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The Death Penalty, Life Without Parole, and Prisons in the United States

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INTRODUCTION

I want to thank Mindpsi for organizing this important conference on prisons and thank the people of Brazil for their hospitality and for inviting me to speak to you about the state of incarceration in the United States. I am an attorney, and for the past 23 years, I have been the Executive Director of the Death Penalty Information Center in the U.S. This is an organization devoted to alerting the American people about the problems of the death penalty through facts, reports, analysis and commentary to the media. I will focus most of my remarks on the U.S. death penalty. I have also worked for many years on prison related issues, especially with women in our federal prison system, and I will devote some of my remarks to the prison system more generally.

OVERVIEW – The U.S. Use of the Death Penalty and Imprisonment

The U.S. is a country of many freedoms and opportunities, but it can also be a very punitive society. America is one of the few developed countries that retain the death penalty. Our immediate neighbors, Canada and Mexico, have abolished the death penalty. Our closest allies, including all of the European Union and almost all of Central and South America, forbid the use of capital punishment. In Central and South

America, only Guatemala, Belize, and Guyana retain the death penalty, and Belize has recently taken steps to end its use of capital punishment.

SLIDE 1 –World map

Although the use of the death penalty has declined, it continues to be regularly practiced in the U.S. In 2014, there were 35 executions, which placed the U.S. among the top five executioners in the world.

SLIDE 2 – Countries with executions

About 3,000 inmates remain on death row, and 31 out of our 50 states allow the death penalty. In addition, there is a federal death penalty that applies to all of the states and territories.

SLIDE 3 – States with death penalty map

The U.S. also has one of the highest rates of imprisonment in the world. About 1 out of every 99 Americans are behind bars. More than 2.2 million people are in jails or prisons in the U.S. The U.S. has less than 5% of the world's population, but over 20% of its prison population.

Many prisoners are serving a sentence of life without the possibility of parole (LWOP). This is a relatively new sentence in our correctional system, having increased greatly in the latter half of the 20th Century. Almost 50,000 inmates are serving LWOP. The use of LWOP has grown 22% just since 2008. Approximately another 100,000 individuals are serving life sentences, with some possibility of parole.

SLIDE 4 – Prison population increase graph

Although there is a constant effort to make our criminal justice system more fair and humane, conditions in many prisons are deplorable. Violence, including rape, is too common, care for the mentally ill is seriously deficient, and a high proportion of inmates come from racial minorities.

Approximately 25,000 prisoners in the U.S. are in solitary confinement, including most of those on death row. This means they are locked in a narrow cell with little human contact for years and years, only being let out for 1 hour of day for exercise. In the case of those on death row, the average time between sentencing and execution is 15 years, and inmates are typically in solitary for that whole time.

THE U.S. IS IN A PERIOD OF CHANGE

I am happy to report, however, that both the death penalty and the prison system in general are in a period of fundamental change. The rationales that have justified our punitive society are being challenged, and the use of both the death penalty and imprisonment are showing clear signs of decline.

The Death Penalty

SLIDE 5 – Drop in executions

After years of increasing in the 1980s and 1990s, executions have declined by over 60% since 1999, when they reached a peak of almost 100 in a year. Death sentences have also dropped by 75% since 1996, reaching their lowest numbers in 40 years in 2014.

Seven states have recently abolished the death penalty, bringing the number of non-death penalty states to 19 out of 50.

SLIDE 6 – Drop in death sentences

In many other states, executions have been on hold for many years. California, for example, which has the largest death row of any state in the country, has not had an execution for almost 10 years. Even many states in the south, where the death penalty has been most prominent, have considerably slowed in their use of capital punishment. Virginia, which used to be second only to Texas in executions, has had only 2 executions in the past five years, and hardly any death sentences. North Carolina has not had an execution in 9 years.

In a recent case before the U.S. Supreme Court that had to do with the secondary issue of what drugs can be used for lethal injection, two of the Justices took the opportunity to challenge whether capital punishment should be allowed to exist in the U.S., citing a litany of problems that have arisen in its recent practice. Justice Stephen Breyer, joined by Justice Ginsburg, said:

I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.... Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.

Many experts are predicting the death penalty will be gone from the U.S. in another 5 to 8 years. Even Texas, which has been the nation's leader in executions for decades, has seen an 80% drop in death sentences. So far in 2015, there have been *no* death sentences in Texas.

