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Blind Justice Requires a Blindfold**

By Scott Phillips

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Racial Disparities in Capital Punishment: Blind Justice Requires a Blindfold

Scott Phillips*

Justice is supposed to be blind – meted out according to the legal characteristics of a case rather than the social characteristics of the defendant and victim. But decades of research on race and capital punishment demonstrate that blind justice is a mirage.¹

In this Issue Brief, I describe research I conducted on race and capital punishment in Harris County, Texas. Though the entire state of Texas has earned a reputation for execution, Harris County – home to Houston and surrounding areas – is the capital of capital punishment. Harris County has executed 104 offenders in the modern era (defined as the time from the Supreme Court’s reinstatement of capital punishment in 1976 to the present). That number means Harris County has executed more offenders than all the other major urban counties in Texas, combined. In fact, if Harris County were a state it would rank second in executions in the nation after Texas.²

My findings suggest that the race of the defendant and victim are both pivotal in the capital of capital punishment: death was more likely to be imposed against black defendants than white defendants, and death was more likely to be imposed on behalf of white victims than black victims (no Hispanic-white disparities were observed). Importantly, the disparities originated in the District Attorney’s (DA) office, not the jury’s deliberation room.

The central claim of the research – that racial disparities exist – does not insinuate that judicial actors intend to discriminate. Indeed, the Harris County District Attorney’s office has a long-standing practice of excluding the race of the parties from the memorandum that the DA uses to decide whether to seek the death penalty. Unfortunately, this commendable practice does not eliminate the influence of race.

The issue brief is divided into the following sections: Part I describes how the Supreme Court prompted, and later responded to, social science research on race and capital punishment. Part II describes the methods and findings of the research I conducted on race and capital

* Scott Phillips is an associate professor in the Department of Sociology and Criminology, University of Denver. This Issue Brief is based on an article forthcoming in the *Houston Law Review* (October 2008, volume 45) entitled: “Racial Disparities in the Capital of Capital Punishment.” Please direct correspondence to: Scott Phillips, , 2000 E. Asbury Avenue, Denver, CO 80208-2948, Scott.Phillips@du.edu.

¹ See U.S. GOV’T ACCOUNTABILITY OFFICE, GGD-90-57, DEATH PENALTY SENTENCING: RESOURCE INDICATES PATTERN OF RACIAL DISPARITIES (1990), *available at* <http://archive.gao.gov/t2pbat11/140845.pdf>; RAYMOND PATERNOSTER, ROBERT BRAME & SARAH BACON, THE DEATH PENALTY: AMERICA’S EXPERIENCE WITH CAPITAL PUNISHMENT (Oxford Univ. Press 2007); David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT 501-51 (James R. Acker et al. eds., 2d ed. Carolina Academic Press 2003).

² For data on Texas executions by county see Death Row Home Page, <http://www.tdcj.state.tx.us/stat/deathrow.htm>, (last visited June 24, 2008). For data on United States executions by state see Death Penalty Information Center, <http://www.deathpenaltyinfo.org/> (last visited Sept. 26, 2008).

punishment in Houston. Part III advances a proposal for reducing racial disparities in capital punishment. Finally, Part IV addresses potential objections to the proposal.

I. The Supreme Court, Social Science Research, and Empirical Patterns

In *Furman v. Georgia*,³ the Supreme Court ruled on a 5-4 vote that capital punishment was administered in an arbitrary manner that constituted cruel and unusual punishment. Most of the justices in the majority used the word “arbitrary” to refer to numerical disparities, arguing that there was no legal basis for distinguishing the handful of defendants who were sentenced to death from the large number of defendants who committed equally reprehensible crimes but were spared. But two justices, Douglas and Marshall, also used the word “arbitrary” to refer to racial disparities in the imposition of capital punishment.

