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## **RACIAL DISCRIMINATION IN THE CRIMINAL JUSTICE SYSTEM**

**CLYDE E. MURPHY\***

A consideration of criminal justice issues raises two parallel questions of public policy: one, how to address the problems of crime and violence which threaten the stability of both the black and white communities and, two, how to address our equal concern that blacks are treated fairly and equitably by the various elements of the criminal justice system. Of particular concern are those elements where the system representatives exercise the greatest amount of discretion in the implementation of their authority, e.g., arrest and police use of force, prosecutorial discretion, jury selection, sentencing and probation, and prison conditions.

Of course, neither an assessment of criminal justice issues, nor a consideration of alternatives for addressing such issues, can exist in a vacuum; rather, such questions are necessarily influenced by other trends and developments in the society at large. Among these considerations are trends in economic opportunity and equality, national policies toward the disadvantaged, and other less tangible trends in social values and cultural ideals.

Elliott Currie, in an article prepared for the National Council on Crime and Delinquency, notes that the United States is becoming a more unequal society:

Inequality breeds violence and crime in many deeply interrelated ways. It creates bitterness, resentment, and alienation among those who see themselves excluded from rewards others share — not just material goods or income alone, but also self-esteem and the chance to participate as full members of their society on an equal footing with others.

Inequality and its usual companion, harsh economic deprivation, weaken and stress the social institutions that make for the healthy growth and development of individuals. They put powerful pressures on families, too often leading to poor parenting, neglect, domestic violence and child abuse. They increase the risks of alcoholism, drug abuse, and inadequate health care — all of which, in turn, put children and youth at a higher risk of delinquency and crime. Inequality and severe poverty sharply limit access to high-quality education and training. They increase the risks of teen-age pregnancy and unwanted children, helping to perpetuate

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new generations of impoverished and ill-prepared families.<sup>1</sup>

The high unemployment rates, the disparity in earnings of people who do work, and the increasing numbers of heads of households whose earnings from year-round work would not bring a family of four above the federal poverty line<sup>2</sup> bode serious consequences in the face of rising earnings, increased discretionary income, and growing power to consume goods and services enjoyed by many other Americans. This paradox of growing poverty and deprivation amid growing affluence and plenty provides a fruitful seedbed for criminal activity and violence.

The transformation of the United States' economy from one based on agriculture to one centered in industry threw millions of rural Americans into an urban-industrial economy that was unable to absorb them. The casualties of that transformation — the victims of rising crime, inner-city joblessness, poverty, drug abuse, and family disruption which characterized the "urban crisis" of the 1960s and their descendants — today make up a substantial part of what is now frequently referred to as the "underclass."

The evidence does not support the view that jobs being created by the new "service economy," are providing minority youth with the types of jobs which can offer young people a solid stake in their communities, reliable hope for the future, or a strong shield against the attractions of illegal work, especially the illicit drug trade.<sup>3</sup>

Some areas of the country have seen strong job growth in the 1980s, based on a booming service economy. But most of the *good* new jobs require more skills and education than the urban poor possess, thereby creating a growing mismatch between jobs and people in the cities. Between 1970 and 1984, New York City gained almost a quarter of a million jobs requiring some college, but *lost* almost half a million requiring less than a high school diploma. The result is what some have called the "dual city" — a city increasingly split between those with the skills and connections that enable access to good jobs, and those whose lack of requisite skills and connections will increasingly cause them to be left behind in the economy of the 21st century.

... To the "old" poor of the inner cities will increasingly be added the "new" poor — those displaced from manufacturing industries, as well as those expelled from rural areas by the renewed crisis in American farming.<sup>4</sup>

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1. CURRIE, *What Kind of Future? Violence and Public Safety in the Year 2000*, at 6 (July, 1987) (prepared for National Council on Crime and Delinquency) [hereinafter cited as Currie, *What Kind of Future?*] See also, CURRIE, *Confronting Crime: An American Challenge* (1985).

2. *Id.* at 7, n.1. See also, Danziger & Gottschalk, *Work, Poverty and the Working Poor*, 109 MONTHLY LAB. REV. 18 (1986).

3. *Id.* See also, CURRIE, *Confronting Crime: An American Challenge*, New York: Pantheon (1985).

4. *Id.* at 9.

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These trends have been aggravated in recent years by the continuous reduction in some of the more successful social programs of the 1960s and 1970s. Between 1979 and 1984 the percentage of poor children served by Aid to Families with Dependent Children, which through its companion Medicaid program underwrote many successful health care services, dropped by 22 percent. The proportion of children enrolled in Head Start programs similarly fell by 21 percent.<sup>5</sup> From the early to mid-1980s, nearly three-quarters of a million fewer people were being served by community health centers for low-income families, two-thirds of them children or women of childbearing age.<sup>6</sup>

The proportion of youth who are not at work is higher in the mid-1980s, with a shrunken youth population, than it was in the 1970s. In 1980, among recent high school graduates not enrolled in college, 31 percent were either unemployed or had dropped out of the labor force altogether. By 1985, the proportion had reached 38 percent. Among youth who had dropped out of high school, the proportion not working in 1985 (a stunning 56 percent) was slightly higher than in the recession year of 1975 - when the size of the youth population was considerably greater. This doesn't mean that a declining youth population won't help young people's job chances at all. It does mean that other factors — perhaps especially the poor quality of many jobs in the youth labor market and inadequate training programs for younger workers — will exert a more powerful influence on the job prospects for the young.<sup>7</sup>

This potential shrinking of the prospects for stable jobs for the disadvantaged — particularly the young — has the additional adverse effect of increasing the attractiveness of the illegal drug trade.

