



Crime & Punishment

James Alan Fox on criminal behavior and the justice system

CAPITAL PUNISHMENT

Death penalty - Still racist after all these years

Posted by James Alan Fox, Crime and Punishment October 12, 2010 08:30 AM

Contextual note: If you've been following this blog since its launch last March, you may already know that I am opposed to capital punishment. My opposition is not so much based on morality, ethics or a fundamental belief about the sanctity of human life, but on utility "that is, the lack of effectiveness or concrete gain derived from executing murderers. Previously, I wrote about the significant financial burden posed by the death penalty process, although, as some have argued, there is no price tag to justice. As promised, I plan to address in due course the many ways in which capital punishment is problematic. Here I discuss the issue of racial bias, and will take up other matters, including deterrence, in future columns.

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In an exit interview□ of sorts just prior to his June retirement, Justice John Paul Stevens confessed to NPR's Nina Totenberg that his only regret, while looking back over his 35 years on the Supreme Court, was a 1976 vote to affirm the use of capital punishment. In *Gregg v. Georgia*, decided just after Stevens' appointment, the high court ended a four year moratorium on the death penalty and cleared the way for states to resume executions under narrowly prescribed conditions.

The hope and expectation at the time was to constrain juries from misguided use of their discretion, a level of arbitrariness that had led the court in 1972 to strike down capital punishment. In a 5-4 decision, supported by 9 separate opinions, the Court had ruled in *Furman v. Georgia* that the death penalty, as practiced, violated the Eighth Amendment prohibition against cruel and unusual□ punishment. The majority was of the opinion that the death penalty, although not cruel and unusual in principle, was however being applied capriciously and unevenly, more often against minorities and the poor.

Then in 1976, when presented with revised statutes, the Supreme Court, by a vote of 7-2 (with Stevens joining the majority), held that capital punishment was indeed constitutional under two conditions. First, the trial process needed to be bifurcated into guilt and penalty phases. Second, juries had to be given clear guidelines concerning the aggravating factors that would warrant such a sanction and the mitigating factors that would indicate otherwise. Stevens and his brethren believed that by reserving capital punishment only for the select group of heinous cases that were without mitigation, the penalty could be applied independently of race or privilege.

The Supreme Court was correct in its expectation, but only to a degree. Since 1976, more white defendants than blacks defendants, both in absolute numbers and in relation to the race-specific homicide offending rates. As displayed in figure below, the gap between the number of white and black prisoners sitting on death row nationwide has actually widened over the past thirty years since capital punishment was reinstated.

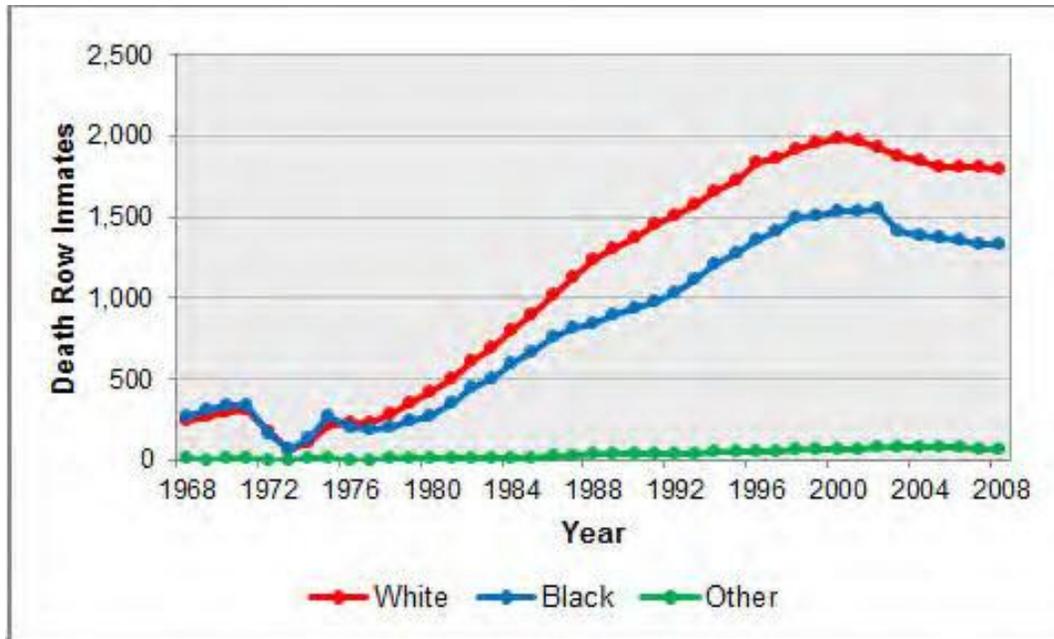


Figure 1: Death row inmates by race

The pattern of racial discrimination is much subtler, however. The figure below shows rates of execution (executions per 1,000 cases) for victim/offender race combinations, by comparing solved homicides for the years 1977–2008 with executions through the end of 2008. Overall, regardless of race combination, there were 1.5 defendants executed per 1,000 known murderers. The differences according to race are, however, quite provocative and give different inferences when probing below the surface.

