

THE DEATH PENALTY AND RACE AND HOW THE ULTIMATE PUNISHMENT HIGHLIGHTS THE FLAWS IN OUR CRIMINAL JUSTICE SYSTEM

Kenneth Williams¹

Submetido em: 28 jan. 2022

Aceito em: 07 fev. 2022

1. INTRODUCTION

The United States often likes to portray its criminal justice system as a model for the rest of the world. In the U.S. an individual accused of a crime has numerous constitutional and other protections. Defendants in the United States are presumed innocent.² They have a right to be represented at trial by a lawyer even if they cannot afford one.³ Defendants have the right to confront their accusers face to face.⁴ If the state is in possession of exculpatory evidence, the prosecutor has a constitutional duty to disclose this evidence.⁵ Defendants also cannot languish in prison for long periods of time as they have the right to a speedy and public trial.⁶ Finally, defendants have the right to have the case tried before a jury of their peers and an impartial judge.⁷

Unfortunately for many defendants these rights are merely theoretical. For many defendants who are poor, minority and otherwise disadvantaged, these rights are not fully realized. Nowhere is this more evident than with the death penalty. In this article, I will discuss the capital punishment system in the United States, a system which highlights some of the systemic problems that plague the U.S. criminal justice system.

2. DISPROPORTIONATE APPLICATION BASED ON RACE

¹ Bachelor of Laws (B.A.) - University of San Francisco (USA); Juris Doctor (J.D.) - University of Virginia Law School (USA); Professor of Law - South Texas College of Law at Houston.

² See *In re Winship*, 397 U.S. 358, 364 (1970).

³ See *Gideon v. Wainwright*, 372 U.S. 355 (1963).

⁴ See U.S. Const. amend. VI.

⁵ See *Brady v. Maryland*, 373 U.S. 83 (1963).

⁶ See U.S. Const. amend. VI.

⁷ *Id.*

The death penalty has been employed during most of the existence of the United States. There was no death penalty for only a brief four year period, having been struck down by the Supreme Court in 1972⁸ only to have been revived by the Court in 1976.⁹ One of the recurring problems with the death penalty is race. The death penalty has always been used disproportionately against African Americans. For instance, before the United States Supreme Court outlawed capital punishment for the crime of rape, 455 individuals were executed for rape and of those executed 405 were African American men, many of whom were executed after having been accused by white women of rape.¹⁰

However, racism in the use of the death penalty is not a relic of the past. The disproportionate use of the death penalty against African Americans continues today. Over 40% of those who end up on death row in the United States are African American even though African Americans constitute a mere 13% of the U.S. population.¹¹ These disparities are also present in the U.S. prison population as a whole.¹² African Americans constitute a disproportionate share of the prison population.¹³

Also troubling is the fact that the vast majority of those on death row ended up there because they killed a white person.¹⁴ This is so despite the fact that more than half of all murder victims in the U.S. are African American.¹⁵ Thus, those who kill African Americans are not likely to be sentenced to death while those who kill whites are much more likely to end up on death row. Numerous studies have concluded that these disparities are the result of racial discrimination in the

⁸ See *Furman v. Georgia*, 408 U.S. 238 (1972).

⁹ See *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹⁰ See *The use of the death penalty for rape, more than for any other crime, demonstrates the racially discriminatory nature of capital punishment in the United States*, available at <https://deathpenaltyinfo.org/policy-issues/race/race-rape-and-the-death-penalty>.

¹¹ See *Current U.S. Death Row Population by Race*, available at <https://deathpenaltyinfo.org/death-row/overview/demographics>.

¹² About 33% of U.S. prisoners are African American. See *The gap between the number of black and whites in prison is shrinking*, available at <https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison/>.

¹³ *Id.*

¹⁴ See *Ways that Race Can Affect Death Sentencing*, available at <https://deathpenaltyinfo.org/policy-issues/race/ways-that-race-can-affect-death-sentencing>.

