

ABA REPORT ON VIRGINIA'S DEATH PENALTY
"TINKERS WITH THE MACHINERY OF DEATH"

By Stephen A. Northup

A recently-released Report by the American Bar Association makes a number of recommendations for improving both fairness and accuracy in the administration of Virginia's Death Penalty. (*RTD* September 6, 2013). The Report was the culmination of a two year study by the Virginia Death Penalty Assessment Team, an eight person blue-ribbon panel that included a former Virginia Attorney General, the Dean *Emeritus* of the University of Richmond Law School, a retired Judge, as well as prosecutors and defense attorneys. Among the Report's recommendations are long-overdue improvements in Virginia's eyewitness-identification procedures and the rules and practices governing access by defense attorneys to information necessary for preparing their cases. The changes recommended in the Report would improve the fairness and accuracy of Virginia's death penalty.

However, even if all the Report's recommendations were enacted into law, use of the death penalty would continue to risk executing the innocent and to be fundamentally unfair in many respects. Since 1973, more than 140 people from throughout the United States have been exonerated and freed from death row. Exonerations from death row have occurred as recently as last year and have included one Virginian. No matter how hard we strive for accuracy in our criminal justice system, we will never be able to make it foolproof, simply because it will always be administered by human beings, who are inherently fallible. Yet the death penalty is an irrevocable punishment. This fundamental inconsistency prompted the Marquis de Lafayette, the French hero of our Revolution, to exclaim: "I shall ask for the abolition of the death penalty until I have the infallibility of human judgment demonstrated to me."

There will also always be elements of unfairness in use of the death penalty, regardless of our efforts to make it fair. In a completely fair system, the death penalty would be applied evenhandedly, without regard to such factors as the race and wealth of defendants or the prejudices and political ambitions of prosecutors. Yet such factors are invariably present in all cases. The randomness of imposition of the death penalty was recently documented in a Report by the Death Penalty Information Center entitled “Struck by Lightning: The Continuing Arbitrariness of the Death Penalty Thirty-Five Years After Its Reinstatement in 1976.” The Report can be found at <http://www.deathpenaltyinfo.org/documents/StruckByLightning.pdf>.

The risk of inaccuracy and inevitable unfairness in use of the death are undoubtedly factors in the growing international movement towards abolition of capital punishment. Europe and the vast majority of countries in the Western world have abandoned use of the death penalty. From that part of the world, only the United States is included among the countries with the greatest number of executions during the past ten years. Other countries on that list include China, Iran, Iraq, Saudi Arabia, Yemen, Pakistan and North Korea. Here at home, during the past six years six states have abolished capital punishment: New York, New Jersey, New Mexico, Illinois, Connecticut and Maryland. Strong abolition movements are underway in a number of other states.

Almost 20 years ago, following a 20 year struggle with the issue of capital punishment, Justice Harry Blackmun concluded that “the death penalty experiment has failed” and that it was time to abandon the “delusion” that capital punishment could be consistent with the Constitution. In an opinion accompanying his vote to overturn the death sentence of a Texas inmate in the case of *Callins v. Collins*, he stated “From this day forward, I no longer shall tinker with the machinery of death.”

The ABA Report on Virginia's death penalty, while commendable for recommending a number of important changes in Virginia law and practice, nevertheless amounts to "tinkering" with the machinery of death. Sooner or later, Virginia – like Justice Blackmun almost 20 years ago – will come to the conclusion that the death penalty experiment has failed and will end its system of capital punishment.

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