The execution rate for white killers (2.0 per 1,000 offenders) is nearly double that for blacks (1.1 per 1,000 killers). Furthermore, those who kill whites are five times as likely to be executed as those who kill blacks (specifically 2.4 executions per 1,000 killers of white victims as compared with 0.5 executions per 1,000 murderers of blacks).

But when examining the race combinations of offenders and their victims, an apparent injustice emerges. Overall, blacks who kill whites have the greatest chance of being executed (4.0 executions per 1,000), almost twice as high as that for whites who kill whites (2.1 executions per 1,000), five times higher than for whites who kill blacks (0.8 executions per 1,000), and, most disparately, more than eight times higher than for blacks who kill blacks (0.5 per 1,000).

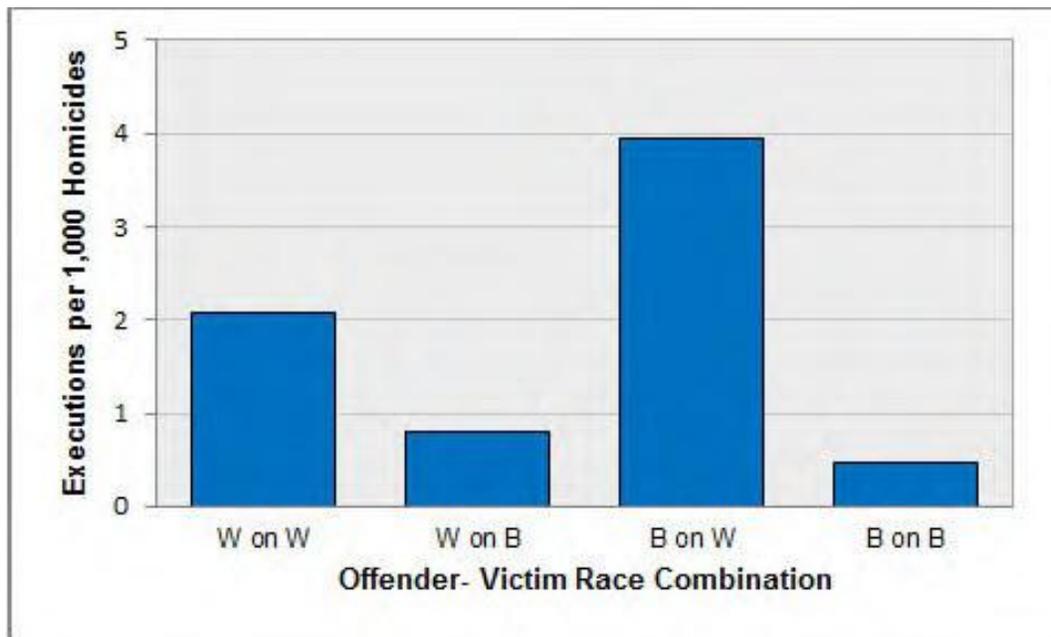


Figure 2: Execution rates by race combination

Thus, although it may appear that black murderers are less likely to receive the death penalty than whites, this is purely a function of the intraracial nature of homicide and the apparent racism of a criminal justice system that places less value on black murder victims. When blacks kill whites, they are more likely than any other victim offender dyad to receive the death penalty.

The concern for racial discrimination, which motivated the 1972 moratorium on executions, no longer seems to sway public opinion or, more importantly, a conservative-dominated Supreme Court. In *McCleskey v. Kemp* (1987), the justices reviewed and debated the results of a statistical study based on over 2,000 murder cases from Georgia. In this research, University of Iowa law professor David Baldus showed that, even while controlling for a host of relevant factors, black defendants who killed white victims had the greatest likelihood of receiving the death penalty. Even so, the Court's majority dismissed the statistical correlation between race and sentencing, indicating that a defendant on appeal would need to demonstrate racial prejudice in his or her particular trial, not a statistical pattern in cases generally.

Beyond the statistical patterns apparent in the nation's recent track record on executions is the fundamental flaw surrounding the 1976 Supreme Court decision, and the reason for Stevens' regret. The justices assumed that juries would in fact follow the prescribed guidelines for identifying the select class of defendants who are most deserving of death. However, a series of research studies from the Capital Jury Project (CJP) shows otherwise. Under the direction of William Bowers, a renowned death penalty scholar, the CJP has conducted over one thousand in-depth interviews with men and women in 14 states who had served on capital juries. The findings indicate, overwhelmingly, that jurors do not understand the complex legal instructions given them by trial judges and often decide cases as they wish regardless of statutory guidelines.

Supporters of capital punishment frequently suggest that death is an appropriate penalty for the worst of the worst. □ No matter what rules, guidelines or conditions are established, however, the death penalty selection process will remain subject to human emotion and bias. It took years and far too many executions before Justice Stevens came to see the 1976 reinstatement of capital punishment as an "incorrect decision." Unfortunately, far too few Americans see things his way.