

UNITED STATES OF AMERICA

Killing with Prejudice: Race and the Death Penalty in the USA

Introduction

“Even under the most sophisticated death-penalty statutes, race continues to play a major role in determining who shall live and who shall die.”¹

Racism in the USA was once blatant: slavery, segregation and lynching were all highly visible manifestations of a violent antipathy toward racial minorities by members of the white majority. Many of these racial based human rights violations were committed with the sanction or even active participation of the authorities.

Today, visible symbols such as the ‘Whites Only’ signs of the 1950s would be totally unacceptable to the majority of US citizens. But the United States continues to struggle with ongoing racial and ethnic divisions. Major steps taken over the past 50 years to remove institutionalised racism has not eliminated the disadvantages which many members of minority groups continue to face in daily life.

As the recent report of the President's Advisory Board on Race stated:

“Race and ethnicity still have profound impacts on the extent to which a person is fully included in American society and provided the equal opportunity and equal protection promised to all Americans.”²

What is true for US society in general also applies to the administration of the death penalty. Historically, the death penalty was applied in a manner that was openly and unashamedly biased against people of colour. Current procedures contain legal safeguards intended to prevent the arbitrary or discriminatory imposition of capital sentences. Despite these efforts, racial discrimination in the contemporary US legal system remains deeply ingrained: more subtle than in the past, but equally deadly. The prejudices of police, jurors, judges and prosecutors may be the unconscious byproducts of racial stereotyping. These animosities may also be deliberately concealed, in the knowledge that such attitudes are socially unacceptable. Even local newspapers can share some of the blame when they unconsciously give front page

¹Former US Supreme Court Justice Harry A. Blackmun, dissenting from the Court's decision in *Callins v. Collins*, 114 S. Ct. 1127, 1135 (1994).

²*One America in the 21st Century, Forging a New Future, The President's Initiative on Race. The Advisory Board's Report to the President.* Published 1998.

attention to the murder of a prominent white, when at the same time the murder of African American citizens attracts only a few lines in the back section.

Despite overwhelming evidence to the contrary, authorities in the USA vehemently deny that the use of the death penalty is in any way influenced by racial considerations. Most officials would likely accept that instances of racial discrimination are an everyday occurrence in US society, yet few are willing to acknowledge its contamination of the capital judicial system. The refusal of the US authorities to admit and address the obvious taint of racism in the administration of the death penalty itself serves to indicate the extent of the problem.

Amnesty International unconditionally opposes the death penalty under all circumstances. Even if it were possible to create a judicial system entirely free from bias, the punishment of death would still violate the most fundamental of all human rights. Each death sentence is an affront to human dignity: the ultimate form of cruel, inhuman and degrading punishment; every execution deepens the culture of violence.

It is undeniable that the death penalty in the USA is applied disproportionately on the basis of race, ethnicity and social status. Coupled with the near-total failure of the authorities to address or even recognize this reality, the persistent presence of racial bias only reinforces the other convincing arguments against any use of the death penalty.

This report primarily addresses prejudice against the African American community in the USA. However, it should be made clear that discrimination in the criminal justice system is not limited solely to those that are black; prejudice can also apply to any member of other minority groups, including Latinos, Native Americans, Asian Americans and Arab Americans.

Historical perspectives: ignoring the lessons of the past

“Many citizens consider it insensitive and unseemly, if not immoral, for a country, with our historical record on slavery and race discrimination, to persist in using a punishment that is administered and controlled almost exclusively by whites and serves no demonstrated function, but has a profound adverse impact, physically, psychologically, and symbolically on its black citizens.”³

The USA has a long history of racism, not only by individuals, but often enshrined in law. In 1776, the original Constitution explicitly legitimized the institution of slavery in three of its

³David Baldus and George Woodward, experts on race and the US death penalty, quoted from *America's Experiment with Capital Punishment*, J.R. Acker, CAP, 1998.

provisions, counting a slave as three-fifths of a person for the purpose of apportioning seats in the House of Representatives.

Particularly in the slave holding states, this attitude permeated the administration of justice. For example, prior to the American Civil War, the law in Georgia prescribed different punishments for certain crimes based on the race of the defendant or victim. The rape of a white woman by a black man was a capital offence, while the same crime committed by a white man carried a sentence of between two and 20 years imprisonment. The rape of a black woman was punishable only by fine or imprisonment, at the discretion of the court.

Other laws were simply applied selectively against blacks. Rape was once punishable by death in Virginia; between 1908 and 1972, only blacks were executed under this statute, even though 45 per cent of those convicted of rape were white. The one white man sentenced to death for rape during this period had his sentence commuted by the governor. In 1950, lawyers representing seven black men appealed their rape convictions on the grounds that only blacks were executed for the crime. The Virginia Supreme Court denied the appeal, stating there was “not a scintilla of evidence” of racial prejudice. All seven were executed.⁴

In the early part of this century, the death penalty in some regions became closely related to the common practice of lynching. A form of extrajudicial execution, lynching was predominately carried out against blacks in the southern states (where the majority of current executions take place). Between 1880 and 1930, 3,220 blacks were lynched compared to 723 whites.⁵ As the practice became socially unacceptable, public demand for the swift execution of alleged criminals was satisfied instead by the guarantee of judicial death sentences.

For example, a man was hanged immediately after an hour-long trial in Mayfield, Kentucky, in 1906. An editorial in the local newspaper, *The Louisville Courier-Journal*, observed that: “The fact, however, that Kentucky was saved the mortification of a lynching by an indignant multitude, bent upon avenging the innocent victim of the crime, was matter for special congratulation”. The editorial noted that, although the trial was hasty, “at least it was not a lynching”. Adding that since a Negro had raped a white woman, “no other result could have been reached, however long the trial.”⁶

One fact alone establishes beyond question the prevalence of racial disparities in the historic application of the death penalty in the USA. Between colonial times and 1990, some

⁴*The Martinville Seven: Race, Rape and Capital Punishment*, Eric W. Rise.

⁵*Lynching in the New South*, W. Fitzhugh Brundage.

⁶Source: *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, Steve Bright, *Santa Clara Law Review* 35 (1995): 433-483.

18,000 people were executed; of that total, only 30 cases involved the execution of a white person for the murder of a black person. In almost all those cases, the social status of the black victim was higher than the social status of the white perpetrator. In 10 cases, the black victim was a slave, and the murder was treated as a property crime against the white slave owner rather than a crime of violence against an African American.⁷

Three centuries of racially discriminatory capital sentencing form the cultural backdrop against which the contemporary death penalty has evolved. Proponents of current procedures assert that the legal safeguards now in place are sufficient to eliminate all traces of racial bias. Amnesty International can find no proof to support this assertion. On the contrary; the administration of the death penalty in the United States remains both arbitrary and discriminatory. Beyond any reasonable doubt, the US death penalty continues to reflect the deeply-rooted prejudices of the society which condones its use.