There is no question that illicit drug dealing is a key source of criminal violence. It bears an important part of the responsibility for rising crime rates in the 1960s — when the “plague” of heroin addiction mushroomed in many cities. And it has been deeply implicated in the high, and more recently rising, rates of violent crime in the 1980s, despite an ever “tougher” approach to both crime and drug-dealing in the courts and prisons.<sup>8</sup>

We are less likely to stop the trade in cocaine, heroin and other hard drugs — or their attendant and escalating violence — while a substantial proportion of disadvantaged young people are offered little more than the choice between inadequate, dead-end work on the one hand, and dangerous but lucrative illicit work on the other.

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5. U.S. House of Representatives, Select Committee on Children, Youth, and Families, *Safety Net Programs: Are They Reaching Poor Children?* 111 (1985).

6. ALDOUS, *Cuts in Selected Welfare Programs: The Effect on U.S. Families*, 1986 J. FAM. ISSUES 12.

7. CURRIE, *What Kind of Future?* at 14 (citing COHANY, *What Happened to the High School Class of 1985*; MONTHLY LAB. REV. (1986)).

8. *Id.* at 15.

Recent trends toward harsher sentences for drug offenses and related violent crimes indicate an increasing reliance on a crowded and volatile prison system as a principal line of defense against crime. Some researchers suggest that incarceration under overcrowded and brutal conditions is likely to have a negative impact on many offenders, making them more alienated, more prone to violence, and less capable of re-entering productive society when they are released. Far from being a response likely to solve the problem of crime in our society in which prison administrators have given up any pretense of offering offenders training, education, or supportive services to offenders that might better prepare them for life on the "outside."

[W]e must work to create a justice system that, while efficient and secure, also takes seriously the task of preparing offenders for a productive role in society . . . . A more effective criminal justice policy means developing credible sanctions outside prisons for less dangerous offenders, if ever constructive programs are to be developed in education or training inside them.<sup>9</sup>

#### RACIAL DISPARITY IN THE UNITED STATES PRISON POPULATION

While blacks comprise approximately twelve percent of the population of the United States, they represent almost fifty percent of the prison population. Thus on any given day, more than five percent of all black males in their 20s in the United States are in prison. About fifteen percent of all black males in this country can be expected to serve some time in a state prison during their lifetime. By comparison, less than one-half percent of white males in their 20s are in prison on any one day, and only two to three percent of white males will be imprisoned during their lifetimes. Moreover, murder is the leading cause of death for young black males, and it is almost as high for young black females.<sup>10</sup>

National Prisoner Statistics indicate that on December 31, 1981 46% of prisoners under state and federal jurisdiction were black (Bureau of Justice Statistics, 1983: 19). Another 1% were American Indian or Alaskan natives. In the Northeast and South, the nonwhite figure equals or exceeds 50%. In states such as New York, California, Texas, and Florida, the incarceration rate for the black population is more than five times as large as the rate for the white population. In Michigan and Illinois, it is over nine times as high as the white rate. The national rate of incarceration for black people is more than six times as high as the rate for white people. Black males, whose imprisonment rate of 128 per 10,000 resident population is eight times the national rate for all groups of 16 per 10,000, constitute the most overrepresented race-sex category in state and federal

9. *Id.* at 21.

10. PETERSILIA, *Racial Disparities in the Criminal Justice System: A Summary*, 31 CRIME & DELINQ. 16 (1985). [Hereinafter, Petersilia, *Racial Disparities in the Criminal Justice System*].

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prisons although white and other males are also somewhat over-represented . . . . Black women constitute the majority of female prisoners and have by far the highest imprisonment rate among the female prisoners and have by far the highest imprisonment rate among the female racial groups. However, . . . women of all races are greatly under-represented in comparison to overall imprisonment rate.

. . . .

According to the 1981 Uniform Crime Reports (Federal Bureau of Investigation, 1982: 179), blacks constituted 26% of all arrests and 34% of arrests for Index offenses (murder, rape, robbery, assault, burglary, larceny, vehicle theft, and arson). Their percentage among arrests for serious violent crimes of homicide, rape, robbery, and assault was even higher; at 46% it was identical to their proportion in the national prison population . . . .<sup>11</sup>

In 1982 Alfred Blumstein of Carnegie-Mellon University published a study on race and imprisonment.<sup>12</sup> This study explored the racial disproportionality of prison populations to discern the degree to which it might have resulted from racial discrimination in the criminal justice system as compared to a disproportionate involvement in criminal activity, particularly in the kind of criminal activity that is most likely to lead to imprisonment and to longer sentences.<sup>13</sup>

While the results presented in Blumstein's study "do not argue that discrimination is absent from the criminal justice system,"<sup>14</sup> his results do not support the view that racial disproportionality in prison populations can be explained entirely by racial discrimination. Nevertheless, Blumstein's exploration of crime-type-specific racial distributions at arrest and in prison indicated that blacks are disproportionately represented in prison as the seriousness of the offense decreases. This suggests that blacks become increasingly disadvantaged as the amount of permissible criminal justice discretion increases (e.g., in prosecution and sentencing), and discrimination is a plausible explanation for a major part of that effect.