¹⁵ See BJS: Bureau of Justice Statistics, *Homicide Trends in the United States*, available at <https://www.bjs.gov/content/pub/pdf/htius.pdf>.

administration of the death penalty.¹⁶ The most prominent study to reach such a conclusion was the Baldus study which showed a disparity in the imposition of the death penalty in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant.¹⁷ The Baldus study took into account 230 variables that could have explained the racial disparities in capital sentencing on non-racial grounds.¹⁸ Even after taking account of these variables, the Baldus study found that defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks.¹⁹ The Baldus study also found that African American defendants were 1.1 times as likely to receive a death sentence as other defendants.²⁰ Thus, the study concluded that African American defendants who kill whites have the greatest likelihood of receiving the death penalty than any other defendant-victim combination.²¹

This study was presented to the Supreme Court by Warren McCleskey.²² McCleskey was a black man who was sentenced to death by a jury in Georgia for killing a white police officer.²³ His responsibility for the crime was not in dispute. Rather, he argued before the Supreme Court that he received a death sentence because he killed a white victim and because he was black, using the Baldus study in support of his argument.²⁴ The Supreme Court acknowledged the legitimacy of the Baldus study but did not allow McCleskey or any other inmate to use statistics as proof of racial discrimination.²⁵ Instead the Court held that in order to prevail, McCleskey and others would have to prove that the decision makers in their cases acted with a discriminatory purpose.²⁶ Thus, they would have to prove that either the jury, prosecutor or judge acted with racial animus. Not surprisingly, given this onerous standard, no death row inmate has been able to prove that he was sentenced to death as a result of his race.²⁷

¹⁶ See Death Penalty Information Center, *Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty*, available at <https://documents.deathpenaltyinfo.org/pdf/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf>.

¹⁷ See *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987).

¹⁸ *Id.* at 287.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 286.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 291 n. 7.

²⁶ *Id.* at 278.

²⁷ See Kenneth Williams, *Most Deserving of Death? An Analysis of the Supreme Court's Death Penalty Jurisprudence*, 44-48 (2012).

In his dissent, Justice Brennan says that “[a]t some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid response to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey’s past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks . . . [t]he story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative: there was a significant chance that race would play a prominent role in determining if he lived or died.”²⁸

These disparities are continuing. According to the Death Penalty Information Center, as of February 2021, the racial disparities as to executions, race of the victim executions and death row population are as follows:

U.S. EXECUTIONS SINCE 1976	EXECUTIONS BY
RACE OF VICTIM	
TOTAL - 1532	WHITE - 1152 (75%)
WHITE - 854 (55%)	BLACK - 204 (13%)
BLACK - 523 (34%)	LATINO - 100 (6%)
LATINO - 129 (8%)	
CURRENT U.S. DEATH ROW POPULATION BY RACE	
TOTAL - 2553	
WHITE - 1076 (42%)	
BLACK - 1062 (42%)	
LATINO - 343 (13%)	
OTHER - 72 (2.9%) ²⁹	

There are several reasons for the continued racial disparities in death penalty sentencing. First is the requirement that the jury be “death qualified.”³⁰ Any juror who is unwilling to consider or who has qualms about the death penalty is likely to be struck by the prosecutor from serving. Because of the history of lynching and the racist use of capital punishment, many African Americans are opposed to the death penalty or at least uneasy with imposing it and thus are struck by the prosecution which often results in black defendants being sentenced by all white

²⁸ *Id.* at 297.

²⁹ See *Race and Death Penalty by the Numbers*, available at <https://deathpenaltyinfo.org/policy-issues/race/race-and-the-death-penalty-by-the-numbers>.

³⁰ *Wainwright v. Witt*, 469 U.S. 412 (1985).

juries. Second, the decision whether to seek death is made by the prosecution and about 95% of all elected prosecutors throughout the United States are white.³¹ The disparity is even greater in states with the death penalty where nearly 98% of prosecutors are white and 1% are black.³² Third, the lives of African Americans have always been devalued in the United States. Fourth, the continued racism in the criminal justice system, as exhibited by the disproportionate number of African Americans who are often killed by police officers under questionable circumstance.