Statistical evidence of racial bias

The role of racial bias in the administration of justice has been the subject of extensive and often controversial research in the USA. Numerous studies have found empirical evidence of disparate treatment of criminal defendants on the basis of ethnic origin. Critics of these findings argue that the statistical results are skewed by factors such as the generally higher crime rates in ethnic communities or poor methodology in the research. Nonetheless, many social scientists have concluded that, when compared to white defendants, minority groups face a greater likelihood of imprisonment and serve longer sentences for identical offences.⁸

In 1998, the Presidential Advisory Board on Race recognised that these discrepancies in the incarceration rate could not be explained solely by the higher crime rates in ethnic communities:

“These disparities are probably due in part to underlying disparities in criminal behavior. But evidence shows that these disparities also are due in part to discrimination in the administration of justice and to policies and practices that have an unjustified disparate impact on minorities and people of color.”⁹

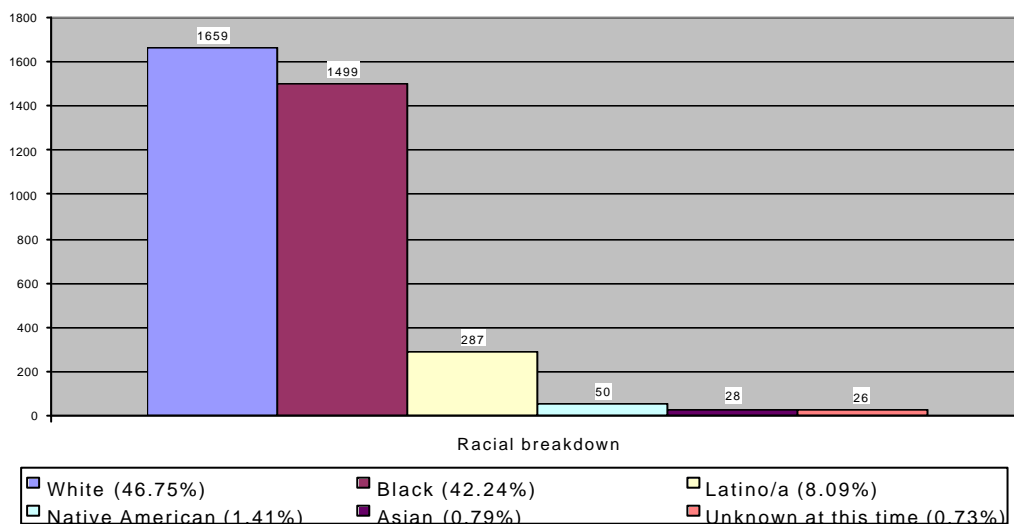
⁷Source: *Executions of Whites for Crimes Against Blacks*, Mike Radelet, Sociological Quarterly, Volume 30 (1989): 529-44.

⁸For example, a 1992 study by the Federal Judicial Center of federal firearms and drug trafficking charges found that the average sentence for blacks was 49 per cent longer than for whites convicted of the same crimes.

⁹*One America in the 21st Century. Forging a New Future.* Page 77.

The Board had been deliberately excluded from examining capital punishment, at least partially because of the perceived public support for the death penalty (see page 23).

While controversy continues to surround many of the issues involving race and the criminal justice system, the findings in one area of study are virtually unanimous. Research into the death penalty over the past two decades has consistently shown a pattern of sentencing anomalies which cannot be explained without reference to racial factors. These non-judicial variables are particularly pronounced when the race of the defendant is linked to that of the victim.

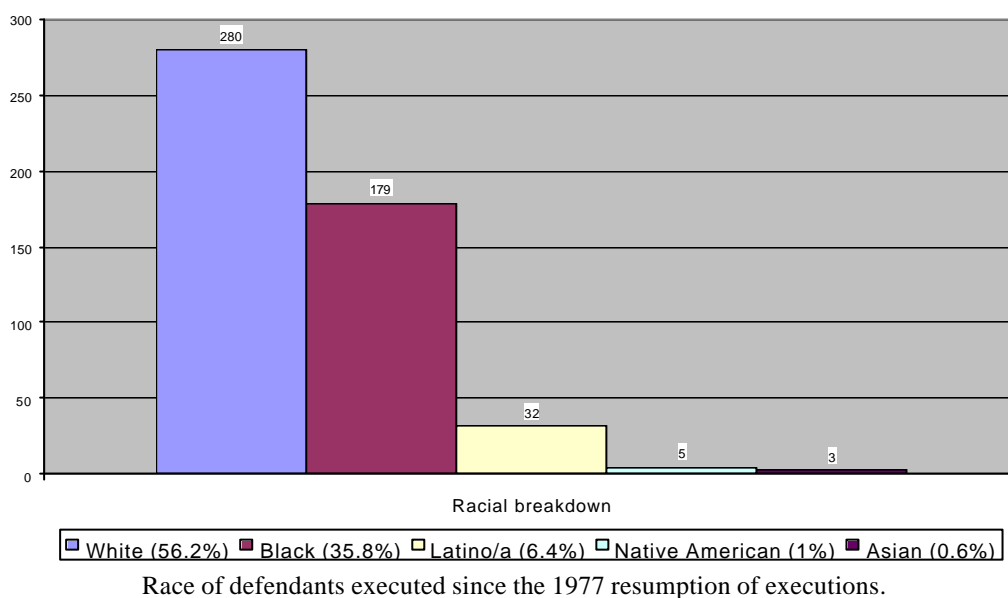


Race of those currently on death row (as of 1 January 1999).

As of 1 January 1999, 3,549 prisoners remained under sentence of death in the USA.¹⁰ Slightly more than half of all death row inmates are people of colour, a number roughly proportional to the overall conviction rates for all categories of homicide. But beneath the surface, glaring inconsistencies appear which strongly indicate that the imposition of death sentences is often influenced by the ethnic background of the defendant and the victim. Of the 500 prisoners executed between 1977 and end of 1998, 81.80 per cent were convicted of the murder of a white, even though blacks and whites are the victims of homicide in almost equal numbers nationwide. In 1972, the US Supreme Court ruled that the administration of the death penalty was unacceptably arbitrary and declared all existing state statutes to be

¹⁰Source for this figure and the data in the bar charts: NAACP Legal Defense Fund *Death Row USA*, Winter 1998.

unconstitutional.¹¹ Four years later, the Court approved new trial and sentencing procedures intended to ensure that the death penalty would be imposed in a consistent and rational manner,



by fairly distinguishing the few murder cases which met the criteria for death sentences from the many which did not.¹² However, research in the years following that 1976 decision continued to show a disproportionate number of death sentences imposed on minority groups, as well as wide geographic variations in its application within some states.¹³

