

Arguments for and Against the Death Penalty

from <http://deathpenaltyinfo.msu.edu/>

ARGUMENT 1 DETERRENCE

The death penalty prevents future murders.

Society has always used punishment to discourage would-be criminals from unlawful action. Since society has the highest interest in preventing murder, it should use the strongest punishment available to deter murder, and that is the death penalty. If murderers are sentenced to death and executed, potential murderers will think twice before killing for fear of losing their own life.

For years, criminologists analyzed murder rates to see if they fluctuated with the likelihood of convicted murderers being executed, but the results were inconclusive. Then in 1973 Isaac Ehrlich employed a new kind of analysis which produced results showing that for every inmate who was executed, 7 lives were spared because others were deterred from committing murder. Similar results have been produced by disciples of Ehrlich in follow-up studies.

Moreover, even if some studies regarding deterrence are inconclusive, that is only because the death penalty is rarely used and takes years before an execution is actually carried out. Punishments which are swift and sure are the best deterrent. The fact that some states or countries which do not use the death penalty have lower murder rates than jurisdictions which do is not evidence of the failure of deterrence. States with high murder rates would have even higher rates if they did not use the death penalty.

Ernest van den Haag, a Professor of Jurisprudence at Fordham University who has studied the question of deterrence closely, wrote: "Even though statistical demonstrations are not conclusive, and perhaps cannot be, capital punishment is likely to deter more than other punishments because people fear death more than anything else. They fear most death deliberately inflicted by law and scheduled by the courts. Whatever people fear most is likely to deter most. Hence, the threat of the death penalty may deter some murderers who otherwise might not have been deterred. And surely the death penalty is the only penalty that could deter prisoners already serving a life sentence and tempted to kill a guard, or offenders about to be arrested and facing a life sentence. Perhaps they will not be deterred. But they would certainly not be deterred by anything else. We owe all the protection we can give to law enforcers exposed to special risks."

Finally, the death penalty certainly "deters" the murderer who is executed. Strictly speaking, this is a form of incapacitation, similar to the way a robber put in prison is prevented from robbing on the streets. Vicious murderers must be killed to prevent them from murdering again, either in

prison, or in society if they should get out. Both as a deterrent and as a form of permanent incapacitation, the death penalty helps to prevent future crime.

Testimony in support of deterrence

Ernest van den Haag

Professor of Jurisprudence and Public Policy, Fordham University. Excerpts from " The Ultimate Punishment: A Defense," (Harvard Law Review Association, 1986)

“Execution of those who have committed heinous murders may deter only one murder per year. If it does, it seems quite warranted. It is also the only fitting retribution for murder I can think of.”

...

“Most abolitionists acknowledge that they would continue to favor abolition even if the death penalty were shown to deter more murders than alternatives could deter. Abolitionists appear to value the life of a convicted murderer or, at least, his non-execution, more highly than they value the lives of the innocent victims who might be spared by deterring prospective murderers.

Deterrence is not altogether decisive for me either. I would favor retention of the death penalty as retribution even if it were shown that the threat of execution could not deter prospective murderers not already deterred by the threat of imprisonment. Still, I believe the death penalty, because of its finality, is more feared than imprisonment, and deters some prospective murderers not deterred by the thought of imprisonment. Sparing the lives of even a few prospective victims by deterring their murderers is more important than preserving the lives of convicted murderers because of the possibility, or even the probability, that executing them would not deter others. Whereas the life of the victims who might be saved are valuable, that of the murderer has only negative value, because of his crime. Surely the criminal law is meant to protect the lives of potential victims in preference to those of actual murderers.”

...