The McCleskey holding would apply to any criminal defendant.³³ In fact one of the Court's explicit concerns in its McCleskey decision was that defendants in non-capital cases would use a favorable ruling in order to challenge their sentences.³⁴ As mentioned earlier, the prisons are disproportionately populated with African Americans.³⁵ There is no question that many probably received sentences more harshly than whites who committed the same or similar crimes or because their victims were white. However, because of the onerous standard articulated by the Court in McCleskey, these defendants also will not meet with success in challenging their sentences on the grounds of racial discrimination. As a result of the racial disparities in the criminal justice system and the belief that these disparities reflected society's devaluation of black life, groups like Black Lives Matter was created.

3. SUBSTANDARD LEGAL REPRESENTATION

Another systemic problem in the United States criminal justice system is the fact that, despite the guarantee of trial by counsel, the representation provided to many indigent defendants is substandard at best and gross at worse in both capital and non-capital cases. Many defendants are sentenced to death because their appointed counsel failed to adequately represent them. Defendants have ended up on death row because their lawyers slept during the trial, were drunk and disoriented at trial, failed to present important evidence, didn't understand the law and

³¹ See "Tipping the Scales: Challengers Take on the Old Boys Club of Elected Prosecutors, available at <https://wholeads.us/research/tipping-the-scales-elected-prosecutors/>.

³² See *Ways that Race Can Affect Death Sentencing*, available at <https://deathpenaltyinfo.org/policy-issues/race/ways-that-race-can-affect-death-sentencing>.

³³ *McCleskey v. Kemp*, 481 U.S. 279, 315-16 (1987).

³⁴ *Id.*

³⁵ See, *supra* note 10.

because their lawyers simply failed to vigorously defend them.³⁶ The case of Duane Buck illustrates the substandard legal representation that death row inmates often receive.³⁷ Buck was charged with capital murder in Harris County, Texas and the prosecutor decided to seek the death penalty.³⁸ Buck's guilt was not in question but whether he deserved to be sentenced to death was. In order for a jury in Texas to sentence a defendant to death, one of the findings the jury must make is that the defendant was a future danger to society even if incarcerated in prison for life.³⁹ Buck's trial attorneys presented the testimony of a mental health expert who testified that there was a connection between race and future dangerousness.⁴⁰ This expert testified that African Americans were more likely to be dangerous in prison.⁴¹ Defense counsel also entered into evidence the report of this expert which indicated that being African American increased the probability of future dangerousness.⁴² Not surprisingly the jury sentenced Buck to death.⁴³ Buck lost all of his appeals in both state and federal court until the U.S. Supreme Court agreed to hear his case.⁴⁴ Fortunately, Buck did not suffer the fate of so many death row inmates. The Supreme Court found that Buck's trial counsel had been ineffective: "[n]o competent defense attorney would introduce such evidence."⁴⁵ The Court also said that the expert's testimony "appealed to a powerful racial stereotype - that of black men as violence prone."⁴⁶

There are several terrible consequences for defendants who receive substandard legal representation. The most serious consequence is that they may be wrongly convicted and punished. Another consequence of bad lawyering in capital cases is the possibility that the defendant will be sentenced to death even though there are mitigating circumstances which would warrant a sentence less than death, for instance that the defendant was intellectually disabled. Incompetent trial lawyers also make it difficult for defendants to receive appellate relief because they may fail to timely object at trial and thereby persevere error for appeal. Finally, an incompetent lawyer is not

³⁶ See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835, 1859-65 (1994).

³⁷ See *Buck v. Davis*, 137 S. Ct. 759 (2017).

³⁸ *Id.* at 768.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 769.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 775.

