



The public radio show about law and American life

Justice Talking Radio Transcript

The Death Penalty: Is Justice Being Served?—Air Date: 3/26/07

First used in Texas in 1982, lethal injection is the method of execution now authorized in 37 of the 38 states that have the death penalty. But the recent botched execution of Angel Nieves Diaz in Florida raises new questions of whether the method violates the Eighth Amendment's prohibition against cruel and unusual punishment. Join us on this edition of Justice Talking as we take a new look at capital punishment and ask age-old questions about whether the death penalty is appropriate retribution for heinous crimes, whether it deters criminal activity and whether it can be administered in a fair and humane way.

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MARGOT ADLER: This is Justice Talking, the public radio show about law and American life. I'm Margot Adler. On today's show we'll look at the death penalty and how it's used in America and why some states are changing their use of capital punishment. We'll look at how lethal injection, once thought to be the most humane form of carrying out the death penalty, may not be as humane as once thought, depending on where it's taking place or who is doing the killing. We'll talk about why there is a disproportionate number of black men on death row. And I'll talk with a former prisoner who spent more than a decade living his days on Pennsylvania's death row.

But first, lawmakers in New Jersey are considering legislation that would abolish the death penalty. Governor John Corzine says he would sign the bill into law, but some New Jersey residents are afraid of what that would mean for the nine men currently on the state's death row. Reporter Brad Linder has this story.

BRAD LINDER: The State of New Jersey has not executed anybody since 1963 and despite the fact that hundreds of people are murdered in New Jersey every year, only nine men are currently facing death sentences. In January a state commission found that New Jersey's death penalty is

unevenly applied, expensive, and unnecessary. The commission recommended abolishing the death penalty. And State Senator Shirley Turner has introduced a bill that would do just that.

SHIRLEY TURNER: What do we gain as a result of putting someone to death? It doesn't bring the person that they murdered back. It just brings us as a state down to their level. There's no human decency or civilization if you believe "an eye for an eye and a tooth for a tooth." I think we've long passed those days of barbarism.

BRAD LINDER: Turner says it costs more to keep a prisoner on death row than to keep him in prison for life. That's not just from the costly appeals process. It's also expensive to keep death row inmates isolated from other prisoners. New Jersey's current death penalty law has been on the books since 1982. Dale Jones is assistant public defender for the State of New Jersey. For 20 years he headed up the office's capital litigation. And he says there is no evidence that the death penalty has reduced violent crime.

DALE JONES: You've got 25 years of proof that the death penalty serves no legitimate public purpose. I mean it's a demonstratively failed public policy in all respects whether you're looking at costs, whether you're looking at deterrents. There's no aspect of it that shows that it's succeeded in any way, shape, or form as a public policy.

BRAD LINDER: If New Jersey's death penalty law is repealed, the toughest sentence defendants in murder cases could get would be life without parole. But what does that mean for the nine men currently on death row? Trial lawyer and death penalty supporter Brian Kincaid says they could become eligible for parole.

BRIAN KINCAID: You have to resentence people to the statute that was in existence at the time of the crime. Otherwise it's unconstitutional. So in other words, nobody on death row in New Jersey could be sentenced to life without parole.

BRAD LINDER: Assistant Public Defender Dale Jones says even after resentencing, none of the men on death row would be eligible for parole before 2036. And many would face additional charges for crimes in other states or crimes for which they weren't already sentenced, including rape, kidnapping, or burglary.

DALE JONES: The people that are on death row now are going to die in prison. There's no question about it. That's where they are now. That's where they're going to stay. That's where they are going to die.

BRAD LINDER: Jones also points out that even if a former death row inmate becomes eligible for parole, that person will still need to go through a parole hearing and may not be released. But some people aren't ready to take Jones' word for it. Sharon Hazard-Johnson's parents were murdered by Brian Wakefield in 2001. Wakefield broke into her parents' home in the Jersey Shore town of Pleasantville. He had planned to rob them and ended up murdering Richard and Shirley Hazard and setting the house on fire. Sharon Hazard-Johnson doesn't want to take the risk that her parents' killer will ever be released.

SHARON HAZARD-JOHNSON: If he's 99 and he gets out, it's not right. They've already committed the act. They've committed an irreversible act.

BRAD LINDER: Hazard-Johnson and her four siblings decided shortly after their parents' murder that they all supported the death penalty for Brian Wakefield. She says her parents never received a second chance and neither should Wakefield.

SHARON HAZARD-JOHNSON: I wish there was some way that my parents could come back. If they could come back I would say let Wakefield, you know, you want to give him a chance? Then give him a chance. He can't bring them back. Nobody can bring them back. God can't bring them back. They'll never come back. And will I ever see them again? I was just thinking that the other day. All of a sudden they're just gone.