”We threaten punishments in order to deter crime. We impose them not only to make the threats credible but also as retribution (justice) for the crimes that were not deterred. Threats and punishments are necessary to deter and deterrence is a sufficient practical justification for them. Retribution is an independent moral justification. Although penalties can be unwise, repulsive, or inappropriate, and those punished can be pitiable, in a sense the infliction of legal punishment on a guilty person cannot be unjust. By committing the crime, the criminal volunteered to assume the risk of receiving a legal punishment that he could have avoided by not committing the crime. The punishment he suffers is the punishment he voluntarily risked suffering and, therefore, it is no more unjust to him than any other event for which one knowingly volunteers to assume the risk. Thus, the death penalty cannot be unjust to the guilty criminal.”

Full text can be found at:

<http://www.pbs.org/wgbh/pages/frontline/angel/procon/haagarticle.html>

REBUTTAL TO DETERRENCE:**The death penalty is not a proven deterrent to future murders.**

Those who believe that deterrence justifies the execution of certain offenders bear the burden of proving that the death penalty is a deterrent. The overwhelming conclusion from years of deterrence studies is that the death penalty is, at best, no more of a deterrent than a sentence of life in prison. The Ehrlich studies have been widely discredited. In fact, some criminologists, such as William Bowers of Northeastern University, maintain that the death penalty has the opposite effect: that is, society is brutalized by the use of the death penalty, and this increases the likelihood of more murder. Even most supporters of the death penalty now place little or no weight on deterrence as a serious justification for its continued use.

States in the United States that do not employ the death penalty generally have lower murder rates than states that do. The same is true when the U.S. is compared to countries similar to it. The U.S., with the death penalty, has a higher murder rate than the countries of Europe or Canada, which do not use the death penalty.

The death penalty is not a deterrent because most people who commit murders either do not expect to be caught or do not carefully weigh the differences between a possible execution and life in prison before they act. Frequently, murders are committed in moments of passion or anger, or by criminals who are substance abusers and acted impulsively. As someone who presided over many of Texas's executions, former Texas Attorney General Jim Mattox has remarked, "It is my own experience that those executed in Texas were not deterred by the existence of the death penalty law. I think in most cases you'll find that the murder was committed under severe drug and alcohol abuse."

There is no conclusive proof that the death penalty acts as a better deterrent than the threat of life imprisonment. A survey of the former and present presidents of the country's top academic criminological societies found that 84% of these experts rejected the notion that research had demonstrated any deterrent effect from the death penalty .

Once in prison, those serving life sentences often settle into a routine and are less of a threat to commit violence than other prisoners. Moreover, most states now have a sentence of life without parole. Prisoners who are given this sentence will never be released. Thus, the safety of society can be assured without using the death penalty.

TESTIMONY IN REBUTTAL TO DETERRENCE:**Hugo Adam Bedau**

Austin Fletcher Professor of Philosophy, Tufts University
Excerpts from “The Case Against The Death Penalty”
(Copyright 1997, American Civil Liberties Union)

“Persons who commit murder and other crimes of personal violence either may or may not premeditate their crimes.

When crime is planned, the criminal ordinarily concentrates on escaping detection, arrest, and conviction. The threat of even the severest punishment will not discourage those who expect to escape detection and arrest. It is impossible to imagine how the threat of any punishment could prevent a crime that is not premeditated....

Most capital crimes are committed in the heat of the moment. Most capital crimes are committed during moments of great emotional stress or under the influence of drugs or alcohol, when logical thinking has been suspended. In such cases, violence is inflicted by persons heedless of the consequences to themselves as well as to others....

If, however, severe punishment can deter crime, then long-term imprisonment is severe enough to deter any rational person from committing a violent crime.

The vast preponderance of the evidence shows that the death penalty is no more effective than imprisonment in deterring murder and that it may even be an incitement to criminal violence. Death-penalty states as a group do not have lower rates of criminal homicide than non-death-penalty states....

