



HUMAN RIGHTS AND THE DEATH PENALTY

in the United States



All People Accused Have the Right to:

EQUAL PROTECTION:

The right to be treated equally and without discrimination or distinction of any kind before the law and with equal protection of the law.⁶⁴

DUE PROCESS:

The right to a fair and public hearing by a competent, independent and impartial court or tribunal established by law⁶⁵ and within a reasonable amount of time.⁶⁶

RIGHT TO NOT BE ARBITRARILY DEPRIVED OF LIFE:

Any deprivation of life must be done in accordance with and in the spirit of the right to life⁶⁷ and in accordance with requirements to a fair hearing, independent tribunal, presumption of innocence, minimum guarantees by the defense and the right to review by a higher tribunal.⁶⁸

FREEDOM FROM TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT:

Be free from subjection to torture or cruel, inhuman, or degrading treatment or punishment.⁶⁹

LIBERTY AND SECURITY OF PERSON:

The Right to liberty and security of person⁷⁰ and in the cases where criminal charges are brought, the deprivation of liberty shall adhere to all provisions for the assurance of due process,⁷¹ freedom from torture,⁷² and prohibition of arbitrary deprivation of life.⁷³

RIGHT TO BE PRESUMED INNOCENT:

Has the right to be presumed innocent until proven guilty according to the law where by he/she has been afforded all of his/her due process rights.⁷⁴

FREEDOM FROM DISCRIMINATION:

Right to full protection of the law without any discrimination based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, without any derogation.⁷⁵

"Everyone has the right to life, liberty and security of person."

Article 3, Universal Declaration of Human Rights (UDHR), 1948

"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

Article 6, International Covenant on Civil and Political Rights, 1966

WHAT ARE HUMAN RIGHTS REGARDING CRIMINAL PUNISHMENT?

The Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and its optional protocols together establish the basic human rights for everyone. Known collectively as the International Bill of Human Rights, these treaties address a broad array of human rights, including those relevant to the death penalty. All people are guaranteed protections from discrimination, torture, and cruel or unusual punishment, as well as rights to life, security of person, due process, and equality before the courts. In 1984, the United Nations adopted the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, which limit the use of the death penalty and protect those facing it from extensive suffering.¹ Five years later, the United Nations reinforced its stance that the death penalty is incompatible with human rights when it adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Countries that ratify the optional protocol must end all executions and take steps to abolish the death penalty.²

DOES THE U.S. RECOGNIZE THESE HUMAN RIGHTS?

The U.S. Constitution guarantees certain rights for all people in the U.S., without distinction of any kind, including race. These rights include the rights to a fair and speedy trial, due process, trial by jury, and protection from cruel and unusual punishment. The 14th Amendment contains the Equal Protection Clause, which protects the rights of all people including minorities on an equal level. In a similar vein, the Declaration of Independence reads that "...all men are created equal..."³ The U.S. is also bound by international treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). The U.S. has not ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (OP2-ICCPR). It has ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) Many other countries, however, have moved toward abolition. For example, the European Union mandates that all its members abolish the death penalty.⁴

IS THE U.S. FULFILLING THESE HUMAN RIGHTS?

U.S. laws protect basic human rights, including those that the administration of the law and due process. Nevertheless, numerous problems with the use of the death penalty mean that these protections are not being guaranteed. Capital punishment in the United States remains arbitrary, racially-biased, and it poses the risks of cruel and unusual punishment and execution of innocent people.

The Arbitrary Nature of Death Sentences

The death penalty system in the U.S. is complex, because there are 35 different systems that use the death penalty. In the U.S., 33 states, the federal government, and the U.S. military use the death penalty and have their own laws regarding it.⁵ Criminals may be executed for committing a crime punishable by federal law or the laws of one of the 33 states. Different states punish similar crimes in different ways. Thus, while two individuals may commit similar crimes, their location can mean the difference between life imprisonment and death. A homicide in Minnesota may result in a prison sentence, but in Texas, it could amount to execution. This arbitrariness, depending on where the crime takes place and whether that state punishes it by death, becomes clear when looking at the pattern of executions in the U.S. Since capital punishment resumed in the U.S. in 1976, 82% of executions have occurred in the South while Texas alone accounts for 37%.⁶ Arbitrariness can be found on a local level, as well. In Ohio, 23% of death row inmates come from Hamilton County, despite the fact that only 9% of the states' murders occur there.⁷ Furthermore, it is largely the prosecutor's decision to pursue the death penalty. Social pressures, beliefs, and political motivations and context can influence the prosecutor's charging decisions and thus the defendant's fate.⁸ Arbitrary conditions also extend to juries in terms of jury selection, jurors who misunderstand their instructions, incorrect juror assumptions that death is required, jurors who predetermine decisions before the sentencing phase, and juries that are predominantly white or inclined toward death or guilt.⁹