BRAD LINDER: Johnson and family members of other victims are working with attorney Brian Kincaid to put pressure on lawmakers not to repeal the death penalty. Kincaid says the fate of the nine men on death row in New Jersey rests with the legislature. And he's willing to apply political pressure. He points out that Megan Kanka was from New Jersey. When Kanka was seven years old she was raped and murdered. Now states across the country have sex offender registration laws that are commonly referred to as "Megan's Laws." Megan Kanka's killer is on death row. And Kincaid says that is something voters should think about.

BRIAN KINCAID: I sure wouldn't want to be in Megan Kanka--the assembly person in Megan Kanka's district and have a placard on every card in Megan Kanka's district saying, this person voted to let Megan Kanka's killer off of death row, which maybe we're not beyond doing.

BRAD LINDER: State Senator Shirley Turner is confident that she's got more than enough votes to pass her bill. But she says it's unlikely that it will come up for a vote until after the November election, thus avoiding any pressure Kincaid or others could apply.

SHIRLEY TURNER: This year we have the entire legislature up for re-election and I don't think any legislator is looking for controversy. And of course when you talk about the death penalty there's a lot of emotion and also a lot of controversy. And there are those people who believe that they may be perceived to be soft on crime if they're not for the death penalty.

BRAD LINDER: Turner says she's not worried that any of the men on death row would be released if her bill passes. Her main priority is ensuring that New Jersey never executes an innocent person. For Justice Talking, I'm Brad Linder.

MARGOT ADLER: We just heard about how New Jersey is considering abolishing the death penalty. To get an update on what other states are thinking about the death penalty I talked with John Blume. He's a law professor at Cornell University and was one of the founders of Cornell's Death Penalty Project, a group that provides legal information and assistance to students and lawyers working on death penalty cases.

Welcome to the show, John.

JOHN BLUME: Thank you for having me.

MARGOT ADLER: So it seems that some legislatures want to scale back and others that haven't had the death penalty in years are reconsidering it. Tell us what's happening around the country with the death penalty.

JOHN BLUME: A main trend that we've seen over the last few years is a substantial reduction in the number of death sentences imposed and a substantial reduction in the number of actual executions. In addition to that there has been a great deal of legislative activity. Primarily on scaling back the death penalty or primarily in states that want to either have moratoriums or study commissions. Or states where there appear to be substantial steps towards abolition in the death penalty totally or in the reduction of the number of capital crimes. On the other hand there has been some movement in the other direction, in that, for example, some states have recently enacted statutes which would make a person who rapes a child or commits a sexual assault on a child eligible for capital punishment.

MARGOT ADLER: In what regions of the country do most executions take place?

JOHN BLUME: It is overwhelmingly but not exclusively a southern phenomenon.

MARGOT ADLER: And why do you think the South is so over-represented?

JOHN BLUME: Well, it has its roots in the history of racial discord in the South and capital punishment was historically a tool of social control in the United States. It was a tool of social control of white slave owners against African-American slaves. I think that in combination with the fact that the South is more conservative religiously and thus you have more fundamentalist Christians and so there's more of an "eye for an eye and a tooth for a tooth" mentality in the South. And I think it's the combination of those two things.

MARGOT ADLER: And what's the racial and gender makeup of people sentenced to death?

JOHN BLUME: Well, the gender makeup is overwhelmingly male. I think it's about 97 percent or more of the people that are on death row are males. The racial composition is it's approximately 57 percent Caucasian, approximately 34 percent African-American, and then 11 percent are essentially given an "other" classification, but that's primarily Hispanics and Asians.

MARGOT ADLER: Twenty years ago the conventional wisdom was that support for the death penalty waxed and waned with the crime rate and at that point I remember with high crime, even many liberal Democratic politicians supported the death penalty. It was considered political suicide not to. Public support for capital punishment is somewhat lower now. What factors do you think contribute to public opinion on the death penalty?

JOHN BLUME: I think there are a number of factors. As you suggest, crime rates is a big one. There's no question about that. We've had a lower violent crime rate in recent years and a lower

murder rate in recent years. And I think that does attribute in part to decreased support for capital punishment. I think that dovetails, though, with another development, which has been taking place over recent years, and that is that the alternative punishment to the death penalty in almost all jurisdictions now is life without the possibility of parole. And as people have come to believe that, I think that's played another factor in decreased support for the death penalty. And then I think the third factor in all this is that the number of exonerations has made some people uncomfortable with capital punishment.

MARGOT ADLER: We're going to talk later in the show about how the Supreme Court has treated cases involving the death penalty. We've recently seen rulings about exempting the mentally retarded, exempting juveniles. What kind of cases do you see coming down the line challenging the death penalty?