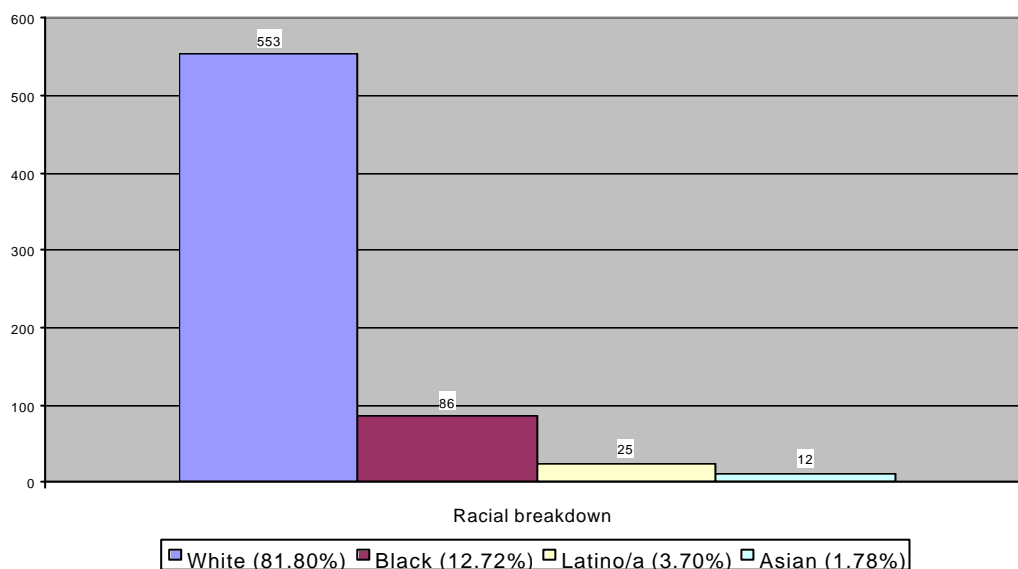
One landmark study of death sentencing patterns in Georgia is particularly noteworthy, both for its thoroughness and its profoundly disturbing conclusions. Professor David Baldus and his colleagues examined more than 2,000 murder cases, including those before and after judicial reforms in 1973 intended to prevent discriminatory sentencing. The survey found that the frequency of cases in which death sentences were obviously excessive declined

¹¹ *Furman v. Georgia*. The risk of racial bias was one of the factors which led the Court to its decision.

¹² In *Gregg v. Georgia*, the US Supreme Court upheld the “guided discretion” procedures for death sentencing established by the Georgia Legislature. These procedures became the general constitutional model for other retentionist US states to follow.

¹³ For example, a 1980 study found that the death penalty was roughly 30 times more likely for the felony murder of a white in the Florida Panhandle than it was for the comparable killing of a black in the state’s northern region. *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, William J. Bowers and Glenn L. Pierce, *Crime and Delinquency*, 26 (1980): 563-635.

following the reforms. However, after accounting for some 200 variable factors in each case (such as the depravity of the crime or previous criminal record of the defendant) a clear pattern of racial disparities remained. When all conceivable legal factors were accounted for, the odds of a death sentence were four times higher for cases with white victims than for cases with black victims. The odds of a death sentence in cases in which blacks killed whites were as much as 11 times higher than the capital murder of a black victim by a white person.¹⁴



Race of victims of those executed for murder since the resumption of executions in 1977

A report released in June 1998 by the Death Penalty Information Center summarized the research to date and reached the conclusion:

“Examinations of the relationship between race and the death penalty, with varying levels of thoroughness and sophistication, have now been conducted in every major death penalty state. In 96% of these reviews, there was a pattern of either race-of-victim or race-of-defendant discrimination, or both. The gravity of the close connection between race and the death penalty is shown when compared to studies in other fields. Race is more likely to affect death sentencing than smoking affects the likelihood of dying from heart disease. The latter evidence has produced enormous

¹⁴ *Equal Justice and the Death Penalty: A Legal and Empirical Analysis*. David Baldus, George Woodworth and Charles Pulaski, Northeastern University Press, 1990.

changes in law and societal practice, while racism in the death penalty has been largely ignored...”¹⁵

Confronted with credible empirical evidence of racial discrimination throughout the capital justice process, the response of most state and federal authorities has been to enter a state of denial. Far from restricting its use, political leaders across the USA are expanding the application of the death penalty, thereby increasing the risk of its use in a discriminatory manner.¹⁶

Prosecutorial discretion and racial bias

The death penalty is not mandatory for any crime in the USA, nor can it be applied except to a fairly narrow category of offences. This selective narrowing of its use has meant that death sentences are comparatively rare; for example, of the 12,007 adults convicted of murder in 1994, only 318 were sentenced to death.¹⁷

In most US jurisdictions which retain the death penalty, the decision on whether to seek its imposition in any particular case rests with local District Attorneys, most of whom are elected officials. Under the US legal system, the authorities who exercise this “prosecutorial discretion” are not accountable for their decisions, except to the public when seeking re-election.¹⁸ With some notable exceptions, US prosecutors seek death sentences in only a small fraction of the eligible cases, for reasons that are highly variable.¹⁹

This individualized and largely uncontrolled use of “prosecutorial discretion” results in wide geographic variations in the application of the death penalty. The likelihood of facing a death sentence for identical crimes fluctuates: adjacent communities with comparable crime

¹⁵*The Death Penalty in Black and White, Who lives, Who Dies, Who Decides*. Available from: Death Penalty Information Center, 1320 18th St NW, 5th Fl. Washington, DC 20036, USA (www.essential.org/dpic).

¹⁶Illinois reintroduced the death penalty for six categories of murder in 1977; by 1998, the eligible categories had nearly tripled. Pennsylvania has expanded its capital murder categories from the original eight in 1978 to 17 in 1998.

¹⁷Source: Bureau of Justice Statistics.

¹⁸In 1978, the US Supreme Court held in *Borden-Richer v. Hayes* that prosecutors have broad discretion in deciding what charges to file or to present to grand juries, so long as probable cause exists.

¹⁹For example, prosecutors in Harris County, Texas, file capital charges (where the law allows) in almost every murder case. Harris County accounts for approximately one-third of all death row prisoners in Texas, a ratio out of all proportion to the population of the county or its homicide rate.

rates may have dramatically different death sentencing rates, for no other reason than the attitude of the local prosecutor.

This unbridled discretionary power in the preliminary stages of a capital prosecution is an obvious source for racial discrimination. Amnesty International is not suggesting that all those who administer the death penalty are overtly racist; some prosecutors strive to make decisions on the laying of charges in a racially-neutral manner. However, given the overall absence of objective standards for filing charges, the idea that prosecutors can always isolate themselves from the racial divisions that effect US society is simply not credible. In some well-documented instances, the misuse of prosecutorial discretion has degenerated into open bigotry.

The death penalty is reserved almost solely for black defendants in some jurisdictions. A legal appeal filed in the case of Ronald Watkins demonstrated that prosecutors in Danville, Virginia, were selectively applying the death penalty on the basis of race. Since 1970, prosecutors had charged 126 people with murder: 93 blacks and 33 whites. Eighteen were charged with capital murder: 16 blacks and two whites. The death penalty was eventually sought in half of the cases involving black defendants; but not for either of the white defendants. All of the seven men sentenced to death in Danville were black.

The state of Maryland also appears to apply the death penalty along racial lines. Of the 17 men currently on death row, 11 are black. Until recently the racial disparity was even more marked (14 to four on 1 July 1998). There have been two non-consensual executions in the state; both prisoners were black.

In 1996, the governor of Maryland appointed a Task Force to examine racial disparity in the use of the death penalty.²⁰ Although its findings were inconclusive, the Task Force found that “the high percentage of African-American prisoners under sentence of death and the low percentage of prisoners under sentence of death whose victims were African-Americans remains a cause for concern”. To Amnesty International’s knowledge, no further action has been taken by Maryland authorities to address this concern.

