

Testimony in Support of Senate Bill 1035 and House Bill 6425

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My name is John Donohue, and I am currently the C. Wendell and Edith M. Carlsmith Professor of Law at Stanford Law School. From 2004 to 2010 I was the Leighton Homer Surbeck Professor of Law at Yale Law School, and I received my PhD in economics from Yale and my law degree from Harvard. I have published extensively on capital punishment, specifically the claimed deterrent effects of the death penalty and the operation of Connecticut death penalty system.

In 1975, Isaac Ehrlich launched the modern econometric evaluation of the impact of the death penalty on the prevalence of murder with a controversial paper that concluded that each execution would lead to eight fewer homicides (Ehrlich 1975). A year later, the Supreme Court cited Ehrlich's work in issuing an opinion ending the execution moratorium that had started with the 1972 decision in *Furman v. Georgia*. Today it is widely recognized that Ehrlich's national time-series methodology is too unreliable to be published in any economics journal.

Over the last few years, a number of highly technical papers have purported to revive the now-discredited Ehrlich finding, again claiming that the death penalty is indeed a deterrent. This work has fared no better than Ehrlich's. In articles published in the Stanford Law Review and the American Law and Economics Review, Justin Wolfers of Wharton and I have reviewed all of these studies in exhaustive and minute detail and found that there is not the slightest credible empirical support for the proposition that the death penalty is a deterrent to murder.

The problems with these studies are abundant. Some are rife with coding errors and overstatements of statistical significance, or are not robust to small changes in data periods, functional form, or control variables. Others are built on faulty or highly-selective data sets, false claims about which regressions are run, and the mis-use of instrumental variables estimation - a sophisticated econometric technique. Even small mis-specifications in this technique can yield extremely misleading results.

I have shown that with the most minor tweaking of the instruments used in these deterrence studies, one can get estimates ranging from 429 lives saved per execution to 86 lives lost. These numbers are outside the bounds of credibility. With roughly 1000 executions over the last 25 years, if we had saved 429,000 lives (against an actual murder toll of roughly 500,000 over that period), the impact of the death penalty would leap out of the data. Murders would have plummeted in death penalty states compared to non-death penalty states, or in the United States, compared with non-executing Canada. Of course none of that happened. Murder rates moved similarly in the US and Canada even when the US resumed executions and Canada did not. Within the US, murder rates have followed similar patterns in the states that have never had capital punishment before or after 1972 compared with the states that resumed executions after

the 1972 judicially imposed moratorium.

This academic dispute was referenced by the U.S. Supreme Court in the 2008 death penalty decision in *Baze v. Rees*. In *Baze*, Justice Stevens cited Donohue and Wolfers (2005) and others to justify the claim that “there remains no reliable statistical evidence that capital punishment in fact deters potential offenders.” Justice Scalia responded to Stevens by saying that his conclusions “are not supported by the available data.” In support of his in my mind unsubstantiated view, Justice Scalia cited only a single article written by two law professors with no empirical training: Cass Sunstein and Adrian Vermuele. Sunstein quickly responded to Scalia’s citation, indicating in a short piece with Justin Wolfers that his views had evolved: “In short, the best reading of the accumulated data is that they do not establish a deterrent effect of the death penalty” (Sunstein and Wolfers 2008). In other words, the sole authority that Scalia relied upon in support of the deterrence argument has now retracted his former support for that position.

Note that even if someone were to amass evidence of deterrence from U.S. data, which has yet to be done despite many dedicated attempts to do so, this evidence would certainly not pertain to the Connecticut death penalty system, which all concede is used far too sparingly and for too limited a class of defendants to influence criminal conduct. Michael Radelet has written that if one includes the former slave state of Missouri, then “91 percent of the *nonconsensual* executions in the United States have been in the South” between 1972 and 2007 (“consensual” refers to those on death row who refuse to contest their execution; for example, the lone execution in Connecticut in the modern era came after Michael Ross’s decade of pleas to be executed were finally granted in 2005). Connecticut is simply not Texas or Louisiana or Mississippi, and it likely will never seek to mimic their patterns of executions.

As we confront the reality that the Connecticut death penalty has not and never will have a deterrent effect on murder, it is important to note that it is nonetheless an immensely costly system to operate. The Connecticut Commission on the Death Penalty has documented the considerably higher expenses associated with capital cases at every phase of the criminal justice process from the selection of jurors, the conduct of the trial and appeals, through post-conviction proceedings, and including the costs of maintaining death row facilities. In 2009 the Office of Fiscal Analysis estimated these costs at \$4 million annually above the cost of life imprisonment without the possibility of release. Cost studies in other states have shown the death penalty to be anywhere from 50% to ten times more expensive than life imprisonment. Without these added expenditures the cost of the death penalty in terms of executing the innocent would be intolerable, for as Radelet notes, “Since *Furman*, more than 125 inmates have been released from America’s death rows because of doubts about their guilt.”

My own research suggests that if one were interested in reducing the number of murders -- as well as other crimes -- it would be rational to eliminate the death penalty and direct the saved resources to hiring more police officers. Unlike capital punishment, the police have been shown to be a cost effective avenue to lower crime costs, including murders. In light of this evidence, it is imprudent to spend millions on a process with no demonstrated value that is marred by racial inequities and that creates at least some risk of executing innocents when other proven crime-fighting measures exist.