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Racial Bias in the Capital Punishment System

Race plays a role in the death penalty. Statistics show that when the victim is white, the defendant is far more likely to receive a death sentence. A 2003 study by the University of Maryland found that prosecutors are more likely to pursue a capital sentence when the victim is white. While only 49% of national murder victims are white, a full 77% of capital homicide cases involve a white victim.¹⁰ In Louisiana, defendants are 97% more likely to receive a death sentence when the victim is white, while California cases involving white victims were three times more likely to produce a capital sentence than when the victim is Black, and four times more likely than when the victim is Latino.¹¹ Racial bias is a serious problem that continues to plague the capital punishment system today. Most recently, North Carolina Judge Gregory Weeks found racial bias to be a factor in the trial of death row inmate Marcus Robinson in a 2012 decision. Weeks stated that racial discrimination by the prosecution during jury selection contributed to the imposition of a capital sentence and commuted his sentence to life without parole.¹²

Inadequate Trial Representation for the Defense

The more money a defendant has, the more likely he or she is to avoid a death sentence. In federal cases, defendants whose “representation costs” were less than \$320,000 were about twice as likely to receive capital punishment as those whose costs exceeded \$320,000.¹³

Only 5% of inmates on death row can afford an attorney. When courts appoint an attorney for an indigent defendant, that attorney may be inexperienced, have massive caseloads, or may not give the case adequate time and attention. Between 1981 and 2001, 20% of convicts who faced the death penalty in Washington had attorneys who were or had been “disbarred, suspended, or arrested.”¹⁴ A 1990 study in the National Law Journal likened capital trials in the South to “a random flip of the coin” citing low-quality court appointed defense attorneys.¹⁵

Unjustifiable Costs

Death penalty cases are costly. Federal capital cases are almost eight times more expensive than similar non-capital cases.¹⁶ In Maryland, the average cost of a death sentence is \$3 million, nearly \$2 million more than life without parole.¹⁷ There are even additional costs hidden in cases where the death penalty is sought but not ultimately obtained: the 106 cases in Maryland where capital punishment was sought but not imposed cost the state an additional \$71 million.¹⁸ In Washington, each death penalty case costs the state well over half-a-million more dollars than a non-death penalty homicide case.¹⁹ Capital cases that result in a death sentence in Tennessee are 48% more expensive;²⁰ in Kansas, they are up to 70% more expensive than non-death penalty cases.²¹ It is difficult to put an exact estimate on the disparity between a death penalty trial and a trial for life without parole, but the difference is clear: cases resulting in life imprisonment average around \$500,000, while estimates for death penalty cases range from \$1-\$7 million.²²

The costs on the state and national level are striking. In California, the cost per year of a criminal justice system with the death penalty is roughly \$137 million.²³ If California were to abolish the death penalty and use life imprisonment as its maximum sentence, the annual cost would be roughly \$11.5 million.²⁴ In other words, a system without the death penalty would save more than \$100 million per year that could be redirected toward education, infrastructure, and crime prevention. A 2011 study concluded that the death penalty has cost California \$4 billion since 1978, during which time it has executed 13 inmates.²⁵ In a recent calculation, California could save \$1 billion over five years if it abolished the death penalty.²⁶

Cruel and Unusual Punishment

Earlier methods of execution in the U.S. included the use of the gas chamber, firing squad, electric chair, and hanging. Today, retentionist states primarily use lethal injection. Lethal injection may give the illusion of a more humane method of punishment, but it can cause unnecessary pain and suffering. Executions by lethal injection apply three drugs in a specific order. The first drug is a large dose of sodium thiopental, which puts the inmate to sleep. The second drug is pancuronium bromide, designed to immobilize and stop breathing. The last drug is potassium chloride, which causes cardiac arrest.