After the Supreme Court’s decision in *Furman*, states began to revise their laws and reinstate capital punishment. Some states eliminated arbitrariness by making the death penalty mandatory for defendants convicted of particular crimes. Other states adopted “guided discretion,” an approach that specified the range of crimes eligible for death, separated the guilt and punishment phases of a capital trial (allowing the prosecution and defense to introduce evidence of aggravating and mitigating circumstances during the punishment phase that could not have been introduced during the guilt phase), and required automatic appellate review. In *Woodson v. North Carolina*⁴ and the companion case *Roberts v. Louisiana*,⁵ the Supreme Court struck down mandatory death statutes arguing that the protection of human dignity required individual consideration of each case. But the Supreme Court upheld guided discretion statutes in *Gregg v. Georgia*⁶ and the companion cases *Proffitt v. Florida*⁷ and *Jurek v. Texas*,⁸ beginning the modern era of capital punishment. Guided discretion statutes soon proliferated as states passed legislation that would comply with the ruling in *Gregg*.

Following the Supreme Court decision in *Gregg* (1976), social scientists began to examine whether guided discretion actually eliminated the influence of race on capital punishment. David Baldus and colleagues’ Procedural Reform Study (PRS) and Charging and Sentencing Study (CSS) remain the most important and rigorous research on the topic.⁹ The authors’ statewide findings in Georgia revealed that the race of the defendant did not influence the chance of being sentenced to death, but the race of the victim did: the odds of a death sentence were 4.3 times higher if the victim was white.

The results of Baldus and colleagues’ research became the basis for the most important Supreme Court decision on race and capital punishment: *McCleskey v. Kemp*.¹⁰ McCleskey argued that racial disparities in the administration of capital punishment rendered the ultimate

³ *Furman v. Georgia*, 408 U.S. 238, 240 (1972).

⁴ *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976).

⁵ *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976).

⁶ *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

⁷ *Proffitt v. Florida*, 428 U.S. 242, 260 (1976).

⁸ *Jurek v. Texas*, 428 U.S. 262, 276-77(1976).

⁹ See DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (Northeastern Univ. Press 1990).

¹⁰ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

sanction unconstitutional. The Supreme Court did not contest the empirical patterns, but nonetheless rejected McCleskey's challenge on a 5-4 vote.¹¹ Most centrally, the court argued that statistical evidence of racial disparities alone, without evidence of discrimination in the particular case at hand, does not establish a constitutional violation. The court was also reluctant to open Pandora's box, reasoning that if social science research regarding racial disparities invalidated capital punishment, then social science research could ultimately undermine the entire criminal justice system.

Two comprehensive reviews of research on race and capital punishment have been conducted since the Supreme Court's decision in *McCleskey*. The United States Government Accountability Office¹² reviewed the 28 studies published from 1972 to 1990, and, more recently, Baldus and Woodworth¹³ reviewed the 18 studies published from 1990 to 2003. The comprehensive reviews suggest the following:

- The race of the **defendant** does not have a consistent influence on capital punishment: some studies suggest that the death penalty is more likely to be imposed against black defendants, but most do not.
- The race of the **victim** has a consistent influence on capital punishment: almost all studies suggest that the death penalty is more likely to be imposed on behalf of white victims.
- Blacks who kill whites are more likely to be sentenced to death than any other racial combination.

II. Focusing on the Capital of Capital Punishment: Question, Methods, and Findings

Though scholars have conducted extensive research on race and capital punishment, no "reasonably well-controlled" study had been done in Texas.¹⁴ Thus, I chose to focus on the following question: Did race influence the DA's decision to seek the death penalty or the jury's decision to impose the death penalty against the 504 adult defendants indicted for capital murder in Harris County, Texas from 1992-1999?

To answer the question, I collected and merged data from multiple archival sources, including: the Harris County District Attorney's Office; the Harris County Justice Information Management System; Harris County Medical Examiner records; the Texas Department of Health's Vital Statistics Mortality File; grand jury indictments; and *The Houston Chronicle*.

The data reveal that the DA during the time period under consideration, John Holmes Jr., was both selective and effective. The DA only sought the death penalty against 129 of the 504 eligible defendants, but secured 98 death sentences. Of the 98 condemned inmates, 34 have been

¹¹ *Id.* at 319-20.

¹² U.S. GOV'T ACCOUNTABILITY OFFICE, GGD-90-57, DEATH PENALTY SENTENCING: RESOURCE INDICATES PATTERN OF RACIAL DISPARITIES (1990), available at <http://archive.gao.gov/t2pbat11/140845.pdf>.

