, admitted, "Much of what I testified to was simply not true." A detective coached her on what to say, and she collected \$4,000 from the governor's office for offering clues leading to Jones's arrest. Chapman's conviction was thrown out because of withheld evidence and ineffective representation. All four defendants were members of racial minorities. It took an average of 14 years between their convictions and exonerations.

Executions by State	2007	2008
Texas	26	18
Virginia	0	4
Georgia	1	3
South Carolina	1	3
Florida	0	2
Mississippi	0	2
Ohio	2	2
Oklahoma	3	2
Kentucky	0	1
Alabama	3	0
Arizona	1	0
Indiana	2	0
South Dakota	1	0
Tennessee	2	0
TOTALS	42	37

Four death row inmates had their death sentences reduced to life without parole this year: John Spirko in Ohio by Gov. Strickland; Samuel Crowe in Georgia by the Board of Pardons; Percy Walton in Virginia by Gov. Kaine; and Kevin Young in Oklahoma by Gov. Henry. Officials do not always provide a principal reason for granting clemency, but in Spirko's case residual doubt about his guilt was cited. Crowe had been an exemplary inmate on death row and showed remorse. Walton suffered from severe mental illness. And in Young's case, his death sentence was considered disproportional to his offense.

Decline in Death Sentences

Since 2000 there has been a marked decline in death sentences in the U.S. Every region of the country and every state which averaged one or more death sentences per year has seen a decline in the annual number of death sentences

between the 1990s and the 2000s, including the major death penalty states of Texas, Florida, and California. A notable exception to this pattern is the federal death penalty, where the average number of death sentences has *increased* markedly since 2000. The federal death penalty law was greatly expanded in 1994. During the Bush administration there was an emphasis on using the federal law more broadly.

REGION	Change in average annual number of death sentences between 1990-99 and 2000-07
Northeast	-53%
South	-44%
Midwest	-57%
West	-43%
Federal	+50% (1995-99 compared to 2000-07; the federal death penalty was expanded in 1994)

This overall drop in death sentences during the 2000s occurred even though the murder rate remained approximately constant during the past seven years. In 2007, the last year for which data are available, the national murder rate was 5.6 murders per 100,000 people, a small decrease from 5.7 in 2006 and a small increase from 5.5 in 2000.

Because executions declined during the same period that death sentences decreased, the size of death row changed only slightly. Nevertheless, the pattern there also reflects a decline in the use of capital punishment. After increasing every year from 1976 until 1999, the size of death row has decreased. As of January 1, 2008, there were 3,309 inmates on death row. The federal death row, however, more than doubled between 2000 and 2008.

Costs of the Death Penalty Affecting States

As the economic crisis affected most of the country, the criminal justice system was not spared. Death penalty cases stood out because they require enormous expenditures on a single defendant, with little expectation the actual sentence will ever be carried out. In 2007 the average time between sentencing and execution grew to 12.7 years, marking the third year in a row it was over 12 years. In 1990 by comparison, the average time to execution was about 7 years.

Lengthy death penalty cases also reflect higher costs, as defendants are kept on death row longer and re-trials are conducted to correct for prior errors. A report from the California Commission on the Fair Administration of Justice estimated that the state was spending about \$138 million per year on the death penalty, and another \$95 million per year is needed to repair a system they described as "broken," "dysfunctional," and "close to collapse." The annual costs include incarcerating 670 inmates on death row at \$90,000 per inmate per year over the costs of incarcerating a prisoner serving a life sentence. Inmates have to wait about 4 years before being assigned an attorney for their first appeal, so \$360,000 is spent per inmate before an appeal is even begun. At the same time, California is experiencing a severe budget crisis in which basic services such as schools, libraries, and law enforcement are facing cut backs.