The Prison System

The decline in the use of the death penalty has been apparent for at least ten years. The drop in our rate of imprisonment is a much more recent phenomenon. The size of the U.S. prison population continued to grow in the twenty-first century, despite the fact that the crime rate has gone steadily down. But now, conservatives, religious leaders, liberals, and many who just want save money are uniting around a review of our overuse of incarceration.

In July, President Obama symbolized this rethinking when he became the first U.S. President to visit a federal prison. He observed a cramped ten-square-meter cell in Oklahoma built to hold three inmates. The President called for fundamental changes in the prison system, saying:

SLIDE 7 – President Obama

Over the last few decades, we've also locked up more and more nonviolent drug offenders than ever before, for longer than ever before. And that is the real reason our prison population is so high. In far too many cases, the punishment simply does not fit the crime. If you're a low-level drug dealer, or you violate your parole,

you owe some debt to society. You have to be held accountable and make amends. But you don't owe 20 years. You don't owe a life sentence. That's disproportionate to the price that should be paid.

In his remarks at the prison after talking to some of the inmates, the President made the issue that we are talking about today quite personal:

"When they describe their youth and their childhood, these are young people who made mistakes that aren't that different than the mistakes I made and the mistakes that a lot of you guys made," Mr. Obama said afterward. "The difference is they did not have the kinds of support structures, the second chances, the resources that would allow them to survive those mistakes. [W]e have a tendency sometimes to almost take for granted or think it's normal" that so many young people have been locked up. "It's not normal," he said. "It's not what happens in other countries. What is normal is teenagers doing stupid things. What is normal is young people making mistakes."

It is very rare for a President—or any political leader, for that matter—to be making such remarks. Most leaders want to show they can be tougher on crime than their opponents, leading to a spiral of more death sentences, more executions, and more incarceration. It took courage for Obama to say what he did, but it probably also took an opening of a window of opportunity. There has been a rash of incidents in the U.S. exhibiting brutal violence by members of law enforcement against minority victims in our inner cities. Many of these outbreaks

were videotaped on cell phones by the public, resulting in widespread media coverage, demonstrations and even riots. A consensus was forming that change was needed, and the President stepped forward.

SLIDE 8 – President Clinton

In the 1990s, faced with a period of rising crime and conservative outcry for harsher penalties in the early part of his first term, President Bill Clinton took the safe path of expanding the prison system. He signed the Comprehensive Anti-Crime Bill of 1994, which greatly expanded federal incarceration and the use of the federal death penalty. Most recently, he admitted this was partly a mistake:

“I signed a bill that made the problem worse,” Mr. Clinton said. “And I want to admit it.”

After years of steady increase, the prison population in the U.S. is finally starting to decrease, but the pace is slow. The total U.S. prison population has declined by only 2.4% since 2009. On the other hand, the rate of violent crime has been decreasing steadily since the mid-1990s. There are about half as many violent crimes per capita now as there were in 1994, and the same is true for murders. Nevertheless, the prison population rose steeply during this same time, until the most recent turn-around.

SLIDE 9 – Repeat of prison population

WHY ARE CHANGES OCCURRING NOW?

Death Penalty

The reasons for the declines in the death penalty and imprisonment are very different. The path of the death penalty was drastically altered by a series of Supreme Court decisions beginning in 1972. In that year, the death penalty was stopped because its application was found to be arbitrary and unpredictable. Jurors lacked clear guidance about which offenders were deemed to be the “worst of the worst.” One Justice described the randomness of the death penalty as similar to being “struck by lightning.”

Because of this Supreme Court review of the death penalty, there were no executions in the U.S. for almost 10 years, between 1967 and 1977. A conservative backlash and a rise in crime led the Court to restore the death penalty in 1976. The Court required specific guidance for the jurors deciding who would live and who would die. They would have to consider specific aggravating factors that made some crimes and criminals worse than others, and they would also have to consider a broad range of mitigating factors that might ameliorate the punishment to be imposed.

With the Supreme Court’s validation, executions, death sentences, and the size of death row started a steady climb upward through the 1980s and 1990s. However, as executions rose, more wrongful convictions were also discovered. The science of DNA testing contributed significantly to the realization that the death penalty risked the taking of innocent lives.

SLIDE 10 – Kirk Bloodsworth

Since 1973, 155 people who were sentenced to death have been cleared of all charges and freed from death row. That means, for every 9 individuals executed, 1 person was found on death row that was innocent.