Lethal injection is fraught with the potential for cruel and unusual punishment.²⁷ Because doctors have an ethical obligation not to participate, executions are conducted by unskilled technicians.²⁸ As a result, lethal injection procedures are often fraught with complications. Finding an inmate’s vein and properly

U.S. Government Obligations⁷⁶

To ensure the rights of those who have been accused the US has the following obligations:

RESPECT:

The US Government must not deprive individuals accused and/or convicted of crimes of their fundamental human rights.

PROTECT:

The US Government is required to take positive steps to ensure the protection of the human rights of those individuals accused of and/or sentenced for crimes.

FULFILL:

The US Government must adopt national legislation necessary to achieve the full realization of the rights of individuals accused and/or convicted of crimes.

TAKE STEPS:

The US Government must use the maximum amount of resources available to ensure the rights of those accused and/or sentenced to crimes based on the resources of society as a whole, not only the resources within the current budget.

MEET MINIMUM STANDARDS:

The US Government must ensure the rights of those accused and/or convicted of crimes based on the minimum standards set forth in the US Bill of Rights and those international instruments to which the US is party and immediately address issues regarding arbitrary deprivation of life, torture, and discrimination in the criminal justice system.

NON-DISCRIMINATION:

The US Government must take positive measures so that individuals are not subject to discrimination of any kind when accused and/or convicted of crimes but instead are held as equals before the law.

PROTECT MOST VULNERABLE:

The US Government must actively ensure that protections are in place for vulnerable individuals accused and/or convicted of crimes including children, the mentally ill and persons with intellectual disabilities.

MONITOR AND REPORT:

The US Government must monitor and report on the realization of the rights of those who stand accused or convicted of crimes so as to ensure accountability and the promotion of basic human rights.

For further info and citations, please visit:
www.discoverhumanrights.org



Cruel and Unusual Punishment (continued)

inserting the needle is one common problem. In 2006, technicians pushed a needle straight through vein of Angel Nieves Diaz. Instead of injecting the drugs into his circulatory system, they entered his muscles causing a prolonged and painful execution.²⁹ The mechanics of the execution can also go awry. Technicians may mistakenly give drugs in the wrong dosage or at incorrect time intervals. The use of a paralyzing drug means that even if the inmate is experiencing severe pain, he or she would be unable to show the pain or tell anyone about it. Even veterinarians do not use pancuronium bromide to put animals to sleep because the American Veterinary Medical Association has concerns that the drug hides signs of pain.³⁰

Capital Punishment Does Not Act as a Deterrent

There is no unrefuted proof that the death penalty prevents homicides. Most capital crimes are not premeditated and so are not as susceptible to deterrence.³¹ Many studies claiming that capital punishment is an effective deterrent to crime have statistical faults. Critiques of several recent articles claiming to show a deterrent effect were able to manipulate the same data to arrive at the opposite conclusion: that capital punishment increases the murder rate.³² Other critiques point to omissions of important data and variables.³³ In fact, abolitionist states statistically have lower murder rates. In 2007, states allowing capital punishment had a 42% higher homicide rate than abolitionist states.³⁴ Given that deterrent studies often have inherent flaws and have been demonstrated to produce opposing findings, the only safe conclusion to draw is that there is no correlation between the death penalty and deterrence.

Questions Regarding the Mentally Ill

Mental illness is defined as “any of various conditions characterized by impairment of an individual’s normal cognitive, emotional, or behavioral functioning, and caused by social, psychological, biochemical, genetic, or other factors, such as infection or head trauma. Also called emotional illness, mental disease, mental disorder.”³⁵ These disorders can include, but are not limited to, schizophrenia, bipolar disorder and borderline personality disorder.