JOHN BLUME: I think probably the next big issue, or the big issue lurking, in the area of categorical exemptions for capital punishment is the question of the propriety of the death penalty for people who are severely mentally ill. There is legislation pending in a number of jurisdictions which would essentially exempt people who are severely mentally ill from the death penalty. The ABA recently had a task force on capital punishment and mental illness, which came out with a recommendation supporting the exemption of people with severe mental illness from capital punishment. And so I think that is probably the next frontier. It's probably some period of time away but I think that's a logical extension of the Supreme Court's decision in Atkins, which said people with mental retardation can't be executed, and Roper, which said that people--juveniles can't be executed.

MARGOT ADLER: Thank you so much for talking with us, John.

JOHN BLUME: Thank you for having me.

MARGOT ADLER: John Blume is one of the founders of Cornell's Death Penalty Project. It's a group that provides legal information and research, and assists students and lawyers working on the death penalty.

MARGOT ADLER: Coming up on Justice Talking: Is lethal injection the best way for states to carry out the death penalty?

UNIDENTIFIED MALE: States shouldn't be fiddling around with human life in the dark and with people who have no training. That's the present system.

UNIDENTIFIED MALE: The procedure by which we execute those whom we detest, the worst of our worst, whom we rightfully hate and despise, should not at all resemble the procedures in a hospice by which we say goodbye to those whom we love.

MARGOT ADLER: Lethal injection and whether a painful death for someone who has been sentenced to die is ever okay. Stay with us.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. We're talking about the death penalty. Throughout our history our country has grappled with the morality of the death penalty. The debate is two-fold: whether we should use capital punishment and what method should be used to carry out an execution. Today most states that have the death penalty use lethal injection.

To talk with me about the history and practice of lethal injection is Deborah Denno. She's a law professor at Fordham University in New York City and has written extensively on the death penalty. She's one of the country's leading experts on lethal injection. Welcome to Justice Talking, Deborah.

DEBORAH DENNO: Thank you.

MARGOT ADLER: I know that lethal injection is used in most states. But in others prisoners can choose the way they are put to death. How does this work?

DEBORAH DENNO: Their choices are between lethal injection and electrocution or hanging or a firing squad or lethal gas.

MARGOT ADLER: And do prisoners ever do this? In other words, choose something other than lethal injection?

DEBORAH DENNO: They do. And this has been a recent development. In the last year and the year before there have been cases where prisoners instead of choosing lethal injection have chosen electrocution.

MARGOT ADLER: And why is this?

DEBORAH DENNO: Well it says something about the state of lethal injection these days. Prisoners, or some prisoners, now think that lethal injection is more inhumane than electrocution. So electrocution to them is the better option.

MARGOT ADLER: When did the states that allow the death penalty begin using lethal injection?

DEBORAH DENNO: Lethal injection was enacted in this country in 1977. However, it wasn't first used until 1982.

MARGOT ADLER: Now, the U.S. has explored many different execution methods in an attempt to find the most humane way of killing a prisoner. Tell us a little bit about some of these different methods and some of the concerns that people raised about each of the methods.

DEBORAH DENNO: Well all the modern methods of execution that the United States has considered are still viable today. Basically the United States started with hanging. That was the

predominant form of execution, but there were a lot of problems with hanging. Large crowds, in some cases 30 or 40 thousand people were attending these public hangings. And it seemed to be very troublesome to the politicians in some states, one state in particular being New York.

MARGOT ADLER: And when did notions of appropriate pain and suffering change?

DEBORAH DENNO: Well they started to change in 1888 when the governor of New York started to become interested in looking for another form of execution, and he appointed a commission of three people who spent over a year looking at every execution method that had ever been used in the entire world. And they started dwindling them down and ultimately picked electrocution.

MARGOT ADLER: Now, if we look at the electric chair, what are some of the concerns that have been expressed about using that form of execution?

DEBORAH DENNO: Well the first electrocution execution was in 1890 and what happened in that execution happens in executions today. There was a faulty problem with the chair. The inmate didn't seem to get enough electricity and seemed to die very slowly. He started bleeding. He started--parts of his body started burning.

MARGOT ADLER: Let's take another example. What about the gas chamber? That's certainly what I remember growing up in the '50s and '60s.

DEBORAH DENNO: Well the gas chamber was enacted in 1921 in this country in the state of Nevada. It too, like electrocution and like all the modern methods of execution, was prompted by a concern for humaneness for the inmate. And the 1921 statute in Nevada actually says that lethal gas will be released at an unknown time when the inmate was sleeping. They found out later, however, that that certainly was going to be an impossible task, in which case the gas chamber was created. But from the very start it had horrific consequences and stopped being used after just a few years.

