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THE DIANE REHM SHOW

DEATH PENALTY IN THE U.S.

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GUESTS

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Political Correctness and the Shameful Injustices of
the Duke Lacrosse Rape Case* (Thomas Dunne Books)

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DEATH PENALTY IN THE U.S.

10:00 a.m.

MS. REHM: Thanks for joining us, I'm Diane Rehm.

Each execution saves five lives, that's the conclusion of one recent study on the deterrent effect of capital punishment. This study is one of more than a dozen which all seem to lend credence to an argument long made by death penalty advocates. Although 65 percent of Americans still favor the death penalty, public support has been declining.

Joining me in the studio to talk about the ongoing national death penalty debate, Virginia Sloan of the Constitution Project; Stuart Taylor, he is senior writer with *National Journal* magazine, and joining us from Houston, Texas, Dudley Sharp. He is a death penalty and victims' rights advocate.

Do join us, (800)433-8850. Send us your e-mail to drshow@wamu.org.

Good morning to all of you.

MR. SHARP: Good morning.

MR. TAYLOR: Good morning.

MS. REHM: And Dudley Sharp, if I could start with you. Give us a sense of some of the recent studies that have been done on whether the death penalty has served as a deterrent.

MR. SHARP: What you're referring to is more than a dozen studies and four defenses of those studies which actually make four additional studies. And what they have found is that there is a deterrent effect which is over and above the deterrent effect of any other lesser sentences.

Most of the people involved in these, if not all of them, are economists, two of which are chairmen of economics department -- one at the University of Colorado, and one at Emory. And basically they found what you said, anywhere from four to about twenty eight innocents are saved via deterrent effect. And that's what the studies find.

MS. REHM: It's interesting and indeed curious to me that these studies have been done by economists.

MR. SHARP: Well, I mean, they deal with incentives primarily, obviously not just in the death penalty debate, but in advertising and corporate work that they do all over the world. And what they have found is that incentives obviously are both negative and positive, and that the death penalty offers a negative incentive for people not to murder, and based on that they found a deterrent effect.

MS. REHM: And I gather these studies were done in certain states. Give us an understanding.

MR. SHARP: What they did was they used data which had been gathered, actually all over the country for decades, and incorporated those numbers into their databases and into their formulas which frankly are extraordinarily complicated. And from that all of these different studies which were done by different economists with slightly different variables all came up with the same conclusion, but they are each quantifiably different. In that they found different numbers were saved by the death penalty.

MS. REHM: Such as.

MR. SHARP: Well, such as, what I stated earlier. The studies varied from saving up to four innocent people, up to twenty eight innocent people with the imposition of the death penalty or execution.

MS. REHM: Dudley Sharp, he is a death penalty and victims' rights advocate.

If you'd like to join the debate call us on (800)433-8850. Send your e-mail to drshow@wamu.org.

Virginia Sloan, as president of the Constitution Project, tell us about your organization's position on the death penalty and the experience of Canada, and how that fits into this debate.

MS. SLOAN: Sure, the Constitution Project specializes in bringing together people of diverse

political philosophies and experiences. And particularly on the death penalty we have a committee of supporters and opponents of the death penalty who got together because they were very concerned about all the mistakes that the system is making, and the extremely high risk that we could be convicting and executing the wrong people.

And what they did is, they came up with a host of consensus recommendations for how the system should be reformed. And so the organization has been promoting those recommendations for the past several years.

We do not take a position on the morality or the legality of capital punishment itself. We just address the various ways in which the system has broken down and what urgently needs to be done to fix it.

I'd like to respond, if I could, to the argument about these deterrent studies, because there -- this debate had been going on for years. There are studies that show that there is a deterrent effect to the death penalty, then there are comparable studies that show there is absolutely no deterrent effect. There is even one that shows that the death penalty might increase the number of murders that occur.

I think the best we're ever going to do on this issue is to conclude that the debate is inconclusive. And the --

MS. REHM: On the question of whether it helps deter or not deter.

MS. SLOAN: Yes, yes. It's inconclusive at best, and as I say, there is a whole host of studies that show that in fact the death penalty does not deter at all. And that the studies that conclude that there is a deterrent effect are methodologically flawed.