Joan Petersilia's 1983 study<sup>15</sup>, *Racial Disparities in the Criminal Justice System*, found that minorities receive harsher sentences and serve longer in prison.<sup>16</sup> She also notes the impact of racial differences in plea bargaining and types of sentencing.

Plea bargaining resolves a higher percentage of felony cases involving white defendants whereas jury trials resolve a higher percentage of cases

11. CHILTON & GALVIN, *Race, Crime and Criminal Justice*, 31 CRIME & DELING. 4,5 (1985).

12. BLUMSTEIN, *On the Racial Disproportionality of United States Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1281 (1982).

13. *Id.*

14. *Id.* at 1281.

15. PETERSILIA, *Racial Disparities in the Criminal Justice System*.

16. *Id.*

involving minorities. Although plea bargaining ensures conviction, it also virtually guarantees a reduced charge or a lighter sentence, or both; conviction by a jury usually results in more severe sentencing.<sup>17</sup>

In a 1985 study<sup>18</sup>, Joan Petersilia and Susan Turner noted that proponents of sentencing reform argue that discrimination can affect sentencing because judges have traditionally had broad discretion in their sentencing decisions.<sup>19</sup> According to this view, curbing that discretion through some type of sentencing reform would theoretically eliminate racial discrimination and thus racial disparities in sentencing. Several states have now instituted sentencing guidelines as well as guidelines for parole decisions and decisions concerning the level of probation supervision. Generally these decisions, especially probation and parole, use the likelihood of recidivism as a gauge.<sup>20</sup>

However, much of the research indicates that some factors correlated with recidivism are also highly correlated with race. For example, while long-term unemployment is generally thought to be a predictor of recidivism, it also happens to be higher in the black population. Policymakers thus face the dilemma of determining whether these factors really do predict recidivism, and if they do, whether guidelines can afford to ignore them despite their racial correlation.

Policymakers have established guidelines for patterns of recidivism in order to obtain the most efficient use of prison space and to incapacitate offenders who pose the most serious threat to public safety. These guidelines include factors such as the seriousness of the crime, whether there were aggravating circumstances (such as use of a weapon or injury to the victim), and the prior criminal record of the defendant. Similarly used are factors such as having served time in a juvenile institution, or having a conviction before age sixteen. These factors while having potential as predictors of recidivism, are also correlated with race.

Recognizing the socioeconomic dislocation that exists in the black community, Petersilia notes that while guidelines intended to overcome racial discrimination "probably do," they cannot be expected to overcome racial disparities in sentencing where serious criminality is disproportionately high in the black population.

Research has established that the socioeconomic conditions associated with crime are more prevalent among blacks than among whites. And demographic trends (e.g. mobility, fertility) appear to be reinforcing the difference. As long as these conditions and trends continue, the prison population is likely to become even blacker-with or without sentencing

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17. *Id.* at ix.

18. PETERSILIA & TURNER, *Guideline-Based Justice, The Implications for Racial Minorities*, The Rand Corpor. (Nov. 1985).

19. *Id.* at v.

20. *Id.*

reform. *The need to seriously address the problems that contribute to black criminality in our society is becoming increasingly apparent.*

In the meantime, however, there can be little doubt classification instruments are profoundly influencing criminal justice decisionmaking, and their growth will almost certainly continue. Therefore, policymakers must begin to examine the impact of the use of such instruments on minority offenders.<sup>21</sup>

The Rand Inmate Survey (RIS), which consists of data regarding male inmates in California, Michigan and Texas, (22 percent of the national state prison population) applies a regression analysis to control for race, age, type of crime, and number of previous juvenile and adult incarcerations. Petersilia concluded that there are racial disparities in the length of court-imposed sentencing.

In all three states, we found that prior criminal record was not significantly related to *length* of court-imposed sentence. However, sentence length was significantly related to age and type of conviction crime. Further, the regression results indicate that, controlling for the defendant's age, conviction crime, and prior record, race made a difference in each state.

Although the relative lengths are not consistent for particular groups or states, these findings support charges that minorities receive longer sentences. In all three states, minority status alone accounted for an additional one to seven months in sentence length.<sup>22</sup>

With regard to corrections and length of sentence served, Petersilia observed:

[O]nce a person is sentenced to prison, he is potentially subject to a range of decisions that are not systematically recorded. Prison guards and staff make decisions that influence strongly the quality of an offender's time in prison, and parole boards and other corrections officials decide how long that time lasts. The possibility of discrimination enters into all these decisions, but length of time served is the only one certain to be recorded. In other words, corrections is a closed world in which discrimination could flourish.

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We found, however, that although minorities received roughly equal treatment in prison, race consistently made a difference when it came time for release. In Texas, blacks and Hispanics consistently served longer than whites — and the disparity was appreciably larger than disparity in court — imposed sentences. In California, blacks served slightly longer sentences, but the disparity largely reflected the original sentencing differences. In Michigan, the parole process evidently worked in favor of blacks. Although their court-imposed sentences were considerably longer than those of whites, they did not actually serve longer . . .

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21. *Id.* at xi.

