

NO DUE PROCESS:

HOW THE DEATH PENALTY VIOLATES THE CONSTITUTIONAL RIGHTS OF THE FAMILY MEMBERS OF DEATH ROW PRISONERS

RACHEL KING*

This article argues that the death penalty violates the constitutional rights of the family members of death row prisoners. First, the article establishes that Americans are entitled to a fundamental "right to family," based on a long history of Supreme Court jurisprudence that has established substantive due process rights such as the right to marry, to use contraceptives, to have children, to make educational decisions for children, and to make decisions about how to configure one's household. Next, the article contends that the death penalty interferes with the constitutional right to family by harming the prisoner's family members, whether or not the prisoner is ever executed. Finally, the article examines each of the justifications for the death penalty in the context of the myriad problems associated with it, such as the conviction of innocent people, racial bias, unfairness in the prosecution of death penalty cases, unequal access to attorneys, and the higher costs of capital punishment compared to long-term incarceration. The article concludes by arguing that the problems associated with the death penalty cannot survive a strict scrutiny analysis, especially when alternatives, such as long-term incarceration, can adequately accomplish the death penalty's purported goals of retribution, deterrence, incapacitation, and restoration of social order.

* Rachel King, J.D., LL.M graduated from Northeastern University School of Law in 1990 and received her Masters in Law in Legal Education from Temple University School of Law in 1998. She is currently counsel for the Subcommittee on Crime, Terrorism and Homeland Security for the Committee on the Judiciary of the House of Representatives. At the time she wrote this article, she was teaching legal writing at Howard University School of Law. She would like to thank Howard Professors Andrew Tazlitz and Laurence Nolan for their assistance in preparing this article. She would also like to thank research assistant George Edwards for his invaluable help. Ms. King has been writing about the death penalty and its impact on families for over a decade. She has written two books: DON'T KILL FOR ME: FAMILIES OF MURDER VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY, RUTGERS UNIVERSITY PRESS, 2003 and CAPITAL CONSEQUENCES: FAMILIES OF THE CONDEMNED TELL THEIR STORIES, RUTGERS UNIVERSITY PRESS, 2005. She has also written several articles and numerous reports about the death penalty.