¹³ BALDUS & WOODWORTH, *supra* note 1.

¹⁴ *Id.* at 519.

executed to date. In short, once the DA decided to seek the death penalty, the die was essentially cast.

The most basic method for investigating potential racial disparities in the administration of capital punishment is to examine raw percentages. The percentages for Harris County suggest that the race of the defendant does not influence case outcomes, though slight disparities emerge based on the race of the victim.

- Defendants:
 - The DA sought death against 27 percent of white defendants, 25 percent of Hispanic defendants, and 25 percent of black defendants;
 - A death sentence was imposed against 21 percent of white defendants, 19 percent of Hispanic defendants, and 19 percent of black defendants.
- Victims:
 - The DA sought death on behalf of 30 percent of white victims, 26 percent of Hispanic victims, and 23 percent of black victims;
 - A death sentence was imposed on behalf of 23 percent of white victims, 21 percent of Hispanic victims, and 18 percent of black victims.

Based on the percentages, some might argue that the investigation is complete – death is administered in the most even-handed manner one could reasonably expect from a human institution doing the important and difficult job of prosecuting hundreds of capital murder cases.

But it is important to delve deeper. To do so, I used standard statistical techniques to examine the impact of race, holding constant the other relevant facts of the case. The multivariate logistic regression models suggest that the truth is more complicated than the percentages suggest.

To begin, consider the impact of defendant race on the odds of the DA seeking the death penalty. The multivariate models indicate that the odds of seeking death are 1.75 times higher against black defendants than white defendants. How did the transformation from percentage parities to multivariate disparities occur? The transformation occurred because black defendants committed murders that were less serious. Specifically, black defendants were less likely than white defendants to:

- Commit the most heinous murders as defined by the aggravating and mitigating circumstances in the case;
- Commit murders in a particularly brutal manner by beating, stabbing, or asphyxiating the victim;
- Commit murders involving a child victim, kidnapping, remuneration, or rape;
- Commit murder as an adult;
- Murder white victims, female victims, and victims who were physically vulnerable due to being especially young or old.

It might seem blasphemous to suggest that murders which include the above circumstances are more serious than those which do not – all murders are horrific. But I use the term “serious” simply because the DA was more apt to seek the death penalty under the above circumstances. The bottom line is straightforward: the DA sought death against black defendants and white defendants at the same rate despite the fact that black defendants committed less serious murders, as defined by the DA’s own track record. Comparing the percentage parities to the multivariate disparities leads to the following conclusion: to impose equal punishment against unequal crimes is to impose unequal punishment. The bar was set lower for seeking death against black defendants.

Now consider the impact of victim race on the odds of the DA seeking the death penalty. The multivariate models indicate that the odds of seeking death are 43 percent lower on behalf of black victims compared to white victims. How did the transformation from small percentage disparities to larger multivariate disparities occur? The transformation occurred because black victims were twice as likely to be killed in murders that had multiple victims. So the DA sought death less on behalf of black victims than white victims despite the fact that black victims were killed in more serious murders. The bar was set higher for seeking death on behalf of black victims.

But there is some good news. The DA decides whether to seek the death penalty, but jurors decide whether to impose the death penalty. Interestingly, the findings suggest that juries partially reversed the racial disparities that originated in the DA’s office: the odds of seeking death are 1.75 times higher against black defendants, but the odds of imposing death drop to 1.49 times higher; the odds of seeking death are 43 percent lower on behalf of black victims, but the odds of imposing death drop to 38 percent lower. Presumably, the jurors’ behavior is a response to the DA occasionally overreaching against black defendants and on behalf of white victims. The net effect is that juries attenuate but do not eliminate racial disparities.

Although the findings suggest that blacks and whites are not treated the same, the findings suggest that Hispanics and whites are treated the same. More research is needed to understand the mechanisms that produce black-white disparities but Hispanic-white parities.