MARGOT ADLER: Are there any methods of execution that the Supreme Court has ruled are unconstitutional because the method was cruel and unusual punishment?

DEBORAH DENNO: The United States Supreme Court has never ruled that any method of execution is unconstitutional. Indeed the court really hasn't even held or evaluated a method of execution in any kind of detail.

MARGOT ADLER: Do you have any sense of how this argument over lethal injection is going to go forward in the next years?

DEBORAH DENNO: I think the biggest problem with lethal injection is something that we've seen recently, and that is that the best people to perform an execution are the very ones professionally who can't do it and that's anesthesiologists. There has been a growing trend recently of a couple of states--and I think this is going to become more pronounced--holding that

their medical societies will not allow anesthesiologists or any doctor to perform these executions. And that they will punish a doctor for doing so.

MARGOT ADLER: And that's because, I assume, it violates the Hippocratic oath, which is "to do no harm."

DEBORAH DENNO: That's right. It's a violation of the Hippocratic oath. Now, technically speaking, the Hippocratic oath is not a legal document. It's not something that a doctor is bound to except for that doctor's professional and moral beliefs. And there have been surveys showing that doctors would be very willing to perform executions.

MARGOT ADLER: Really?

DEBORAH DENNO: That's right. It's simply only recently become a legal issue that doctors would be punished for doing so, or a more professional medical issue.

MARGOT ADLER: Deborah Denno is a law professor at Fordham University in New York City. To hear more of our conversation, visit our website, justicetalking.org. Thank you for talking with me.

DEBORAH DENNO: Okay, you're welcome.

MARGOT ADLER: Recently the media have reported on problems with the way lethal injections are being done and whether prisoners are being subjected to unnecessary pain and suffering during executions.

To debate the ethics of lethal injection I'm joined by two people who have very different ideas about the death penalty. Robert Blecker is a law professor at New York Law School. He is a proponent of the death penalty as a form of retribution. Richard Dieter is the executive director of the Death Penalty Information Center, an advocacy group that works to oppose the death penalty. Welcome both of you.

RICHARD DIETER: Thank you.

ROBERT BLECKER: Hi Margot. Thank you.

MARGOT ADLER: Richard, tell us why lethal injection is at the foreground of a national conversation right now.

RICHARD DIETER: Well, the issue is the human dignity in which we treat our fellow citizens under the Eighth Amendment and there are restrictions on how we can punish. And apparently the current method of lethal injection imposes enormous risks of extreme pain, unnecessary pain. And if that's the case it's not allowed under the Constitution and so states are going to have to

modify that method, not necessarily throw out the whole lethal injection, but change it in some way.

MARGOT ADLER: Robert, I've heard that you want to broaden this conversation about methods of execution like lethal injection to focus on what level of pain is justified in executing someone on death row. How would you frame the conversation?

ROBERT BLECKER: Well human dignity is an issue that the abolitionists generally claim for themselves but we who support the death penalty claim that sometimes, but only sometimes, it's the only dignified response. In terms of whether lethal injection is painful and therefore unconstitutional, the United States Supreme Court has never held, of course, that the punishment must be painless. It couldn't and shouldn't and wouldn't because punishment in its very essence encompasses pain. The question is whether it passes a threshold of pain that thereby makes it unconstitutional. The Supreme Court has held that what we may not impose is a lingering death. My view is that some people who deserve to die, not everyone, but some people who deserve to die, deserve a quick but painful death. Not torture, which unquestionably violates the Eighth Amendment.

MARGOT ADLER: Recent articles have exposed the circumstances in which some states use untrained people to give lethal injections who really don't know what they're doing. Some people say that executions by lethal injections could be made more humane by having anesthesiologists administer the lethal drugs. Do you think, Richard, that a doctor should be present at every execution?

RICHARD DIETER: Well, you know, the states are the ones that chose this medical process. They got themselves into a quagmire I believe. They chose a method supposedly to make it easier and less painful for people to watch but they chose a medical procedure. The experts to carry out such a function are doctors. But doctors don't want to participate. So I don't think we should be forcing doctors into the execution chambers, no. But I do think that they are the experts and states shouldn't be fiddling around with human life in the dark and with people who have no training. That's the present system.

MARGOT ADLER: Robert, what do you think?

ROBERT BLECKER: I think we made a big mistake when we adopted lethal injection as our primary means of execution. And here Richard and I might occupy some common ground. The procedure by which we execute those whom we detest, the worst of our worst, whom we rightfully hate and despise, should not at all resemble the procedures in a hospice by which we say goodbye to those whom we love. It is, as he said, has become a medical procedure. There's no reason a priori why a doctor can't administer a lethal dose if he's not, or she, is not acting as a doctor. A doctor can act as a soldier and fire a gun. So I think we made a bad turn when we moved toward lethal injection. Doctors don't belong at--as a critical part of executions and execution procedures should not resemble hospitals. We should execute. We should punish in a way that it is clearly distinct from the way that we treat medically.

