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MARYLAND COMMISSION ON CAPITAL PUNISHMENT

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PUBLIC HEARING

COMMISSION MEETING

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ANNAPOLIS, MARYLAND

JULY 28, 2008

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OFFICIAL TRANSCRIPT OF PROCEEDINGS

Transcriptionist: Robin C. Comotto  
Notary Public

Proceedings recorded by digital CD recording.  
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## IN ATTENDANCE:

Benjamin Civiletti                      Former United States  
Attorney General/  
Commission Chairman

## Special Witnesses and Experts:

Deborah T. Poritz                      Former Chief Justice o  
Of the New Jersey  
Supreme Court

Raymond Paternoster                  Professor  
University of Maryland

David C. Baldus                      Professor  
University of Iowa  
Law School

Brian Stevenson, Esquire              Executive Director

Thomas Brewer                      Assistant Professor of  
Justice Studies  
Kent State University

David Kaczynski                      Brother of Ted Kaczynski

Bill Babbitt                      Brother of Manny Babbitt

## Additional Witnesses:

Jack Kamer

Paul Muchino

Sister Diane Bardol

IN ATTENDANCE (CONT.):

Sister Bridget Connor

Brother Gerald Sullivan

Rick Stack

Eldridge James

Reverend Mamie Williams

Lauren Dudley

Virginia Smith

Former Councilman Michael Shaffer

Identified Commission Members:

David Kendall, Esq.	Representing Member of The Public
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Adrienne A. Jones	Delegate MD House of Delegates Speaker Pro Tem
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Jamie Raskin	Senator Maryland State Senate
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William Spellbring	Former Judge Circuit Court for Prince George's County
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Rick N. Prothero	Representing Family Members Of Murder Victims
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## IN ATTENDANCE (CONT.):

Kirk Noble Bloodsworth	Exonerated Former State Prisoner
Matthew Campbell, Esq.	Representing Member of The Public
Bernadette DiPino	Chief of Police Ocean City, Maryland Representing Maryland Chiefs of Police
Sandy Rosenberg	Delegate, District 41, Baltimore City Representing Member of The Public
William Frank	Delegate, Baltimore County
Vicki A. Schieber	Representing Family Members of Murder Victims
Katy O'Donnell, Esquire	Chief Attorney of the Maryland Office of the Public Defender Capital Defense Div.
Various Unidentified Commission Members	
John Cox	

Now I'd like to call Executive Director Brian Stevenson to the witness chair. Welcome and good late afternoon.

MR. STEVENSON: Thank you, Mr. Chairman. It's my pleasure to be here. I really appreciate being invited by the Commission, and I'd also like to commend all of you for taking time out of what I know are very busy careers and professional lives to struggle with this question of the death penalty. I think it's a real testament to the commitment of people in Maryland that this Commission is even occurring and doing the terrific work that you're doing.

I'd like to make some comments and points that broaden the conversation about race and the death penalty, to a broader context. I'd like to talk about this issue in reference to the psycho and social effects of the questions surrounding race and the death penalty, and some of the legal effects, as well.

I'm going to make just six points, the first of which, the question of the death penalty has to be seen. The death penalty, legitimately, gets all the attention, and we talk about race and the criminal justice system. I think it legitimately gets all of the focus in the litigation and cases under the law, but it needs to be understood as part of a broader, bigger story about race and the criminal justice system.

The death penalty, quite rightly, has been the focus of a lot of empirical research and race has been a dominant part of that, but the same time period that has brought this analysis around race and the death penalty has also brought a very dramatic change in the American criminal justice system. And I want to suggest that that change has resonance when we think about the importance of confronting racial bias in the administration of the death penalty.

During roughly the same era that the death penalty has resulted in over eleven hundred executions and thousands of death sentences between

the 1970's and today, there's been another phenomenon going on in the broader criminal justice system, and that's mass incarceration. In 1972, there were three hundred thousand people in jails and prisons. Today there are two point three million. Today there are six million people on probation and parole.

This use of incarceration has had dramatic consequences for American society. We now have the highest rate of incarceration in the world, but it's had particular effects in minority communities, particularly in African American communities. One out of three black men between the ages of eighteen and thirty is in jail, probation, parole, or under some control of the criminal justice system. In many urban communities, like Baltimore, Washington, DC, the rate of criminal justice control actually increases to as high as fifty percent.