The sample is so small. There were only 53 people who were executed last year. And the death penalty process is so haphazard that you really cannot effectively study the deterrent effect.

MS. REHM: And what about the public support for the death penalty?

MS. SLOAN: Well, as you point out, it is declining. As people, I think, more and more conclude that the criminal justice system makes some serious mistakes, people are becoming more and more concerned about it. And, of course, the death penalty is the ultimate punishment. Once it's carried out you can't go back. And so the number of executions is declining, the number of death sentences is declining.

And for the first time this year when the Gallup Poll asked the question, would you support capital punishment, or if there were an alternative of life without possibility of parole, would you support that? For the first time this year, those supporting life without parole are more than those supporting the death penalty.

MS. REHM: Virginia Sloan, she is president of the Constitution Project.

And now, Stuart Taylor, I know you wrote an extensive article. Recently you quoted Chief Justice Earl Warren, and what he wrote in 1958. He wrote, "The evolving standards of decency that marked the progress of a maturing society." How -- he talked about the tension between those who support the death penalty and those who do not. How do you see that tension today?

MR. TAYLOR: Yes. I think -- you know, and we've seen a little of it today already. But on the evolving standards of decency, a Supreme Court case law for how to interpret cruel and unusual punishment in the constitution, and the idea is well, yes, they had the death penalty in the early days, but now things may be different, you know, people have different values, and therefore we can't just look to the original intent, that's the argument.

In the Supreme Court with several justices relying on that argument in 1972 stuck down all death penalties, all death penalty laws in the country. They didn't quite say, never. And in fact they started up again. But then something -- and they relied on evolving standards decency, but then the standards of decency evolved in a direction they hadn't anticipated.

Support for the death penalty went up dramatically over the next few months in immediate reaction to the decision it seems, and over the following years.

And so the argument looked a little weak. But then recently it's beginning to look stronger, because especially of the dramatic downward trend in the number of death sentences returned by juries over the last 10 years or so from 315 death sentences in 1994 to 128 in 2005.

MS. REHM: And why do you see that happening?

MR. TAYLOR: I see four reasons that make a certain amount of sense. Of course, one that I'm not counting here is, there has been a decline in homicides, but not enough to account for this dramatic decline in death sentencing.

First, I think, DNA exoneration, you hear more and more people say, and I don't have statistical studies, more and people say, gee, I'm for the death penalty. I'm a little nervous about it because now I hear about these cases of people who are on death row being exonerated, and maybe there weren't that many, but why take a chance. So there is one.

Two, defense layering I think has become more expert, in part because of court decisions, in part because of the more resources being available, and it's rare for people who have good defense lawyers to get the death penalty. Usually, defense lawyers can put on a lot of evidence in the so called mitigation phase that makes some jurors think, well, this guy is, you know, is abused as a kid, he is crazy as a jaybird. I don't think I want to send him to his death.

Third, life without parole as an alternative. Jurors used to worry and (inaudible) well, we'd better execute this guy or he is going to be out on the street again, he might kill someone else. The availability of life without parole as an alternative, and jurors believing that it will stick, has changed that equation.

And fourth, and this more in the long-run of history, the current Supreme Court case where lethal injection methods are being changed -- challenged on the ground that it may cause unnecessary pain because it's botched so often. If you look at that in the long run of history you used to have people being torn apart by lions in the coliseum, burned at the stake, drawn and quartered, stoned, still happens in some parts of the world.

And -- but in this country in the last 200 years we go to more and more methods that are designed to eliminate pain and make the execution humane. And -- but we never quite get there. And I wonder whether this might reflect an evolving standard of decency somewhere.

MS. REHM: Stuart Taylor is senior writer with *National Journal* magazine. He is also contributing editor at *Newsweek*, and coauthor with KC Johnson of *Until Proven Innocent*.

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(Intermission)

MS. REHM: As we talk about the ongoing debate over the death penalty New Jersey may become the 14th state to outlaw the death penalty.

Dudley Sharp, what are the arguments for and against, and how do you see New Jersey's move?

MR. SHARP: Well, it's almost a done deal that the death penalty will be stricken from the statute books in New Jersey in December. The governor stacked a committee that was overwhelmingly against the death penalty. Most of -- myself as well as the other pro-death penalty people in New Jersey had predicted the outcome of the death penalty commission's conclusion in New Jersey before they arrived.

