

BRIEF ANALYSIS

No. 121

*For immediate release:
Friday, August 5, 1994*

Death by Quota

The U.S. Supreme Court ruled in 1987 that a death sentence cannot be overturned solely on the basis of statistics that show general racial disparities in sentencing. To overturn a death sentence, defendants must show evidence of discrimination in their particular cases.

The Racial Justice Act was intended to nullify the Supreme Court's ruling by explicitly allowing statistics to be the basis of death penalty appeals. The act was passed by the House, but omitted from the final crime bill being considered by Congress. The Congressional Black Caucus agreed to drop the Racial Justice Act from the crime bill after President Clinton promised to use executive orders to achieve the same result on the federal level. The act likely will surface again in Congress in one form or another.

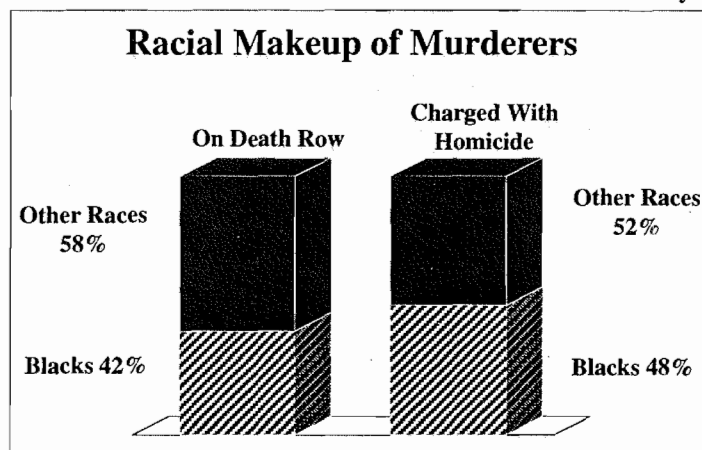
Is death sentencing really racially discriminatory? Those who claim there is a pattern of discrimination are ignoring a host of studies that show otherwise. When all relevant factors are taken into account, there is no relationship between race and the likelihood of any particular sentence.

Abolishing the Death Penalty. Under the Racial Justice Act, the burden of proof would shift to state and federal authorities. They would have to demonstrate that any racial disparities in sentencing are "clearly and convincingly" explained by nonracial factors. Given the high cost of litigation and likely delays, as well as the difficulty of proving nondiscrimination when sentencing is based partly on factors not easily subjected to statistical analysis (how does one quantify the "heinousness" of a crime?), the death penalty would be effectively eliminated, as both blacks and whites would be able to show statistics alleging discrimination.

Studies of the Death Penalty: Race of the Criminal. The evidence for discriminatory death sentencing through the 19th and early 20th centuries, particularly in the South, has seemed incontrovertible. Nevertheless, in 1974, researcher John Hagan found that most of the past studies had confused correlation and causation. When Hagan controlled for prior record and type of offense, he found that the influence of race dropped dramatically.

In a similar vein, a 1981 study by Gary Kleck of Florida State University found that between 1929 and 1966 the rate of execution for blacks (9.7 per 1,000 murders) was slightly lower than that for whites (10.4 per 1,000 murders). Indeed, Kleck observed that outside of the South, the probability that a white would be executed was substantially higher than the risk for non-whites. Since then, many other studies have found that white defendants are at greater risk in murder cases than black defendants.

Studies of the Death Penalty: Race of the Victim. Sociologists have sought more subtle evidence of discrimination. As far back as the 1930s, a



handful of studies had reported that blacks who killed whites were more likely to receive the death penalty than were blacks who killed other blacks or whites who killed members of either race. For example, a 1983 study found that the offender-victim racial combination was as significant a predictive factor in death sentencing as any other variable. A number of studies have attributed this seeming racism to prosecutorial discretion. However, there are several problems with that conclusion.

First, interracial killings are rare. Between 92 and 97 percent of homicides involve whites killing whites or blacks killing blacks. Second, in the small number of interracial slayings (the vast majority being blacks kill-

ing whites), the circumstances surrounding the crimes appear to be substantially different. Black on black homicides are most likely to occur during altercations between persons who know each other. Black on white homicides (and to a somewhat lesser extent, white on white homicides) are often committed during the course of a felony or by a multiple offender. Judges and juries are more likely to render harsher verdicts if the victim is an innocent store owner or a police officer than if the victim dies as a result of a bar fight with the accused. Finally, other factors such as a defendant's prior criminal record are important.

The McCleskey Case. In the 1980s, the National Association for the Advancement of Colored People (NAACP) funded a major study that gained notoriety when it was used in the defense of Warren McCleskey, a black man sentenced to death for the shooting of a white police officer in Georgia. The study showed that in cases of "mid-range aggravation," blacks who killed whites were more likely to receive the death penalty than whites who killed whites. The authors argued that racial bias occurred because prosecutors and juries were prejudiced.

An expert methodologist, Joseph Katz, analyzed the NAACP study for the prosecution and found a number of conceptual and methodological problems. Most importantly, Katz argued that the researchers had not accounted satisfactorily for the fact that black on white murders tended to be the most aggravated of all and frequently were combined with armed robbery, as McCleskey's was. This was the case that resulted in the Supreme Court ruling that statistics were not enough to prove racial discrimination. Katz later told the Senate Judiciary Committee that:

- 67 percent of black on white killings in Georgia involved armed robbery.
- Only 7 percent of black on black killings involved armed robbery.
- Black on white murders more frequently involved kidnapping and rape, mutilations, tortures or beatings or were carried out execution-style.

These are all aggravating circumstances that increase the likelihood of a death sentence.

Analysts at the Bureau of Justice Statistics have pointed out that the percentage of inmates on death row who are black (42 percent) is lower than the percentage of criminals charged with murder or nonnegligent manslaughter who are black (48 percent). Some critics reply that the police may be more likely to arrest and charge blacks than whites. Yet Patrick Langan, a senior statistician at the Bureau of Justice Statistics, investigated the possibility of such discrimination and found little evidence of it.

Politics and the Death Penalty. Clearly there are reasons other than statistical analysis for the continued belief that the legal system discriminates against black defendants. For example, those who oppose the death penalty on principle perceive capital punishment as a vestige of an outmoded, barbaric and irrational penal code. Black elites often perceive discrimination in places others do not. They are joined by members of the white cultural establishment, who are quick to sympathize with those who allege racial unfairness. But the best available evidence indicates that disproportionate numbers of blacks commit murder and that when the victims are white the crimes generally are aggravated. That is why blacks are overrepresented on death row relative to their proportion of the population as a whole.

Of course, many questions remain. Is the death penalty arbitrary, given that only a fraction of those eligible are ever executed? Is it barbaric? Is it ineffective as a deterrent? If the answers to these questions are affirmative, the death penalty can be either abolished or further reformed. But whatever society's decision, it should not be based on unsubstantiated charges of racial discrimination.

*By Stanley Rothman and Stephen Powers, Center for the Study of Social and Political Change, Smith College, based on "Execution by Quota?" in **The Public Interest**, Summer 1994.*