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(2006)

“The Death Penalty in Black and White”

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[Death Row, Somers, CT]

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[The] evidence shows that there is a better than even chance in Georgia that race will influence the decision to impose the death penalty: a majority of defendants in white-victim crimes would not have been sentenced to die if their victims had been black.

Surprisingly those words were written by former United States Supreme Court Justice William Brennan in 1987 when he criticized the majority of the Court for continuing to uphold a "capital-sentencing system in which race more likely than not plays a role".

Racism. It's a nasty word and many people would prefer to look the other way and deny its very existence. Not only does it exist, it exists in one of the most sensitive areas of our judicial system – capital punishment.

The question of racial discrimination in capital sentencing procedures has prompted an on-going debate. Racism was a major reason why United States Supreme Court Justice Harry Blackman recently deplored our country's use of the death penalty stating: "I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed". And he further stated"... it surely is beyond dispute that if the death penalty cannot be administered consistently and rationally, it may not be administered at all".

There is much evidence to show that race is an important factor in determining who will be sentenced to die for a crime and who will receive a lesser punishment for the same exact crime. Extensive research on capital sentencing patterns over the past 20 years have repeatedly found that race considerations, whether conscious or subconscious, permeate decisions of life and death in state courts throughout our country.

One simple way to see this is to simply examine the make-up of the current death row population. According to the NAACP's Legal Defense and Education Fund's publication *Death Row, U.S.A.*, as of January 1994, 1117 (40%) of the prisoners under sentence of death in America were black, despite the fact that blacks comprise only about 12% of the population nationally. In some states blacks condemned to death outnumber whites condemned to death. Finally, if you consider all minorities as a group, a full 50% (1401 men and women) on death row today are non-white.

Consider a few statistics from the January 1994 issue of *Death Row, U.S.A.*

Alabama - 50 (43 %) of their 117 death row prisoners are black; blacks make-up only 26 % of the state's population.

Louisiana - 28 (68 %) of their 41 death row prisoners are black; blacks make-up only 25 % of the state's population.

Mississippi - 31 (58 %) of their 52 death row prisoners are black; blacks make-up only 36% of the state's population.

North Carolina - 48 (38 %) of their 128 death row prisoners are black; blacks make-up only 23 % of the state's population.

South Carolina - 21 (42%) of their 50 death row prisoners are black; blacks make-up only 30% of the state's population.

Virginia - 23 (50%) of their 47 death row prisoners are black; blacks make-up only 19% of the state's population.

Although many people would find these statistics to be shocking, they might not be too surprised. After all, the south has always been perceived as being more racist than the rest of the country. So consider a few statistics from some other, non-southern states:

Illinois - 97 (60 %) of their 162 death row prisoners are black; blacks make-up only 15% of the state's population.

Maryland - 11 (80 %) of their 14 death row prisoners are black; blacks make-up only 25% of the state's population.

New Jersey - 5 (56 %) of their 9 death row prisoners are black; blacks make-up only 15% of the state's population.

Ohio - 62 (47%) of their 127 death row prisoners are black; blacks make-up only 10% of the state's population.

Pennsylvania - 101 (60%) of their 168 death row prisoners are black; blacks make-up only 10% of the state's population.

While I don't have the figures of the minority populations for the two states with the country's largest death row populations, both have significantly high minority populations of condemned men:

California - 215 (56 %) of their 380 death row prisoners are non-white.

Texas - 203 (56 %) of their 363 death row prisoners are non-white.

However, statistics on the race of the offender alone do not necessarily prove bias, given that roughly 50% of those arrested for murder are black. Of far more significance are the racial disparities revealed by an examination of the race of the murder victim in cases where the death penalty is imposed. The 227 prisoners executed between 1976 (when the death penalty was reinstated by the courts) and January 1994, had been convicted of killing 302 victims. Of these victims 255 (84%) were white and only 47 were black or of another minority group. While 86 black or ethnic-minority prisoners have been executed for murdering white victims, only two white murderers have been executed for the murder of a non-white - one for the murder of a black man and one for the murder of an Asian woman. And while the figure is somewhat dated, as of mid-August 1988, 727 blacks were under the sentence of death for killing white victims, while only 43 whites were under sentence of death for killing black victims.