MARGOT ADLER: Richard, isn't the whole argument over the problems with lethal injection just another way to overturn our country's use of the death penalty?

RICHARD DIETER: Well, I don't think that's how it started. I think that this is a challenge brought by the defense attorneys based on recent science and they're following their ethical obligations to challenge the death penalty for their clients. This is not something that grew up out of the anti-death penalty movement. Not at all. I mean that--this is a secondary issue about which method you would use. But it has, I think, exposed the problem that, you know, taking human life is difficult. It's problematic. It causes more delay. And people are becoming frustrated with the death penalty not because they believe it's morally wrong but because it simply doesn't work.

MARGOT ADLER: Twenty years ago the discussion around the death penalty was does the death penalty deter crime? Now the conversation is much more about whether retribution is necessary and in fact a form of justice. Robert, I know that retribution is a word that you use a lot. Talk about it.

ROBERT BLECKER: First, as to deterrence, those who oppose the death penalty actually make the argument more difficult for themselves than they need to. The question is not whether the death penalty deters. Of course it deters some people and it won't deter others. The question is whether the death penalty deters more effectively than its principle alternative, life without parole. And there the most recent studies tend to indicate that it does, but there is a counter to those studies and some of them are getting pretty sophisticated, so that one can--reasonable minds can differ and say that the evidence is not there. But of course what is there is human nature. I do use retribution a lot because it's the only justification for the death penalty that I feel certain is right. First, don't confuse retribution with revenge. Although they have something in common, which is a painful response to past pain, they're very different. Revenge need not be limited in any way. It doesn't have to be proportional and it doesn't have to be directed appropriately at the target who deserves it. The past counts and it continues to count. And it counts in a way that will trump questions of costs and benefits, both financial costs and economic costs. You know, Richard Dieter says the death penalty doesn't work, that's the problem with it. Well, of course, why doesn't it? And he, by the way, he acknowledged that retribution is legitimate.

MARGOT ADLER: Well let me ask him right now. Richard, do you think that revenge and retribution are the same thing or different?

RICHARD DIETER: No, they are different things. Revenge can be, you know, sort of just the taking out of personal emotions. I think society can do retribution. And you could do it through torture. You could do it through, you know, lots of physical punishments far worse than the death penalty. You could do it through the death penalty or you could do it through life without parole. The question is what works best for society to make society safer?

MARGOT ADLER: Richard, right now there's not one justice on the Supreme Court who is 100 percent opposed to the death penalty. What does that mean for the future of the anti-death penalty movement?

RICHARD DIETER: Well in fact we don't know that. What justices do is interpret the Constitution and I think there's no justice who would interpret the Constitution presently to say the death penalty is unconstitutional. But there certainly are a lot more votes lately restricting the death penalty than expanding it, which was the practice in the 1990s and '80s. So we're seeing no juveniles can be executed, no people with mental retardation. The quality of defense has to be better. Prosecutors are not allowed to use race in selecting juries, you know, case after case. So I think there's reason to believe that the death penalty is certainly problematic in the eyes of the Supreme Court.

MARGOT ADLER: Robert, I was reading your bio. I noticed that you say that time and again the rich and powerful are given breaks that are denied to poor and powerless offenders. You say that you believe that more than half of those now on death row don't belong there, that the deck is stacked against the poor. If you believe this, how can you support the institution as it now is? And how would you change it to meet your standards?

ROBERT BLECKER: Well when I say that half of the people on death row don't belong there I'm not at all suggesting that they're innocent of the murders for which they've been convicted and sentenced to die. What I am suggesting is that they're not the worst of the worst. We have presently death row statutes which are overly inclusive. They include as aggravating circumstances circumstances that they ought not to include. But the aggravating circumstance that's got to be eliminated, the most class-based aggravating circumstance that we never think of as such, and actually it's the most race-based too, is the felony murder aggravator, specifically robbery. Those who kill in the course of a robbery where the robbery goes bad have unquestionably robbed for a pecuniary motive, but they may well not have killed from a pecuniary motive. And death row is populated by robber-murderers more than any other category, of robberies gone bad where the 7-Eleven store owner, say, grabs the shotgun, as he justifiably may or might in self defense, or the kid gets nervous, etc, etc. Robbery should not in and of itself be an aggravator. If we eliminated the robbery aggravator the racial disparity would drop enormously. The number of people on death row would drop. The costs of maintaining a death penalty system would drop. And most importantly we would come much more nearly toward doing justice in which we confine the death penalty to only the worst of the worst, or really the worst of the worst of the worst.

MARGOT ADLER: Richard, what do you think?