III. Desocialization: A Proposal for Change

Racial disparities in capital punishment are often used to call for abolition. But Texas is unlikely to abolish capital punishment in the absence of a Supreme Court mandate, and the Supreme Court demonstrated in *McCleskey v. Kemp* that it is not going to rule capital punishment unconstitutional based on statistical evidence of racial disparities.

Thus, I propose a more plausible plan for reducing racial disparities: desocializing the decision to seek the death penalty. Sociologist Donald Black’s concept entitled the “desocialization of law” offers an intriguing idea for reducing the influence of social characteristics on legal proceedings.¹⁵ Drawn from Black’s (1976) theory of law,¹⁶ desocialization is based on a simple but powerful notion: social information about defendants

¹⁵ DONALD BLACK, *SOCIOLOGICAL JUSTICE* (Oxford Univ. Press 1989).

¹⁶ DONALD BLACK, *THE BEHAVIOR OF LAW* (Academic Press 1976).

and victims cannot influence a legal proceeding if such information is unknown. Black also provides examples of how one could reduce or eliminate the social information available to judicial actors, while still ensuring that judicial actors have all the relevant legal information about a case. Black explains:

Over the centuries, information about social characteristics has been steadily attenuating in all walks of life. In this sense, human life is *desocializing* (italics in original). Once everyone had abundant information about everyone else in their daily lives, but no longer. The telephone operator knew personally those who made calls; the doctor knew the patients; the banker, the grocer, and the tailor knew the customers. But now this is rare. The increased scale, organization, and fluidity of modern life have resulted in a desocialization of human affairs. So have electronic communications. Transactions of all kinds are increasingly standardized and impersonal. More and more, everyone is treated the same everywhere. The disappearance of social information is reducing discrimination throughout society. Law, however, lags behind. It remains saturated with information about the social characteristics of litigants and others involved in legal affairs. Some cases, such as those resulting in a major criminal trial, are veritable feasts of social information about all concerned – with revelations of financial and family history, personal habits, associations, and improprieties. The abundance of this information, particularly in court, makes legal discrimination possible...The more social information, the more discrimination. It follows that a reduction of this information about every case – a desocialization of law – would reduce discrimination in legal life.¹⁷

Black's broad theoretical concept of desocialization could be tailored to any legal setting. To examine how Black's concept of desocialization could be specifically applied to Harris County, it is important to describe the local capital litigation process in more detail.¹⁸ To begin, the intake division prosecutor determines whether a homicide can be charged under the Texas capital murder statute. If a suspect is charged with capital murder, the complaint is assigned to a state district court. The intake prosecutor then forwards the case file to the chief prosecutor in the state district court who continues to build the file by acquiring additional evidence. The case must be presented to a grand jury within 90 days, though the investigation is often ongoing. If the grand jury returns an indictment for capital murder then the DA has the option to seek death. Having secured an indictment, the chief prosecutor and division chief prepare a capital murder summary memorandum that details the facts of the case and recommends whether to seek death. The memorandum is submitted to the bureau chief who also recommends whether to seek death. The DA makes the final decision of whether to seek the death penalty based on the capital murder summary memorandum and subordinates' recommendations.

¹⁷ *Id.* at 66-68.

¹⁸ The description of the legal process is derived from personal correspondence with Scott Durfee who is the Chief Counsel to the Harris County District Attorney.

I propose the following plan to create a genuine race-blind process for deciding whether to seek the death penalty:

