



## Can the Death Penalty

### Yes

by John McAdams, associate professor of political science, Marquette University

We should, generically, want fairness in all areas of public policy. And we should especially want fairness with regard to the death penalty, since the stakes are high. But the opponents of the death penalty make a most peculiar argument about fairness. They argue that if the death penalty is not administered fairly, and especially administered with *racial* fairness, it must be abolished.

Nobody would even think of trying to apply this principle in a consistent way. If we find that black neighborhoods get less police protection than white neighborhoods, would we withdraw cops from both black and white neighborhoods? If banks are discriminating against black home buyers in mortgage lending, would we demand they stop all mortgage lending? If we find the IRS discriminating against middle-class and poor taxpayers, would we want to abolish the IRS? All right,

ing at statistics is that blacks are over represented on death row. Thus, we might conclude that the system is unfairly harsh on black defendants. Many have. As Frank Chapman said: "For 48 percent of the death row population in our country to be black is clearly practicing genocide when you consider that Afro-americans are only 12 percent of the population." Somewhat more

recent figures show 41.7 percent of the death row population to be black, and of all prisoners executed since 1988, 38.7 percent have been black.

Presumably, this is because of racist prejudice against black defendants on the part of prosecutors, or juries, or on the part of the voting public to which judges and prosecutors are responsible in a democracy.

I call this the mass market version of the racial disparity argument.

But then suppose we look a bit further. Notice that 48 percent of murder victims are black (in 1995). And then we notice that the vast majority of murders are *intraracial* and not *interracial*. Among murders involving blacks and whites, 90 percent involve a white killing a white or a black killing a black. Almost three-quarters of the rest involve blacks murdering whites, and only a small handful involve whites murdering blacks. Knowing this, the number of blacks on death row, and the number of blacks executed doesn't look far out of line.

But we want to go beyond eyeballing numbers to get a solid assessment of bias. To do that, we have to control for factors that might legitimately result in more or less severe sentences. The opponents of the death penalty have actually cited the fact that blacks who murder whites are treated more harshly than blacks who murder blacks to argue for racial bias in the system. Unfortunately, the odds of black on white murders being comparable to black on black murders are about zero.

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**The death penalty is administered as fairly as other public policies, and especially as fairly as other criminal sanctions.**

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that *does* have an attraction, but nobody is seriously suggesting it.

What do the opponents of the death penalty say should replace it? Life imprisonment, perhaps? But there is no reason to believe this penalty is more fairly imposed than the death penalty. So are we going to knock the maximum down to 10 years? If so, we face the same problem.

In addition to the philosophical incoherence of the argument, the empirical reality of racial disparity in capital punishment is a lot more complicated than simplistic notions about racism run riot in the criminal justice system would lead you to believe. It's important here to understand that the opponents of the death penalty make two different arguments about racial fairness, and they are flatly contradictory.

The first thing that we see when we start look-





# Penalty Be Administered Fairly?

## No

by Leigh B. Bienen, senior lecturer, Northwestern University School of Law

Since 1976, 38 states have re-enacted capital punishment statutes, and the state supreme courts have upheld those statutes. But from coast to coast, the death penalty remains fundamentally unfair and unjust. While unfairness in most policies is a cause for reform, when the stakes are life and death unfairness is cause for abolition. Capital punishment is unfair in its geographic

variance; it is unfair because of its statutory ambiguity; it is unfair because of the extralegal variables, such as race, that influence decisions.

More than 3,000 people are on death row now and more than 325 have been executed since 1976. Texas alone has executed more than 100 people.

But a crime that is capital in one state may not be capital next door. The likelihood of being executed in Texas is far higher than in any other state. Just as a few miles can mean the difference between life and death, so can a few years. California voters changed the composition of the California Supreme Court earlier this decade by replacing three judges who were pilloried for overturning state death sentences. The remaining justices and their new colleagues now routinely uphold death sentences.

Within a single state, differences in demographics or geography or prosecutors' policies cause huge discrepancies in the application of the same statute. For example, it is far more likely that a murder will be prosecuted capitally in a suburban or rural county than in a large urban jurisdiction. One county prosecutor will prosecute every death-eligible case capitally. In the county across the line, the prosecutor may plead out all but the most egregious murders, or choose to prosecute none as capital cases.

If vast differences exist between individual counties within the same state, larger differences exist among the states. Some states allow the execution of those under 18, a few do not. Many

state laws allow those who do not do the killing themselves to be sentenced to death; others do not. Some states allow the execution of the mentally retarded, some do not. Each state defines the subset of capital murders differently, but in each state, the proportion of murders that could result in a death-penalty sentence is a fraction of all murders.

Each state supreme court interprets its own capital statute and the surrounding federal and state constitutional requirements differently. No one, not even capital punishment experts, understands the law.

Jurors don't understand the law. Interviews with jurors show that they don't understand statutory aggravating and mitigating circumstances, the provisions that the U. S. Supreme Court said were to enable juries to decide fairly who would live

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**The reason to abolish the death penalty that overrides all other reasons is simple: it is not just.**

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and who would die. Jurors confuse statutory aggravating factors with mitigating factors because mitigating factors often sound like aggravating factors. Showing a juror that a candidate for the death penalty suffers from a mental disease or defect, or mental retardation or other behavioral deficits, may persuades some jurors that this is all the more reason to execute that person. And those are supposed to be mitigating factors, reasons not to sentence to death.

Jurors don't understand judges' instructions or jury selection procedures. More logical than lawyers, perhaps, jurors who are questioned at length about their attitudes towards the death penalty before a case starts assume that the death penalty is a possible, and perhaps even appropriate or expected outcome. Yet, jurors are not supposed

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White on black murders are rare, and difficult to deal with statistically, so what we are basically left with is a comparison of the treatment of blacks who murder blacks, and whites who murder whites.