RICHARD DIETER: Well, I would have to agree with Professor Blecker on a lot of what he had to say. I think the death penalty is over-inclusive. It's arbitrary along factors that have nothing to do with the crime and the person who committed it. They have to do with how much resources they have for defending themselves, whether their victim was white--that's a death penalty case. If the victim is black: not so much. You know, and you can look at various crimes, people who have been serial killers, people who have been bombers and terrorists, who don't get the death penalty. And yet just the cases that Robert described do get the death penalty. There's, you know, the robbery gone bad. It's still a crime but hardly the worst of the worst. So the death penalty isn't achieving its number one goal and hasn't done so. I mean this was the problem that

the Supreme Court overturned it on in 1972 and it's still a problem today as I think both of us agree.

MARGOT ADLER: Thank you both for coming on Justice Talking.

ROBERT BLECKER: Thank you for having me, Margot.

RICHARD DIETER: Thank you.

MARGOT ADLER: Richard Dieter is the executive director of the Death Penalty Information Center, an anti-death penalty advocacy group. Robert Blecker is a law professor at New York Law School and a proponent of the death penalty.

MARGOT ADLER: Coming up on Justice Talking, we'll talk with an Alabama attorney who represents prisoners on death row. And we'll hear how DNA proved one man's innocence.

UNIDENTIFIED MALE: You know, here's somebody just booted in society like a homeless person. And, you know, you find your own place to stay.

MARGOT ADLER: Life after death row and how there's a disproportionate number of black men on death row. Stay with us.

MARGOT ADLER: This is Justice Talking, where we make the connection between law and American life. I'm Margot Adler. We're talking about the death penalty and how it's carried out in the United States. One of the objections raised to the death penalty is that it disproportionately affects minorities.

To learn more about the complicated issue of race and the death penalty I talked with Bryan Stevenson, the executive director of the Equal Justice Initiative of Alabama. He's an attorney who advocates for the poor and people of color in the criminal justice system. There are about 3,300 people on death row right now. I asked him what the racial makeup is of people currently on death row.

BRYAN STEVENSON: It disproportionately over-represents people of color; about half of the people under sentence of death are racial minorities, the largest racial minority group being African-Americans.

MARGOT ADLER: Your organization is located in Alabama. That state, I've heard, has the highest rate of execution in the country. I always thought that was Texas.

BRYAN STEVENSON: Well it's on a per capita basis. Texas executes a lot more people than we do here in Alabama. What actually happens here is that we sentence more people to death

per capita than any other state. You know, when you adjust for population size there are some surprising states that emerge as some of the biggest users of capital punishment, states like Alabama, and places like Delaware even, get to the top of that list.

MARGOT ADLER: And why Alabama? Why do you think that there is such a high rate in Alabama?

BRYAN STEVENSON: Well I think that we have several components to our statute that increases the number of people who end up sentenced to death. We're the only state in the country that allows our elected trial judges to override a jury's verdict of life. So about 23 percent of the people on our death row actually got life verdicts from juries that were overridden by our elected trial judges who imposed the death penalty. I think that fact and the absence of any kind of indigent defense system is the biggest contributor to our high death rate. We're one of the few states that have no public defender system. About two-thirds of the people on our death row were sentenced to death after being represented by appointed lawyers who by law could not be paid more than \$1,000 for the representation that they provided out of court.

MARGOT ADLER: I've read that someone is much more likely to be sentenced if the murder victim is white. Is this true? If so, tell me why.

BRYAN STEVENSON: Yes, race of the victim is probably the greatest predictor of who gets the death penalty in this country. There was a landmark study in the 1980s by David Baldus, a University of Iowa professor, that ultimately went to the U.S. Supreme Court that looked at Georgia's death penalty. In that study it was established that you're 11 times more likely to get the death penalty if the victim is white than if the victim is black. If the defendant is black and the victim is white you're 22 times more likely to get the death penalty. And these were all data presented to the U.S. Supreme Court as a basis for stopping capital punishment.

Now the court in a very closely decided case, 5-4, upheld Georgia's death penalty statute and this legacy of racialized death sentencing has continued. About 80 percent of the people on death row in the United States, about 80 percent of the people who have been executed, have been executed for offenses involving victims who are white, even though African-Americans and people of color are much more likely to be victims of homicide. In my state of Alabama, for example, two-thirds, 65 percent of all murder victims here are black. But 80 percent of the people on death row have been sentenced to death for crimes involving victims who are white. And these race-of-victim disparities are some of the most compelling evidence about why the death penalty operates in a racially biased manner.

MARGOT ADLER: Earlier in the show one of our guests said that death sentences tied to felony murder are the most class- and race-based, that it disproportionately affects poor people and people of color. What are your thoughts on this?