The administration of capital justice in the city of Philadelphia appears particularly suspect. Of the 124 prisoners from Philadelphia on death row as of October 1998, only 15 were white. A recent study found that, even after making allowances for case differences (such as the brutality of the crime or the previous criminal record of the defendant), blacks in Philadelphia were substantially more likely to receive death sentences than other defendants who committed similar murders. The study found that if being black was ranked as an

²⁰*The Report of the Governor’s Task Force on the Fair Imposition of Capital Punishment*, released December 1996.

“aggravating factor”²¹ in determining whether a death sentence was imposed, it would rank as the third-highest.²²

Michael Goggin, a former prosecutor for Cook County, Illinois, recently admitted that the District Attorney’s office ran a contest to see which prosecutor could be the first to convict defendants whose weight totalled 4,000 pounds. Men and women upon conviction were marched into a room and weighed. Because most of the defendants were black, the competition was known by local officials as “Niggers by the Pound”.²³

The District Attorney of Cook County, Illinois, was responsible for the prosecution of Dennis Williams and Verneal Jimerson, who were convicted and sentenced to death for a crime they did not commit. Upon their release in July 1996, Dennis Williams was asked why he thought he had been wrongly convicted. “The police just picked up the first four young black men they could and that was it. They didn’t care if we were guilty or innocent,” he replied. Overt racism appears to have contributed to wrongful convictions in the cases of many of the 77 men and women released from death row since 1973 on grounds of innocence.²⁴

In Houston County, Alabama, Mike Ashley, black, was sentenced to death in 1992 for the murder of his ex-girlfriend’s new lover. The prosecution contended that Ashley entered the house through a window, thereby committing burglary, the aggravating factor in the murder that would qualify the defendant for the death penalty.

A year before the murder for which Mike Ashley was sentenced to death, a white man had been convicted of murdering his estranged wife’s lover in similar circumstances. Two years later, a white woman was convicted of murdering her husband for monetary gain, also a capital offence. Of the three cases, Ashley’s was the only one in which the Houston District Attorney sought the death penalty. It appears that the only overriding difference in the cases was the race of the defendant.

²¹Aggravating factors are the component that qualifies the murder as a death penalty case. For example, the murder was committed in conjunction with a rape or robbery.

²²D. Baldus, et al., *Race Discrimination and the Death Penalty in the Post Furman Era: An Empirical and Legal Overview, with Preliminary Findings from Philadelphia*, Cornell Law Review, Volume 83, September 1998.

²³Quoted in *The Flip Side of a Fair Trial*, Chicago Tribune, 13 January 1999.

²⁴For further information see *USA: Fatal Flaws: Innocence and the Death Penalty*, AI Index AMR 51/69/98. The report concludes that racism played a major part in the assumption of guilt by the authorities in many of the cases of exonerated black and Hispanic death row inmates.

In 1994, Ashley's conviction was overturned by an appeal court, partly on the basis that potential black jurors were excluded on racial grounds (see below). At the time of writing, Mike Ashley was awaiting a retrial; again, the prosecution is seeking a death sentence.

During the tenure of the current DA of Houston County, the death penalty has been sought against 22 defendants, 19 of them black.

A study conducted in connection with the case of juvenile offender Shareef Cousin²⁵ examined the use of the death penalty in Orleans Parish, Louisiana, between 1990 and 1995. Based on data from more than 400 homicide charges, the study found troubling disparities in charging and sentencing procedures. During that period, all those sentenced to death in Orleans Parish were black.

The Orleans Parish District Attorney sought the death penalty almost three times as often if the victim was white. Where black defendants were charged with the murder of a white person, 72.7 per cent of the cases (32 out of 44) resulted in a capital charge. By comparison, the death penalty was requested in only 21.4 per cent of the cases involving white defendants and victims. Murders where both the defendant and victim were black were similarly under represented: a death sentence was sought in 28.5 per cent of the cases (102 out of 365).

Racial disparities were also evident in non-death penalty cases. If the victim was black, only one time in 20 (5.5 per cent) did the District Attorney press for a first-degree murder conviction. But when the victim was white, that figure increased to 27 per cent (one case in four). It is inconceivable to Amnesty International that any number of legal variables could explain away a five-to-one disparity in the laying of charges along racial lines.

Excluding minorities from jury duty

Abuses of prosecutorial authority are not limited to the selective laying of capital charges. The jury selection process for death penalty trials permits both the defence and the prosecution to question prospective jurors and to exercise a set number of "peremptory challenges" - the right to exclude individuals deemed to be unsuitable without giving a reason. In a host of cases

²⁵Following the reversal of his conviction on appeal, the murder charges against Shareef Cousin were dropped in January 1999. He became the 76th person sentenced to death in the USA since 1973 who was later exonerated. For further case information see *On the Wrong Side of History: Children and the Death Penalty in the USA*, AI index AMR 51/58/98.

involving black defendants, prosecutors have used their challenges to create all-white juries, in order to increase the likelihood of a conviction and death sentence.

In the case of Albert Jefferson, black, convicted of the murder of a white victim in Chambers County, Alabama, in 1983, a prosecutor removed 26 potential black jurors in order to obtain three all-white juries (one jury was for a hearing on Jefferson's mental competence to stand trial, another for guilt and a third for sentencing). During post-conviction proceedings, lawyers representing Jefferson discovered lists made by the prosecutor prior to jury selection, in which the prosecutor divided prospective jurors into four categories: "strong", "medium", "weak", and "black".

However, a state circuit judge in Chambers County ruled that no racial discrimination occurred in the selection of the juries, as there were race-neutral reasons for each of the potential black jurors to be removed from the jury. In 1994, the conviction and death sentence were overturned on the grounds that the prosecution had withheld evidence favourable to proving Jefferson innocent. He was later convicted of a lesser offence.

In 1986, the US Supreme Court ruled in *Batson v. Kentucky* that the removal of potential jurors on the grounds of race was unconstitutional and that prospective jurors could only be removed on "race neutral" grounds. The Court held that a defendant must show that "purposeful discrimination has taken place in the jury selection process", in order to prevail on appeal under the new ruling. The impact of the decision was further limited by the Court's requirement that it would not apply retroactively.

One year after the *Batson* ruling, the Assistant District Attorney for Philadelphia made a training videotape for the city's prosecutors. On the video, he describes how to select a jury more likely to convict, including the removal of potential black jurors:

"Let's face it, the blacks from the low-income areas are less likely to convict. There's a resentment to law enforcement... You don't want those guys on your jury... If you get a white teacher in a black school who's sick of these guys, that may be the one to accept."

The video also instructed the trainee prosecutors on how to hide the racial motivation for the rejection of prospective jurors in order to avoid successful claims of racial discrimination from defence lawyers. The tape did not become public until 1997. Immediately after its release, a journalist monitored the selection of juries in Philadelphia. Of the four trials he looked at, the prosecution used 27 out of 27 strikes to eliminate potential black jurors.