And, overwhelmingly, what they did in the seven major points was, they concluded along strict anti-death penalty lines what would happen in those categories. And they didn't even look at the pro-death penalty arguments which were -- would either contradict those arguments or which were stronger than those arguments. And most of us, again on the pro-death penalty side predicted that that would happen in New Jersey, and it did. It was very easy to predict. And it seems to me that they have the votes in New Jersey. It's a lame duck session there. A number of people who are going to be voting won't be there when the new session comes in next year. And so I would much rather they wait till the new people get sworn in so that people could be held responsible for their votes.

But they are intentionally not going to do that, and they're going to have the vote in December, and I predict that they will outlaw the death penalty.

MS. REHM: Virginia, how significant is the fact that this is coming from the New Jersey state legislature.

MS. SLOAN: Well, I think the fact that it's coming from the legislature is very significant because of course the legislature represents the people, it's not just a court or an individual governor as was the case in Illinois. But I'd really like to respond to what Mr. Sharp said about the commission in New Jersey.

The commission was made up of supporters and opponents of the death penalty. There were four, or perhaps even five, law enforcement representatives including a representative of the attorney general's office, on the commission there were victim advocates as well.

And they did not come in with any predetermined positions about the death penalty. They held extensive hearings. They extensively reviewed all of the evidence and they came to the conclusion that whether you're morally for or against the death penalty it simply is not working. And that was the view of the victim representatives as well as the law enforcement representatives.

MS. REHM: Stuart, are other states considering the same actions?

MR. TAYLOR: I'm not aware of any. I may have missed some. But I think one broad phenomenon we can see is that if you look at public opinion polls nationally, support for the death penalty in the abstract is still pretty high, 65 percent I think is the most recent. And it goes up and down over the year. But it's always been pretty high. In fact, except back in -- before the Supreme Court outlawed it in '72 it was at an all-time low just about.

But it varies greatly regionally, and the northeast of course is more -- is less pro-death penalty than the rest of the country. And so it's not surprising that it's in New Jersey that we're seeing this.

MS. REHM: But explain to me what happened after the Supreme Court outlawed it in '72, then what happened?

MR. TAYLOR: Well, on public opinion support for the death penalty went up. The court's decision, which was splintered, indicated that the problem the -- the majority struck down death penalties because they thought they were random, capricious in terms of who got executed.

Even now, about one -- your chances of being executed if you committed homicide are about one in three hundred. And there is no -- there was no logic certainly then between who got and who didn't. The poor people tended to get it, black defendants who had killed white victims tended to get it, and so it seemed unfair in its incidence.

They also suggested, well, if the states could make it more fair and systematic then maybe we would uphold it. You know, various states pass various laws, and the kinds that the Supreme Court then upheld four years later in 1976 were those that had a special death sentencing proceeding, in which aggravating circumstances would be weighed against mitigating circumstances.

MS. REHM: So what is the case before -- that the Supreme Court will now consider?

MR. TAYLOR: The case they now consider comes after dozens of cases since then. And it doesn't really go to that issue. It just goes to the method. The lethal injection method being used in 36 of the 38 death penalty states involved a cocktail of three drugs. First an anesthetic to put the person to sleep, then something to paralyze the person, then something to stop the heart.

The controversy in the Supreme Court is whether this procedure, as botched often by incompetent people doing it, executioners don't tend to be the greatest professionals in the world, is causing unnecessary pain or poses a risk, and therefore if the -- most of the death penalty opponents can hope for here is the Supreme Court says it's an unnecessary risk, you got to do it another way.

MS. REHM: Dudley Sharp, how do you weigh in on

that?

MR. SHARP: The assessment, it's very accurate on how lethal injection is going to turn out. It's the -- Supreme Court will not find the method unconstitutional. What they will do -- may be is mess with the procedure. You know, there has been over a 1,000 executions, over 900 of them have been lethal injection. And percentage wise, an extremely small percentage of those actually have been botched.

And the two studies which are so critical of lethal injection which are from *The Lancet* article in England and the *PLoS* article in the United States, all of them use words like may, might, may or might cause pain, because they don't have evidence that they actually do cause pain. And that's going to be one of the things that's presented to the Supreme Court.