In New Mexico, the state supreme court unanimously ruled death penalty prosecutions would have to be abandoned if the legislature did not provide more money for indigent defense. The legislature refused to allocate the necessary funds, putting the death penalty in doubt. A similar warning came from the Utah Supreme Court, which unanimously held death sentences would be overturned if sufficient funds were not provided for appeals:

It is the duty of the legislative branch to provide for adequate defense of capital defendants, including sufficient resources to attract, train, compensate, and support legal counsel. It is left to the legislative branch to determine how best to accomplish this goal. However, it falls to us, as the court of last resort in this state, to assure that no person is deprived of life, liberty, or property, without the due — and competent — process of law. **Without a sufficient defense, a sentence of death cannot be constitutionally imposed.**

This basic concept is bedrock upon which our constitutional government stands.

Archuleta v. Galetka, No. 20070228 (Utah S. Ct. Nov. 7, 2008) (emphasis added).

Both New York and New Jersey recently abandoned the death penalty after weighing the merits of a system in which tens of millions of dollars were being spent with virtually nothing to show for it. In Maryland, a state commission headed by former U.S. Attorney General Benjamin Civiletti heard testimony that each of the state's five executions cost about \$37 million, when all costs were taken into account. The Commission voted 13-7 to recommend abolition of the death penalty, citing problems of innocence, racial disparities, and costs. A General Assembly vote on abolition is expected early in 2009.

Supreme Court Justices Voice Deep Concerns



In 2008, some Supreme Court Justices expressed serious concerns about the process in death penalty cases. Justice Stevens (pictured) went the furthest, calling the death penalty "the pointless and needless extinction of life." While concurring in *Baze v. Rees*, the lethal injection case, he announced he no longer believes the death penalty is constitutional:

I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and

cruel and unusual punishment violative of the Eighth Amendment.” (quoting Justice White in *Furman v. Georgia*).

The Court rejected the expansion of the death penalty to non-homicide offenses against individuals in *Kennedy v. Louisiana*. The defendant, Patrick Kennedy, was convicted of raping his stepdaughter and sentenced to death under a 1995 Louisiana law that broadened the death penalty.

After the Court agreed to hear the case, at least five states (Alabama, Missouri, Colorado, Mississippi, and Tennessee) considered expanding the death penalty to include the crime of child rape; all of those bills were defeated. In striking down the law, the Court went beyond the statute's technical flaws, and even beyond the crime of child rape. Justice Kennedy, writing for the majority, warned about broader problems with the death penalty: "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." He took into account the many dangers of the death penalty and concluded it should be restricted to homicides:

Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, *for crimes that take the life of the victim*. (emphasis added).

In other cases Justices commented about the death penalty even when the Supreme Court refused to grant review. The Court declined to review *Walker v. Georgia*, a case in which the defendant argued the Georgia Supreme Court should have compared his death sentence to other Georgia cases in which defendants did not receive the death penalty. Justice Stevens believed the case deserved review:

I find this case, which involves a black defendant and a white victim, particularly troubling. . . . Rather than perform a thorough proportionality review to mitigate the heightened risks of arbitrariness and discrimination in this case, the Georgia Supreme Court carried out an utterly perfunctory review. Its undertaking consisted of a single paragraph, only the final sentence of which considered whether imposition of the death penalty in this case was proportionate as compared to the sentences imposed for similar offenses. . . .

Particularly troubling is that the shortcomings of the Georgia Supreme Court's review are not unique to this case. . . .

And the likely result of such a truncated review—particularly in conjunction with the remainder of the Georgia scheme, which does not cabin the jury's discretion in weighing aggravating and mitigating factors—is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment.

Finally, the Court sent a signal it may want to restrict prosecutors' use of victim impact statements in death sentencing hearings. In *Booth v. Maryland*, the Court initially found such testimony to be unconstitutional because of the danger the jury could be overwhelmed by emotional statements from victims' family members about their suffering and loss. That decision was reversed a few years later in *Payne v. Tennessee*. This year, in *Kelly v. California*, the Court was asked to limit the extent of such victim statements. Three Justices dissented from the Court's refusal to take the case. (Four Justices are needed to grant review.) Justice Stevens, with Justices Breyer and Souter also dissenting, expressed his concerns about victim impact statements:

In the years since *Payne* was decided, this Court has left state and federal courts unguided in their efforts to police the hazy boundaries between permissible victim impact evidence and its impermissible, 'unduly prejudicial' forms.... Having decided to tolerate the introduction of evidence that puts a heavy thumb on the prosecutor's side of the scale in

death cases, the Court has a duty to consider what reasonable limits should be placed on its use.