Numerous studies have been conducted to try to quantify the extent of racial disparities in capital cases. One study done in the late 1970's by William Bowers and Glenn Pierce, both of Northeastern University, compared statistics on all criminal homicides and death sentences imposed in Florida, Georgia, Texas, and Ohio. Death sentences in these four states accounted for 70 % of all the death sentences imposed nationally at that time. They found that far more killers of whites than killers of blacks were sentenced to death. They also found that although most killers of whites were white, blacks who killed whites were proportionately more likely to receive the death sentence than any other group.

In Florida and Texas, for example, blacks who killed whites were, respectively, five and six

times more likely to be sentenced to death than whites who killed whites. Among black offenders in Florida, those who killed whites were 40 times more likely to get the death penalty than those who killed blacks. No white offender in Florida had ever been sentenced to death for killing a black person up through the period studied (a white man sentenced to death in Florida in 1980 for killing a black woman was the first white person in that state to be sentenced to death for the murder of a sole black person - and he has yet to be executed).

Several other studies, conducted in a variety of capital punishment states, have arrived at the same conclusion: killers of whites are far more likely to be sentenced to death than killers of blacks.

An exhaustive study conducted in the early 1980's by Professor David Baldus sought to discover why killers of white victims in Georgia had received the death penalty approximately 11 times more often than killers of black victims. He found that the two most significant points affecting the likelihood of an eventual death sentence were the prosecutor's decisions on whether or not to permit plea bargains and whether or not to seek a death sentence after a murder conviction. Black-victim cases were far more likely to result in pleas to manslaughter or life sentences upon conviction of murder, than cases with white victims. Black defendants with white victims were both less likely than others to have their charges reduced and more likely than others, upon conviction of murder, to receive the death penalty.

Professor Baldus noted that prosecutors had sought the death penalty in only 40 % of the cases where defendants were convicted of a capital crime - the others received automatic life sentences without a penalty hearing. But perhaps the most disturbing finding was that although cases with white victims tended to be more aggravated in general, the levels of aggravation in crimes involving black victims had to be substantially higher before prosecutors would seek the death penalty. Thus the overall disparities in death sentencing were due more to the prosecutor's charging and sentencing recommendations than to any jury sentencing decisions.

Several other studies have also found significant racial disparities in prosecutor's

decisions on charging. The Bower's study found that the victim's race had a significant "extra-legal" influence on whether or not a capital charge would be filed. And a study done by Michael Radelet and Glenn Pierce, "Race and Prosecutorial Discretion in Homicide Cases", found a tendency by some prosecutors to "upgrade" cases with white victims and "downgrade" those with black victims.

However, these findings and others like them do not necessarily imply that prosecutors deliberately discriminate in their charging and sentencing recommendations. In areas with a large white majority population that strongly supports the use of capital punishment, there is inevitably more pressure on prosecutors to seek the death penalty in cases with white victims than in those with black victims or victims from other minorities. Also, in general, there is more community outrage, publicity, and public pressure when the murder victim comes from a middle-class background, which is more likely to apply to whites than blacks. The issue was well summed up by the authors of a study similar to Professor Baldus' when they wrote:

Since death penalty prosecutions require large allocations of scarce prosecutorial resources, prosecutors must choose a small number of cases to receive this expensive treatment. In making these choices they may favor homicides that are visible and disturbing to the community, and these will tend to be white victim homicides (Gross and Mauro).