You know, I've had several discussions with death penalty opponents as well as people for it, on this topic. And, you know, I'm asked often, why don't they just use the anesthetic and it will just take longer? And I think that may be what they end up doing. Because the argument besides botched executions in general, the major argument has been that inmates could feel pain, that the second drug, the paralytic, that Stuart talked about, would mask the pain caused by the third drug which can burn severely in the veins, and you can feel it if you're conscious.

However, as I stated before, the two major studies that have looked at this could not conclude, and their conclusions stated this, that anyone had actually suffered under these conditions, and that's going to be part of what we hear in the Supreme Court.

MS. REHM: Virginia.

MS. SLOAN: Well, I think, first of all, it's pretty hard to know for sure whether somebody has actually suffered pain because they are dead. But the briefs in these cases are replete with instances, medical testimony about people, who have been crying out in pain, who've been gasping for air, who have been clearly conscious during the procedure. And I think Stuart accurately describes the drugs.

What happens is, if the first drug doesn't render you unconscious, then the second drug will -- because it paralyzes your muscles, you can't breathe, and you suffocate. And if you're conscious and you're suffocating, that in itself is a horrible way to die.

MS. REHM: But what about Dudley's point that if indeed you use an anesthetic to put someone totally out that that pain and suffering won't occur?

MS. SLOAN: Well, certainly that is the concept of lethal injection, but it's simply not happening. These protocols have been devised by people who are not medical professionals or this is not their area of expertise. And so that's not happening.

MS. REHM: And most physicians refuse to participate.

MS. SLOAN: Yes, but there is one, for example, who has not --

MR. SHARP: Well, now that --

MS. REHM: Hold on Dudley, I'll get to you.

MS. SLOAN: There is one in Missouri. The Missouri courts have barred him from participating in executions because he is dyslexic. He gets the dosages wrong, and he has been barred from practicing at various hospitals. There are 20 malpractice suits against him. And the Missouri courts have said, you cannot participate in this procedure in Missouri. The federal government has now hired this doctor to advise and create its own protocols on lethal injection.

MS. REHM: Dudley Sharp.

MR. SHARP: Yeah. Medical professionals did a survey of 435 physicians, 19 percent of which said that they would be willing to participate in lethal injection, 19 percent. And it's an extraordinary high percentage.

And the reason they're not participating is the American Medical Association has told them ethically they can't, even though lethal injection is not a medical procedure and the execution of prisoners has no relation

whatsoever to do with patients. Even so, the AMA has banned physicians from participating in lethal injection. That's why they won't do it.

MS. REHM: So Stuart this whole issue of how people are put to death and whether there is pain and suffering is the narrow issue on which the Supreme Court is going to hear arguments, is that correct?

MR. TAYLOR: Right. That is correct. Now, I think it's probably likely that the four more liberal justices will say this should be struck down and maybe the four more conservative justices or some of them will say, no, it shouldn't. And it may be up to Justice Anthony Kennedy, the person in the middle. And so attitudes pro or con death penalty affect how receptive people are going to be to the kind of evidence that we've seen.

If you're of Dudley's view, you look at it one way, and it looks pretty thin. If you're of the anti-death penalty view you look at it another way and it looks overwhelming, and they're both honest positions. But I think this is an area where one's fundamental gut reaction to the death penalty tends to affect how you see every aspect of the argument.

MS. REHM: All right. It's time to open the phones (800)433-8850. First to Charlotte, North Carolina. Good morning, Tim, you're on the air.

TIM: Good morning, Diane. Thank you so much for taking my call.

MS. REHM: Certainly.

TIM: I have two quick points. My first point is this. My first question point is, I'm not an economist, I'm a layman, but as a layman it almost sounds absurd to me to try to quantify this whole notion of death penalty as a deterrent, like what actually happens in the mind of the criminal. Do they actually think -- stop and think, hey, this is going to cause me to get the death penalty, no, but this will be life in prison without parole. So, you know what, I'm actually not going to do that because I'll get the death penalty.