As one Illinois appellate court judge sarcastically noted, "Surely, new prosecutors are given a manual, probably entitled 'Handy Race-Neutral Explanations' or 'Twenty Time-Tested

Race-Neutral Explanations’?” The judge listed the many vague explanations given by Illinois prosecutors to remove blacks from the jury, which included:

“too old, too young, divorced, unkempt hair, freelance writer, wrong religion, social worker, renter, lack of family contact, single, lack of maturity, improper demeanor, improper attire, lives alone, lives in an apartment complex, mis-spelled place of employment, unemployed, employed as a part-time barber, spouse employed as school teacher, failure to remove hat, living with girlfriend, deceased father.”²⁶

Amnesty International believes that the *Batson* decision, with all its good intentions, has manifestly failed to prevent racial bias in the jury selection process. Proving “purposeful discrimination” is nearly impossible, since prosecutors need only fabricate a vaguely plausible non-racial reason for dismissing potential jurors to conceal their real intent. The Supreme Court ruling has not eliminated trials involving racially imbalanced juries that appear to have been chosen on racial grounds, or the execution of black prisoners tried by all-white juries after the exclusion of all potential black jurors.

Racism behind closed doors: prejudice in the jury room

A cornerstone of the Anglo-American system of justice is the right of all defendants to a trial before a jury of their peers. To ensure that juries deliberate fairly and impartially, prospective jurors are questioned during the selection process (known as *voir dire*). Individuals with a bias for or against the defendant are to be excluded from jury service. As a further safeguard to protect the integrity of the process, jurors deliberate behind closed doors. Their discussions are not recorded as part of the court transcript of the case.

Recent research into the attitudes of jurors in capital cases has shed a disturbing light on a process which may be far less impartial than the requirements of justice would demand. Since 1990, the Capital Jury Project has undertaken interviews with more than 1,000 jurors who served in death penalty trials in 14 US states.²⁷ While the results of this massive project are still in the early stages of review, the preliminary findings strongly indicate that former jurors were

²⁶Source: Appeal court judge Alan Greiman criticising Cook County (Illinois) prosecutors in September 1996 quoted in *The Flip Side of a Fair Trial*, Chicago Tribune, 13 January 1999.

²⁷For further information, see: *The Capital Jury Project: Rationale, design and preview of early findings*, William J. Bowers, Indiana Law Journal 70: 1043-1102 (1995). Also see William J. Bowers, Marla Sandys, and Benjamin D. Steiner (1998): *Foreclosed impartiality in capital sentencing: Jurors' predispositions, guilt trial experience, and premature decision making*, 83 Cornell Law Review, 1476-1556.

subject to a wide range of misconceptions and prejudices which may undermine their ability to render reliable verdicts in capital cases.

One preliminary review of the Capital Jury Project data highlighted the racial attitudes which a number of the jurors displayed during the interviews.²⁸ Although the author of the report cautions that the excerpts are not representative of all jury deliberations, quotes from white jurors about black defendants and victims - given under the guarantee of anonymity - demonstrate that ethnic bias does not always stop at the door of the jury room. The comments included:

“He [the defendant] was a big man who looked like a criminal...He was big and black and kind of ugly. So, I guess when I saw him I thought this fits the part”.

“I didn't know who they [the victims] were but I was impressed from the trial that there are two definite lifestyles. The black community was entirely different from the way I was raised and the way we lived. The value of life--it's totally different”.

“...when I heard about the killing, I thought, well, they're just wiping each other out again. You know, if they'd been white people, I would've had a different attitude. I'm sorry that I feel that way.”

“Just a typical nigger. Sorry, that's the way I feel about it.”.

As the report notes, “One can only speculate how many other jurors felt similar racial sentiments, but did not express them because of hesitance to give a response that would meet with disapproval”.

Some jurors simply lie about their racist views. James Edward Jenkins was accepted on the jury that decided the guilt and sentence of Napoleon Beazley, a juvenile offender now on death row in Texas. During jury selection, the judge asked Jenkins: “I will instruct you not to let bias, prejudice or sympathy play any part in your deliberations...Can you follow that instruction?”, to which Jenkins replied that he could. Attorneys representing Beazley later approached Jenkins to discuss the trial. He refused to talk to them, saying “the state said that we don't have to say nothin' to nobody.” While slamming the door, he added “That nigger got what he deserved”.

²⁸*Race in the jury room: A preliminary analysis of cases from the Capital Jury Project*, unpublished paper presented to the American Academy of Criminal Justice Sciences by Margaret Vandiver, March 1997.

In a sworn statement to defence attorneys, his wife confirmed that Jenkins has a strong prejudice against African Americans:

“...James is racially prejudiced. I have heard James use many derogatory terms, including the use of the word ‘nigger’ on more occasions than not when he is talking about black people. I would find it difficult to believe that James could have set his prejudice aside and not let it influence him to some degree [during the trial].”

The US Supreme Court has admitted that racism can play a part in the jury deliberation process. In 1986, the Court ruled that potential jurors could be asked questions about their racial attitudes, since “because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate...”

The Court went on to write:

“On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favourably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.”²⁹

Louis Truesdale, black, was executed in South Carolina on 11 December 1998 for the murder of a white woman. Attorneys representing Truesdale presented statistical evidence during legal appeals that showed the death penalty was sought in a racially biased manner by the local prosecutors.³⁰ Between 1977 and 1993, the death penalty was sought in 63 per cent of all cases involving a black defendant charged with the murder of a white victim and in 5 per cent of cases involving all other racial combinations of defendant and victim. Despite testimony from a leading statistician that the likelihood of such a pattern occurring by chance was one in 1,000, the courts denied the appeal on the basis that there was no evidence of racial discrimination in the authorities' decision to seek the death penalty.

²⁹*Turner v Murray*.

³⁰The statistics are also cited in *Post-McClesky Racial Discrimination Claims in Capital Cases*, Blume, Eisenberg & Johnson, 83 Cornell Law Review 1771 (1998). The study also found compelling statistical evidence of racial discrimination in the selection of juries.

The jury that convicted and sentenced Truesdale to death consisted of 11 whites and one black woman. Afterwards, the lone black juror stated in a sworn affidavit that during the trial she overheard two white male members of the jury discussing the case, one of whom said: “this nigger had to fry”. She went on to describe how these comments “frightened and intimidated” her. She was the only juror who voted for life during the jury’s sentencing deliberations.³¹

Under South Carolina law, the jury must unanimously decide to impose a death sentence. After many hours, during which time she continued to feel afraid of and intimidated by her fellow jurors, the lone black juror gave in to the pressure and changed her vote to death. Had she known, as she now does, that a deadlocked jury would have automatically resulted in a sentence of life imprisonment for Truesdale, she said that she would have refused to change her vote.

People who hold racist views are aware that these opinions are unacceptable to many others and therefore may attempt to conceal them when called for jury duty. Other potential jurors may be influenced by unconscious racial stereotypes, while consciously believing that they are free from prejudice. Only extensive background research and intense questioning by a skilled defence attorney is likely to reveal these attitudes. Few indigent defendants on trial for their lives are likely to receive such a high level of representation from their court-appointed attorney. Even when they do, there is powerful evidence to suggest that bigotry can and does contaminate the jury process.