22. PETERSILIA, *Racial Disparities in the Criminal Justice System* at 21-22.



Petersilia observes that in Texas minority defendants not only receive longer sentences than whites but parole decisions lengthen those sentences even more. In Michigan, however, even though blacks receive sentences 7.2 months longer than white defendants, they serve equal time. Petersilia drew the following conclusions from these observations:

Texas has a very individualized, highly discretionary, parole process that incorporates the full range of an inmate's criminal history and personal and socioeconomic characteristics. Since 1976, Michigan parole decisions have been based almost exclusively on legal indicators of personal culpability such as juvenile record, violence of conviction crime, and prison behavior. Evidently, this practice not only overcomes racial disparities in time served, but also even overcomes racial disparities in sentencing.<sup>24</sup>

Petersilia's study also examined motivation, weapon use, and prison behavior as elements likely to influence the impression a prisoner makes on probation officers, judges, and parole boards, and thus as characteristics which might help explain the differences observed in sentencing and time served. While the statistically significant differences were few, the following observations were made with regard to prisoner responses on the RIS.

All three racial groups rated economic distress as the primary motive for committing crimes, with "high times" second and "temper" third. However, there was only one statistically significant difference in motivation. Whites rated "high times" much higher than blacks and hispanics. Nevertheless, there were some other suggestive differences. Blacks rated economic distress considerably higher than "high times", whereas whites rated it only slightly higher. This suggests that socioeconomic conditions among blacks may be more consistently related to crime than they are among whites. That comes as no particular surprise; but if probation officers, judges, and parole boards see unemployment as an indicator or (sic) recidivism - rather than as a mitigating circumstance in crime - blacks or any unemployed offenders are likely to receive harsher sentences and serve longer.<sup>25</sup>

Petersilia also found that the proportion of blacks in prison for burglary is considerably higher than the proportion of blacks arrested for that crime notwithstanding the fact that blacks were least likely to be armed during burglaries.<sup>26</sup>

Addressing the question of the overrepresentation of blacks and minorities in the arrest population, Petersilia concluded:

Whatever their reasons, the racial differences in warrant arrests and re-

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23. *Id.* at 22-23.

24. *Id.* at 30.

25. *Id.* at 25-26.

26. *Id.* at 26.

lease rates suggest that the police operate on different assumptions about minorities than about whites when they make arrests. Other study findings tend to reinforce the suggestion that the system regards minorities differently. Controlling for the factors most likely to influence sentencing and parole decisions, the analysis still found that blacks and Hispanics are less likely to be given probation, more likely to receive prison sentences, more likely to receive longer sentences, and more likely to serve a greater portion of their original time.<sup>27</sup>

Petersilia's study unambiguously states that minorities are given longer, harsher sentences at conviction and serve longer terms than whites in two of the three states studied. She also suggests that a partial explanation of this pattern can be obtained by considering who makes the decisions at key points in the system and what kinds of information they use to make those decisions.

As an example, consider the widespread influence of the presentence investigation report (PSR) which describes factors such as the subject's family background, marital status, education and employment history, past encounters with the law, gang affiliation, and drug and alcohol abuse. Minorities often do not show up well in PSR indicators of recidivism such as family instability and unemployment. As a result, probation officers and parole boards are likely to identify minorities as higher risks, and therefore candidates for harsher sentences, and longer time served.

### RACIAL DISCRIMINATION AND THE SENTENCE OF DEATH

Probably the most profound expression of racial discrimination in sentencing occurs in the use of capital punishment. This issue was recently placed squarely before the Supreme Court in *McCleskey v. Kemp*.<sup>28</sup> There McCleskey's defenders addressed the question of why, out of seventeen defendants charged with the killings of police officers in Fulton County, Georgia between 1973 and 1980, only Warren McCleskey — a black defendant charged with killing a white officer — had been chosen for a death sentence. In the only other one of these 17 cases in which the predominantly white prosecutor's office in Atlanta had pushed for the death penalty, a defendant convicted of killing a black police officer had been sentenced to a life term.

The centerpiece of McCleskey's evidence was a pair of studies conducted by Professor David Baldus of the University of Iowa. These studies examined 2,484 cases of murder and non-negligent manslaughter that occurred in Georgia between 1973, the date when its present capital mur-

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27. *Id.* at 28.

28. 107 S. Ct. 3199 (1987).

der statute was enacted,<sup>29</sup> and 1979, the year after McCleskey's own death sentence was imposed. The Baldus team got its data on these cases principally from official state records supplied by the Georgia Supreme Court and the Georgia Board of Pardons and Paroles.

Under Professor Baldus' direction the researchers collected information regarding more than five hundred factors in each case including information relating to demographic and individual characteristics of the defendant and the victim, the circumstances of the crime and the strength of the evidence of guilt, and the aggravating and mitigating features of each case. These are features specified by Georgia law to be considered in capital sentencing, along with other factors recognized in the legal and criminological literature as theoretically or actually likely to affect the choice of life or death. Professor Baldus processed the data through a wide array of sophisticated statistical procedures including multiple-regression analyses based upon alternative models that considered and controlled for as few as ten or as many as 230 sentencing factors in each analysis. When the evidence was presented in court, Baldus re-analyzed the data several more times to take account of every additional factor, combination of factors, or model for analysis of factors suggested by the State of Georgia's expert witnesses, its lawyers, and the federal trial judge. The Baldus study has since been uniformly praised by social scientists as the best study of any aspect of criminal sentencing ever conducted.<sup>30</sup>

The Baldus study showed that death sentences were being imposed in Georgia murder cases in a clear, consistent pattern that reflected the race of the victim and the race of the defendant and could not be explained by any non-racial factor. For example, although less than 40 percent of Georgia homicide cases involved white victims, in 87 percent of the cases in which a death sentence was imposed, the victim was white. White-victim cases were almost eleven times more likely to produce a death sentence than were black-victim cases.