Does anyone actually think that this actually

happens in the minds of a criminal? That's my first point. And the second quick point, Diane is, if you compare our society to that of other industrialized nations, other European, Asian nations that are industrialized we are by far ahead of the pack when it comes to executions, when it comes to the death penalty. But, yet, we're also way ahead of the pack when it comes to violent crimes, egregious crimes. And so their state, their society is safer, ours is less safer, we have the death penalty. How can you justify that difference between these two societies and still have the death penalty in the U.S.?

MS. REHM: Tim, thanks for your call. What about that question? He says it's absurd to try to quantify this because you're assuming rational thinking on the part of someone who is about to kill someone else. Stuart Taylor

MR. TAYLOR: I think he makes a very good point. And I think in a typical murder, it's hard to imagine a rational thought process like this. Now, if you do a thought experiment, let's suppose that the death penalty were automatic for any homicide, no arguments, automatic; I think the contract killing business would begin to look a little less attractive to some people. I think armed robbers might, you know, who are rational actors sometimes might think twice before the pull the trigger.

However, because the death penalty is so rare, your chances of getting it are one in three hundred, if you commit a homicide, then it becomes more of a stretch to think that that rather small risk is going to influence people.

MS. REHM: At 27 before the hour, you're listening to *The Diane Rehm Show*.

And Dudley, the second part of his question was in relation to comparing the U.S. to other industrialized nations, both in terms of carrying out the death penalty and the rate of violence in this country. How do you respond?

MR. SHARP: Well, first of all, Europe, for instance, is very much against the death penalty. They just did a poll in Europe regarding the execution of Saddam Hussein in December of 2006. And the majority of Europeans in fact, did support the execution of Saddam Hussein.

So it really isn't a moral issue between the two countries -- I mean, between the two groups, because a majority of people under some circumstances do support the death penalty. This also goes to Stuart's 65 percent of support for executions in the United States. At that same time, if you ask somebody if they morally supported the death penalty, 74 percent of Americans do.

And if you ask people about a specific crime such as terrorism -- or in Connecticut for example that recently executed serial rapist murderer Michael Ross, in New England, 85 percent of the citizens in Connecticut supported the execution of Michael Ross.

So I'm not sure about the -- necessarily the regional opposition to the death penalty in the United States based on specific crimes that are -- when committing capital murder that some people are in fact for it.

One other issue that's brought up about the rational actor. Certainly, not all murderers will be deterred, not all criminals are deterred. However, we know that criminals do care about consequences, that's why they try and get away with their crimes, and why they don't commit crimes under certain sets of circumstances because they know they would be caught.

It's not the fear of being caught that bothers criminals, it's the fear of being punished. And when you're looking at some criminals who are rational actors there is quite a bit of anecdotal evidence gathered by a number of people of criminals who have not murdered in certain states because they're death penalty states, and have gone to another state to commit a specific murder because it's a non-death penalty state. It's really --

MS. REHM: Virginia, do you want to comment?

MS. SLOAN: Yeah, I appreciate it. I think the people who do these studies have probably never met a criminal. I have been a criminal defense lawyer long ago in my career and I have to say that most of these crimes are crimes of passion, they are crimes of opportunity. They are not crimes of people who think rationally well. If I commit this crime I'm going to get this sentence or I'm going to get that sentence, or maybe I should go to

this other state where there is no death penalty. People who commit crimes do not think that way. And so I have to say that's another reason why these deterrent studies just simply are not -- they're inconclusive at best, and they just don't make any sense in the real world.

MS. REHM: Stuart Taylor.

MR. TAYLOR: You know, I think, I don't have a magic bullet to resolve that argument. I do -- you know, I think it's always a matter of degree. Most murderers may not be rational actors, some are. Those who are might or might not think of one in three hundred risk of getting the death penalty as something they should take into the calculation. If it was a one in two risk they'd be more likely to take it into their calculation.

Now, who of all people would Americans agree should be executed? I would say Osama Bin Laden, but that might result in more killings.

MS. REHM: And Saddam Hussein, does one understand the rationale for executing him?

MR. TAYLOR: I think it's -- you know, he is thought of as a monster who caused many deaths, sure.

MS. REHM: Stuart Taylor, he is senior writer for *National Journal* magazine. When we come back, more of your questions, comments, stay with us.

(Intermission)

MS. REHM: And we're back talking about the ongoing debate over the death penalty. There is a case that the Supreme Court will consider this term as to whether the death penalty constitutes cruel and unusual punishment.

