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SENTENCING DISPARITY AND JURY PACKING: FURTHER CHALLENGES TO THE DEATH PENALTY

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No legal sanction has produced more debate and greater controversy than capital punishment. Although the debate on the death penalty encompasses many issues, including its deterrent effect and moral justification, a recurrent theme has been the manner in which it has been applied. Critics of capital punishment have pointed out that, as historically applied, the death penalty has been discriminatory, with a greater proportion of executions for blacks compared with whites. This position was argued by counsel for Furman in the landmark case, *Furman v. Georgia*.[1] Other sources of institutional discrimination and bias in capital cases, such as jury selection procedures, have also been identified.

Recognizing the history of systematic biases in the states' use of the death penalty, the Supreme Court has tried to eliminate procedural irregularities from the death sentencing process. In two notable cases, *Witherspoon v. Illinois*[2] and *Gregg v. Georgia*,[3] the Court suggested formal guidelines and standards for capital cases to reduce arbitrariness and capriciousness. Although these two decisions were designed to eliminate the discriminatory practices producing the disproportionate execution of blacks, our investigation of the constitutionally approved death penalty law in one southern state, South Carolina, indicates that, rather than being eliminated, discrimination and bias have simply taken more sophisticated forms: (1) "partial" discrimination, where white and black offenders *appear* to be equally likely to be sentenced to death until the race of the victim is considered, and (2) a more masked form of discrimination at the jury selection stage where the attitudes of potential jurors

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1 408 U.S. 238 (1972).
2 391 U.S. 510 (1968).
3 428 U.S. 153 (1976).

are decisive in the probability of their selection for jury service in death cases, with a subsequent effect on the verdict and sentence.

There is evidence from investigations in other states that such hidden forms of discrimination do exist in constitutionally acceptable death penalty statutes. In relation to the role of victim's race and the death sentence, Foley traced, from indictment through sentencing, every person indicted for first degree murder (N=829) in twenty-one of sixty-seven Florida counties for the years 1972-1978.[4] She found that "the more overt racial discrimination in cases prior to the 1972 Supreme Court decision has been eliminated."[5] In Florida, black defendants indicted for murder were more likely to be found guilty than were whites; if found guilty, blacks were not, however, more likely to receive the death penalty.[6] The important selection factor for the death penalty was the race of the victim. Even after controlling for the offender's and victim's occupations, number of prior convictions, and the number of victims in the incident, defendants charged with killing whites were substantially more likely to receive the death penalty once found guilty than were defendants charged with killing blacks.[7]

Bowers and Pierce found the same pattern of discrimination based on the race of victim post-*Furman* (through 1977) in Florida, Georgia, Ohio and Texas.[8] In all four states, the race of the victim was a much more important determinant of the sentence than the race of the defendant. A defendant had a much greater chance of receiving the death penalty if he was convicted of killing a white than if the victim was black.[9] All four states showed substantial interaction between race of offender and race of victim, with the black offender/white victim case being the most likely to result in the death penalty in all four states.[10]

There is also some preliminary evidence on the even more complex form of discrimination produced at jury selection when potential jurors are screened out of capital trials because they oppose capital punishment. This screening of jurors focuses on the process of the voir dire in capital cases, a process called "death-qualification." In the *Witherspoon*

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[4] L. Foley, Florida After the Furman Decision: Discrimination in the Imposition of the Death Penalty (1980) (paper presented at the Interdisciplinary Conference on Capital Punishment in Atlanta, Apr. 19, 1980); L. Foley, The Effect of Race on the Imposition of the Death Penalty (1979) (paper presented at the meeting of American Psychological Association in New York, Sept. 1979).

[5] *Id.* at 1.

[6] *Id.* at 6.

[7] *Id.* at 7.

[8] BOWERS & PIERCE, *Arbitrariness and Discrimination under Post-Furman Capital Statues*, 26 CRIME & DELINQUENCY 563 (1980).

[9] *Id.* at 595.

[10] *Id.* at 597.

case, the Supreme Court ruled unconstitutional the then existing Illinois death statute, which permitted the exclusion for cause of any venireman who had "conscientious or religious scruples against the infliction of the death penalty in a proper case."[11] The Court held that such a selection process produced a jury biased unfairly towards the death penalty, and articulated a more equitable standard of death-qualification. This standard, adopted virtually nationwide, permits venire-men in capital cases to be excluded for cause if they claim either that they can imagine no circumstance in which, as jurors, they could vote for the death penalty, *or* that knowledge that the defendant, if convicted, could receive the death penalty would keep them from being able to render fair and impartial decisions on the question of guilt.