1. The case file should be prepared in the traditional manner.
2. The DA's office should hire an assistant to strip the capital murder summary memorandum of all information that might insinuate the race of the defendant and victim, including, but not limited to: the names and addresses of the parties and the location of the crime. Other information might also need to be altered. If, for example, the defendant was found with crack in his pocket, a drug that is thought to be more commonly used by blacks than whites, then the report could be changed to note that the defendant was found with drugs in his pocket. The report might even use some ranking to delineate the seriousness of the drug without mentioning the name of the drug (Schedule 1 drugs, Schedule 2 drugs, etc). Or if the report mentioned that the victim was a 10th grade student in a high school that was known to be predominantly black, then the report could be changed to note that the victim was simply a 10th grade student. Pictures of the defendant and victim would also need to be removed. Indeed, the pieces of information that might provide clues about the race of the parties would change from case to case, and are impossible to enumerate in advance. The assistant would need to be vigilant in recognizing the racial markers that are unique to each case. To be clear, the assistant would not alter relevant legal information about the case.
3. The chief prosecutor, division chief, and bureau chief who might be aware of the race of the parties should not provide a recommendation to the DA regarding whether to seek death.
4. The DA should make a concerted effort to avoid learning the race of the parties through media coverage, conversations with others in the office, or other channels. To sequester the DA from media coverage the assistant could provide the DA with newspapers and tapes of the local news that have been stripped of stories about pending capital murder cases. Though sequestering the DA from media coverage of pending capital murder cases might seem extreme, it is exactly what is asked of jurors.
5. If the DA inadvertently learns the race of the parties then he/she should allow a designated alternate to decide whether to seek death (perhaps a DA from another jurisdiction). In sum, the DA alone should decide whether to seek the death penalty based on the race-blind memorandum.

IV. Addressing Potential Objections

Having proposed a plan for change, I believe that it is important to respond to two potential objections: (1) that racial disparities do not exist and (2) that the proposed plan is impractical and places an unreasonable burden on the DA's office.

If statements made to the media are an accurate indicator, then the Harris County District Attorney's office does not seem to be convinced that racial disparities exist. In a *New York Times* article about my research, Scott Durfee, Chief Counsel to the Harris County DA, noted: "To the extent Professor Phillips indicates otherwise, all we can say is that you would have to look at each individual case. If you do that, I'm fairly sure that you would see that the decision was rational and reasonable."¹⁹ Durfee's response demonstrates that lawyers and social scientists often speak different languages. Lawyers tend to see each case as a unique set of facts that must be considered in isolation. Social scientists tend to examine broad patterns across numerous cases. The result is often miscommunication. The purpose of my research is not to investigate whether each decision can be justified. Given that all murders are an abomination, one could make a persuasive case for death against any defendant. Instead, the purpose of my research is to investigate whether a pattern of racial disparities emerges across hundreds of cases considered simultaneously. The question of racial disparities is, by definition, comparative.

Durfee also commented in a *Houston Chronicle* article that if there were ever "definitive evidence" of racial disparities the DA's office would take steps to address the problem.²⁰ Durfee is correct that the research I conducted does not provide definitive evidence of racial disparities – no social science research could meet such a standard. But the research is strong. In fact, the research is as strong as possible given the fact that I was denied access to the capital murder memorandum for each case.²¹ If the DA's office had provided access to these memorandums then the research would have approached the unattainable standard of definitive proof -- I would have had the same exact information the DA had when he decided whether to seek death. Thus, I could have controlled for all potential confounders. The DA's office denied access because the memorandum is a confidential work product. Yet there is nothing stopping the DA's office from using the memorandums to conduct an internal investigation. Therefore, I suggest that the DA's office hire a team of independent experts to replicate the research I conducted using the memorandums. The research team should be comprised of independent experts who have not conducted prior research on capital punishment in Texas. That means I am excluded. In the social sciences, there are three main organizations with members who study capital punishment: the American Society of Criminology, the Academy of Criminal Justice Sciences, and the Law and Society Association.²² The leaders of the organizations could provide lists of people who are experts in capital punishment, research methods, and statistics. Because prosecutors would be advising and guiding the social scientists, the investigation could be done in a manner that guarantees that the DA's office is satisfied with the research protocol. To be sure, I am not suggesting that the research I conducted is an insufficient basis for action. Instead, I am arguing that if the DA's office does not find my research compelling then the burden shifts to the DA's

¹⁹ Adam Liptak, *A New Look at Race When Death is Sought*, N.Y. TIMES, Apr. 29, 2008, at A10.

²⁰ Lisa Falkenberg, *Remedying Unequal Punishment*, HOUSTON CHRONICLE, May 1, 2008, at B1.

²¹ Scott Durfee, Chief Counsel to the Harris County District Attorney, provided archival documents that were used to verify the list of defendants generated by the Harris County Justice Information Management System and determine if the DA sought the death penalty. But the DA's office denied access to the capital murder memorandums.