When the race of the defendant was also considered, 22 percent of black defendants who killed white victims were sentenced to death. Eight percent of white defendants who killed white victims were sentenced to death. One per cent of black defendants who killed black victims were sentenced to death. Three percent of white defendants who killed black victims were sentenced to death.<sup>31</sup>

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29. 15 Ga. Code Ann. § 17-10-30 (1982).

30. The findings of the Baldus study as well as the implication of the Supreme Court's decision in *McCleskey v. Georgia* is discussed by Professor Anthony Amsterdam in his Commencement Address, John Jay College of Criminal Justice, May 31, 1987.

31. Out of roughly 2500 Georgia homicide cases, only 64 involved killings of black victims by white defendants, therefore the 3% death-sentencing rate in this category represents a total of two death sentences over a six-year period.

No non-racial factor explains these racial patterns. Multiple regression analysis, the model with the maximum explanatory power, showed that the race of the victim was as good a basis for predicting whether or not a murderer would be sentenced to death as were the aggravating circumstances which the Georgia statute explicitly says should have been considered in favor of a death sentence.<sup>32</sup>

In sum, Georgia had executed seven murderers since it passed its present statute in 1973. Six of the seven were black. All seven of the victims were white.

Presented with this evidence the United States Supreme Court rejected McCleskey's Equal Protection challenge to his death sentence.

It [the Supreme Court] did not question the quality or validity of the Baldus study, or any of the findings . . . . It admitted that the manifest racial discrepancies in death sentencing were unexplained by any nonracial variable, and that Baldus' data pointed to a "likelihood" or a "risk" that race was at work in the capital sentencing process. It essentially conceded that if a similar statistical showing of racial bias had been made in an employment-discrimination case or in a jury-selection case, the courts would have been required to find discrimination proved, and to grant legal relief. But, the Court said, racial discrimination in capital sentencing cannot be proved by a pattern of sentencing results: a death-sentenced defendant like McCleskey must present proof that the particular jury, or the individual prosecutor, or some other decisionmaker in his own case, was personally motivated by racial considerations to bring about his death. Since such proof is never possible to obtain, racial discrimination in capital sentencing is never possible to prove.<sup>33</sup>

The Supreme Court plainly understood the scope of the challenge presented by McCleskey.

McCleskey's statistical proffer must be viewed in the context of his challenge. McCleskey challenges decisions at the heart of the State's criminal justice system . . . . Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsel against adopting such an inference by the Baldus study.<sup>34</sup>

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32. Aggravating circumstances explicitly enumerated the statute are as follows: 1) offender has a prior record of conviction for a capital felony, 2) felony murder, 3) offender knowingly created a great risk of death to more than one person in a public place, 4) murder committed for purpose of receiving money, 5) murder was of a judicial officer while carrying out his official duties, 6) committed murder as an agent of another person, 7) murder involved horrible or inhuman torture, 8) murder of a peace officer, 9) offender is an escapee, 10) murder for preventing an arrest.

33. Address by Professor Anthony Amsterdam, John Jay College or Criminal Justice Commencement (May 31, 1987) [hereinafter cited as Amsterdam, Commencement Address].

34. *McCleskey v. Kemp*, 107 S. Ct.— (1987).

Professor Amsterdam summarizes the scope of the Supreme Court's decision as follows:

Its decision is not limited to capital sentencing, but purports to rest on principles which apply to the whole criminal justice system. Every part of that system from arrest to sentencing and parole, in relation to every crime from murder to Sabbath-breaking, involves a multitude of separate decisionmakers making individualized decisions based upon "innumerable [case-specific] factors." All of these decisions are important for the protection of society from crime. All are conceived as "necessarily requir[ing] discretionary judgments." In making these discretionary judgments, prosecutors and judges as well as jurors have traditionally been immunized from inquiry into their motives. If this kind of discretion implies the power to treat black people differently than white people and to escape the responsibility for explaining why one is making life-and-death decisions in an apparently discriminatory manner, it implies a tolerance for racial discrimination throughout the length and breadth of the administration of criminal justice. What the Supreme Court has held, plainly, is that the very nature of the criminal justice system requires that its workings be excluded from the ordinary rules of law and even logic that guarantee equal protection to racial minorities in our society.<sup>35</sup>

#### THE EXCLUSION OF BLACKS FROM JURIES

The United States Supreme Court recently took an "historic step toward eliminating the shameful practice of racial discrimination in the selection of juries".<sup>36</sup> In *Batson v. Kentucky*,<sup>37</sup> the Court followed a path it began over a century ago in *Strauder v. West Virginia*<sup>38</sup> when it invalidated a state statute providing that black citizens could not serve as jurors. By holding that a prosecutor's use of peremptory challenges to exclude blacks from a jury trying a black defendant is subject to a challenge as purposeful discrimination under the Equal Protection clause, the court in *Batson* implicitly recognized the pernicious nature of racial discrimination in jury selection, and the harm done by this common and flagrant practice.

As Justice Marshall's concurring opinion points out, in several jurisdictions prosecutors have used peremptory challenges to strike as many as 82 percent of black jurors in criminal cases. Moreover, prosecutors have not been hesitant to make clear their willingness to use peremptory challenges in this manner.

