

RACE, THE CRIMINAL JUSTICE SYSTEM, AND COMMUNITY-ORIENTED POLICING

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I. RACE AND THE CRIMINAL JUSTICE SYSTEM

The impact of race on the distribution of punishment in the criminal justice system has been the source of intense debate in contemporary legal scholarship.¹ The very nature of the question whether blacks are treated fairly by the criminal justice system suggests that somehow blacks may be shortchanged or cheated by the imposition of the death penalty. The three main criticisms in this regard assert (1) that the death penalty is pronounced more often against blacks than against whites; (2) that the death penalty is imposed more often against blacks than against whites; and (3) that the death penalty is not equally imposed against blacks and whites for the same crimes. This Article demonstrates that these criticisms are absolutely false.

At the heart of commonly-held misconceptions about race and the death penalty is the assumption that because blacks compose only twelve percent of the American population, no more than twelve percent of the inmates on death row should be black. This neat, succinct, and compartmentalized notion is said to be "fair." On closer examination, however, there is nothing fair about it. Recognizing the inherent bias of generalizations from such statistics, in *McCleskey v. Kemp*² the Supreme Court held that in a specific case of trial and

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1. See generally SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION, RACIAL DISPARITIES IN CAPITAL SENTENCING (1989); GREGORY D. RUSSEL, THE DEATH PENALTY AND RACIAL BIAS: OVERTURNING SUPREME COURT ASSUMPTIONS 69 (1994); David C. Baldus, Charles Pulaski, & George Woodworth, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985); William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); Raymond Paternoster, *Race of Victim and Location of Crime: The Decisions to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983); Michael L. Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409 (1985).

2. 481 U.S. 279 (1987).

sentencing, statistical evidence alone could not demonstrate intentional discrimination leading to an equal protection violation.³ The proponents of proportional representation on death row are really arguing for an outcome-based death penalty of the sort that concerned the Court in *McCleskey*. Women are not equally represented on death row.⁴ Asians, Navajos, immigrants and people of various educational, social, and economic backgrounds are not equally represented either.⁵ The whole notion of outcome-based criminal justice is wrongheaded because it does not suit itself to analysis of individual circumstances; people are not sentenced to death in statistical groups. Rather, each individual case is carefully handled and a decision is made on the basis of individual circumstances. Human interaction in any sphere of life is not directly or deterministically proportional.

For all practical purposes, every inmate on death row has killed someone. Out of the over 3,000 people currently on death row,⁶ there may be one or two cases where a mistake may have been made, but the elaborate system of appeals will eventually solve even these problems.⁷ Most people opposed to the death penalty do not understand that the many opportunities for appeal render the probability of error insignificant, whether the criminal is black or white.

Opponents of the death penalty are also likely to overlook the fact that a simple murder is insufficient to result in the imposition of the death penalty. Death-row inmates have not only killed someone, they have killed someone in a particular way. Specifically, they have killed someone in the course of committing a crime. In a given case, for example, an individual might be hijacked at gunpoint, kidnapped and taken to another

3. See *McCleskey*, 481 U.S. at 291-99.

4. Out of 2,890 prisoners on death row on December 31, 1994, only 41 were women. See James J. Stephan & Tracy L. Snell, *Capital Punishment 1994*, BUREAU OF CRIMINAL JUSTICE STATISTICS BULLETIN, Feb. 1996, at 1.

5. See *id.* (reporting that of the 2,890 prisoners under sentence of death on December 31, 1994, "23 were Native American and 17 were Asian-American").

6. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1995 (Kathleen Maguire & Ann. L. Pastore eds., 1996) [hereinafter BOJS 1995], at 604 tbl.6.74 (1995) (listing 3,122 prisoners under sentence of death as of April 30, 1996).

7. See DEATH PENALTY AND SENTENCING INFORMATION (Justice for All, Houston, Texas), Sept. 1996, at 1-2 (reporting that "there is no credible evidence to suggest that any innocent persons have been executed since 1950").

location, sexually assaulted at another location, and, then murdered—a series of events that constitutes at least four different crimes. Most of the 3,000 inmates on death row have committed other crimes in addition to murder. About 67% of death row inmates had previously been convicted of at least one felony before they committed their capital crime; about 40% were actually on parole or probation at the time they committed the capital crime.⁸ The equity considerations of the death penalty involve much more than counting numbers and assigning values to those numbers.

Many people who claim that the death penalty is racially biased fail to take into account the various circumstances of the particular individuals involved. If opponents of the death penalty would change their focus from the skin color of the death row inmates to that of the victims of the inmates, they might develop a different attitude about the death penalty. Blacks are the victims of criminal activity in numbers far exceeding their proportion in the population. For example, in 1994, 51% of the victims of murder were black.⁹ Almost 98% of the people who kill blacks are other blacks.¹⁰ Blacks murder a certain number of white victims as well. Viewed from this perspective, one would think that a majority of people on death row would be black, but this is not the case. In fact, only 40% percent of death-row inmates are black—a proportion significantly less than the proportion of murders committed by blacks.¹¹

Opponents of the death penalty use two types of arguments, though not all opponents use both arguments. First, opponents make the normative argument that the death penalty is itself an evil. Depending upon the particular case, however, the death penalty can be interpreted as the lesser of several evils—and therefore preferable to the greater evils—rather than viewed in

8. See Stephan & Snell, *supra* note 4, at 1 (further noting that nearly 10% of death row inmates had a prior homicide conviction).