New Voices

Every year people who formerly supported the death penalty, or people who come from groups that the public assumes support the death penalty, such as law enforcement officers or family members of crime victims, voice strong concerns about the current practice of the death penalty. Among the more notable "new voices" this year are the following:



Jeanne Woodward, former Director of the California Department of Corrections and Warden of San Quentin Prison

I wish the public knew how much the death penalty affects their wallets. California spends an additional \$117 million each year pursuing the execution of those on death row. Just housing inmates on death row costs an additional \$90,000 per prisoner per year above what it would cost to house them with the general prison population.

A statewide, bipartisan commission recently concluded that we must spend \$100 million more each year to fix the many problems with capital punishment in California. Total price tag: in excess of \$200 million-a-year more than simply condemning people to life without the possibility of parole.

If we condemn the worst offenders . . . to permanent imprisonment, resources now spent on the death penalty could be used to investigate unsolved homicides, modernize crime labs and expand effective violence prevention programs, especially in at-risk communities. The money also could be used to intervene in the lives of children at risk and to invest in their education--to stop future victimization.

Op-ed, Los Angeles Times, Oct. 2, 2008.

Kathy Garcia, whose nephew was murdered 20 years ago, testifying before the Maryland Senate Judiciary Committee:

I've watched too many families go through this to make me believe the system will ever work. The death penalty divides families at the very time they need each other the most.

Catholic News Service, Mar. 8, 2008.

James Abbott, Police Chief, West Orange, NJ, and member of the New Jersey Death Penalty Study Commission:

I no longer believe that you can fix the death penalty. Six months of study opened my eyes to its shocking reality. I learned that the death penalty throws millions of dollars down the drain--money that I could be putting directly to work fighting crime every day--while dragging victims' families through a long and torturous process that only exacerbates their pain.

As a police chief, I find this use of state resources offensive. . . . Give a law enforcement professional like me that \$250 million, and I'll show you how to reduce crime. The death penalty isn't anywhere on my list.

Op-ed, Fort Worth Star-Telegram, Jan. 20, 2008.

Donald McCartin, former Orange County (CA) Superior Court Judge, who sentenced nine men to death:

It's a waste of time and taxpayers' money. It cost 10 times more to kill these guys than to keep them alive in prison. It's absurd. And imagine the poor victims' families having to go through this again and again.

Orange County Register, Mar. 2, 2008 (All but one of the nine men Judge McCartin sentenced to death still remain on California's death row. One man died of a heart attack.)

**DEATH ROW INMATES
BY STATE (Jan. 1, 2008)**

California	667
Florida	397
Texas	373
Pennsylvania	228
Alabama	203
Ohio	188
N. Carolina	173
Arizona	126
Georgia	107
Tennessee	102
Louisiana	88
Oklahoma	84
Nevada	77
Mississippi	64
S. Carolina	63
U. S. Government	51
Missouri	48
Arkansas	40
Kentucky	39
Oregon	35
Virginia	21
Delaware	19
Idaho	19
Indiana	19
Illinois	13
Nebraska	10
Connecticut	9
Kansas	9
U.S. Military	9
Utah	9
Washington	9
Maryland	6
South Dakota	3
Colorado	2
Montana	2
New Mexico	2
Wyoming	2
New Jersey*	0
New York*	0

Total death row 3,309

(7 inmates in the national total received two death sentences from different states.)

*States now without the death penalty

**Sen. Joseph Tydings, former U.S. Senator and prosecutor:**

As a lawyer and former U.S. attorney, I have both prosecuted and defended death penalty cases. As a member of the Maryland House of Delegates and as a U.S. senator, I have studied and dealt with this issue for more than 40 years. While I have never been philosophically opposed to the death penalty, and have supported it in special cases, I now have deep concerns about the failures in our criminal justice system in capital cases. . . .