The Supreme Court ruled in *Ford v. Wainwright*, 477 U.S. 399 (1986), that the insane cannot be executed and that defendants are entitled to a competency evaluation once they make a “substantial threshold showing of insanity.”³⁶ There have been numerous defendants who received stays of execution pending competency reviews. In 2007, *Panetti v. Quarterman*, 551 U.S. 930, tightened the standards that states must use when determining competency.³⁷ Under *Panetti*, the Court defined Ford’s procedural standards, requiring “an adequate opportunity to submit expert evidence in response to the report filed by the court-appointed experts.”³⁸ The Court also tightened restrictions on competency, finding that comprehension of the link between the punishment and the crime committed may not satisfy competency because “gross delusions stemming from a severe mental disorder may put that awareness in a context so far removed from reality that the punishment can serve no proper purpose.”³⁹ Nevertheless, persons suffering from severe mental illnesses can still be executed if they do not satisfy the definition of “incompetence” set forth under *Ford* and *Panetti*. As a result, many mentally ill prisoners have been executed over the years, including some who suffered from psychotic delusions.

Questions Regarding the Intellectually Disabled

In 2002, the U.S. Supreme Court ruled that executing the intellectually disabled⁴⁰ was cruel and unusual punishment and prohibited the practice. Each state uses its own test to determine intellectual disability, but the test generally requires:⁴¹

- substantial intellectual impairment;
- that the impairment affects the individual’s everyday life; and
- that the disability appears before the age of 18 years.

Despite this prohibition, there is still significant risk that an intellectually disabled person could be executed. If a lawyer fails to realize or prove that a defendant is intellectually disabled, the defendant could still be sentenced to death. Thus, protecting the rights of the intellectually disabled is closely intertwined with the quality of the defendant’s lawyer.

Juvenile Offenders

In 2005, the Supreme Court ruled in *Roper v. Simmons* that the execution of juvenile offenders is a violation of the Eighth and Fourteenth Amendments to the Constitution. Prior to the ruling and following the death penalty’s reinstatement in 1976, the United States executed 22 juvenile offenders for crime committed before they were 18.⁴² Following the ruling prohibiting the execution of juvenile offenders, the United States is now in compliance with standards set by international law, including Article 6 of the International Covenant on Civil and Political Rights⁴³ and Article 37 of the Convention on the Rights of the Child.⁴⁴

“Considering that the use of the death penalty undermines human dignity and convinced that a moratorium on the use of the death penalty contributes to the enhancement and progressive development of human rights, that there is no conclusive evidence of the deterrent value of the death penalty and that any miscarriage or failure of justice in the implementation of the death penalty is irreversible and irreparable...”

~ United Nations Resolution 62/149, Moratorium on the use of the death penalty, 26 February 2008.



Risks of Executing an Innocent

As of June 2012, 140 death row inmates have been exonerated because of evidence of their innocence. Florida leads the nation in exonerations of the wrongfully convicted on death row with 23 since 1976.⁴⁵ There is increasing awareness of the great risk of executing the innocent. Governor George Ryan of Illinois issued a moratorium on the death penalty in 2000, citing the persistent issue of wrongful conviction,⁴⁶ before Illinois finally abolished the death penalty in 2011.⁴⁷ Factors that lead to wrongful convictions include eyewitness misidentification, poor defense, misconduct by police, prosecutors and forensic experts, false testimony, false confessions, racial bias, mishandling of evidence, and external pressures.⁴⁸ Between 2000 and 2011 there has been an average of five exonerations per year, up from an average of three per year between 1976 and 1999.⁴⁹

There is strong evidence that defendants who were executed in the United States were actually innocent. Cameron Todd Willingham was executed in 2004 for the alleged killing of his three children in a house fire. An independent investigation by four national arson experts later found that the original conclusions were based on flawed techniques, and that there was “nothing to suggest to any reasonable arson investigator that this was an arson fire.”⁵⁰

More recently, Troy Davis was executed in 2011 despite serious doubts as to his guilt.⁵¹ The Georgia Bureau of Investigations concluded that the jury was misled while a majority of the witnesses for the prosecution recanted or changed their testimony, some citing police coercion. Calls for clemency came from all over the world, and included Pope Benedict XVI, a former FBI director, a former Georgia Supreme Court Justice, and petitions totaling over 850,000 signatures.⁵²