9. See BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1995, at 313 (1995).

10. See BOJS 1995, *supra* note 6, at 363 tbl.3.139.

11. In 1994, there were 1138 blacks on death row out of a total of 2848 inmates. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993, at 666 tbl.6.108 (Kathleen Maguire & Ann. L. Pastore eds., 1994). In 1994, 51.9% of all murderers known to the police were black. See BOJS 1995, *supra* note 6, at 362 tbl.3.138.

isolation as a specific evil that, merely because it is evil, should not be employed. Death penalty opponents also assert that death does not serve as a deterrent. The problem with these criticisms is that they are based on conjecture. In reality, no one knows for certain whether the death penalty is a deterrent. However, common sense suggests that it might be, and the need to protect the public from the most vicious offenders justifies taking this punitive action.

Admittedly, the death penalty is not perfectly administered. For instance, in the State of South Carolina, Pee Wee Gaskins, a mass murderer,¹² was convicted and sentenced to death.¹³ In South Carolina, there are forty-two separate avenues of appeals; consequently, it is impossible for criminals to be put to death soon after their sentencing, even if they plead guilty.¹⁴ Indeed, Gaskins was on death row for over eight years.¹⁵ Prior to being placed on death row, Gaskins was in prison serving several concurrent life sentences.¹⁶ During that time period, Gaskins accepted payment to blow up a fellow inmate, and promptly proceeded to do just that.¹⁷ The delays in our criminal justice system enabled both this prolonged process and the unfortunate chain of events in the interim to come to fruition.

The same disproportionate representation of blacks as both criminals and victims is visible in the context of other crimes. When viewing the racial composition of U.S. prisons, one should bear in mind the fact that 51% of the victims of murder are black (as noted above).¹⁸ In addition, blacks are twice as

12. See *Gaskin Pleads Guilty to Killing 7*, CHARLESTON POST & COURIER, Apr. 19, 1978, at 1-A.

13. See William Harwood, *Regional News*, UPI, March 26, 1983, Saturday, AM cycle, available in LEXIS NEWS Library, ARCNEWS File.

14. Long delays are not unusual in the administration of the death sentence. See DEATH PENALTY AND SENTENCING INFORMATION, *supra* note 7, at 1 (detailing 38 steps, all related to trial and review, necessary in Texas before a death sentence can be carried out). From 1973-95, on average, only 0.3% of those on death row were executed each year. See *id.* Long delays in the application of the death penalty are not unusual. Those prisoners executed during 1994 had been under sentence of death an average of ten years and two months. See Stephan & Snell, *supra* note 4, at 1.

15. Gaskins was convicted in March of 1983. See Harwood, *supra* note 13. He was not executed until September 1991. See *South Carolina Executes Man for Murder*, N.Y. TIMES, Sept. 6, 1993, at A18.

16. See Harwood, *supra* note 13 (reporting that, at the time he was sentenced to death, Gaskins was serving 10 life sentences, 9 of which were for murder).

17. See *id.* (reporting that Gaskins was convicted of rigging a bomb in another prisoner's cell as part of a murder-for-hire scheme).

18. See BUREAU OF THE CENSUS, *supra* note 9, at 313.

likely to be rape victims as whites,¹⁹ and almost three times more likely to be victims of robbery.²⁰ In Oakland, California, for instance, a black person is six times more likely to be killed as a result of homicide than a white person.²¹ In these types of violent crime, the victim and the perpetrator are very likely to be of the same race;²² therefore, we should not be surprised to find that the perpetrators of murders in which a black victim is killed are likely to be blacks.

Further, certain types of crime are committed more often by blacks than by whites. In the case of armed robbery, for example, national statistics indicate that 64% of all victims describe their attackers as black.²³ Such statistics just do not arise as a consequence of bad luck. There are specific social and cultural circumstances that account for their occurrence. We should not be surprised to find that the racial composition of prisoners in general, just as that of death-row inmates, approximates the racial composition of the perpetrators of crime.

II. CHARLESTON'S SUCCESS WITH COMMUNITY-ORIENTED POLICING

Our criminal justice system is in need of serious reform. We have developed an elaborate array of mechanisms for keeping people out of jail,²⁴ and with the exception of a very limited number of federal crimes, few people go to jail for a first, second, third, or even fourth offense. In South Carolina, juveniles can be arrested innumerable times before they reach the age of seventeen, yet the moment they reach the age of eighteen, every new offense from that point forward is treated as if the other offenses had never occurred. Keeping people out of

19. See BOJS 1995, *supra* note 6, at 233 tbl.3.6.

20. See *id.*

21. See Oakland Police Dep't, Oakland, CA, Internal Statistics, in Katherine Bishop, *Oakland Grapples with Murder Rate*, N.Y. TIMES, April 15, 1992, at A16.