On-duty police officers do not suffer a higher rate of criminal assault and homicide in abolitionist states than they do in death-penalty states. Between 1973 and 1984, for example, lethal assaults against police were not significantly more, or less, frequent in abolitionist states than in death-penalty states. There is ‘no support for the view that the death penalty provides a more effective deterrent to police homicides than alternative sanctions. Not for a single year was evidence found that police are safer in jurisdictions that provide for capital punishment.’ (Bailey and Peterson, *Criminology* (1987))

Prisoners and prison personnel do not suffer a higher rate of criminal assault and homicide from life-term prisoners in abolition states than they do in death-penalty states. Between 1992 and 1995, 176 inmates were murdered by other prisoners; the vast majority (84%) were killed in death penalty jurisdictions. During the same period about 2% of all assaults on prison staff were committed by inmates in abolition jurisdictions. Evidently, the threat of the death penalty ‘does not even exert an incremental deterrent effect over the threat of a lesser punishment in the abolitionist states.’ (Wolfson, in Bedau, ed., *The Death Penalty in America*, 3rd ed. (1982))

Actual experience thus establishes beyond a reasonable doubt that the death penalty does not deter murder. No comparable body of evidence contradicts that conclusion.” Full text can be found at http://www.aclu.org/library/case_against_death.html#deterrent

ARGUMENT 2 RETRIBUTION

A just society requires the death penalty for the taking of a life.

When someone takes a life, the balance of justice is disturbed. Unless that balance is restored, society succumbs to a rule of violence. Only the taking of the murderer's life restores the balance and allows society to show convincingly that murder is an intolerable crime which will be punished in kind.

Retribution has its basis in religious values, which have historically maintained that it is proper to take an "eye for an eye" and a life for a life.

Although the victim and the victim's family cannot be restored to the status which preceded the murder, at least an execution brings closure to the murderer's crime (and closure to the ordeal for the victim's family) and ensures that the murderer will create no more victims.

For the most cruel and heinous crimes, the ones for which the death penalty is applied, offenders deserve the worst punishment under our system of law, and that is the death penalty. Any lesser punishment would undermine the value society places on protecting lives.

Robert Macy, District Attorney of Oklahoma City, described his concept of the need for retribution in one case: "In 1991, a young mother was rendered helpless and made to watch as her baby was executed. The mother was then mutilated and killed. The killer should not lie in some prison with three meals a day, clean sheets, cable TV, family visits and endless appeals. For justice to prevail, some killers just need to die."

Testimony in support of retribution

Louis P. Pojman

Author and Professor of Philosophy, U.S. Military Academy. Excerpt from "The Death Penalty: For and Against," (Rowman & Littlefield Publishers, Inc., 1998)

"[Opponents of the capital punishment often put forth the following argument:] Perhaps the murderer deserves to die, but what authority does the state have to execute him or her? Both the Old and New Testament says, "'Vengeance is mine, I will repay,' says the Lord" (Prov. 25:21 and Romans 12:19). You need special authority to justify taking the life of a human being.

The objector fails to note that the New Testament passage continues with a support of the right of the state to execute criminals in the name of God: 'Let every person be subjected to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. Therefore he who resists what God has appointed, and those who resist will incur judgment.... If you do wrong, be afraid, for [the authority] does not bear the sword in vain; he is the servant of God to execute his wrath on the wrongdoer' (Romans 13: 1-4). So, according

to the Bible, the authority to punish, which presumably includes the death penalty, comes from God.

But we need not appeal to a religious justification for capital punishment. We can site the state's role in dispensing justice. Just as the state has the authority (and duty) to act justly in allocating scarce resources, in meeting minimal needs of its (deserving) citizens, in defending its citizens from violence and crime, and in not waging unjust wars; so too does it have the authority, flowing from its mission to promote justice and the good of its people, to punish the criminal. If the criminal, as one who has forfeited a right to life, deserves to be executed, especially if it will likely deter would-be murderers, the state has a duty to execute those convicted of first-degree murder.”

REBUTTAL TO RETRIBUTION:

The death penalty is not a just response for the taking of a life.

Retribution is another word for revenge. Although our first instinct may be to inflict immediate pain on someone who wrongs us, the standards of a mature society demand a more measured response.