BRYAN STEVENSON: Well I think it's true that the less aggravated the crime--that is if you're not talking about an Oklahoma City bombing kind of situation, or a crime involving, you know, a dozen victims--you're going to have much more discretion. You're going to have the influence of things like race manifesting themselves in a much more significant way. So while two-thirds

of the people on death row in this country or at least in most Deep South states are there for things like robbery and murder, that's going to be the situation where there's the greatest likelihood of bias and discrimination. And I think that's borne out by these data.

MARGOT ADLER: Do you see any ways that sentencing could be reformed so that African-Americans are not disproportionately sentenced to the death penalty?

BRYAN STEVENSON: Well I think if we paid greater attention to the way our laws are operating, I mean, this doesn't happen in a vacuum. You know, unfortunately many people of color when they come into a courtroom are presumed guilty. The negative stereotypes--the way we reinforce, both in the media and in popular culture, identities of young people of color as dangerous, as violent, as criminal, creates this presumption of guilt. And I think that feeds to these data that we're talking about. And it's going to be hard to overcome that. And that's one of the reasons why I just feel like we have to suspend things like capital punishment.

But there are a number of things that we could do. We could make jury selection a lot fairer. I've got cases in Alabama that are coming out of counties that are majority black where no person of color is serving on the trial jury. And our courts and I don't think our larger society has done enough to curb and constrain that kind of bigotry that continues to manifest itself in case after case. And if I could just add, I think any time we debate or discuss race and the death penalty, we have to put this in an historical context. In places like Alabama buried in the ground are the broken bodies of thousands of people who were lynched, thousands more who died in convict leasing camps at the turn of the century, and many more who died during slavery. We cannot have a discussion about race and the death penalty that doesn't appreciate that we are still living in the shadow of apartheid, that we have never reconciled ourselves to this history of lynching and execution of people of color because of race. And it's in that context that I think this discussion has to be framed.

And just like in Germany, if they reinstated the death penalty and it ended up being used disproportionately against people who were Jewish, you could not debate that issue without reference to the Holocaust. I think that it's absolutely critical that when we talk about race and the death penalty we talk about how we have yet to reconcile ourselves to this horrific history of lynching, racialized violence directed at people of color in the context of apartheid and slavery.

MARGOT ADLER: Bryan Stevenson is the executive director of the Equal Justice Initiative of Alabama. Thank you so much for coming on our show.

BRYAN STEVENSON: Happy to be here.

MARGOT ADLER: Not everyone on death row is guilty and in the past decade DNA testing has proven the innocence of over 120 people who were sentenced to die. Harold Wilson of Philadelphia is one of those people. He was convicted of a triple murder in Philadelphia and spent 16 years in prison on Pennsylvania's death row. He was acquitted in November 2005 after

DNA evidence found that blood from the crime scene did not come from Wilson or any of the victims.

Harold, thanks for coming on the show.

HAROLD WILSON: Thank you and it's a pleasure to be speaking with you today.

MARGOT ADLER: You've been out of prison for almost a year and a half. What's it been like for you?

HAROLD WILSON: Oh, wow, it's been really hard. It's really been difficult, you know, trying to get a life back in free society. I'm having problems, you know, with just getting around basically, you know. And the surrounding area where I was brought up at has changed a lot. And medical issues, you know, not having, being exonerated not having medical insurance, not being able to find work because the City of Philadelphia refused to give me a full pardon, render equal justice to me and allow my criminal record to be expunged.

MARGOT ADLER: What other adjustments have been hard to make?

HAROLD WILSON: Adjusting to just people, you know, trusting people. You know, the help that's never there? The assistance is not there for exonerees because you don't have a probation officer. You don't have--you're not an ex-offender re-entering in society, you know. You're somebody just booted in society like a homeless person and, you know, you find your own place to stay.

MARGOT ADLER: Now I know that you've been working hard to get Pennsylvania to stop using the death penalty.

HAROLD WILSON: Uh hmm.

MARGOT ADLER: Tell me about that work.

HAROLD WILSON: I have been speaking with many legislators and state representatives at my district to, you know, convince them that a human being like myself coming back into society deserves due compensation for being wrongly incarcerated, wrongly in prison, wrongly convicted, wrongly sentenced to death.

MARGOT ADLER: Now you've also been working against the death penalty in general, correct?

HAROLD WILSON: I have been diligently working as an advocate against the death penalty since my release.

MARGOT ADLER: What do you say to people who say the death penalty is a deterrent to crime?

HAROLD WILSON: Personally, me, I am totally against death penalty because I think a person would suffer more with a life sentence. And the 17 years that I suffered under a wrongful conviction, under the penalty of death, race discrimination, politically motivated, drawn-out appeal processes, ineffective assistant counsel, I wouldn't wish death on my worst enemy, my worst enemy.