The purpose of the *Witherspoon* death-qualification standard, then, was to produce a jury less biased in its attitudes toward the death sentence contributing to its more equitable application. Sporadic research since *Witherspoon* has questioned whether or not *Witherspoon* death-qualified juries are less biased towards conviction and the death penalty. The data tentatively suggest that the death-qualification process excludes certain subgroups of the population and produces a high degree of attitudinal homogeneity with regard to conviction and penalty. A 1971 Harris poll of a nationally representative sample found jury selection based on the *Witherspoon* questions would result in the underrepresentation of blacks, of people with less than a high school education, and people with certain religious beliefs (especially Jews and Agnostics) on capital juries.[12]

Further evidence of the bias inherent in the death-qualification process was reviewed in a recent California case, *Hovey v. California*.[13] The experimental jury studies cited in *Hovey* revealed that juries qualified on the *Witherspoon* standard have identifiable characteristics.[14] They are, first of all, biased in favor of the prosecution by being more likely to consider constitutional rights mere technicalities and more likely to believe the prosecutor's than the defense's arguments. Secondly, *Witherspoon*-qualified juries are more likely to convict than nonqualified juries. Thirdly, they underrepresent certain identifiable subgroups of the population, such as blacks. Finally, excluding prospective jurors on the basis of their opposition to the death penalty degraded the quality of the deliberations in that excludable jurors remembered

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11 391 U.S. at 522 (footnote omitted).

12 White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 CORNELL L. REV. 1176, 1186 (1973).

13 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980).

14 *Id.* at 26-59, 616 P.2d at 1314-41, 168 Cal. Rptr. at 141-68.

more of the details of the case and examined the evidence more critically.

These preliminary findings suggest that post-*Witherspoon* death-qualification procedures may produce unrepresentative juries and jurors biased toward conviction and the death sentence, precisely the outcome that the Supreme Court wanted to avoid when it articulated the *Witherspoon* standard. This research note reports more recent and more definitive data on the existence of both forms of discrimination in the death penalty procedures of one southern state.

METHODS

The two forms of discrimination alluded to in the paragraphs above required two different data collection strategies. To examine the effect of the race of the victim in the imposition of the death penalty, we examined all cases of homicide in South Carolina in which the death penalty could have been sought from June 8, 1977, through November 30, 1979. South Carolina passed a new death penalty statute, which became effective on June 7, 1977.[15] The statute lists seven aggravating circumstances, at least one of which must be found to be present beyond a reasonable doubt, for the court to order a death sentence. A review of the South Carolina State Law Enforcement Division's Supplemental Homicide Reports from June 8, 1977, through November 30, 1979, revealed 205 cases of murder that met the statutory condition requiring at least one aggravating circumstance.[16] (The presence of an aggravating circumstance is noted on the initial police homicide report, then transcribed to the Supplemental Homicide Report.) During that same time period, there were fifty-seven defendants against whom prosecutors had sought the death penalty. The races of the victims and defendants were furnished by circuit solicitors and public documents.

Data pertaining to jury attitudes and excludability from jury service were obtained from two telephone surveys conducted in South Carolina. The surveys were conducted in two separate counties of the state, one in September 1980 and the second in October 1981. In the first survey, a random sample of 205 registered voters in the county (South Carolina selects jurors from voter registration lists) were interviewed by telephone regarding their knowledge of an actual murder case that was coming up for trial in that county. Those who knew of the case were asked about the conclusions they had drawn about the guilt of the defendant, the appropriate penalty should the defendant be found guilty, and their attitude toward the death penalty. Identical questions about

[15] S.C. CODE § 16-3-20 (Supp. 1976).

[16] STATE LAW ENFORCEMENT DIVISION, STATE REPORT (South Carolina 1980).

TABLE 1

PROSECUTOR'S DECISIONS TO REQUEST THE DEATH PENALTY FOR AGGRAVATED HOMICIDE BY RACE OF VICTIM AND RACE OF DEFENDANT

Race of[a] Defendant	Race of[b] Victim	Defendants[c] in Aggravated Homicide Cases	Number of[d] Defendants for whom death penalty was requested	Proportion of Defendants for whom death penalty was requested	Ratio Between Proportions	Probability of Difference
all	all	205	57	.278	—	—
white	all	67	27	.403	1.3:1	.05
black		97	30	.309		
all	W	148	51	.345	3.2:1	.0001
	B	55	6	.109		
black	W	60	26	.433	3.9:1	.0001
black	B	36	4	.111		
white	W	57	25	.439	2.0:1	.05
white	B	9	2	.222		
white	W	57	25	.439	1.0:1	.24
black	W	60	26	.433		
white	B	9	2	.222	2.0:1	.10
black	B	36	4	.111		
white	W	57	25	.439	4.0:1	.001
black	B	36	4	.111		
white	B	9	2	.222	2.0:1	.06
black	W	60	26	.433		

[a] The race of the defendant was not known in 41 out of 205 cases of aggravated homicide cases reported by the South Carolina Law Enforcement Division (SLED).