Here is an e-mail from Victoria in Rochester, New York. She says, "If the death penalty were a good deterrent then it would seem to follow that murder rates in Texas, the state that executes far more people than any other, or all others combined, should be by far the lowest in the country. In fact, Texas doesn't even rank in the lower half. And extending the argument, countries that don't have the death penalty should have murder rates far

in excess of the U.S. and they do not." Dudley.

MR. SHARP: Well, that's untrue. Obviously countries like South Africa and Mexico, they don't have the death penalty, have extraordinarily high violent crime and murder rates, and a country that probably more consistently applies to the death penalty than any others, Singapore is by far one of the most peaceful countries in the world.

But you don't measure -- and this is where some people misunderstand, you don't measure deterrence just by looking at murder rates and execution rates. You can have higher murder rates, for instance, Detroit, I think has the highest murder rate in the nation and that's a non-death penalty city and a non-death penalty state.

And then you've got New Orleans which is a death penalty state that has extraordinarily high murder rates and Delaware which is a death penalty state has extraordinarily low murder rates. And it goes like that from state to state, and from country to country around the world. There is many factors involved in measuring deterrence.

MS. REHM: All right.

MR. SHARP: And so you can't just measure it that way, that's not how it's done.

MS. REHM: Stuart.

MR. TAYLOR: I think there is a huge host of demographic and cultural factors that influence what death penalty rates are from place to place, and from time to time, death penalty -- you know, murder rates I'm sorry. And that's why the deterrence argument is a complicated one. It would be easy to decide whether or not there is deterrence if you could just say, well, the murder rate in Texas is high, and they have the death penalty, therefore no deterrence, that's much more complicated than that. And I think Dudley made some valid points. I think the caller made some valid points, but the argument -- that's why we have economists doing statistical studies.

MS. REHM: Virginia.

MS. SLOAN: Well, I think that for all the

factors that Dudley and Stuart have both raised, those are the reasons or some of the reasons why the people who say there is no deterrent effect or that one cannot be proven it's all of those complicated factors coming together that do not allow for a definitive conclusion in this case.

And we also have to look at the fact that because there is such a limited sample of people who are convicted of capital crimes and sentenced to death, that also will affect whether you can come to a valid conclusion.

MS. REHM: All right. Let's get a first person account from Paul in Fort Worth, Texas, good morning, you're on the air.

PAUL: Good morning, Diane. Thank you for having me on.

MS. REHM: Certainly.

PAUL: I have a couple of comments from two standpoints. One, as a psychologist, I want to say that it is so true that the number of people involved in these studies are so small and the confounding variables are so many that to even discuss statistics and the effectiveness of the death penalty is an absurdity, and really a big lie that is used on both sides, because statistics is just not relevant.

Second thing I want to comment on, as a victim of - my bother having been murdered many years ago, they did capture the man, it was a mugging and brutal murder. They captured the man and he was sentenced to life imprisonment, and I just want to say as a victim, since the other gentleman is a victims' advocate, that I think that the family members who are not supportive of the death penalty tend to be quieter people who are content for the most part, many of them, with life imprisonment and things like that.

I think the people who want revenge for some reason are more vocal about this. And I don't know how a nation that defines itself as predominantly Christian can testify the idea of capital punishment, of murder like this. I don't understand that.

MS. REHM: Paul, first of all I'm so sorry about

your brother and --

PAUL: Thank you.

MS. REHM: -- cannot even imagine the pain you must have felt when he was killed.

Do you agree, Virginia, that those who are seeking revenge as opposed to those who are opposed to the death penalty, do you see those in two camps in the same way that Paul does, that those who are opposed are quieter people, and those who are seeking revenge speak out in favor?

MS. SLOAN: Well, first let me say that I cannot begin to imagine what it's like to have a loved one murdered.

MS. REHM: Indeed.

MS. SLOAN: And so I speak from that perspective. But I don't think it's so easily quantifiable. Anyone who has a family member murdered is going to want revenge. And that's why we don't let the victims and their families impose the sentences. We let that be done by neutral and independent body, but --

MS. REHM: But at the same time Paul certainly implies that as a psychologist he sees no justification even though he is a relative of someone who was murdered.