We must honor America's fundamental democratic and constitutional principle that innocent people shall not be executed. The penalty for conviction in capital cases should be changed to life imprisonment without the possibility of parole until we are willing or able to provide the resources to stop these frightfully tragic miscarriages of justice."

*Op-ed, Baltimore Sun, Aug. 22, 2008.***Editorial, Richmond (VA) Times-Dispatch, which formerly supported the death penalty:**

The only affirmative case that can be made on behalf of killing someone instead of locking him away forever is the sentiment that certain heinous fiends deserve to die. Indeed they do; indeed, they deserve much worse than that, and their death is certainly no great loss to the world. But the judicial system does not exist to mete out divine retribution.

Those who believe in limited government also should believe government ought to limit itself to protecting the public--and ought to refrain from playing God. We long have supported capital punishment. . . . To put a new spin on an old conservative trope: If it is not necessary to execute, then is it necessary not to execute? The question is growing tougher.

*Editorial, January 22, 2008.***International Concerns**

U.S. relations with the world community were dealt a setback when the U.S. Supreme Court, by a 5-4 vote, allowed a foreign national from Mexico to be executed in Texas, despite an order by the International Court of Justice (ICJ) forbidding the execution. The Supreme Court majority conceded that the execution would violate a binding legal obligation of the United States, and this point

was accepted by all parties to the case, by every state or federal judge who considered the case, and by all international law authorities, in and outside the United States. President Bush had ordered compliance with the ICJ's ruling that the Vienna Convention on Consular Relations required a review of Jose Medellin's case, but the Supreme Court held that Texas' procedural rules regarding the timing of appeals took precedence over the treaty commitments of the United States. Medellin was executed on August 5. At least 50 other Mexican nationals on U.S. death rows who were included in the ICJ's ruling may now face a similar fate.

Justice Breyer would have granted a stay of execution, noting: "[T]o permit this execution to proceed forthwith places the United States irremediably in violation of international law and breaks our treaty promises."

In June, the Council of the European Union renewed its call for the end of the death penalty in all cases and circumstances as a matter of human rights. Around the world, 135 countries have abandoned the death penalty for ordinary crimes in law or in practice. Only 62 countries continue to use the death penalty, and even fewer regularly carry out executions.

Conclusions

As executions resumed in 2008 after a temporary moratorium, chronic problems with the death penalty also returned. Many executions had to be stayed, some defendants were granted clemency and others were freed altogether as new evidence emerged, even at late stages of appeal. It has become increasingly clear that the death penalty is being viewed more skeptically by the American public. Death sentences and executions have declined in the current decade. Supreme Court Justices, law enforcement officers, and victims representatives have voiced deep concerns about the way the death penalty has been applied and whether it deserves fixing. Clearly, a more reliable death penalty system will be very expensive. As the country's economic crisis deepens, some states have abandoned capital punishment and others are considering doing so, primarily on pragmatic grounds.

The costs of the death penalty are not only measured in dollars and cents but also in terms of the public's respect for our system of justice and in our international reputation. Almost all executions occur in a small minority of states, after a wait of 10-15 years, with a far greater chance of reversal than execution. Victims' families are increasingly dissatisfied with what the death penalty offers them. The U.S. is isolated from its allies through its continued use of capital punishment.

The recent election revealed that the American public has become impatient with government programs that are very expensive and do not work. There is a broad consensus for change. As a program with increasing costs and questionable returns, the death penalty could be affected by these sentiments in coming years.

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The Death Penalty Information Center is a non-profit organization serving the media and the public with analysis and information on capital punishment. The Center provides in-depth reports, conducts briefings for journalists, promotes informed discussion and serves as a resource to those working on this issue. Richard Dieter, DPIC's Executive Director, wrote this report with assistance from DPIC staff. Further sources for facts and quotes in it are available upon request. The Center is funded through the generosity of individual donors and foundations, including the Roderick MacArthur Foundation, the Open Society Institute, the JEHT Foundation, and the Butler Family Fund. The views expressed in this report are those of DPIC and should not be taken to reflect the opinion of its donors.