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by

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Whether it be lynching or legally-imposed capital punishment, the threat or use of death as a punishment has been a powerful means of class and race intimidation throughout American history. In the nineteenth century, statutes that explicitly considered race were not uncommon; in Virginia, for example, the statutes of 150 years ago listed five capital crimes for whites and 70 for black slaves.[1] Today, historians interested in capital punishment use records of state compensations to slave owners to learn how many slaves were executed.

The federal government's statistics on executions date from the 1930s. Between 1930 and 1967, 3,859 prisoners were executed in the United States, 54 percent of whom were black. There were 455 executions for rape, and 405 of the defendants (89 percent) were black.[2] There are no known cases in American history in which a white man was executed for the rape of a black woman.

Executions were temporarily halted in 1967, and in 1972 the U.S. Supreme Court invalidated all existing death penalty statutes.[3] They did so in large part because they found the penalty to be arbitrarily applied, and hence cruel and unusual punishment in violation of the Eighth Amendment. Many thought that decision would forever end the legality of the death sentence in the United States. But in the last 15 years, some 36 states and the federal government have successfully reinstituted death penalty statutes, 75 inmates have been executed, and today 1,900 men and women live under sentences of death.[4] If present rates double to a national pace of one execution per week, we will still not eliminate our current backlog of death row prisoners until the year 2023.

The most significant (indeed, the only) progress made in the last 20 years in reducing racial disparities in executions was a 1977 Supreme Court decision that outlawed the death penalty for those convicted of rape.[5] If we examine only executions for murder, we learn that between 1930 and 1967, 50.1 percent of the executions involved nonwhites. Today, 49.3 percent of those on death row, all of whom stand convicted of murder, are nonwhite. Thus, all the efforts to revise death penalty statutes in the last 15 years to make them more fair have reduced the relevant minority population by less than one percent.

The death penalty remains a southern phenomenon. With the exception of five "consensual" executions (where the inmates dropped their appeals), all American executions in the last 20 years have been in the former states of the Confederacy. In the 1980s, all of the 11 former Confederate states, save Arkansas and Tennessee, have executed at least two inmates.

Research that examined the question of racial bias in the application of the death penalty before the 1972 *Furman* decision was plentiful, alarming in its exposure of racial bias, and methodologically limited.[6,7] Research looking at who has been condemned since 1972 has found that while sentencing is still correlated with race of defendant, the race of the victim exerts the strongest predictive power. While some of this research has exposed racial bias in the presentencing decisions made by prosecutors, the bulk of the work has focused on sentencing disparities.[8,9]

The first such study examined over 16,000 homicide cases in Florida, Georgia, Texas, and Ohio.[10] Results indicated that, even when controlling for whether or not the homicide involved an accompanying felony, black defendants convicted of killing whites were more likely to receive the death penalty than were defendants in any of the other three racial configurations. Radelet, in a study of Florida homicides that occurred between strangers, found similar patterns, as did Jacoby and Paternoster in South Carolina.[9,11] In a more comprehensive study, Gross and Mauro used the FBI's Supplemental Homicide Reports to examine sentencing patterns in eight states (Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia).[12] Even when the data were adjusted for felony circumstances, the defen-

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dant-victim relationship, etc., the racial disparities—along lines of the victim's race—still remained.

A simple observation illustrates the problem. In Florida, since its current death penalty statute was passed in 1972, about 45 percent of the murder victims have been black. However, of the 400 defendants sentenced to death over this period, only 10 percent had black victims.[13,14]

The results of the above research closely parallel the conclusions reached by David Baldus and his colleagues, who examined sentencing patterns in Georgie.[15,16] Their work has been widely hailed as the most sophisticated, detailed, and meticulous study ever conducted on sentencing patterns in the United States. The study examined over 2,000 Georgia murders that occurred from 1973 through 1979. Statewide, defendants charged with killing whites were sentenced to death in 11 percent of the cases, whereas those charged with killing blacks were condemned in only one percent of the cases. The defendant's race had a significant effect on sentencing, but was not as strong as race of victim. In trying to explain this association, data were collected on some 230 additional variables that might be hypothesized as affecting sentencing, such as defendant's prior record, etc. However, even when the effects of these variables were controlled, those charged with killing whites were still 4.3 times more likely to be sentenced to death than were defendants charged with killing blacks. Overall, Baldus concluded that in Georgia almost one-third of the death sentences were imposed as the result of race-of-victim discrimination.

What is being done about this problem? Judicial remedies have been sought and denied, so the battles are now being joined in the legislatures. With the support of the NAACP Legal Defense Fund, the results of the Baldus study were recently presented to the U.S. Supreme Court. In an April 1987 decision, a sharply-divided Court ruled 5 to 4 that because the study did not prove *intentional* racial discrimination, it was insufficient to demonstrate a constitutional violation.[17] The lengthy decision assumed the validity of the Baldus study but dismissed it as irrelevant. Georgia may use its death penalty in a racially discriminatory fashion, the Court ruled, as long as the discrimination is not intentional.

The country's civil rights leadership was active in attempting to make the racist use of the death penalty a priority issue long before the Court ruled in the McCleskey case, albeit, mysteriously, the majority of blacks voice support for executions. Julian Bond, John Conyers, Jesse Jackson, Coretta Scott King, Joseph Lowrey, and Andrew Young, among many others, have been outspoken in their opposition to the death penalty. As the frequency of executions increases over the next few years, it will be interesting to see how long it will take before our legislators realize that too much racism and too many killings have already occurred.

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