In combination with racial segregation, the consequence of criminal justice involvement in the lives of people of color is an overwhelming feature.

I point that out because that consequence creates a relationship to the criminal justice system that I think is highly relevant to the work that this Commission is doing. The despair, the distrust, the skepticism, the doubt, are all part of this story.

There are many serious collateral consequences for mass incarceration. For example, in my state of Alabama, thirty-one percent of the black men have permanently lost the right to vote. There's a projection that in another five years we could actually be at a level of disenfranchisement that rivals the level of disenfranchisement at the time of the Voting Rights Act. And the silence surrounding that is quite significant.

Well, I'm going to suggest that that reality has huge implications for any question about race and a punishment, race and the functioning of the criminal justice system. And I'm going to suggest it has implications not just for all of us who are involved in policy, but it actually has implications for the people who are directly affected.



I go into communities where young people of color, young men, twelve, thirteen, fourteen years of age, tell me that they don't believe that they're going to live past the age of eighteen. And they say that's rooted in despair because they see their friends dying from drugs or effectively dying by being sent to prison, and the criminal justice system represents this huge threat.

It is not a system that is deemed to be protective. It is not a system that is deemed to be fair. It is a system that is deemed to swallow and consume. And whether it's legitimate or not, I want to suggest that the death penalty, in its relationship to this broader story, is important.

The death penalty, in many ways, reflects our criminal justice system's ultimate authority. We claim that we can execute people, and that is exercising great power. It is the ultimate power. I'm going to argue that that ultimate authority comes with an ultimate responsibility, and that if we don't exercise that responsibility fairly, reliably, in a

non-racially discriminatory manner, the implications for this broader story about race and the criminal justice system get larger. The question of the integrity of the criminal justice system is at its most demanding when we talk about things like race and the death penalty.

Second point, historically we have relied on the legal system, the court system, to help us in dealing with these broad problems, these psycho social problems, the legal problems. It was the Supreme Court, the United States Supreme Court that saved us from the difficult choices and struggles that surrounded racial segregation.

It's great for me to actually be here because I consider myself a product of this region. I grew upon the Eastern Shore -- I didn't grow up in Maryland. I actually grew up in the southern county of Delaware, near Salisbury, near Ocean City, near Queen Anne, and when I grew up we were dealing very definitely with racial segregation. The movie

theater in my community -- I'm old enough to remember it being segregated. We had to go to the balcony.

My school system was segregated. I had to start my education in the colored schools, and I remember when lawyers came in and implemented Brown v Board of Education, and the Court's commitment to equal justice in Brown made race bias, in the public education system, race discrimination in the public education system, not inevitable, in direct contrast with what Professor Baldus has just been talking about.

Well this notion that the courts have failed us, or have not yet responded, is very much rooted in actual decisions. The McCleskey case cannot be over examined, over understood, over considered. It is a very, very significant legal pronouncement. The history of race and the death penalty has really shaped the conversation about the death penalty in this country. It's worth noting that in 1972, when the United States Supreme Court was wrestling with the death penalty, in Furman v Georgia, that case was

brought by the NAACP legal defense fund, whose primary motivation was the race effects, the racial bias that was connected with capital punishment.

They were representing people primarily in the deep south that were struggling with the legacy of lynching. It was involvement in the state's use of death, execution, etcetera, as a form of social control that made this a priority issue for the NAACP, and so the perceived racial bias (inaudible) was very much a focus in the Furman litigation. And in that case, the court noted that eighty-seven percent of the people executed for the crime of rape in America were black men convicted of raping white women. And these other disparities, based on race, was what motivated many of the court members to find the death penalty unconstitutional.

As we know, the Court didn't say it was a violation of the Eight Amendment, cruel and unusual punishment, but the court did say, it was arbitrary, like being struck by lightning. And what they meant by that was that there was evidence of racial

discrimination. Not as sophisticated as what we've heard about today but quite apparent.

Well that same concern with race gave rise to the second case in the trilogy of the modern death penalty, which was Gregg v Georgia. When lawyers went back to the Court, in 1976, they essentially argued that no matter what states do these disparities based on race are going to persist. And they said, look, you can't believe in 1976, four years after Furman that the problems of racial bias, and sentencing, and discretionary judgments, and arrests, and prosecution have been eliminated. And we're going to still have a racially biased death penalty.