MS. SLOAN: Yes. And I think that there are many people in this country, there is Murder Victims' Families for Human Rights, that is an organization that opposes the death penalty. And I think that they believe that for a whole host of reasons the death penalty doesn't work, isn't right, and that there are other alternatives that work just as well to attain justice --

MS. REHM: Dudley, do you want to comment?

MR. SHARP: Yeah. First of all Paul, I'm terribly sorry about the murder of your bother, and my heart goes out to you and your family. Regarding revenge, I completely agree that the system that we have setup now doesn't allow for revenge. It really doesn't matter totally, unfortunately, what the victim's survivors may

want in these cases.

The prosecutors are going to make a decision based on the case facts and decide whether to seek the death penalty or not seek the death penalty in any particular death penalty eligible case, and that's why the immediate family members are excluded, because they want it to be a justice decision not a revenge decision.

Regarding deterrence, I don't think you can so easily dismiss the statistical studies. They range over a long period of time, take in an extraordinary number of factors, and the thing that's a little unusual about them is that these 12 studies were all done by different groups with different methodologies. And they all came up with the same result. And it should not be that surprising.

And the reason that is is because there is not a prospect for a negative consequence that doesn't deter some people. And all deterrence is about is deterring some people, not all people, not a majority, but just some. And if you are undecided whether it does or it does not then it seems to me to be a fairly simple solution and that is that you do execute, why because it might deter. If you execute and it doesn't deter you prevent a murderer from ever harming again because they're dead.

MS. REHM: Stuart.

MR. SHARP: If you fail to execute them and it does deter, you are knowingly sacrificing --

MR. TAYLOR: Can I beak in Dudley?

MS. REHM: Sure.

MR. SHARP: Yeah.

MR. TAYLOR: Yeah. I think there is certainly something to that. But I think the arguments end up being inconclusive. I'm not sure how conclusive Dudley thinks they are on deterrence. I think probably if you took a meter on who opposes the death penalty and who supported it a kind of a gut feeling in favor of what's called retributive justice would be on the high side with those who support the death penalty, and that's closely related to revenge. The legal system is a substitute for private

vengeance.

There are lot of people who believe in good faith that if you kill somebody, particularly in certain circumstances, a horrible murder, you deserve to die. Some people believe that, some people don't. I think that's probably the biggest difference we have.

MS. REHM: Virginia.

MS. SLOAN: One thing that we haven't really discussed this morning, and it does affect the deterrence argument is the extent to which the system is getting it wrong. And the extent to which the death penalty system is, by virtue of its extraordinary cost, really bringing the entire criminal justice system down.

There are -- there have been 124 people who've been exonerated and released from the death row because we didn't get it right. *The Washington Post*, and *60 Minutes* just did a stunning series about a bullet analysis that the FBI has been using for years to help convict people that has now been discovered to be junk science. How many people are on death row or in prison because of this junk science?

We have to understand when we're talking about revenge, when we're talking about deterrence that we are getting it wrong in too many cases.

MS. REHM: And a caller in Cleveland, Ohio. Good morning, Michael.

MICHAEL: Good morning, Diane. Thank you for taking my call.

MS. REHM: Sure.

MICHAEL: I simply -- I mean, I think it's great to have a discussion about how we execute people, and whether it's cruel and unusual, and whether they're -- you know, the death penalties are deterrent. But quite frankly, I think the discussion should be more about whether or not we're putting truly the guilty to death, because I think the death penalty is here to stay. The overwhelming majority of people agree that the death penalty in the United States should stay.

However, projects like the Innocence Project have shown that we are putting innocent people, are subjecting them to the death penalty. And I think the burden of proof which is beyond a reasonable doubt is not working well enough for the -- to put somebody to death. I think the -- with our scientific abilities now we should be able to get closer to absolute certainty, and I don't think the burden of proof beyond a reasonable doubt comes even close to absolute certainty.

MS. REHM: Virginia.

MS. SLOAN: Well, let me just comment on one thing you said, that there will never be -- we will never be capable of absolute certainty, DNA or biological evidence is only available in about 10 percent of criminal cases. And --

MS. REHM: And why is that?