The emotional impulse for revenge is not a sufficient justification for invoking a system of capital punishment, with all its accompanying problems and risks. Our laws and criminal justice system should lead us to higher principles that demonstrate a complete respect for life, even the life of a murderer. Encouraging our basest motives of revenge, which ends in another killing, extends the chain of violence. Allowing executions sanctions killing as a form of 'pay-back.'

Many victims' families denounce the use of the death penalty. Using an execution to try to right the wrong of their loss is an affront to them and only causes more pain. For example, Bud Welch's daughter, Julie, was killed in the Oklahoma City bombing in 1995. Although his first reaction was to wish that those who committed this terrible crime be killed, he ultimately realized that such killing "is simply vengeance; and it was vengeance that killed Julie.... Vengeance is a strong and natural emotion. But it has no place in our justice system."

The notion of an eye for an eye, or a life for a life, is a simplistic one which our society has never endorsed. We do not allow torturing the torturer, or raping the rapist. Taking the life of a murderer is a similarly disproportionate punishment, especially in light of the fact that the U.S. executes only a small percentage of those convicted of murder, and these defendants are typically not the worst offenders but merely the ones with the fewest resources to defend themselves.

TESTIMONY IN REBUTTAL TO RETRIBUTION:**National Council of Synagogues and the Bishops' Committee for Ecumenical and Interreligious Affairs of the National Conference of Catholic Bishops**

Excerpts from "To End the Death Penalty: A Report of the National Jewish/Catholic Consultation" (December, 1999)

"Some would argue that the death penalty is needed as a means of retributive justice, to balance out the crime with the punishment. This reflects a natural concern of society, and especially of victims and their families. Yet we believe that we are called to seek a higher road even while punishing the guilty, for example through long and in some cases life-long incarceration, so that the healing of all can ultimately take place.

Some would argue that the death penalty will teach society at large the seriousness of crime. Yet we say that teaching people to respond to violence with violence will, again, only breed more violence.

The strongest argument of all [in favor of the death penalty] is the deep pain and grief of the families of victims, and their quite natural desire to see punishment meted out to those who have plunged them into such agony. Yet it is the clear teaching of our traditions that this pain and suffering cannot be healed simply through the retribution of capital punishment or by vengeance. It is a difficult and long process of healing which comes about through personal growth and God's grace. We agree that much more must be done by the religious community and by society at large to solace and care for the grieving families of the victims of violent crime.

Recent statements of the Reform and Conservative movements in Judaism, and of the U.S. Catholic Conference sum up well the increasingly strong convictions shared by Jews and Catholics...:

'Respect for all human life and opposition to the violence in our society are at the root of our long-standing opposition (as bishops) to the death penalty. We see the death penalty as perpetuating a cycle of violence and promoting a sense of vengeance in our culture. As we said in *Confronting the Culture of Violence*: 'We cannot teach that killing is wrong by killing.' We oppose capital punishment not just for what it does to those guilty of horrible crimes, but for what it does to all of us as a society. Increasing reliance on the death penalty diminishes all of us and is a sign of growing disrespect for human life. We cannot overcome crime by simply executing criminals, nor can we restore the lives of the innocent by ending the lives of those convicted of their murders. The death penalty offers the tragic illusion that we can defend life by taking life.'¹

We affirm that we came to these conclusions because of our shared understanding of the sanctity of human life. We have committed ourselves to work together, and each within our own communities, toward ending the death penalty."

Endnote

1. Statement of the Administrative Committee of the United States Catholic Conference, March 24, 1999

COUNTER ARGUMENT 3 INNOCENCE

The risk of executing the innocent precludes the use of the death penalty.