And that's when the Court said, no, without evidence, we will not presume a racially biased capital punishment. And that gave rise to the amazing work of Professor Baldus, and others, to try to document this problem. And we're in the process now, still, in trying to respond to that question. The difficulty for us is that when the evidence was

developed and we went back to the United States Supreme Court, in McCleskey v. Kemp, and the Court accepted Professor Baldus' research, that showed these very real race effects, the Court ultimately said that these disparities are inevitable. That this is not a problem that the courts will fix. This is a problem for legislative bodies, for political bodies, for institutions like yourself.

And in many ways, by punting this issue, the Court took a very different position on this question than they've taken on questions of employment, and education, and housing. And as a result of that, the responsibility has really shifted in a way that's not really sort of precedential in American struggles around questions of racial bias, to people like you.

I think it's sort of unfair because as an advocate, as a lawyer, the Courts have always been the institutions protected from a political vulnerability, political attack. They're supposed to be the institutions that protect minority rights,

even when everybody wants to execute people because they're angry about crime and they're fearful about violence, it's the court's obligation to say if it's unfair, if it's discriminatory, you cannot do it. It's protecting minority rights that is the business of the courts.

But in this arena, the Court has said, we cannot do it. And consequently, this difficult task of protecting people who are hated, protecting people who are feared, protecting people who are vilified and demonized in the press, becomes your responsibility. And that's quite challenging.

For me, it's quite interesting because, as an advocate, I'm not used to sort of making appeals in this context because it is so hard. When you start talking about the violence, and the crimes, and the victimization -- my grandfather was murdered when I was sixteen years old, and I have some personal relationship to the horror of what homicide can do to a family, to the aspirations of a family, to the dreams of a community.

And so that's why I think the work of this Commission is so important, but I want to suggest that even though this institutional shift has occurred, that we can still do better than what we are doing currently on issues of race and the death penalty. But I do think it's important to recognize that the current status of the law now makes this a challenge, for us, for you. We cannot expect the courts to fix this problem.

Third point. The problems of mass incarceration, the tolerance of bias and discrimination in the administration of the criminal justice system, particularly in the administration of the death penalty, has very serious consequences. When the United States Supreme Court says that race bias is inevitable in the administration of the death penalty, it is not just speaking to outcomes for individual clients. They're saying something, in my judgment, very profound about our commitment to equal justice.



I've argued cases at the Court. I've never been able to reconcile myself to this decision in McCleskey. When I give speeches, I tell folks, frequently, that to me McCleskey is the Dredd Scott of our generation. It is the Plessy v Ferguson of our era, because there is this concession to bias. And I can't make sense of that. I see where it says "equal justice under the law." When I argue cases I read that, I get inspired by it, and then I go in and we talk about cases where the Court has already pronounced this inevitability doctrine, and I think that's a fundamental problem.

But the other consequence of inevitability and the rhetoric and the tolerance is that it creates and sustains and reinforced different outcomes, that we somehow should expect some of the disparities that we are talking about, that somehow we should tolerate those disparities, somehow we should accept them as a part of the world in which we live. And when do that we create these presumptions that then get re-internalized in these communities.

And I want to suggest that these presumptions are very dangerous. I now believe, in the work that I do and in the places where I work, and in many places around this country, we've actually created a presumption of guilt that many minority defendants have to overcome when they are charged. That presumption of guilt is magnified by all of the discretionary judgments that manifest themselves -- prosecuting charging decisions, police decisions, resource decisions, jury selection decision, a sentencing decision. Those decisions are aggravated by things, like poverty, where you do see race effects, as well.

Now we frequently say that our criminal justice system is very wealth sensitive, and I don't think there's much dispute about that. I tell my students frequently that our system treats you better if you're rich and guilty than if you're poor and innocent. Frequently, culpability and evidence of guilt is not going to be more significant than the

resources your bring into that process, and race becomes a part of that question.

And so these discretionary judgments are part of the story about race and the death penalty that are worth thinking about. And you see them throughout. Jury selection decisions -- for example, we are dealing now with continuing problems with racially bias use of preemptory strikes. You see these in individual cases but they contribute to this larger story about the tolerance of race bias.