SLIDE 11 – Graph numbers of Exonerations

(This graph shows how the large number of exonerations from death row became a central issue about 15 years ago.)

Jurors and the American public began to lose faith in the reliability of the death penalty system. At the same time, LWOP became a more common sentence in our criminal justice system, thereby giving jurors and prosecutors an alternative that protected society, punished the criminal, but avoided the risk of executing the innocent. Death sentences and executions have dropped considerably as a result of these developments.

SLIDE 12 – Support for LWOP

Other developments have also had an effect on the declining use of the death penalty. Capital punishment in the U.S. has always been plagued by the problem of unfairness. Even for those who are guilty, who receives the ultimate sentence is strongly influenced by race, economics, geography, and the quality of representation given the defendant. With respect to race, it is not only the race of the person charged with the crime that is important, but the race of the victim in the underlying murder. The death penalty is far more likely to be imposed in cases where the murder victim is white than if the murder victim is a member of a minority.

Moreover, as death sentences have become rarer --and even more rarely carried out--it raises the question of why one case receives a death sentence and ten others like it do not. A punishment that is carried out only on a select few of those who are eligible fails to satisfy the reasons for its existence. The death penalty has been justified as a

deterrent to future crime and as a form of retribution for the victims' families. But if we really believed the death penalty was necessary for those goals, we would be carrying out far more executions than 35 per year. In light of this contradiction, the U.S. Supreme Court may decide in the relatively near future that the death penalty has become cruel and unusual and hence a violation of our constitution because it has no reasonable purpose and is so rarely applied.

SLIDE 13 – Supreme Court

The high cost of the death penalty has been another factor in its declining use. Costs have risen as courts have recognized that the quality of lawyers is critical in avoiding mistakes, and that scientific testing and adequate appeals were essential in every case. The innocence issue has had a major effect on the costs of the death penalty.

Finally--and most recently--the drug companies and pharmacists that have supplied the lethal injection drugs for almost all U.S. executions have begun resisting participating in executions, making it much more difficult for states to carry out lethal injections. Many of our drugs were being manufactured in Europe, which has a firm position against capital punishment. The use of new and untried drugs led to a series of terribly botched executions in 2014. Now states are scrambling to find safe, effective drugs so that they can resume lethal injections next year.

Imprisonment

The reasons for the decline in the prison population are different from those affecting the death penalty. Although the murder rate in the U.S. has been declining since the early 1990s, that did not immediately affect the rate of imprisonment. The U.S.

murder rate was about 10 murders per 100,000 people in the early 1990s. It is now less than half that amount. Other measures of crime have also come down considerably. Nevertheless, the prison population rose steadily in the same period.

Many of those sentenced to long terms in the 1990s have been in prison for 25 years or more. As inmates grow older, they are less of a danger to society if returned to the community. Moreover, their health costs in prison are greater as they age. States are finally realizing that huge prison populations are an unbearable cost. There is now particular emphasis on reducing the sentences of “non-violent” offenders, which often includes those involved in drug crimes. Courts have been concerned with overcrowding in prisons and have mandated the early release of some prisoners. The U.S. Supreme Court has put strict restrictions on the use of LWOP for juvenile (under 18 years of age) offenders. The use of “three strikes” laws is being cut back. These statutes required a life sentence if a defendant had been convicted of three offenses, even when the third conviction was a relatively minor offense. Religious conservatives have also taken up the cause of over-imprisonment, lending rare bi-partisan support to change on a social issue.

CONCLUSION

The U.S. has stood out from among its allies around the world by its continued use of the death penalty and its exceptionally high rate of incarceration. It has also been unusual because of its high rate of crime. Now that crime generally, and murders in particular, have sharply declined, the U.S. is taking a fresh look at the punitiveness of its criminal justice system.

The death penalty has seen the most dramatic changes. Once it became clear that the death penalty posed a high risk to innocent lives, its use dropped sharply. It is now apparent that this risk cannot be completely removed. Moreover, there is other evidence of unfairness, particularly along racial lines, that makes people uncomfortable with the death penalty. It now seems that its days are numbered, and it may not last another decade.

The realization that we are wasting valuable resources by unnecessarily incarcerating individuals for long periods for even minor offenses has been slower coming, but is now causing broad change. The U.S. will retain its prison system and probably remain one of the countries with a high rate of incarceration. But it will be reserved for more violent and repeat offenders. To the extent that violent crime continues to decline, the imprisonment rate will retreat to where it had been decades ago.

Thank you.