And what do we find when we make this comparison? As scholars such as Gary Kleck, William J. Bowers, Sheldon Ekland-Olson and David Baldus have shown, murderers of blacks who are themselves overwhelmingly black are treated more *leniently* than murderers of whites. Of course, this can be formulated in a politically correct manner, as a bias against black *victims*. As Randall L. Kennedy, describing David Baldus' study, remarked: In the marketplace of emotion, the lives of blacks simply count for less than the lives of whites.

I call this the specialist version of the racial disparity argument. I'm quite happy with this formulation, since it expresses concern for the victims of crime. But I can't avoid noticing that it flatly contradicts the mass market version.

But given that racial disparity is real, how severe is it? David Baldus, who is probably the top scholar in the area, recently described the statistical findings:

... what do the data tell us about differences in discrimination in the pre- and post-*Furman* periods [after legislatures tightened sentencing procedures in response to the court's ruling]? There are significant differences in race effects, both across and within states. There are differences in the magnitude of race effects at different decision-making levels in the states i.e., prosecutorial decisions to seek the death penalty and jury decisions to impose death. There are also differences that correlate with culpability. The risk of race effects was very low in the most aggravated capital cases; however, in the *mid-range* cases, where the correct sentence was less clear; and the room for exercise of discretion much

broader, the race disparities are much stronger. Whereas the overall average disparity for the two groups (black v. white) tends to be 6-8 percentage points, in the mid-range cases the disparities are typically two to three times that large [12 to 24 percentage points].

Baldus then goes on to describe some reactions to his findings:

There is much anecdotal evidence from lawyers who represent capital defendants. Many of them seriously question the validity of statistical studies that do not reveal disparities based upon the race of the defendant. It is possible that there is such discrimination, but that it is not sufficiently large and systematic to be picked up by the data.

Baldus, perhaps out of politeness, doesn't note that lawyers are in the business of producing anecdotal evidence to support their client's position, and that those who represent capital defendants are a highly self-selected and hardly unbiased group.

So what we have, in the way of hard statistical evidence, fails to support the politically correct fantasy of massive discrimination. Is the death penalty administered with perfect fairness? No. Is it administered as fairly as other public policies, and especially as fairly as other criminal sanctions? Yes.

Public officials should work to make the system even fairer. In particular, better provision could be made for an effective defense in capital cases. And I think that a revival of executive clemency (which has fallen into disuse) in cases where a jury is perceived to have been too harsh would be a good thing. But the notion that unfairness, and particularly racial unfairness, requires the end of the death penalty makes neither philosophical nor empirical sense.





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to think about the death sentence until guilt is decided. Jurors don't understand whether they have final responsibility for imposing the death sentence, and if they do understand what they have done, they often assume the sentence will be reversed on appeal.

That judges don't understand the law is evidenced by the fact that there are so many reversals for extreme and embarrassing errors in capital cases. Judges worry about re-election and retention, and their pensions, and that they will be thrown out if they don't sentence to death. Prosecutors and defense attorneys don't understand

the law, as can be seen in the reports of trials in the tiny fraction of cases that are appealed.

As a result of all this confusion, capital cases have a high rate of reversal. Al-

most half of all cases that came before federal courts on habeas petitions, when the federal courts considered capital cases on successive habeas petitions, resulted in the reversal of the death sentence. These death sentences were reversed reluctantly, not because federal judges were soft on crime, but because the errors and constitutional violations were glaring. Yet most state death sentences are not reversed, especially now that federal habeas has been restricted.

Certainly neither victims nor defendants understand the law. Anyone can understand how victims' families and loved ones would want the person who killed one of their own to die. In most cases theirs is the simplest and most dignified of responses, the easiest to understand. Nor is it difficult to see why victims' families end up angry and frustrated by the legal system.

The public and the press don't understand the law of capital punishment. How could they when gross factual and legal errors appear regularly in news reports? Lawyers who have studied the law and tried cases under capital statutes for years don't understand it. Statutory language and syn-

tax are ambiguous and mired in confusion. The procedures for capital prosecution and trial are interpreted in a thousand different ways in a single jurisdiction, rightly or wrongly, and those decisions are rarely written down. Hence precedent, which is supposed to explain and iron out contradictions, doesn't exist. The interpretations of procedural statutes by courts, prosecutors and others are random and idiosyncratic when they are explained, partly because the participants in the process are angry and frustrated. All in the middle of it see an enormous waste of time, money and human resources.

And as if all of these 'legal' reasons were not enough, on top of everything else extralegal forces influence who is sentenced to death. Whether the case is newsworthy; where it occurs, whether the defendant and the victim and the circumstances have certain sympathy provoking characteristics, perhaps related to class, race and other nonlegal factors, will play a role in deciding who is charged with capital murder, who is prosecuted, who is sentenced to death and who is executed. The appearance of the defendant and the attractiveness of the victim may be more important than the aggravated nature of the homicide. And this doesn't even touch the subject of the role and influence of the media in capital cases.

Capital punishment clogs up the courts and wastes energy that could be better spent locking up murderers and making sure that the culpable are not released. Since so few sentenced to death are actually executed, less than one in 10, the system ties itself in knots and defendants end up sentenced to life anyway. So why not just sentence murderers to life, and forget about the circus of a capital trial?

Finally, though, it is a question of justice. Even if the present system were not a national embarrassment, even if it were not a waste of time and money, even if it were not irrational in the extreme, even if it did not corrupt and distort our system of laws, the reason to abolish the death penalty that overrides all other reasons is simple: it is not just.