The United States Supreme Court, this past term, in a case called Snyder v Louisiana, overturned a death sentence where a prosecutor was found to have illegally excluded African Americans from jury service. And the Court has done that now a half dozen times in just the last decade. In my state of Alabama, we actually have twenty-five death penalty cases where courts have found illegally discriminatory use of preemptory strikes.

I'm arguing a case, to the Eleventh Circuit, in two months, where a prosecutor used twenty-three

preemptory strikes to exclude all twenty-three African Americans qualified for jury service. He said he struck the first half dozen because "they looked to be of low intelligence," with no record evidence to support that. And that case has actually been affirmed by every state in federal court.

And it creates again these collateral consequences, which I think are, again, relevant to this. So this question of other discretionary judgments shaping the way we have to think about this, I'm going to suggest, is important.

Fourth, I think when we talk about race and the death penalty, in our particular social and political contexts, it is not simply adequate to talk about the evidence and whether the evidence supports a judgment (inaudible) there is race bias or description or not.

I think we also have to talk about appearance. The personification of justice in our society is the judge. And we have very clear rules about when a judge is allowed to be the judge. And

those rules require that, not when the judge is bias that he step down, not when the judge is unfair that she be recused, but when there is the appearance of bias or the appearance of unfairness. In order for justice to be respected, in order for there to be some confidence in the outcome, we cannot tolerate that apparently biased, that apparently unfair judge, from presiding over the case. And I really would like to suggest to this Commission that the framework of appearance of bias and discrimination that we use for questions of the personification of justice in judges is absolutely relevant to the question of how we think about tolerating race and the death penalty.

If it appears to be unfair, if it appears to be discriminatory, if in Maryland almost all of the people on death row are there for white victim crimes, and if all of the people are people of color -- if we have these huge disparities I don't want us to discount the significance of that as we evaluate the legitimacy of these concerns and the importance of these concerns.

Fifth, I want to suggest that the appearance of bias and unfairness is so important because it has real resonance when we talk about the broader health of the community. I mentioned that I grew up on the Eastern Shore. If you'll just permit me one personal anecdote. My mother was a musician, a church musician. And for me, at least, she was the kindest, sweetest, gentlest person you'd ever want to me. She just took in kids all the time. I was often frustrated by all of these stray kids she would bring into our house to nurture and take care of. I was sort of jealous about that. She had a very, in my judgment, sweet temperament.

But I remember when it was time for us to get polio shots in southern Delaware and we had to go to the health clinic, which at that time, required the black kids to wait outside the back door until all of the white kids were finished.

And I remember it being a very cold day and when we finally got through, after standing out there for two or three hours for the white kids, they let

the black kids come in, and the medical staff was understandably tired. They had been working with this population for quite a while.

And the nurses were grabbing these kids, kind of roughly. And my sister went before me, and the nurse grabbed her kind of rough, and she gave her this vaccine, and it was very, very traumatic for my sister, who started screaming. Then the nurse reached for me, and I was screaming. I didn't want this shot. And she grabbed me and the nurse jabbed me in the arm and I screamed really loud.

And then I saw something I've never been able to understand. I saw my mother go berserk. She picked up all of the medicines on a tray and threw them against the wall. She started slinging things around in this health clinic, and other black parents came and intervened and started advocating for her with the doctors and the nurses, and begging them not to call the police. They negotiated her retreat from the clinic by promising that she would not come back.

And what was strange to me about this was that it seemed so out of character.

I want to suggest that what my mom was experiencing was what I characterize as psychic harm. It is a consequence of living with tolerated victimization based on race. It is a consequence of tolerating too much disparity. Too much discrimination. Too much bias. It wasn't the particular thing that you could evaluate. The nurse did nothing cruel or criminal. The nurse didn't do something to justify that response, but in the context of what we were talking about, what we were living with, the reaction was, in my judgment, defensible.

Now I will concede that I spend a lot of my time representing people like my mom -- other mothers and fathers who are dealing with these internalized histories of victimization, of communities that are struggling with their continuing status in the margins of society, people that are living with decades of failure and distrust and discomfort with



the tolerance of racial discrimination and subordination. But I want to also suggest that that harm, that consequence, is deeply relevant to the question of whether we tolerate disparities based on race in the administration of the death penalty.