[b] The race of the victim was not known in 2 out of 105 aggravated homicide cases reported by SLED.

[c] Source: SLED, Supplemental Homicide Reports.

[d] Source: Various court transcripts, newspaper accounts, circuit solicitors and their employees, county clerks of court, sheriff's employees.

another actual murder case were asked of a random sample of 159 registered voters in the county where that case was soon to be tried. For economy of presentation, the data from both telephone surveys were combined after initial separate analyses revealed identical findings.

RESULTS

The data pertaining to discrimination in the sentencing of white and black murder defendants are summarized in Table 1. During the first twenty-nine months of South Carolina's new death penalty statute, prosecutors were significantly more likely to request the death penalty for whites than blacks charged with aggravated murder. From this it

TABLE 2

PUBLIC OPINION SURVEY RESPONSE DISTRIBUTION

SURVEY QUESTION	RESPONSE	PERCENT OF RESPONSES	NUMBER OF RESPONSES
Do you remember hearing or reading anything about the case?	Yes No	94.8% 5.2%	364
From what you know about this case right now, do you think the person charged with this murder is:	Probably guilty Probably not-guilty Don't know	46.2% 7.5% 46.3%	318
If the person charged with this crime is found guilty in court, what penalty do you think he should receive? Should he get:	The death penalty Life imprisonment Some other penalty Don't know	33.8% 32.8% 5.6% 27.8%	302
We would like to know about your opinion of the death penalty generally. Which of the following two statements best describes your attitude toward the death penalty?	There are some cases where I would be in favor of the death penalty I am opposed to the death penalty under any circumstances Don't know	74.4% 20.0% 5.6%	340
Would your feelings against the death penalty prevent you from returning a verdict of guilty at the first trial, even if the evidence showed that he was guilty?	Yes No Don't know	12.2% 69.8% 18.0%	328
Excludable: Either opposed to the death penalty under any circumstances *or* unable to render a verdict of guilty	Yes No	27.7% 72.3%	329
Respondent's race	White Black	78.7% 21.3%	343

may appear that the South Carolina post-*Gregg* death penalty statute[17] has eliminated racial discrimination in the implementation of the death sentence. This is only apparently the case, however, and the key to the anomaly is the race of the victim. Defendants who were charged with killing whites were 3.2 times more likely to have prosecutors seek the death penalty than those charged with killing blacks ($p<.001$). While the race of the victim was a significant factor in the decision to seek the death penalty, the race of the defendant did condition the effect of victim's race on the prosecutor's decision to seek a death sentence. While prosecutors sought the death penalty nearly four times as often for blacks accused of killing whites as they did when blacks were accused of

[17] *See* note 15 *supra*.

TABLE 3

DIFFERENCES BETWEEN DEATH-QUALIFIED AND EXCLUDED RESPONDENTS

QUESTION	RESPONSE	DEATH QUALIFIED	EXCLUDED	X^2 AND SIGNIFICANCE
		N=238	N=91	
From what you know about this case right now, do you think the person charged with this murder is:	Probably guilty	48.3%	37.4%	8.94 (p<.02)
	Probably not-guilty	4.6%	14.3%	
	Don't know	47.1%	48.3%	
If the person charged with this crime is found guilty in court, what penalty do you think he should receive? Should he get:	The death penalty	42.0%	8.9%	55.60 (p<.0001)
	Life imprisonment	20.6%	55.6%	
	Some other penalty	3.4%	8.9%	
	Don't know	34.0%	26.6%	
Respondent's race	White	87.3%	59.3%	30.01 (p<.0001)
	Black	12.7%	40.7%	
Respondent's sex	Male	34.8%	29.6%	.56 (p>.05)
	Female	65.2%	70.4%	

killing other blacks (p<.0001), they were only twice as likely to seek the death sentence when white defendants had white rather than black victims (p<.05).

Data concerning intra-and interracial homicide as it pertains to the decision to ask for the death penalty are reported in the last four panels of Table 1. The death penalty is as likely to be sought for whites who kill other whites as for blacks who kill whites (ratio=1.0 to 1, p=.24). When white defendants are accused of killing blacks, the death penalty is twice as likely to be sought than when blacks are accused of killing other blacks (ratio=2.0 to 1, p>.05). The last two panels of Table 1 compare the inter- and intraracial ratios of death penalty requests. Here it is shown that the death penalty is four times more likely to be requested for whites accused of killing whites than for blacks who kill other blacks (ratio=4.0 to 1, p<.001). Blacks accused of killing whites are twice as likely to have the death penalty requested as are whites accused of killing blacks (ratio=2.0 to 1, p>.05).