An instruction book used by the prosecutor office in Dallas County, Texas, explicitly advised prosecutors that they conduct jury selection so as to eliminate "any member of a minority group." In 100 felony trials

35. Amsterdam, Commencement Address, *supra* note 24.

36. *Batson v. Kentucky*, 476 U.S. 79, 102 (1987). (Marshall, J., concurring).

37. *Id.*

38. 100 U.S. 303 (1880).

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in Dallas County in 1983-1984, prosecutors peremptorily struck 405 out of 467 eligible black jurors; the chance of a qualified black sitting on a jury was one-in-ten, compared to one-in-two for a white.<sup>39</sup>

The Court's opinion effectively lightens the evidentiary burden faced by a criminal defendant who claims that the prosecution's use of peremptory challenges to exclude minority group members from the petit jury violates the Equal Protection Clause of the Fourteenth Amendment.

However, as important as this case may prove to be in ensuring fair trials for black defendants, participation by black citizens in the judicial process as members of juries, and in restoring the appearance of justice to black citizens observing the process, the opinion does not address the use of peremptory challenges by defense attorneys. Indeed, as Justice Marshall argues in his concurring opinion, the prerequisites to such a challenge, and the ease with which prosecutors may be able to meet those challenges, demand not only an extension of *Batson* to defense attorneys, but an outright prohibition of the use of peremptory challenges altogether.

The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system . . . . Justice Goldberg, dissenting in *Swain*, emphasized that "[w]here it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former . . . ." I believe that this case presents just such a choice, and I would resolve that choice by eliminating peremptory challenges entirely in criminal cases.<sup>40</sup>

### POLICE VIOLENCE AND THE BLACK COMMUNITY

Consistently over the last two decades studies have shown that racial minorities — principally black Americans — number disproportionately among persons killed by police through the use of deadly force.<sup>41</sup> Such incidents frequently ignite the smoldering tensions of communities that feel victimized by the reality of political and economic powerlessness.

The aftermath of the killing of Arthur McDuffie in Miami, Florida provides a vivid example of the volatility of the deadly force issue. After a trial in which the police officer defendants were found not guilty, Miami experienced a massive riot which resulted in a billion dollars

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39. *Batson v. Kentucky*, 476 U.S. at 104.

40. *Id.* at 107.

41. See e.g., Goldkamp, *Minorities As Victims of Police Shootings: Interpretations of Racial Disproportionality and Police Use of Deadly Force*, *Readings On Police Use of Deadly Force*, Edited by James J. Fyfe, The Police Foundation (1982).

worth of property damage and 14 persons killed.<sup>42</sup> Other cities have experienced varying degrees of tension as a result of such incidents. In New York, for example, a Congressional committee investigated such occurrences and ultimately a black police commissioner was appointed.

In 1985 the Supreme Court addressed the question of the use of deadly force in the apprehension of suspects. In *Tennessee v. Garner*<sup>43</sup>, the Supreme Court held that the common law fleeing felon rule — which authorized police to use deadly force to prevent the escape of fleeing felony suspects — violated the Fourth Amendment. The Court held that the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable, and that a police officer may not seize an unarmed, nondangerous suspect by shooting and killing him. However, the Court noted that if police officers have probable cause to believe a crime involves infliction or threatened infliction of serious physical harm then deadly force may be used to prevent escape.<sup>44</sup>

This important decision is one of several opinions rendered over the last few years that define the basis and extent of the individual officer's ability to use deadly force, as well as the liability of the police department or municipality for the improper use of force by its law enforcement officers.

The standard put forward in *Garner* raises questions of both the policy used by the police department, (i.e., when the police department permits the use of deadly force by its officers), and the actions of the individual officer (i.e., regardless of the policy, whether this officers actions conformed to the constitutional standard).

In like fashion, the Supreme Court's decision in *Monell v. Department of Social Services*,<sup>45</sup> while significantly expanding the remedies available for constitutional violations by municipalities, did not foreclose litigation on such questions as what constitutes a "policy" or "custom" for which a municipality might be held liable, or which municipal officials have the power to make city policy. Recently, the Supreme Court has begun to address the task of explicating these decisions and the litigation which addresses these questions is likely to have wide ranging effects.

Questions regarding the interaction of the police and the black community were central in the Kerner Commission<sup>46</sup> report of two decades ago, and are no less important today, as local officials attempt to deal

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42. *Florida v. Diggs*, No. 79-21601 (11th Cir. 1980).

43. 471 U.S. 1 (1985).

44. *Id.* at 11.

45. 436 U.S. 658 (1978).

46. Report of the National Advisory Commission on Civil Disorders (1968).

with inner cities racked by economic dislocation, inadequate housing, substandard educational facilities, and high crime rates.

Expanded employment opportunities aimed at fully integrated police departments has been shown to have a very beneficial impact on police/community relations. For example, several judicial decisions have recognized the increase in effectiveness to be derived via community cooperation when the department is representative of the community it serves<sup>47</sup>. Following the affirmative action program instituted by the Detroit Police Department it was found that both the number of police shootings of citizens and the number of citizen shootings of police decreased<sup>48</sup>.