Finally, I want to suggest that our thinking about this issue needs to be understood to be in a question that's not just about the policy, per se, but about the question of justice more broadly. The biblical injunction is, to whom must is given must is required. When you claim the right to kill you're being given a lot, but you're required to do a lot. And I think, in that context, it becomes very, very difficult to justify the disparities that we have seen and heard about, the differences that seem to emerge around race and geography, in the context of our particular history.

It's often said that you judge the civility of a society by how you treat -- or you ought not judge the civility of a society by how you treat the rich and the privileged and the protected, but you

should judge the character and the civility of a society by how you treat the poor, the neglected, the condemned. I think Maryland's ultimate commitment to eradicating racial bias and discrimination, our ultimate measure of progress on questions of equal justice and race, cannot be evaluated on anything other than questions like race and the death penalty, because it's the very hated, condemned people that are the subject of this Commission's work, that provide the truest, clearest picture of where we are in our commitment to equal justice.

And ultimately, in my view, I think that this question of race and the death penalty no longer can really sort of be decided on the axis that we've historically used. Historically, we've asked the question, does this person deserve to die for the crime that he or she has been accused of, for the crime that he or she has committed. I think given the kind of evidence that we're talking about here, given the history of problems and disparities and discrimination, given our broader moral goals and

broader moral commitments, the relevant question is, do we deserve to kill?

Can we, with these kinds of disparities? Can we, with these kinds of differences and the appearance of bias and discrimination reconcile ourselves to a commitment of justice that can be defended and utilized to measure who we are and our commitments to fairness?

My final thought before I open this for questions, any questions, is that there is the opportunity for remedy. Sometimes when I work in poor and minority communities it's very easy to become very discouraged about the possibilities for reform. What's exciting to me about the work that you are doing is that when we acknowledge bias, when we acknowledge discrimination, and we say we do not tolerate it, even when we give up something that we might want, it has huge implications for the hope dynamic in these communities.

I've seen that in New Jersey. I've seen that in other communities that have dared to say, we will

not tolerate race bias. And as somebody who grew up in this region, who understands from a personal perspective some of the consequences of segregation and these histories, I would love to see that, in Maryland.

Thanks very much.

CHAIRMAN CIVILETTI: Thank you, very much.

Questions? Left side? On the right?

Questions?

Kirk?

MR. BLOODSWORTH: Kirk Bloodsworth, former death row inmate. Brian, you and I have known each other for quite some time, and you know when you talk about the presumption of guilt, which I have had some, a little bit of experience in this area, could you explain to me a little more of why that is, (inaudible) playing it out in the newspapers, say, versus the victim, in big terms.

Like I can remember in my own case that it seemed like that's really what was pushing this whole thing and because of the violence that was occurred I

think it sort of couldn't see the trees -- you know, the forest for the trees, so to speak, and then this thing happened. Tell us a little bit about your point of view in that area.

MR. STEVENSON: Sure. No, I appreciate that question. I'll make two points about it. I mean, one, none of us likes to feel at risk, if there's been a terrible crime, which there are terrible crimes in our communities. We all feel better if there is resolution. And frankly, when the crimes don't get solved there's growing fear and then there's anger.

Well, fear and anger are emotions that can really shape the way the criminal justice functions, if we're not careful. And when we introduce fear and anger into the functioning of the criminal justice system, it's very, very likely that we're going to see outcomes that are unreliable.

And so I think that this presumption of guilt is much more satisfying to a community that is fearful and angry than a presumption of innocence.

We don't like thinking that we don't know who the person is who committed this crime. We don't like thinking that we don't know who to be angry at.

And I think that this problem of presumption of guilt is a very serious one. It's aggravated most by resources, that is poverty, because without an advocate who can overcome that presumption of guilt - - it doesn't matter if you're white or black -- you're in a lot of trouble. But I also think it is aggravated by race because we are so ready to believe the narratives that emerge, time and time again, that stigmatize and stereotype.

The second thing I'll say in response to that question is that a lot of the racial bias that I think are being measured and caught in these studies is not racial bias of people saying, oh, you know, I just hate Latinos. I'm going to put as many Latinos on death row as possible. I just hate African Americans. I don't think it's insidious in that way. I think a lot of it is unconscious. We're very comfortable with the stories that we've heard time

and time again. I've heard that story. I can tell you what the ending is.