In 1987, the United States Supreme Court examined the issue of racial discrimination in the death penalty, in the case of *McCleskey v. Kemp*, to determine if Georgia's capital punishment system violated the Equal Protection Clause of the Fourteenth Amendment. The Court demanded a seemingly impossibly (and for many observers, a clearly unfair) level of proof for the defendant who was required to prove either that the decision-makers in his particular case had acted with a discriminatory intent or purpose, or that the Georgia State Legislature had enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect.

The Court, by a narrow five to four majority, concluded that statistics alone do not prove that race entered into any capital sentencing decision in anyone particular case. The Court further noted that:

Any mode for determining guilt or punishment has its weaknesses and potential for misuse. Despite such imperfections, constitutional guarantees are met when the mode for determining guilt or punishment has been surrounded with safeguards to make it as fair as possible.

However, the majority did indicate that the arguments should be presented to the individual state legislative bodies, for it is their responsibility, not the Court's, to determine the appropriate punishment for particular crimes. They noted that:

Despite McCleskey's wide ranging arguments that basically challenge the validity of capital punishment in our multi-racial society, the only question before us is whether in his case... the law of Georgia was properly applied.

In a dissenting opinion, Justice John Paul Stevens noted:

The Court's decision appears to be based on a fear that acceptance of McCleskey's claim would sound the death knell for capital punishment. If society were indeed forced to choose between a racially discriminatory death penalty (one that provides heightened protection against murder "for whites only") and no death penalty at all, the choice mandated by the Constitution would be plain.

Following the *McCleskey* ruling a Congressional bill entitled the "*Racial Justice Act*" was drafted. The bill would forbid "racially disproportionate capital sentencing" and would outlaw death sentences found to have been imposed in a racially discriminatory manner. It was debated and defeated in the United States Senate by a vote of 52 to 35 on October 13, 1988. In subsequent years, this same bill has been consistently defeated on every occasion that it has come up for a vote.

We cannot simply continue to live with the illusion that capital punishment works in the perfect unbiased manner that we desire. While we may wish otherwise, race has an indisputable and integral part in our capital punishment system. The evidence is not speculative or theoretical, but rather is empirical. One of the most telling statistics from the Baldus study was that six of every eleven defendants convicted of killing a white person would not have received the death penalty if their victim had been black. These figures may vary from state to state, but the underlying conclusion remains the same: the taking of a white life is worth greater punishment

than the taking of a black life. Is this the kind of justice system we want?

Justice Brennan once wrote: "We have demanded a uniquely high degree of rationality in imposing the death penalty. A capital-sentencing system in which race more likely than not plays a role does not meet this standard".

It is clearly time to abolish the death penalty. There are suitable alternatives. Those who favor the abolition of the death penalty do not advocate releasing convicted murderers into society. The choice is not between the death penalty and release, but between the death penalty and life imprisonment. Replacing the death penalty with natural life sentences (with no possibility of release) is clearly a suitable alternative that fulfils society's requirements to be protected. Race will undoubtedly still be a factor in other sentencing decisions. However, until we can find a way for our society to solve its problems with racial discrimination in the judicial system, we cannot allow race to be a factor in determining who lives and who dies.

What can you do to help? Several organizations are working hard to rid our country of capital punishment. Contact one or more of the following:

- National Coalition to Abolish the Death Penalty (1325 "G" Street, NW; Lower Level - B; Washington, DC 20005 Tel. 202-347-2510).
- Murder Victims Families for Reconciliation (2093 Willow Creek Road; Portage, IN 46368 Tel. 219-763-2170).
- Catholics Against Capital Punishment (P.O. Box #3125; Arlington, VA 22203 Tel. 703-522-5014). All Christians welcome.
- Amnesty International USA (Campaign to Abolish the Death Penalty; 322 Eighth Avenue; New York, NY 10001 Tel. 212-807- 8400).
- American Civil Liberties Union (Capital Punishment Project; 122 Maryland Avenue, NE; Washington, DC 20002 Tel. 202-546-0738).

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