22. Of a sample of murder victims analyzed by the FBI, 93% of black murder victims in 1995 were killed by black offenders, while 83% of white victims were killed by whites. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1995: UNIFORM CRIME REPORTS FOR THE UNITED STATES, at 17 tbl.2.8 (1996) (percentages calculated from statistics provided).

23. See Alan Wolfe, *Two Nations, Black and White, Separate, Unequal*, THE NEW REPUBLIC, Sept. 13, 1992, at 30 (book review).

24. For example, courts employ various types of parole and probation programs, as well as pre-trial intervention and home-confinement programs.

jail, sealing juvenile records, and ineffective prevention all contribute to the commitment of further crimes. A different approach is needed.

Charleston has had a degree of success with fighting crime and other communities may benefit from the unique approach the city has taken. From the outset, it should be clear that Charleston's success is not the result of increased police violence. Charleston police have fired their weapons only three times in the last fifteen years, killing one person and wounding two others.²⁵ Nonetheless, the number of armed robberies in Charleston in 1994 was the lowest it has been in twenty-two years, and the number of burglaries was the lowest in thirty-five years.²⁶

Our success is attributable to a number of factors that in combination are now known under the name "community-oriented" policing.²⁷ First, we have developed an anti-parole program. Specifically, we have created a division in the police department to travel to the state capital in order to oppose the parole of every burglar, armed robber, and rapist arrested by our department. Every time an offender is up for parole, an official of the Charleston Police Department goes to the hearing to oppose that person's parole. If a prisoner received a sentence of twenty years, we do everything in our power to ensure that this person actually serves the full twenty-year penalty. We have never been criticized for racism in implementing this policy because we oppose all paroles, regardless of the person's racial characteristics. Over the last twelve years, the program has enjoyed a success rate of 93%; in other words, only 7% of the individuals arrested by the Charleston Police Department who came up for parole for burglary, armed robbery, or rape actually received parole.²⁸ In 1994 and 1995, our success rate was 100%.²⁹ This program is a key reason why Charleston now has the lowest number of burglaries and armed robberies in thirty-five years. The people who commit those crimes are simply staying in

25. See Police Dep't, Charleston, South Carolina, Internal Statistics (on file with the editors of this journal).

26. See *id.*

27. We never actually used the term ourselves. In fact, we had no idea we were practicing community-oriented policing until we read in *The New York Times* that we were doing so. See *Chief of Police Stands Apart in S. Carolina*, N.Y. TIMES, June 14, 1987, at 33.

28. See Police Dep't, Charleston, South Carolina, Internal Statistics, *supra* note 25.

29. See *id.*

prison.

Second, the Charleston Police Department is committed to the old-fashioned notion that children should be in school during school hours. As part of the city's anti-truancy program, police officers patrol the streets looking for children who are in places where they do not belong. If police officers spot children unattended by adults during school hours, they pick them up and take them to school. If the officers determine that the children have been expelled or suspended, the police take them home. Police departments used to do this across the nation, even in cities as large as New York.³⁰ Most abandoned such programs in the late 1960s after a certain group of people gained control of our colleges, universities, and schools of education and propagated the misguided notions that the concept of a truancy officer was oppressive and that children should want to come to school out of a love of learning.³¹ Our anti-truancy program recognizes that not all children love to learn. In many cases, children have to be coerced into learning. The police department can play a constructive role in helping schools perform their function while simultaneously reducing crime by keeping kids busy with their school work.

Third, the Charleston Police Department has instituted several programs to reduce friction between the police and the community. For example, if the police must break somebody's door down, the Department immediately makes arrangements to secure the house so that the residents can sleep in their homes that same night. The door is repaired, usually the very same night that it is damaged. We are able to do this because we take a picture of the door and obtain the dimensions before we destroy it; this enables the officers to have all the necessary materials on hand when the door is destroyed. This service is valuable because the suspect behind the door is almost never the owner of the door. Therefore, when the police kick the door down, they are externalizing a cost. By fixing the doors immediately, we put the cost back on ourselves and thereby avoid alienating the people of the community.

Finally, the Charleston Police Department has made efforts to

30. At one point, New York City had almost 750 truant officers. See N.Y. Board of Education, Internal Statistics (on file with the editors of this journal).

31. Currently, New York City has 200 truant officers. See *id.*

keep people informed about neighborhood policing. In many cities, the police sweep into the community for an arrest and merely indicate to onlookers that it is a police matter. In Charleston we believe that the residents of a neighborhood are entitled to know who is being arrested and why the arrest is being made. They should not have to wait for the evening news. Neighborhood residents should be a part of the process of solving crimes—and should be made to feel that they are part of the process. We have found residents to be very helpful when we communicate with them; they often facilitate our law-enforcement efforts. We solve a great many crimes that other communities cannot solve, simply because in our community people are willing to talk to the police.