⁴⁶ *Id.* at 776.

in position to challenge the prosecution's case which is crucial to the proper functioning of the adversarial system.

The Supreme Court attempted to address the problem of incompetent counsel in its decision in *Strickland v. Washington*.⁴⁷ In *Strickland*, the Court held that all criminal defendants have a right to an effective counsel.⁴⁸ In order to prevail on a claim that his lawyer was not effective, defendant must prove 1) that his lawyer's performance was ineffective and 2) that he suffered prejudice as a result of his lawyer's poor performance.⁴⁹ Many defendants who have received poor legal representation often do not have their convictions overturned on appeal because even if they can prove that their counsel's performance was deficient, courts often reject the claim on the grounds that the defendant did not suffer prejudice as a result of counsel's performance.⁵⁰ Thus, even if trial counsel failed to investigate the defendant's possible alibi or if there's an eyewitness that counsel failed to contact, the defendant will not prevail because an appellate court will likely conclude that had the attorney done a better job it is still likely that the defendant would have been convicted and thus he suffered no prejudice.⁵¹ The problem with the prejudice requirement is that we have learned in numerous high profile cases that the quality of legal representation often makes a big difference even when the evidence against the accused appears at face value to be overwhelming.⁵²

4. WRONGFUL CONVICTIONS

Another systemic problem with the U.S criminal justice system is that too many defendants are wrongly convicted both in capital and non-capital cases. It seems as though a month doesn't go by during which we don't hear about a wrongfully convicted inmate being released because of evidence later discovered that exonerates him. Since 1973, there have been approximately 176 actual exonerations of death row inmates.⁵³ There are currently approximately

⁴⁷ 466 U.S. 668 (1984).

⁴⁸ *Id.* at 686.

⁴⁹ *Id.* at 687, 691.

⁵⁰ See Kenneth Williams, *Does Strickland Prejudice Defendants on Death Row?*, 43 U. Rich. L. Rev. 1459 (2009)

⁵¹ *Id.* at 1481.

⁵² *Id.* at 1466-67.

⁵³ Information on exonerations in capital cases available at <https://deathpenaltyinfo.org/policy-issues/innocence>.

2500 individuals on death rows throughout the United States.⁵⁴ Researchers estimate that about 4% of these individuals are actually innocent, which would mean that there are currently 120 individuals on death row who may be executed for crimes that they did not commit.⁵⁵ Unfortunately, not every death row inmate with strong actual innocence claims has been exonerated. There have been credible reports indicating that there is a strong possibility that innocent individuals have been executed.⁵⁶ Because convictions are easier to obtain in non-capital cases and are not as heavily scrutinized, the number of wrongfully convicted individuals in prison for non-capital cases is most likely much higher than the 4% estimate for capital cases.

There is a public perception that with the advent of DNA, wrongful convictions will cease to occur. Unfortunately that will not happen. While DNA testing has certainly helped in identifying the real perpetrators of crimes, individuals will continue to be wrongfully convicted and even sentenced to death for several reasons. First, only 5 to 10 percent of all criminal cases involve biological evidence that could be subjected to DNA testing.⁵⁷ Second, many defendants are convicted because of eyewitness identifications. Erroneous eyewitness testimony, however, has been described as “the single greatest cause of wrongful convictions in the U.S. criminal justice system.”⁵⁸ This is because the stress of the crime may affect the witness’s perception of the events.⁵⁹ Furthermore, eyewitness identifications are most erroneous when witnesses are identifying perpetrators of a different race.⁶⁰ Third, many wrongful convictions occur because of police and prosecutorial misconduct.⁶¹ Police and prosecutors are under enormous pressure to solve crimes. This public pressure to solve crimes often leads them to employ tactics that coerce the wrong person into confessing to crimes. Moreover, even though prosecutors are required to turn over evidence also frequently withhold evidence favorable to the defendant.⁶² Fourth, prosecutors often use jailhouse snitches in order to obtain incriminating statements from suspects.⁶³

⁵⁴ See supra note 10.