For the defence: racist representation of indigent defendants

The prejudices of prosecutors and jurors are not the only racial factors which threaten the impartiality of capital trials. Almost all people accused of death-eligible crimes are impoverished and must rely on court-appointed lawyers to defend them at trial. Given the appallingly low standards of many court-appointed attorneys in numerous jurisdictions, there is an ever-present risk that minority defendants may be represented by lawyers who are not only incompetent, but also openly bigoted.

³¹Another example of the intimidation of a lone black juror by the white majority was during the trial of William Hance, executed in Georgia on 31 March 1994. For more information see *The Death Penalty in Georgia: Racist, Arbitrary and Unfair*, AI index AMR 51/25/96.

Wilburn Dobbs is one of at least five cases in Georgia where defence attorneys referred to their own clients during the trial by racial slurs, including “nigger”.³² In California, Melvin Wade was sentenced to death after being represented by an attorney who used defamatory language against blacks (including Wade), who failed to adequately present evidence of the childhood abuse suffered by Wade, and who asked that his own client be sentenced to death during the penalty phase of the trial.

Examples of prejudiced representation abound from across the USA. For example, Ramon Mata, a Hispanic man was convicted and sentenced to death in Texas in 1986 by an all-white jury after his attorney agreed with the prosecutor to the removal of all potential non-white jurors. Although the trial judge was aware of this highly irregular arrangement, the appellate courts ruled that Mata’s right to a fair trial was not affected by it: he remains on death row. Gary Burris, black, executed in Indiana on 20 November 1997, was described to the jury by his white attorney as an “insignificant, snivelly little street person” during closing arguments.

Thomas Nevius, black, was convicted and sentenced to death in Nevada for the murder of a white victim in 1982. He was tried before an all-white jury after any potential black jurors had been removed during the jury selection process. After the trial, Nevius’ defence attorney stated in a sworn affidavit that at the time of the trial the prosecutor told him “you don’t think I wanted all those niggers on my jury, did you?” The prosecutor claimed in his sworn response that his memory of the conversation had faded and that if he did use derogatory language, it was in response to the defence attorney’s comment that he had “done a good job of getting rid of all the niggers.”

The appellate courts have refused even to address these serious allegations, on the grounds that they were raised too late in the legal proceedings. The late claim may well have been due to the fact that Nevius was represented by the same inexperienced lawyers (including the one who purportedly started the conversation with the prosecutor) for the first 10 years that he was on death row.

Even when the attorney is not an overt racist, a lack of cultural sensitivity to other ethnic groups may affect their ability to prepare adequately for the case. White attorneys who are unable to relate to the black community may be unable to properly defend their black clients. This is particularly true during the penalty phase of the trial, which will involve gathering mitigating evidence within that community and preparing black character witnesses to testify in a predominately white court room.

³²For further information, see: *The Death Penalty in Georgia; Racist, Arbitrary and Unfair*, AI index AMR 51/25/96.

Racism on the bench

Whatever the colour of a defendant's skin, they are entitled to presume that the judge who presides over their trial will administer the proceedings in an impartial manner. But trial judges in the USA are mostly elected officials; like prosecutors, their neutrality cannot be assumed merely because of the responsible position with which they have been entrusted by the community.

In Missouri, Brian Kinder, an unemployed black man, was tried before Judge Earl Blackwell in 1991. Six days before the trial started, Judge Blackwell released a press statement announcing his change of political allegiance from the Democratic Party to the Republican Party. The statement read:

“The truth is that I have noticed in recent years that the Democratic party places far too much emphasis on representing minorities such as homosexuals, people who don't (sic) want to work, and people with a skin that's any color but white.”

Attorneys representing Kinder requested that the judge remove himself from the trial on the grounds that the statement indicated an inability to preside fairly in the case of an unemployed black man. Judge Blackwell refused, responding: “As far as this court is concerned, every individual...is absolutely entitled to their constitutional rights...I think people get off the track when they start talking about colour.” Kinder was tried before an all-white jury, convicted and sentenced to death. He remains on death row.

A defence investigation of Judge Blackwell's background revealed that he had opposed the racial integration of Missouri schools during his term as a state senator. At a hearing into the issue of possible judicial bias against Kinder, Blackwell testified that he opposed integration on the grounds of cost.

The Missouri Supreme Court denied Kinder's appeal, ruling that Judge Blackwell's comments “did not call into question the judge's impartiality in the trial of the indigent African-American defendant”. The press statement “merely expressed the trial judge's dissatisfaction with affirmative action and government entitlement programs”. The Court's first-ever black judge, Justice Ronnie White, dissented from the ruling, characterizing Judge Blackwell's comments as “race-baiting” in an attempt to win an election.

In 1985, Anthony Peek was tried, convicted and sentenced to death in Florida. A new judge was appointed after Peek was found guilty, explaining to the jury that, “for reasons they need not be concerned with”, the original Judge was unable to preside over the penalty phase of the trial. On appeal, it was revealed that the reason for removing the original Judge was that

he had referred to the defendant's family as "niggers".³³ Anthony Peek was later granted a new trial, at which he was acquitted and released from death row.

It should come as no surprise that some judges have been removed for overt racism, considering that the judiciary in the USA consists almost exclusively of former attorneys and prosecutors, a number of whom have displayed racist attitudes. More troubling still is the likelihood that an unknown number of judges may have learned to mask their personal biases well enough to elude detection, while continuing to preside over death penalty cases.

Death by insinuation: playing on racial stereotypes

It is the role of the prosecution to persuade the jury that the defendant is guilty; in capital cases, the prosecution must also convince jurors that the defendant is so irredeemable as to merit the harshest penalty which the law can impose. In their zeal to obtain death sentences, some prosecutors have resorted to tactics intended to trigger latent prejudices and racial stereotypes in the minds of jurors.

Emmitt Foster, black, was executed in Missouri on 3 May 1995. During the penalty phase of his trial, the all-white jury heard witnesses from the local African Methodist Episcopal Church testify that Foster was active in the church on a regular basis. While cross-examining one of these witnesses, the prosecution produced a picture of a black man sitting between an US flag and a Muslim flag and wearing a (Muslim) fez. The prosecutor then asked the witness if he knew that Foster was a Muslim. (It was never proved that the man in the picture was actually Foster, nor was the picture dated). This line of questioning was clearly designed to inflame any possible prejudices of jury members against other religions and to discredit members of the local church. The prosecutor then went on to refer to Foster as "that" on numerous occasions.

Mumia Abu-Jamal, black, was convicted and sentenced to death in 1982 for the murder of a white Philadelphia police officer. He was tried before Judge Albert Sabo; a judge responsible for imposing 31 death sentences - the highest total for any US judge since the reintroduction of the death penalty in the USA. The jury that convicted and sentenced Abu-Jamal to death did not ethnically represent the local community as it consisted of 10 whites and two blacks, in a city that had a 40 per cent African American population at the time. The prosecution used 11 of its peremptory challenges to exclude potential black jurors.

During the sentencing phase, Judge Sabo permitted the prosecution to cross-examine Abu-Jamal with respect to a 12-year-old *Philadelphia Inquirer* article about the Philadelphia

³³*Peek v. Florida*, (1986).

Chapter of the Black Panther Party (a radical political party which espoused revolutionary methods to obtain “black liberation”). The article identified Abu-Jamal as the 16-year-old communications secretary for the chapter. The prosecutor cross-examined him about his membership in the Black Panther Party and certain views he expressed in an interview included in the article.