The data reveal a more subtle form of discrimination in post-*Gregg* death penalty statutes. While it appears that white defendants are more likely to have the death penalty requested in their cases, this is only because white defendants are more likely to have white victims. It is the presence of a white victim that accounts for the greater probability of a death penalty request for white defendants. Discrimination still appears to exist, but it now takes the form of a greater probability that prosecutors will seek the death penalty if the victim is white.

Evidence concerning the effect of the exclusion of potential jurors

and its subsequent effect in producing a jury prone to a guilty verdict and the death penalty is reported in Tables 2 through 4. Table 2 reports the highlights of the telephone surveys. Twenty-seven percent of the respondents were *Witherspoon*-excludable, a figure which is close to the 1971 national Harris Poll's finding of twenty-three percent excludable.[18] Excluding these respondents from juries on the basis of their opposition to the death penalty would differentially affect white and black respondents, resulting in the exclusion of 20.7 percent of the whites compared with 55.2 percent of the blacks (Table 4). This difference is statistically significant (x^2=30.01, p<.0001) and greater than the thirty-three percent to fifty-two percent disparity between blacks and whites found in the 1971 Harris Poll.[19]

From the perspective of systematic bias in the process of sentencing a defendant to death, a most interesting finding of this study is the relationship between excludability and the conclusions drawn by respondents about the case. Compared with excludable respondents, death-qualified subjects were more likely to say that they thought the defendant was probably guilty, 48.3 percent versus 37.4 percent (Table 3). Moreover, excluding potential jurors on the basis of their opposition to the death penalty would result in excluding 54.2 percent who thought the defendant was probably not guilty compared to 22.8 percent who thought the defendant was probably guilty (Table 4).

The effect of excludability on the respondents' opinions regarding the appropriate penalty in the case is even greater. Almost half (forty-

TABLE 4

IMPACT OF SCREENING PROSPECTIVE JURORS BY DEATH-QUALIFICATION
(Percentages calculated by Row)

QUESTION	RESPONSE	DEATH QUALIFIED	EXCLUDED	X^2 AND SIGNIFICANCE
From what you know about this case right now, do you think the person charged with this murder is:	Probably guilty	77.2%	22.8%	8.94 (p<.02)
	Probably not-guilty	45.8%	54.2%	
	Don't know	71.8%	28.2%	
If the person charged with this crime is found guilty in court, what penalty do you think he should receive? Should he get:	The death penalty	92.6%	7.4%	55.60 (p<.0001)
	Life imprisonment	49.5%	50.5%	
	Some other penalty	50.0%	50.0%	
	Don't know	77.1%	22.9%	
Respondent's race	White	79.3%	20.7%	30.01 (p<.0001)
	Black	44.8%	55.2%	
Respondent's sex	Male	31.4%	68.6%	.56 (p>.05)
	Female	34.8%	65.2%	

[18] White, *supra* note 12, at 1187.
[19] *Id.* at 1186.

two percent) of the death-qualified subjects said that the defendant, if convicted, should receive the death penalty compared to only 8.9 percent of the excludables (Table 3). Exclusion of potential jurors based on the *Witherspoon* standard would result in excluding only 7.4 percent who favored the death penalty in those cases and 50.5 percent of those who favored life imprisonment (Table 4). Our findings from these two telephone surveys reveal a hidden source of bias in death sentencing and bear out the warnings presented in the *Hovey* case. Although the *Witherspoon* standard was intended to eliminate bias in capital juries, our evidence suggests that it does not.

CONCLUSIONS

The evidence presented here is as consistent as it is troubling, for it suggests that the procedural safeguards established in *Gregg* and *Witherspoon* to eliminate inequities in the administration of the death penalty have not accomplished their purpose. The courts have attempted to introduce the rule of law into the administration of capital punishment. The expressed intent of the decisions of the courts has been to reduce the systematic irregularities that have degraded the quality of justice in capital cases. Our evidence and the evidence of others suggest that the courts have succeeded in introducing only the *illusion* of the rule of law, cloaking inequitable outcomes with rules that appear to guarantee equity. The post-*Gregg* death statute of South Carolina, thus far, has resulted in a pattern of discrimination more subtle than that evidenced before *Furman*. In addition, the death-qualification procedures approved in *Witherspoon* appear to produce juries biased towards both convictions and the death penalty and disproportionately exclude blacks from serving on capital juries. When one considers how long it took the Supreme Court to recognize the more obvious forms of discrimination, the prospects for addressing the more subtle forms are not good.