

Deadly disparity in sentencing
Commentary by Joseph Krakora
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After almost 24 years, it is clear that the death penalty has failed in New Jersey. Capital punishment has failed because there is not -- and never will be -- a fair system in place to determine who does and who does not deserve the ultimate punishment. It has failed because it represents a significant misallocation of state resources. And it has failed because it does not further the legitimate interests of our criminal justice system.

The recent debate over the continued viability of the death penalty in this state has focused on the enormous cost associated with it and the risk that an innocent person will be executed. Both are legitimate concerns.

The resources allocated to the prosecution and defense of capital cases could be better used. A number of DNA exoneration cases around the country have demonstrated the risk of a wrongful execution. In addition, there have been valid moral issues raised in connection with the execution of juveniles, the mentally retarded and the mentally ill.

Above and beyond these crucial issues, however, is another vital issue that must be emphasized. As a capital defense attorney who has handled death penalty cases in eight counties over a 16-year period, I am convinced that New Jersey's capital punishment law has and continues to be applied in an absolutely inconsistent, arbitrary and irrational manner.

Here is an obvious example. There are about 150,000 people in Cumberland County. There are about 800,000 in Essex County. As of October, the statewide Office of the Public Defender had 17 clients charged with murder in Cumberland County. Six were formally facing the death penalty. A seventh was awaiting sentencing after his capital case resulted in a conviction for murder but no death penalty. In Essex County, we have more than 80 clients charged with murder. Although those cases are at different stages in the pretrial process, not a single one has been formally designated by the Essex County prosecutor as a capital case.

This disparity defies rational or logical explanation. Of the 21 defendants facing the death penalty in New Jersey earlier this fall, 11 were charged in either the Cumberland County area court system or the Morris-Sussex one.

There are many examples of this disparity. One-third of New Jersey's counties, including two of its most populous (Hudson and Union), have not returned a death sentence since capital punishment was reinstated almost a quarter-century ago.

The reality is that in New Jersey the likelihood that an accused murderer will face the death penalty depends on factors as arbitrary as where the crime was committed and who happens to be serving as the local prosecutor. The likelihood that an accused murderer will receive a death sentence depends on a different set of arbitrary factors, such as the

make-up of the jury, the relative skills of the attorneys and the willingness of a prosecutor to offer a plea bargain.

There is absolutely no consistency or uniformity in the process at any level. Homicides prosecuted as capital cases in some parts of the state are downgraded to manslaughter in others. The arbitrary nature of capital punishment in New Jersey means that the system is not fair and never will be.

Even without the death penalty, New Jersey law already authorizes judges to impose sentences for murder ranging from 30 years without parole up to life imprisonment. The No Early Release Act provides that defendants must serve 85 percent of a sentence imposed for murder and specifies that a life-sentenced defendant must serve 63 years before being eligible for parole. Certain categories of murders carry sentences of life without the possibility of parole. Judges in New Jersey already have the tools to protect society and punish offenders, even if the death penalty were abolished tomorrow.

Nothing is more important in a justice system than the actual and perceived fairness in its application. Our system of capital punishment has neither. It is time to end the death penalty in New Jersey.