MARGOT ADLER: Harold Wilson spent more than 16 years in prison on Pennsylvania's death row. He was freed in November 2005 after being cleared by DNA evidence. Thank you so much for talking with us.

HAROLD WILSON: Thank you very much.

MARGOT ADLER: Every person who is sentenced to die gets an appeal. And in very rare instances those cases make their way to the U.S. Supreme Court. This term the court will hear seven cases that are related to the death penalty.

To learn more about those cases I spoke with Lyle Denniston, our Supreme Court reporter. He also covers the court for SCOTUSblog. I asked him about one of the cases out of Texas that had to do with the way jurors were instructed to consider evidence.

LYLE DENNISTON: This is a particular controversy that involves how do you make sure that when a jury hears evidence that would suggest they do not give a death penalty that they're going to take that fully into account? And the Supreme Court has said at least four times in the last quarter century that every court that holds a death penalty hearing must make sure that the jury is fully apprised of its opportunity to consider every bit of evidence that would favor the person and mark against the death penalty. For example, the person had a troubled childhood or the person is mentally retarded or somehow mentally impaired. And the court has been very insistent that states make absolute certain that jurors know that they can consider all of this evidence however strong the evidence on the other side in favor of execution may be.

MARGOT ADLER: So one of these cases is the case where there were a whole bunch of documents, I gather, that the jury was never given to consider and it was right in the courthouse there, correct?

LYLE DENNISTON: Yes, the prosecution in that case appeared to have willfully withheld material that the jury could have considered. The other case is one in which the Supreme Court itself just 18 months before thought it had resolved the whole case and sent it back to the Texas Court of Criminal Appeals. That court found another reason not to follow the Supreme Court. And so in both of these cases a group of retired federal judges have filed a brief in the court suggesting that the court find a way to make sure that state and federal courts follow what the Supreme Court tells them to do.

MARGOT ADLER: So the court has ruled in regard to the juvenile death penalty, in regard to the mentally ill, but it hasn't had a case that forced it to decide whether the nation should use the death penalty or not. Do you think this kind of broad case could come before the court?

LYLE DENNISTON: Well I suspect that the Supreme Court, Margot, is not presently going to consider that. I mean, as presently constituted. There is no member of this court like the late Justice William Brennan or the late Justice Thurgood Marshall who believes that the death penalty is unconstitutional in all circumstances. So there's no one within the court who would be pushing the other members of the court to grant and review a case in which that issue was raised. So while two members of the court, sometimes three, Justices Stevens and Ginsburg, often vote to delay executions, so far neither of them has urged the court to strike down the death penalty in all circumstances.

MARGOT ADLER: Historically the death penalty has been a divisive issue among Supreme Court justices. Tell me how Justice Blackmun switched his viewpoint on the death penalty.

LYLE DENNISTON: Harry Blackmun came on the court having served on a lower court and in that capacity having upheld a number of death sentences. As he served his time on the court, about a quarter of a century, he slowly began to see what he called "the machinery of death" breaking down over and over and over again. And he ultimately concluded, I think as a moral as much as a legal question, that he simply would no longer tinker with the lives of inmates using this really very complex machinery, legal machinery, that the court has devised. By the way, I think the court has probably devised that very complex machinery in order to try to avoid the ultimate question of getting rid of the death penalty, but in an effort perhaps to make it work as best it can without actually throwing it out.

MARGOT ADLER: And when Justice Blackmun made this switch, how did that decision affect other justices?

LYLE DENNISTON: I don't think it had any impact on any other justices because once you have served for just a few terms on the court you have been exposed frequently to death penalty cases, oftentimes to expose them when they're coming up at the last minute on the night of the execution and it comes in the circuit where you are the presiding judge for emergency matters. So I think very early on each justice begins to form a set of views, opinions about the validity of the death penalty and the validity of various methods and procedures for imposing the death penalty. So if one justice moves as far away from the center as Harry Blackmun did, and as Justices Brennan and Marshall always were, I don't think that necessarily draws anybody along with them. I think this is such a peculiarly individualistic matter, Margot.

MARGOT ADLER: Thanks so much, Lyle.

LYLE DENNISTON: Oh, well thank you Margot. I'm glad to be with you.

MARGOT ADLER: Lyle Denniston covers the Supreme Court for us and writes about the court for SCOTUSblog.

That brings us to the end of our show today. You can go to our website, justicetalking.org, to find out more about our guests and the issues raised on our show today. While you're there you can let us know what you think about the death penalty. You can also check out our blog, where many of the nation's leading commentators give you their views, and you can also podcast the show. Thanks for joining me. I hope you'll tune in next week. I'm Margot Adler.