⁵⁵ See *National Academy of Science Reports Four Percent of Death Row Inmates are Innocent*, available at <https://innocenceproject.org/national-academy-of-sciences-reports-four-percent-of-death-row-inmates-are-innocent/>.

⁵⁶ See *Executed But Possibly Innocent*, available at <https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent>.

⁵⁷ See Williams, supra note 48.

⁵⁸ R. Warden, *How Mistaken Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row*, available at <http://www.deathpenaltyinfo.org/studycwc2001.pdf>.

⁵⁹ See Williams, supra note 48 at 64.

⁶⁰ *Id.*

⁶¹ See Williams, supra note 48 at 64-67.

⁶² See Williams, supra note 48 at 67-70.

⁶³ See Williams, supra note 48 at 74-75.

These snitches are often put in close proximity to the suspect and have an incentive to attribute incriminating statements to the suspect. They often fabricate or embellish statements that they claim were made by the suspect in order to obtain leniency in their cases and thus this testimony is highly suspect. Finally, a strong contributing factor to wrongful convictions, as mentioned earlier, is the ineffective legal representation that many criminal defendants receive.⁶⁴ Most criminal defendants in the U.S. simply do not have the resources to properly defend themselves.

Surprisingly, federal courts in the U.S. do not allow an inmate to put forth a claim of actual innocence⁶⁵ although some states do allow such a claim.⁶⁶ An inmate cannot file a habeas corpus petition in federal court containing a claim of actual innocence even if they have strong evidence to support such a claim. That's because the Supreme Court has placed greater value on finality than justice and fairness.

Another systemic problem is that the U.S. criminal justice system is often run like an assembly line. This is because over 90% of defendants' cases are never tried but instead are settled through plea bargains.⁶⁷ Typically in a criminal case an indigent suspect is appointed counsel, who often has an enormous caseload. This appointed counsel often does very little if any investigation into the defendant's case. Appointed counsel often only meets with the defendant once and that is typically in order to urge him to accept a plea offer from the prosecutor. Defendant is then brought before a judge and enters a plea and receives a long prison sentence. This assembly line justice contributes to the problem of wrongful convictions.

5. LACK OF DIVERSITY

There are also systemic problems with many of the actors in the U.S. criminal justice system. One significant problem is that they do not reflect the diversity of the U.S. The U.S. is 13% African American yet the prosecutors and judges are over 90% white.⁶⁸ Thus, those making the initial decision whether to seek death are overwhelmingly white. Furthermore, despite Supreme

⁶⁴ See Williams, *supra* note 48 at 70-72.

⁶⁵ See *Herrera v. Collins*, 506 U.S. 390 (1993).

⁶⁶ See e.g., Tex. Code Crim. Proc. 11.071 Section 5.

⁶⁷ See *Innocence Is Irrelevant*, available at <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/>.

⁶⁸ See *supra* note 28; Tracy E. George and Albert H. Yoon, *Measuring Justice in State Courts: The Demographics of the State Judiciary*, 70 Vanderbilt Law Review 1887, 1903 (2017)

Court decisions that have prohibited racial discrimination in the selection of the jury, discrimination in jury selection persists.⁶⁹ Studies have shown that all-white juries are more likely to convict and also to sentence the defendant to death and that a single black juror can alter the dynamics.⁷⁰ Therefore, the prosecution has an incentive to remove as many African Americans from the jury as they can legally get away with.