The death penalty alone imposes an irrevocable sentence. Once an inmate is executed, nothing can be done to make amends if a mistake has been made. There is considerable evidence that many mistakes have been made in sentencing people to death. Since 1973, at least 88 people have been released from death row after evidence of their innocence emerged. During the same period of time, over 650 people have been executed. Thus, for every seven people executed, we have found one person on death row who never should have been convicted. These statistics represent an intolerable risk of executing the innocent. If an automobile manufacturer operated with similar failure rates, it would be run out of business.

Our capital punishment system is unreliable. A recent study by Columbia University Law School found that two thirds of all capital trials contained serious errors. When the cases were retried, over 80% of the defendants were not sentenced to death and 7% were completely acquitted.

Many of the releases of innocent defendants from death row came about as a result of factors outside of the justice system. Recently, journalism students in Illinois were assigned to investigate the case of a man who was scheduled to be executed, after the system of appeals had rejected his legal claims. The students discovered that one witness had lied at the original trial, and they were able to find the true killer, who confessed to the crime on videotape. The innocent man who was released was very fortunate, but he was spared because of the informal efforts of concerned citizens, not because of the justice system.

In other cases, DNA testing has exonerated death row inmates. Here, too, the justice system had concluded that these defendants were guilty and deserving of the death penalty. DNA testing became available only in the early 1990s, due to advancements in science. If this testing had not been discovered until ten years later, many of these inmates would have been executed. And if DNA testing had been applied to earlier cases where inmates were executed in the 1970s and 80s, the odds are high that it would have proven that some of them were innocent as well.

Society takes many risks in which innocent lives can be lost. We build bridges, knowing that statistically some workers will be killed during construction; we take great precautions to reduce the number of unintended fatalities. But wrongful executions are a preventable risk. By substituting a sentence of life without parole, we meet society's needs of punishment and protection without running the risk of an erroneous and irrevocable punishment.

Testimony in support of innocence

Gerald Kogan, Former Florida Supreme Court Chief Justice

Excerpts from a speech given in Orlando, Florida, October 23, 1999

“[T]here is no question in my mind, and I can tell you this having seen the dynamics of our criminal justice system over the many years that I have been associated with it, [as] prosecutor, defense attorney, trial judge and Supreme Court Justice, that convinces me that we certainly have, in the past, executed those people who either didn't fit the criteria for execution in the State of Florida or who, in fact, were, factually, not guilty of the crime for which they have been executed.

And you can make these statements when you understand the dynamics of the criminal justice system, when you understand how the State makes deals with more culpable defendants in a capital case, offers them light sentences in exchange for their testimony against another participant or, in some cases, in fact, gives them immunity from prosecution so that they can secure their testimony; the use of jailhouse confessions, like people who say, 'I was in the cell with so-and-so and they confessed to me,' or using those particular confessions, the validity of which there has been great doubt. And yet, you see the uneven application of the death penalty where, in many instances, those that are the most culpable escape death and those that are the least culpable are victims of the death penalty. These things begin to weigh very heavily upon you. And under our system, this is the system we have. And that is, we are human beings administering an imperfect system.”

...

And how about those people who are still sitting on death row today, who may be factually innocent but cannot prove their particular case very simply because there is no DNA evidence in their case that can be used to exonerate them? Of course, in most cases, you're not going to have that kind of DNA evidence, so there is no way and there is no hope for them to be saved from what may be one of the biggest mistakes that our society can make.”

The entire speech by Justin Kogan is available at <http://deathpenaltyinfo.org/koganspeech.html>.

REBUTTAL TO INNOCENCE

Executing the innocent is a rare but acceptable risk of the death penalty.

There is no proof that any innocent person has actually been executed since increased safeguards and appeals were added to our death penalty system in the 1970s. Even if such executions have occurred, they are very rare. Imprisoning innocent people is also wrong, but we cannot empty the prisons because of that minimal risk. If improvements are needed in the system of representation, or in the use of scientific evidence such as DNA testing, then those reforms should be instituted. However, the need for reform is not a reason to abolish the death penalty.