And sadly this phenomena of mass incarceration and this kind of over use of the incarceration system, particularly with regard to African American men elevates their risk of a presumption of guilt. It's not even just among people who are different. African Americans apply the same presumptions of guilt to other African Americans. It's not a strange story when a poor person from some low income community is accused of a crime. It's a very familiar story. We actually are very attracted to the not so familiar stories, which is why we seem kind of to never get enough when the wealthy celebrity is accused of some violent crime.

But I would like to suggest that those two things relate to this problem of presumption of guilt -- fear and angry, and the familiar narratives that make it less incumbent for there to be reliable process because we sort of already know.

Every wrongful execution -- you're a prime example of every wrongful conviction and death sentence has a narrative that can be connected to these problems -- fear, anger resulting in unreliability. And it's one of the sad realities of the modern death penalty.

CHAIRMAN CIVILETTI: Thank you, Mr. Stevenson, very much. I appreciate it.

One quick question?

SENATOR RASKIN: Thank you, Professor Stevenson, Jamie Raskin, for the record.

I want to ask you two quick questions, one about statistics, because we heard a lot about statistics today and, you know, when there's too much discussion about statistics there's a way in which it can cloud the mind.

The first thing I wanted to ask is, the Supreme Court, in McCleskey v Kemp, actually accepted Professor Baldus' showing that the race of the victim matters a lot. I think that the Supreme Court accepted the conclusion that the murdered of a white



victim is four times more likely to receive the death sentence than the killer of an African American victim.

Is there any statistical reason to think, is there any new evidence to think that that conclusion, accepted by the Supreme Court, has changed in any way since the Court's decision in McCleskey?

MR. STEVENSON: Not any legitimate legal reason. I mean, one of the interesting things about McCleskey, it was authored by Justice Powell, who wrote for a five-four court -- it was a very close decision. The Court decided it five to four. The only thing that's changed is when Justice Powell retired from the Court he was asked if there was any decision that he regretted, if there was any case that if he had to vote over again he would vote differently. And the case he identified was McCleskey. And so -- but that's, of course, not a legal change. The decision still stands. It is still the law of the land.

SENATOR RASKIN: A change of heart. And this is my final question for you, which is that even if it's correct, as Justice Scalia posited, and I think as Professor Baldus now accepts, that the infiltration of racial bias into this system is inevitable and ineradicable. That doesn't mean that it's inevitable and ineradicable that we go along with it, right? And I take it that this is one of your points and if you would just elaborate briefly on it, that the Constitutional values of equal protection and due process are binding, not just on the judicial branch, but also on the other branches of other government, isn't that right?

MR. STEVENSON: Oh, I think that's absolutely right. I think, as a practical matter, that on the current legal course we will not get a correction any time soon on these problems, but I agree with your view, if I understand your comment or question correctly, is that that doesn't relieve us from the obligation of dealing with this problem. I mean, obviously, if you don't have the death penalty then

racial bias in the administration of the death penalty is neither inevitable or eradicable. You have done something about it. And I'm suggesting that you've done something quite profound and significant that has even implications for the tolerance of race in the broader criminal justice system.

I think, you know, in some ways there are two ways of looking at the question of race and the death penalty. It's because, you know, we have this punishment which we can't really afford to make mistakes with, and so therefore we're going to take precautions that we wouldn't take in other contexts, and I think that's a legitimate rationale for saying where there's evidence of racial bias we're simply not going to permit ourselves the luxury of executions.

But the other way of thinking about it is, if we can say, no, if you will, to tolerating racial bias in the administration of the death penalty, we, I think, create a platform for challenging,

confronting, addressing racial bias in the administration of the criminal justice system, throughout. One of the reasons Justice Brennan, in his dissent, which was a really quite brilliant opinion, one of the reasons that he said that the Court failed in McCleskey was because they talked about if we deal with racial bias in the administration of the death penalty, we'll have to deal with it in other felony crimes, property crimes, drug crimes. And what Justice Brennan ridiculed the Court for was "a fear of too much justice," and in many ways I think he was right.

But I don't think we should let that fear, in any way, dissuade us from, I think, really critical task of confronting racial bias throughout the criminal justice system. I think we can do a lot to advance that effort by eliminating the death penalty and confronting it in the capital punishment context.

CHAIRMAN CIVILETTI: Thanks again. We appreciate your testimony, and I'd like to call Professor Brewer.