As mentioned earlier, the prosecutor has a legal and ethical duty to disclose exculpatory evidence to the defense.⁷¹ However, they often fail to do so. That is because of the pressure on prosecutors to win. Prosecutors have few incentives to disclose exculpatory evidence and there are almost no consequences for failing to do so. In theory they can be disciplined by the state bar for failing to disclose exculpatory evidence and even prosecuted but in reality neither rarely happens. Judges in the U.S. are overwhelmingly white and often are former prosecutors and therefore tend to be either consciously or subconsciously favorable to the prosecution.⁷² Furthermore, judges in many states are elected by the voters and because of political pressure tend to side with the prosecution.⁷³

Efforts have been made to make the police forces more diverse. However, the fact that unarmed African Americans continue to be shot and killed by the police illustrates that this has not necessarily resulted in a change in the way in which the police handle suspects, especially those of color. Some police officers extract false confessions through tactics approved by the Supreme Court, such as tricking and even lying to suspects and through tactics that are clearly illegal, such as failing to properly Mirandize suspects and even through the use of physical violence.

6. RECOMMENDATIONS AND CONCLUSIONS

The U.S. criminal justice system is in serious need of reform. First, it is time for the United States to join the majority of the international community, including our European and

⁶⁹ See *Yes, Jury Selection is as Racist as You Think. Now We Have Proof*, available at <https://www.nytimes.com/2018/12/04/opinion/juries-racism-discrimination-prosecutors.html>.

⁷⁰ Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337 (2000). This mock juror study found that white jurors were more likely to impose the death penalty on a black defendant than a white defendant. *Id.* at 349.

⁷¹ See *supra* note 4.

⁷² See *supra* note 57.

⁷³ See *Elected Judges Uphold More Death Sentences, Study Finds*, available at <https://eji.org/news/study-elected-judges-uphold-more-death-sentences/>.

North and South American allies and abolish the death penalty. How should this be done? While some states have recently repealed their death penalty statutes, full abolition cannot be achieved legislatively. In states like Texas it would be nearly impossible to repeal the death penalty anytime in the near future. Therefore, it is up to the U.S. Supreme Court to do so. The jurisprudence for doing so is already in place.⁷⁴ The 8th Amendment prohibits cruel and unusual punishment. The Court has interpreted this to mean that any punishment that does not comport with “evolving standards of decency” violates the Amendment.⁷⁵ The Court has looked to objective evidence of evolving standards of decency such as legislation in the states.⁷⁶ The Court could conclude the death penalty violates the 8th amendment because the movement in the states is toward abolition. Several states have recently abolished the death penalty and many have not carried out the death penalty in a long time if ever. Furthermore, no state that has abolished the death penalty has reinstated it. The Court could also cite the fact that the death penalty is now disfavored in the international community.⁷⁷ The Court could also conclude as it did in *Furman* that the death penalty is too arbitrary and that it fails to serve any legitimate penological purpose such as deterrence or retribution.⁷⁸

A second reform that needs to be made in order to improve the American criminal justice system is to devote more resources to defense counsel. Defense attorneys should receive better compensation. If this happens more talented lawyers will pursue careers in criminal defense and defendants will receive better representation as a result. Furthermore, more talented individuals will be attracted to defense work if they have adequate resources in which to defend their clients. Finally, it is vital that the practice of excluding persons based on their race be eliminated. This practice undermines confidence in the criminal justice system. Justice Marshall⁷⁹ previously and Justice Breyer⁸⁰ on the present court have urged the Court to abolish peremptory challenges. These peremptory challenges provide prosecutors with the opportunity to remove African Americans from juries. Given the cost, they are not worth the very small benefit that they may provide and should be eliminated.

⁷⁴ See *Glossip v Gross*, 135 S. Ct. 2726, 2744 (2015) (Breyer, J., dissenting)

⁷⁵ See *Roper v Simmons*, 543 U.S. 551 (2005).

⁷⁶ *Atkins v Virginia*, 536 U.S. 304 (2002).

⁷⁷ See *Roper v Simmons*, 543 U.S. 551, 575 (2005).

⁷⁸ See *Glossip v Gross*, 135 S. Ct. 2726, 2759 (2015) (Breyer, J., dissenting)

⁷⁹ See *Batson v Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring)

⁸⁰ See *Miller-El v. Dretke*, 545 U.S. 231, 266-67 (2005) (Breyer, J., concurring)