Besides, many of the claims of innocence by those who have been released from death row are actually based on legal technicalities. Just because someone's conviction is overturned years later and the prosecutor decides not to retry him, does not mean he is actually innocent.

If it can be shown that someone is innocent, surely a governor would grant clemency and spare the person. Hypothetical claims of innocence are usually just delaying tactics to put off the execution as long as possible. Given our thorough system of appeals through numerous state and

federal courts, the execution of an innocent individual today is almost impossible. Even the theoretical execution of an innocent person can be justified because the death penalty saves lives by deterring other killings.

TESTIMONY IN REBUTTAL TO INNOCENCE:

Paul G. Cassell

Associate Professor of Law, University of Utah, College of Law, and former law clerk to Chief Justice Warren E. Burger. Statement before the Committee on the Judiciary, United States House of Representatives, Subcommittee on Civil and Constitutional Rights Concerning Claims of Innocence in Capital Cases (July 23, 1993)

"Given the fallibility of human judgments, the possibility exists that the use of capital punishment may result in the execution of an innocent person. The Senate Judiciary Committee has previously found this risk to be 'minimal,' a view shared by numerous scholars. As Justice Powell has noted commenting on the numerous state capital cases that have come before the Supreme Court, the 'unprecedented safeguards' already inherent in capital sentencing statutes 'ensure a degree of care in the imposition of the sentence of death that can only be described as unique.'"

...

"Our present system of capital punishment limits the ultimate penalty to certain specifically-defined crimes and even then, permit the penalty of death only when the jury finds that the aggravating circumstances in the case outweigh all mitigating circumstances. The system further provides judicial review of capital cases. Finally, before capital sentences are carried out, the governor or other executive official will review the sentence to insure that it is a just one, a determination that undoubtedly considers the evidence of the condemned defendant's guilt. Once all of those decision makers have agreed that a death sentence is appropriate, innocent lives would be lost from failure to impose the sentence."

...

"Capital sentences, when carried out, save innocent lives by permanently incapacitating murderers. Some persons who commit capital homicide will slay other innocent persons if given the opportunity to do so. The death penalty is the most effective means of preventing such killers from repeating their crimes. The next most serious penalty, life imprisonment without possibility of parole, prevents murderers from committing some crimes but does not prevent them from murdering in prison."

...

"The mistaken release of guilty murderers should be of far greater concern than the speculative and heretofore nonexistent risk of the mistaken execution of an innocent person."

Full text can be found at:

<http://www.law.utah.edu/faculty/bios/cassell/TESThousehearing.htm>

COUNTER ARGUMENT 4 ARBITRARINESS AND DISCRIMINATION

The death penalty is applied unfairly and should not be used.

In practice, the death penalty does not single out the worst offenders. Rather, it selects an arbitrary group based on such irrational factors as the quality of the defense counsel, the county in which the crime was committed, or the race of the defendant or victim.

Almost all defendants facing the death penalty cannot afford their own attorney. Hence, they are dependent on the quality of the lawyers assigned by the state, many of whom lack experience in capital cases or are so underpaid that they fail to investigate the case properly. A poorly represented defendant is much more likely to be convicted and given a death sentence.

With respect to race, studies have repeatedly shown that a death sentence is far more likely where a white person is murdered than where a black person is murdered. The death penalty is racially divisive because it appears to count white lives as more valuable than black lives. Since the death penalty was reinstated in 1976, 158 black defendants have been executed for the murder of a white victim, while only 11 white defendants have been executed for the murder of a black victim. Such racial disparities have existed over the history of the death penalty and appear to be largely intractable.

It is arbitrary when someone in one county or state receives the death penalty, but someone who commits a comparable crime in another county or state is given a life sentence. Prosecutors have enormous discretion about when to seek the death penalty and when to settle for a plea bargain. Often those who can only afford a minimal defense are selected for the death penalty. Until race and other arbitrary factors, like economics and geography, can be eliminated as a determinant of who lives and who dies, the death penalty must not be used.