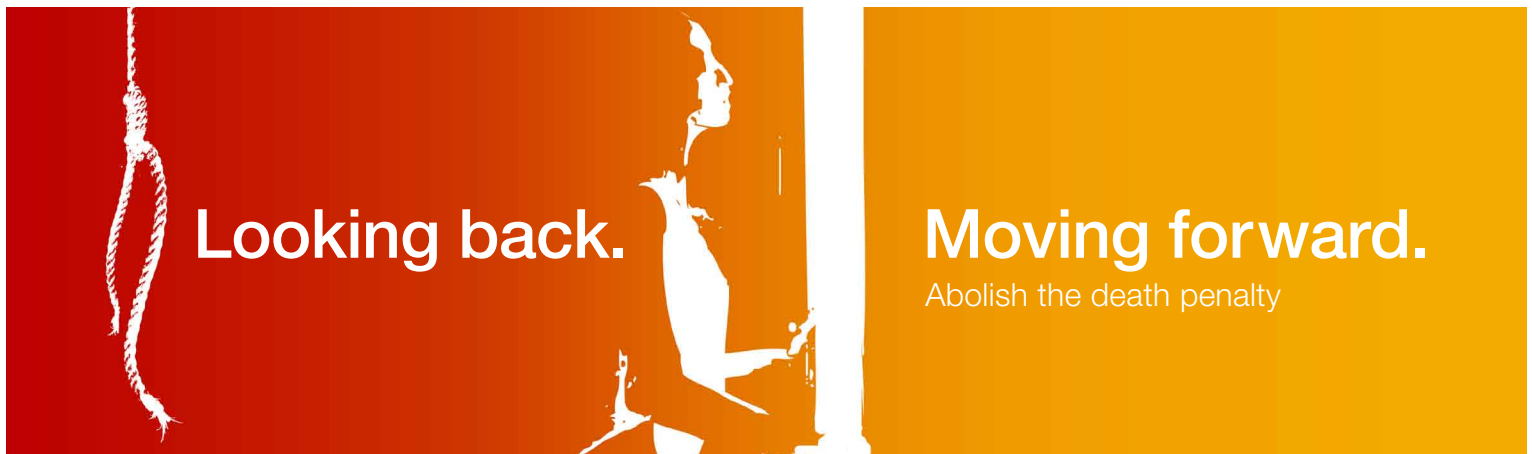
A 2012 investigation by researchers at Columbia University Law School concluded that Carlos DeLuna was executed in 1989 for a crime that he did not commit.⁵³ DeLuna was convicted of murdering Wanda Lopez solely by the identification of a single night-time eye witness. DeLuna maintained his innocence up to the time of his execution, claiming that the real murderer was Carlos Hernandez. Prosecutors refused to investigate that possibility despite the fact that Hernandez had a history of violence against women and was arrested multiple times with the same type of knife used in the murder. He later bragged for years that he murdered Wanda Lopez and allowed DeLuna to take the fall.⁵⁴

Trends Away from the Death Penalty and the U.S. on the International Stage

Today, there are more abolitionist countries than countries that use the death penalty. As of June 12, 2012, 141 countries have abolished the death penalty or are abolitionist in practice.⁵⁵ Seventy-four countries have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. The U.S. is not one of these.⁵⁶ Although the U.S. still uses the death penalty, many of our European counterparts have already abolished it. Since 1990, more than fifty countries have abolished capital punishment for all crimes, most recently Burundi (2009), Togo (2009), Gabon (2010), and Latvia (2012).⁵⁷ In accordance with this trend, the U.N. General Assembly has passed resolutions urging countries to issue a moratorium on executions, with the ultimate goal to abandon the death penalty.⁵⁸

Even when countries retain the death penalty in law, many of their practices are moving away from capital punishment. Amnesty International found that of the 58 countries with the death penalty, only 23 actually executed an inmate in 2010.⁵⁹ The number of executions in the U.S. is also declining, down from 90 in 1999 to 43 in 2011.⁶⁰ Most recently, New York, New Jersey (both 2007), New Mexico (2009), Illinois (2011), and Connecticut (2012) have abolished capital punishment.⁶¹ In Oregon, Governor Kitzhaber issued a moratorium on executions in 2011 for the duration of his term, stating, “It is time for Oregon to consider a different approach.”⁶²

China led the world in executions in 2010 with estimates in the thousands, although the exact number is unknown due to the secrecy of these numbers. Alongside Iran (252+), North Korea (60+), Yemen (53+), and the United States (46), these five countries accounted for the vast majority of global executions in 2010.⁶³ It is of concern that the U.S. has placed itself within this group of countries with egregious human rights records.





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