In the last few decades there has been an increase in the call for more effective methods of handling and processing claims of police brutality. This increase is indicative of a growing concern about the frequency of such occurrences and the likelihood that such occurrences will go uninvestigated or unpunished. Similarly, citizen complaints can serve the fundamental purpose of helping to improve police/community relations by acting as vehicles for disciplining officers and deterring others from abusing their use of discretionary power.<sup>49</sup>

The traditional means of dealing with civilian complaints of police brutality involve internal review, where the police establish a special unit to investigate themselves, and an external review which has generally meant some form of civilian complaint review board. While each of these methods has its own advantages and drawbacks, in some instances they have been useful in helping the various parties reach an understanding of their shared concern for weeding out undesirable officers from the police force.

However, while increased participation by blacks on urban police forces and improved training of police officers in handling potentially volatile situations are important in curbing police misconduct, "vigorous prosecution of police misconduct cases is absolutely essential to demonstrate that no one, including a police officer, is above the law."<sup>50</sup>

While in theory police misconduct can be deterred by the possibility that an officer may be prosecuted under state criminal statutes for complaints ranging from murder to simple assault and battery, such prosecutions rarely occur. Moreover, the lack of vigorous prosecution promotes

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47. *Wygant v. Jackson Board of Education*, 478 U.S. 1014 (1986). Similar holdings have been made by the United States Courts of Appeal for the First, Second, Fourth, Fifth, Sixth, Seventh and Eighth Circuits. See also, Presidents Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* 167 (1969).

48. *Baker v. City of Detroit*, 483 F. Supp. 930 (E.D. Mich. 1979). See also, Ronald Ellis, *Victim-Specific Remedies: A Myopic Approach to Discrimination*, 13 N.Y.U. REV. LAW & SOC. CHANGE 575, 586-588 (1984-85).

49. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police*, Washington, D.C., Government Printing Office (1967).

50. United States Commission on Civil Rights, *Who is Guarding the Guardians?* 102 (1981).



alienation and suspicion of law enforcement authorities by the community. The district attorney's office is often viewed with suspicion in these instances. There is a perception that an elected prosecutor is apt to give greater priority to constituents' concern for law and order, than to a police violence problem which impacts most harshly on the minority community. There is a concern that the police and the district attorney play interrelated roles. The district attorney is unlikely to prosecute officers whom he depends on for the successful completion of other prosecutions.

In order to deal with both the perceptual problem that the district attorney's office is not an effective instrument for controlling police violence, as well as the empirical evidence that blacks and Hispanics suffer physical abuse and death at the hands of the police in disproportionately greater numbers than the white community, two simultaneous steps are important.

The district attorney's office should develop and publicly announce a position and a set of procedures to deal with police violence against citizens. These procedures should include early, direct and independent intervention into the investigation of all police arms discharges which involve the shooting of a civilian. Similarly, there should be an investigation into any police act in which a civilian is injured, e.g., by bludgeoning with nightsticks or other uses of force that involve injury to the civilian. These procedures should also include flagging for investigating all police reports which involve physical injury to the arrestee and a specific policy designed to ensure follow-up on all civilian complaints of police misconduct.

Once these policies and procedures have been announced and put into place, the district attorney's office must strictly follow these procedures, conduct an aggressive investigation and, if warranted by the facts, prosecute the offending police officer. If on the other hand, prosecution is not warranted, the district attorney should make public the results of the investigation so that the underlying reason for that decision is known and can be evaluated by the public. Similarly, the district attorney should cooperate in departmental or administrative reviews and should also make relevant information available to private litigants should a civil lawsuit ensue.

The essence of these proposals is that police violence against citizens should be viewed with the same gravity and investigated with the same vigor as investigations into the most heinous of crimes. The fundamental assumption of these proposals is a systematic approach to the problem of police violence, publicly announced and aggressively followed by the district attorney's office. This approach will lessen the occurrence of these incidents and will reassure the public that when and if they do occur they

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will be honestly investigated and, if necessary, aggressively pursued by the district attorney's office.

## GAUGING THE PUBLIC'S VIEW

A recent public opinion survey shows the position of the public on many of these questions. The study, conducted by the Public Agenda Foundation,<sup>51</sup> made twenty observations based on ten focus group discussions. Included among the observations and findings were the following:

[t]he public believes sentencing should be uniform for similar crimes committed under similar circumstances;

... the public is informed about prison overcrowding, but does not understand the causes of overcrowding or how overcrowding inhibits rehabilitation;

... the public believes that the primary goal of the prison system should be to rehabilitate offenders, but feels that the system is falling far short of meeting that goal;

... the public readily supports alternatives to incarceration for certain classes of offenders. However, there is strong opposition to alternatives to incarceration for repeat offenders, drug dealers, and those convicted of violent crimes;

... Americans see the underlying causes of crime as factors related to poverty and the values with which children are raised;

... beyond the underlying causes, Americans feel that there are two more immediate causes of crime: the use of illegal drugs and the lack of adequate deterrents to crime.<sup>52</sup>

## CONCLUSION

In 1982 the National Minority Advisory Council on Criminal Justice issued a report which examined the various elements and institutions of the Criminal Justice system.<sup>53</sup> The report directly confronts the major public policy contradictions of life in the United States, noting the society's attempt to "act within an egalitarian ideological posture while treating minorities with direct, blunt and flagrant inequality."<sup>54</sup>

[T]he police, courts, and correctional system play a crucial role in perpetuating the view among minorities that they are powerless and without a voice in determining their own fate at the time when overt racism is outlawed. This view is maintained chiefly through the underrepresentation of minority employees in the criminal justice system. Thus, minorities

51. Doble, *Crime and Punishment: The Public's View*, The Public Agenda Foundation (June 1987).

52. *Id.*

53. National Minority Advisory Council on Criminal Justice, *The Inequality of Justice: A Report on Crime and the Administration of Justice in the Minority Community* (1982).