TESTIMONY IN SUPPORT OF ARBITRARINESS AND DISCRIMINATION

Reverend Jesse L. Jackson, Sr.

President and Chief Executive Officer, Rainbow/PUSH Coalition, Inc. Excerpt from "Legal Lynching: Racism, Injustice & the Death Penalty," (Marlowe & Company, 1996)

“Who receives the death penalty has less to do with the violence of the crime than with the color of the criminal's skin, or more often, the color of the victim's skin. Murder -- always tragic -- seems to be a more heinous and despicable crime in some states than in others. Women who kill and who are killed are judged by different standards than are men who are murderers and victims.

The death penalty is essentially an arbitrary punishment. There are no objective rules or guidelines for when a prosecutor should seek the death penalty, when a jury should recommend it, and when a judge should give it. This lack of objective, measurable standards ensures that the application of the death penalty will be discriminatory against racial, gender, and ethnic groups.

The majority of Americans who support the death penalty believe, or wish to believe, that legitimate factors such as the violence and cruelty with which the crime was committed, a defendant's culpability or history of violence, and the number of victims involved determine who is sentenced to life in prison and who receives the ultimate punishment. The numbers, however, tell a different story. They confirm the terrible truth that bias and discrimination warp our nation's judicial system at the very time it matters most -- in matters of life and death. The factors that determine who will live and who will die -- race, sex, and geography -- are the very same ones that blind justice was meant to ignore. This prejudicial distribution should be a moral outrage to every American.”

REBUTTAL TO ARBITRARINESS AND DISCRIMINATION

The death penalty is applied fairly and may be used.

Discretion has always been an essential part of our system of justice. No one expects the prosecutor to pursue every possible offense or punishment, nor do we expect the same sentence to be imposed just because two crimes appear similar. Each crime is unique, both because the circumstances of each victim are different and because each defendant is different. The U.S. Supreme Court has held that a mandatory death penalty which applied to everyone convicted of first degree murder would be unconstitutional. Hence, we must give prosecutors and juries some discretion.

In fact, more white people are executed in this country than black people. And even if blacks are disproportionately represented on death row, proportionately blacks commit more murders than whites. Moreover, the Supreme Court has rejected the use of statistical studies which claim racial bias as the sole reason for overturning a death sentence.

Even if the death penalty punishes some while sparing others, it does not follow that everyone should be spared. The guilty should still be punished appropriately, even if some do escape proper punishment unfairly. The death penalty should apply to killers of black people as well as to killers of whites. High paid, skillful lawyers should not be able to get some defendants off on technicalities. The existence of some systemic problems is no reason to abandon the whole death penalty system.

TESTIMONY IN REBUTTAL OF ARBITRARINESS AND DISCRIMINATION

Justice Lewis Powell

United States Supreme Court Justice

excerpts from *McCleskey v. Kemp*, 481 U.S. 279 (1987)

(footnotes and citations omitted)

(Mr. McCleskey, a black man, was convicted and sentenced to death in 1978 for killing a white police officer while robbing a store. Mr. McCleskey appealed his conviction and death sentence, claiming racial discrimination in the application of Georgia's death penalty. He presented statistical analysis showing a pattern of sentencing disparities based primarily on the race of the victim. The analysis indicated that black defendants who killed white victims had the greatest likelihood of receiving the death penalty. Writing the majority opinion for the Supreme Court, Justice Powell held that statistical studies on race by themselves were an insufficient basis for overturning the death penalty.)

“[T]he claim that [t]his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since [this] claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys or judges. Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could -- at least in theory -- be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decision making. As these examples illustrate, there is no limiting principle to the type of challenge brought by *McCleskey*. The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not 'plac[e] totally unrealistic conditions on its use.' (*Gregg v. Georgia*)”

The entire decision can be found at

<http://supct.law.cornell.edu:8080/supct/>
(by searching "historic decisions - capital punishment")