²² See The American Society of Criminology, <http://www.asc41.com/> (last visited Sept. 26, 2008); Academy of Criminal Justice Sciences, <http://www.acjs.org/> (last visited Sept. 26, 2008); Law and Society Association, <http://www.lawandsociety.org/> (last visited Sept. 26, 2008).

office to conduct a rigorous internal investigation that would provide the strongest possible evidence of whether racial disparities exist.

But even those who concede that racial disparities exist might argue that desocialization is unrealistic and places too high a burden on the DA's office. I submit that desocialization is realistic for five reasons:

1. Most importantly, the Harris County DA's office is committed to equal justice, and therefore the current administration of capital punishment must be changed. The office's website includes a letter to the public stating that all staff are expected to demonstrate "...an absolute commitment to the ends of securing justice without regard to status, race, gender, or national origin, or the prominence of either the victims of crime or those charged with crimes."²³ The existence of racial disparities does not suggest that the statement is insincere. Instead, disparities demonstrate that capital punishment is a microcosm of a society in which race continues to shape life chances. Desocialization provides a concrete plan for realizing a goal that the DA's office is already attempting to achieve – removing race from the decision-making process.
2. Desocialization builds on existing practices. As mentioned earlier, the Harris County District Attorney's office already takes commendable steps to remove race from the decision-making process of whether to seek the death penalty. The proposed plan merely expands existing practices to create a genuine race-blind procedure.
3. Desocialization is affordable. The Harris County DA's office would probably only need about \$50,000 a year to hire an additional assistant.
4. Desocialization builds on an existing ethical framework. The DA is bound to a code of conduct that could be expanded to include the obligation to make all reasonable efforts to avoid learning the race of the parties in a capital case.
5. Desocialization includes contingencies. If the DA happens to learn the race of the parties then a designated alternate can decide whether to seek the death penalty.

In the world of potential public policies, desocialization is procedural rather than revolutionary, logistical rather than utopian, affordable rather than exorbitant. Desocialization could be implemented if the DA in Harris County became committed to the idea and used the weight of his/her office to force change. Whether the current DA, or either of the two candidates currently running for the post, would choose to do so is impossible to predict. Desocialization could also be implemented in other jurisdictions if local officials are willing to think creatively about how to apply the broad concept to the concrete case.

²³ Welcome to the Harris County District Attorney's Office, <http://app.dao.hctx.net> (last visited Sept. 26, 2008).

The potential merit of desocialization should be evaluated according to three standards: (1) Does the proposed plan have the potential to reduce racial disparities? To be sure, desocialization is imperfect. But the plan has potential: if all information that might insinuate the race of the parties is removed from the decision to seek the death penalty then the impact of race would surely attenuate if not disappear. (2) How do objections to the proposed plan compare to the problem of racial disparities? The critical issue is not whether legitimate objections can be made – legitimate objections can always be raised in response to calls for change. The critical issue is whether the objections are so compelling as to reject a plan that might reduce the fundamental injustice of disparate treatment. (3) Is desocialization more realistic than alternative ideas? The only alternative idea is to abolish capital punishment. Desocialization is clearly an uphill climb – progress would be slow and uneven until standard procedures could be established -- but desocialization is not as inconceivable as abolition in Texas at the present time.

V. Conclusion

My research suggests that the race of the defendant and victim are both pivotal in the capital of capital punishment: death was more likely to be imposed against black defendants than white defendants, and death was more likely to be imposed on behalf of white victims than black victims. The disparities arise in the DA's decision to seek the death penalty. In fact, juries provide a partial correction to the initial disparities. Presumably, the jurors' behavior is a response to the DA occasionally overreaching. Nonetheless, disparities remain.

The disparities do not suggest that the DA intends to treat people differently. The DA's office has a long-standing and laudable policy of not including the race of the parties in the memorandum used to decide whether to seek the death penalty. To reduce racial disparities, the existing policy should be expanded to create a genuine race-blind decision-making process. Desocialization would not impede the work of the DA's office – it would simply strip the capital murder memorandum of irrelevant information. Indeed, how can one object to removing information that is not supposed to matter anyway? Put simply, blind justice requires a blindfold.