54. *Id.* at xxxi.

see few of their own with the legal power to exercise authority. Moreover, when competition for basic needs becomes keen in a stagnant or receding economy and when the push for equality comes closer to home, the veil of charity in an already fragile socioeconomic system disintegrates. Minorities are treated by key elements of the criminal justice system in ways that stigmatize, brutalize and reinforce their oppression in society, as a whole.<sup>55</sup>

With regard to the operation of the police, the report concludes: [T]he system appears to function to protect police officers who have killed citizens. In the final analysis, power is an inextricable element of police accountability. Police are only responsive to those whom they perceive to have power in this society. To halt the potential danger of police, minorities must gain access to the power structures, at least in their communities. Meanwhile, the police should not be allowed to define their role to the communities; rather, the communities should define and limit the role of the police. Minorities want police that serve them, prevent crime, respect their language and culture, and respond to their communities with the same speed and respect routinely accorded white communities.<sup>56</sup>

With regard to the operation of the courts, the report concludes: The long line of Supreme Court decisions guaranteeing equal rights for indigent and minority defendants appears to have come to an end with the Burger Court. In 1974, the Burger Court denied indigents the right to court-appointed counsel in their pursuit of discretionary review. It further limited the indigent's exercise of his or her right to counsel by permitting the state, as a condition of probation, to impose the payment of state incurred costs for appointed counsel.<sup>57</sup>

With regard to the operation of the corrections system, the report concludes:

[W]hile the U.S. Prison system is more and more populated by minority inmates, control of the system remains in the hands of predominantly white males.

...

The structure of the parole system is also antithetical to minority prisoners' interests. The main criteria used by parole boards in determining release are employment, housing, age (persons 18 to 25 years old are assessed as high risk), criminal history and behavior. Given the social handicaps affecting minorities, these criteria further reduce minority prisoners' chances for parole.<sup>58</sup>

A comprehensive examination of the criminal justice system reveals that it has not escaped the effects of racism and discrimination that have historically existed in American society. The research in this area tends

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55. *Id.*

56. *Id.* at xxxiv.

57. *Id.* at xxxvi.

58. *Id.* at xxxvi-vii.

to support the view that minorities are more likely to be suspected of crime than whites; that they are more likely to be arrested; that they are more likely to be injured or killed during that arrest; that they are less likely to secure bail; that they are more likely to be indicted than whites and that they are less likely to have their cases dismissed or charges reduced. Minorities tend not to get a trial by a jury of their peers because of the underrepresentation of minorities on jury panels. If tried, minorities are more likely to be imprisoned and more likely to serve full terms without parole. Also, they are more likely to obtain harsher sentences whether they plead guilty or are found guilty.

The history of the last two decades is replete with efforts on the part of policymakers to alter the traditional practices of the adult and juvenile justice systems.<sup>59</sup> However, few would argue that the current criminal justice system is functioning very well. According to official estimates, crime continues to increase despite efforts at reform.

Moreover, while the research on the equities of the system often differ according to the ideological bias of the examiner, more often than not there is a recognition that socioeconomic factors are a major contributor to the high rates of crime affecting the black community.

It follows that no amount of reform is likely to be truly effective unless the underlying problems of economic opportunity are likewise addressed. Similarly, while such problems must be addressed by all sectors of society, it is particularly necessary in the short term to address them as they exist in the criminal justice system.

Several researchers have noted that discrimination is most possible at the points in the system where there is greater discretion of the criminal justice representative. Some jurisdictions have addressed this problem by attempting to limit discretion by the use of guidelines in the areas of sentencing and parole. For instance, it is equally important to make concerted efforts to increase the number of blacks and other minorities who are in a position to exercise that discretion.

Such efforts are necessary throughout the system by police officers, district attorneys, public defenders, jurors, judges, commissioners of police and corrections, as well as parole officers and wardens. For just as specific reforms in mechanisms of social control may be necessary, they must be implemented with an awareness of the interconnections of that system and the socio-political-economic realities faced by its victims, and beneficiaries.

Contemporary reformers must confront a political-economic system that is becoming increasingly dysfunctional. Economic trends indicate that the class of permanently unemployed will grow even larger . . .

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59. AUSTIN & KRISBERG, *Wider, Stronger, and Different Nets: The Dialectics of Criminal Justice Reform*, J. RES. IN CRIME AND DELINQ. (1981).

Chronically high rates of unemployment and uncontrollable inflation are heightening pressures bearing on physical survival, and the increased social costs of the political economy are placing greater demands on public funds to control the casualties of that system . . . .<sup>60</sup>

As the United States moves into the twenty-first century, rather than solving the crisis for minorities in the 1960s, we are seeing the decedents turn into the "underclass" of the 1980s. Minorities are much more likely than whites to be in the lowest income groups. They are more likely to be unemployed, ill-housed and subject to poor health care and political powerlessness. Unless these concerns are addressed and black people and other minorities obtain the opportunity to achieve economic security, self-esteem, a lifestyle which promises them a solid stake in their communities and reliable hope for the future, no amount of criminal justice reform is likely to have a lasting effect on the underlying disparities of the system.

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60. *Id.*