Later, in closing arguments to the jury, the prosecutor again made reference to quotations from the newspaper article, suggesting that Abu-Jamal had demonstrated a rebellious attitude towards law and order. In fact, he had no previous criminal convictions. The prosecutor appears to have overtly used the defendant’s past political beliefs and his previous affiliation with a black radical organization to persuade the jury to impose the death penalty

Abu-Jamal’s trial took place against a backdrop of tension and animosity between the predominately white authorities and many in the African American community. At the first pre-trial hearing, the judge commented: “I know there are certain cases that have explosive tendencies in this community, and this is one of them.”

The pervasive atmosphere of hostility by many of those in authority towards Mumia Abu-Jamal continues to this day. Since the trial, the President of the Philadelphia Fraternal Order of Police Officers has made numerous statements calling for Abu-Jamal’s execution, including: “We want him burned and we want it done soon.”

Amnesty International is concerned that the level of hatred of Mumia Abu-Jamal by the law enforcement community and the lack of independent and impartial arbiters in Pennsylvania’s appeal court system mean Mumia Abu-Jamal may be preventing him from receiving a fair and impartial hearing for the legal claims he has made concerning his original trial.

The US Supreme Court: ignoring the reality

In 1857, the US Supreme Court ruled in *Dred Scott v. Sandford* that no black person, whether slave or free, could be a US citizen because the Constitution itself excluded them from the national community. This exclusion was justified because blacks were “subordinate and inferior beings, who had been subjugated by the dominant race, and...remained subject to their authority.”

In 1896, in *Plessy v Ferguson*, the US Supreme Court upheld laws segregating the races as constitutional, under the “separate but equal” doctrine (i.e. that neither race was discriminated against but were simply separated from each other). This doctrine remained in effect for the next 50 years.

A landmark 1954 decision marked the end of the “separate but equal” doctrine and set the stage for sweeping legislative and judicial reforms in the field of civil rights. In *Brown v. Board of Education*, the Supreme Court unanimously ruled that racially-segregated schools were inherently unequal and hence unconstitutional. However, that unanimity masked deep divisions beneath the surface. As one of US Supreme Court Justice Jackson’s law clerks wrote in an advisory memorandum on the case in 1954, shortly before it was decided, “I think *Plessy v. Ferguson* should be reaffirmed...I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by ‘liberal’ colleagues”. The memorandum was written by William Rehnquist, the current Chief Justice of the US Supreme Court.³⁴

Under Chief Justice Rehnquist, the US Supreme Court has followed a course which undermines or reverses outright many of the hard-fought gains in the area of civil rights and civil liberties from three decades ago. Nowhere is this regressive attitude more apparent --and deadly -- than in the irrational faith which the Court has shown in the fairness of current death penalty procedures.³⁵

In 1987, the Court turned its attention to the issue of racial disparities in death sentencing. Attorneys representing Georgia death row inmate Warren McCleskey appealed to the Supreme Court on the basis of a rigorous statistical analysis of Georgia sentencing procedures.³⁶ As detailed on page 7, the study found that the odds of a death sentence being imposed in a case involving a white victim were higher, and increased further if the defendant was African American. McCleskey, black, had been condemned to death for the murder of a white police officer. The Court accepted the validity of most of the study’s findings but, in a remarkable opinion, ruled that “...at most the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an *inevitable* part of our criminal justice system” (emphasis added).

In a 5-4 opinion written by Justice Lewis Powell, the majority maintained that McCleskey had not demonstrated that the decision-makers in his particular case had discriminated against him. Statistical proof of systemic bias in the sentencing process as a whole was not grounds to reverse an individual death sentence. Nor did this statistical evidence

³⁴ See *Simple Justice*, by Richard Kluger, Vintage publications.

³⁵For example, in *Board of Education of Oklahoma City Public Schools v Dowell* (1992), the Court ruled that a district court decree ordering desegregation of public schools could be terminated, despite a new policy by the local school board in which half of the elementary schools would have almost entirely white or entirely black enrolment. The Chief Justice wrote the majority opinion, finding that court orders arising out of *Brown v. Board of Education* to prevent one-race schools were “a temporary measure to remedy past discrimination.”

³⁶For details of the Baldus study, see page 7.

invalidate the state's capital sentencing procedures as a whole; the burden was on the defendant to show actual prejudice in his individual case. Short of an admission of racial bias by the prosecutor or jurors, this high burden of proof is, of course, virtually impossible to meet. Warren McCleskey's appeal was denied.

Several years later, following his retirement from the Supreme Court, Justice Powell was asked if there was any case over his long career in which he now wished that he had voted differently. "Yes," he replied, "*McCleskey v. Kemp*." Powell conceded that he did not know what to make of the findings of the Baldus study. "My understanding of statistical analysis ranges from limited to zero", he noted. Were he still a member of the Court, Powell would vote against the death penalty in all cases: "I have come to think that capital punishment should be abolished".³⁷ This change of heart came too late for Warren McCleskey, who was executed on 25 September 1991.³⁸

In a dissenting opinion to the *McCleskey* ruling, Justice Brennan wrote:

"It has been scarcely a generation since the Court's first decision striking down racial segregation...We cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries...We remain imprisoned by the past as long as we deny its influence on the present."

Race and the Federal authorities: failing to meet historic obligations

Throughout US history, the Federal Government has played the predominant role in the elimination of institutionalized racism. Historic measures such as the Emancipation Proclamation which abolished slavery, the passage of the Fourteenth Amendment to guarantee equality before the law and civil rights legislation outlawing discrimination were all initiated by the federal authorities. It is all the more shameful, therefore, that the US government has failed to address racial prejudice in the administration of the death penalty.

For many years, Amnesty International has presented its findings on the racial use of the death penalty to both federal and state authorities, with no satisfactory response from either level of government. In July 1996 prior to the 1996 Atlanta Olympic games, Amnesty International published a report which provided overwhelming evidence of discrimination in the

³⁷*Justice Lewis F. Powell Jr.: a Biography*, by John C. Jeffries Jr.

³⁸For further information, see *USA: The Death Penalty in Georgia: Racist, Arbitrary and Unfair*,
AI Index: AMR 51/25/96.

application of the death penalty in Georgia.³⁹ A copy of the report was sent to the Clinton administration, which totally ignored the entire report. The Federal Government has consistently declined to intervene in death penalty issues at the state level, on the grounds that its local application is solely the concern of the individual states.

In a reply to Amnesty International, the office of the US Attorney General stated:

“The Administration and this Department support the death penalty in appropriate cases. By the same token, we are unalterably opposed to its application in an unfair manner, particularly if that unfairness is grounded in racial or other discrimination”.

Amnesty International sent a detailed reply to the Attorney General, asking what further evidence would be required to demonstrate the racially discriminatory nature of the death penalty in practice, what actions the Federal authorities were taking to ensure that the death penalty was not used in an unfair manner, and what form their “opposition” to the unfair use of the death penalty would take. The organization enclosed further evidence supporting its concerns. No reply was received from the US Government.