MS. SLOAN: Because there may be no biological evidence that was left at the scene. In a rape case obviously there is semen or the like. There may be blood that's been left at the scene. But in a lot of cases there is none of that. And so you don't -- you're not going to have that kind of absolute certainty that DNA evidence may provide.

But the DNA exonerations have highlighted the flaws in the system resulting from eyewitness testimony, from snitch testimony, from problems with forensic labs with the terrible state of counsel in these cases, a whole host of problems in cases where there isn't forensic evidence. So I don't think we are ever going to be capable of absolute certainty.

MS. REHM: Stuart.

MR. TAYLOR: I think Michael makes a good case that beyond a reasonable doubt -- has enough reasonable doubt -- has enough doubt involved in it to leave us nervous when it's the death penalty. You could make a case for saying it has to be a mathematical certainty. Now, the courts are not going to do that because you can also slice burdens of proof so fine.

But I think there are more and people who in the abstract may support the death penalty, who sit in as a juror may think, well, I'm sure enough to convict this guy, but I'm not quite there in terms of executing him, and that may account for the decline in death sentences.

MS. REHM: At seven minutes before the hour you're listening to *The Diane Rehm Show*.

And here is an e-mail from Bill in Middletown, Connecticut. He says, "I'd like to hear your guest talk about two things, the inherent cost of the death penalty despite people thinking it's cheaper than imprisonment. And two, the use of the death penalty in extracting a plea bargain. An innocent person may well agree to plead guilty and accept a prison sentence giving up the right to appeal if prosecutors take the death penalty off the table thinking well, at least I'll be alive." Stuart.

MR. TAYLOR: Let me talk to the plea bargain question, because I wrote a long story about a man on death row named Lloyd Schlup, who I thought might well have been innocent, and his case went to the Supreme Court and went back.

Ultimately, his conviction -- his sentence was overturned, and the choice was put to him, you can take a sentence of life without parole, or we will put you on trial again and maybe you'll get the death penalty again. He took life without parole, but his lawyer still insists -- and so he pled guilty. His lawyer still insists he did not do it. And I think there is a strong case there.

MS. REHM: What about the whole question of the cost of the death penalty, Virginia?

MS. SLOAN: Well, I don't think there is any doubt that the death penalty is so much more expensive than any other method of punishment that stems from the cost of keeping somebody on death row and also from the protections that the system has built in, that I think are certainly not sufficient, but there are levels of review in a capital case that don't occur in non-capital cases, and it makes the system extraordinarily expensive. Also the counsel system that is supposed to be in place makes it more expensive.

MS. REHM: Give me an estimate of cost.

MS. SLOAN: I have some figures here somewhere which I can try to find.

MS. REHM: Ranging from --

MS. SLOAN: Millions of dollars more for capital cases that for say, life without possibility of parole to keep --

MS. REHM: And is that consistent, Stuart?

MR. TAYLOR: Well, I think it does. You know, to -- you know, let's say \$40,000 a year to keep a prisoner in prison, 40 years in prison that's \$1.5 million, \$1.6 million. You know, the lawyering in the Duke Lacrosse case which was not a capital case cost more than \$3 million all by itself. And so, if you have really good defense lawyering then the prosecution is going to have to spend more to counter it on mitigation and aggravation, and it does mount up. It's easy to get \$1 million, \$2 million or even more.

MS. REHM: Will the Supreme Court overtly take into account the question of morality, Stuart?

MR. TAYLOR: Two justices, William Brennan and Thurgood Marshall always did, for most of their career, said it's always immoral, we don't care about deterrence, it's always immoral, and at the end Harry Blackman took the same position famously saying, "I shall no longer tinker with the machinery of death."

MS. REHM: Stuart Taylor is senior writer with *National Journal* magazine. He is coauthor with KC Johnson of *Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case*.

Dudley Sharp is a death penalty and victims' rights advocate.

Virginia Sloan, president of the Constitution Project.

Thank you all so much.

MS. SLOAN: Thank you.

MR. TAYLOR: Thank you.

MS. REHM: And thanks for listening everybody.
I'm Diane Rehm.

SPEAKER: *The Diane Rehm Show* is produced by Sandra Pinkard, Nancy Robertson, Jonathan Smith, Tanya Weinberg, and Emmanuel Touhey. The engineer is Toby Schreiner. Dorie Anisman answers the phones.

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