Nonetheless, such was President Clinton’s concern around race relations that he announced the establishment of a Presidential Advisory Board on Race in 1997. The function of the Board was to examine aspects of race relations in the USA and to report back to him. However, the Board’s mandate did not extend to assessing whether African Americans were being killed by a judicial system that treated them unfairly because of their skin colour. In an interview with *Time*⁴⁰ magazine, the President was asked if the Board would examine race and the use of the death penalty. He replied:

“[that] would not be a fruitful line of inquiry. The [US] Supreme Court has made a decision there⁴¹ [and] overwhelming majorities of all racial groups favor capital punishment.”

The Advisory Board’s report made just one reference to the racial disparities in the imposition of the death penalty. None of the eight recommendations in the chapter on the criminal justice system addressed capital punishment. While the report attempted to address inequities in prison sentences for drug offences, it ignored the even greater unfairness of discriminatory death sentences.

³⁹*USA: The Death Penalty in Georgia: Racist, Arbitrary and Unfair.*

⁴⁰Dated 16 June 1997. Page 34.

⁴¹*McCleskey v Kemp* (1987); see page 22 for details.

The federal authorities have consistently disregarded evidence of ethnic prejudice in death penalty procedures, even when the findings were produced by their own agencies. In 1990, the General Accounting Office (an independent agency of the US government) issued a report on death penalty sentencing patterns. After reviewing and evaluating 28 major studies, the report concluded that 82 per cent of the surveys found a correlation between the race of the victim and the likelihood of a death sentence. The finding was “remarkably consistent across data sets, states, data collection methods and analytic techniques. . . [T]he race of victim effect was found at all stages of the criminal justice system process . . .”⁴² No action was taken to address these findings.

Federal agencies may themselves be guilty of using race as a criteria for the seeking of a death sentence for crimes prosecuted under federal law. Of the 20 prisoners under a federal sentence of death on 1 October 1998, 15 came from ethnic minorities. Of the eight prisoners under a military sentence of death, only one is white.

A staff report issued in March 1994 by the Congressional Subcommittee on Civil and Constitutional Rights concluded: “Under our system, the federal government has long assumed the role of protecting against racially biased application of the law. But under the only active federal death penalty statute, the federal record of racial disparity has been even worse than that of the states...”

The report pointed out that three-quarters of those convicted of participating in a drug enterprise under provisions of the federal Anti-Drug Abuse Act have been white and 24 per cent have been black. However, of those chosen for death penalty prosecutions under this section, just the opposite is true: 78 per cent of the defendants have been black and only 11 per cent were white. At a 1993 hearing on this issue, this disparity prompted Texas Representative Craig Washington to tell the Deputy US Attorney General that “if some redneck county in Texas had come up with figures like that, you’d be down there wanting to know why.”

According to recent statistics compiled by the Federal Death Penalty Resource Counsel Project (dated 1 September 1998), of the 133 federal death penalty prosecutions authorized by the Attorney General since 1988, 32 have been against whites and 101 against members of minority groups (17 Hispanic, 6 Asian/Indian and 78 black).

In total, 76 per cent of federal death penalty prosecutions have been against minority defendants. Federal officials deny that the figures indicate racial bias, arguing that their own internal procedures ensure that all racial references are removed from prosecutors’ applications

⁴²*Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, United States General Accounting Office, Report to Senate and House Committees of the Judiciary, 26 February 1990.

for the approval of capital charges. Far less certain is whether or not the prosecutors who submit those applications in the first place are also “colour blind”.

Federal sentencing procedures recognize the possibility that racial bias can play a part in whether the defendant receives a death sentence. In all federal death penalty cases, jurors must sign a form at the end of their deliberations which states:

“By signing below, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victims was not involved in reaching his or her individual decision, and that the individual juror would have made the same recommendation regarding the sentence for the crimes in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or the victims.”

While Amnesty International welcomes this attempt to prevent racist decision-making, it does little to root out unconscious prejudice or stereotyping by jurors. Furthermore, since the declaration is signed after the jury has reached its decision, it is highly unlikely that individual jurors would admit to racial prejudice at such a late stage in the trial process.

The failure of racial justice legislation: a moral paralysis

There have been many unsuccessful attempts to legislate against the racist use of the death penalty. Proponents of Warren McCleskey’s claims (detailed on pages 7 and 22) called on the US Congress to exercise its statutory authority to prohibit any unjustifiable racial disparities demonstrated through statistical evidence. In 1988, the Fairness in Death Sentencing Act (also known as the Racial Justice Act) was proposed. The legislation would have allowed capital defendants to challenge their death sentence by using statistical evidence of discriminatory practices.

Over the next few years, the Act was modified and regularly introduced in Congress. In 1990 it was passed by the US House of Representatives but defeated in the Senate. The Act was reintroduced in the Senate the following year as a provision of another bill. President Bush made it clear that he would prevent passage of the entire bill if the Racial Justice Act was not removed; the Senate promptly removed the legislation. Proposed again in 1994, the Racial Justice Act once more failed to become law.

Opponents of the Act appeared unconcerned at the compelling evidence of racial bias in the use of the death penalty. Instead, they assaulted the legislation through misrepresentation,

by referring to the Act as “the Death Penalty Abolition Act”, or implying that the Act would create death penalty “quotas” from each race.

Only one US state has approved legislation which attempts to ensure that racial bias does not play a part in the life-or-death decisions of the courts. Kentucky passed a Racial Justice Act in 1998, after a study commissioned by the state General Assembly showed that every death sentence up to March 1996 was for the murder of a white victim, despite over 1,000 black murder victims during the same time.⁴³

Even these overwhelming statistics were challenged by the pro-death penalty lobby. One assistant district attorney, Joseph Bouvier, was quoted in the press as stating: “This is a classic example of what people mean when they say there are lies, damn lies and then there’s statistics.”

Under the provisions of the Kentucky legislation, the courts may consider statistical or other evidence indicating a bias in the decision to seek the death penalty relating either to the race of the victim or the defendant. The claim must be raised by the defendant in a pre-trial conference, followed by a hearing at which both sides are allowed to submit evidence. It is up to the defence to show by clear and convincing evidence that race was the basis for the prosecution’s decision to seek the death penalty. The provisions of the legislation are not retroactive and will not apply to any case prior to 1998.

In February 1997 the American Bar Association (ABA), passed a resolution calling for a moratorium on the use of the death penalty in the USA until all jurisdictions using it were striving “to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendants.” While not opposed to the death penalty *per se*, the ABA concluded that the authorities were failing to confront the undeniable and unacceptable role of racial bias and poverty in its application. Since the adoption of the moratorium resolution, a number of lawyers’ groups in individual states have passed similar motions, including the Bar Associations of Connecticut, Ohio and Pennsylvania.

The passage of the Racial Justice Act by Kentucky legislators is a positive indication of their willingness to address the most obvious manifestations of racial prejudice. But as the contents of this report demonstrate, selective application of capital charges by prosecutors is just one of a multitude of factors contributing to discriminatory death sentences. No legislation, however well-intended, can address these more subtle but equally insidious aspects of racial bias in the use of the death penalty

⁴³*Race and the Death Penalty in Kentucky Murder Trials: 1976 - 1991*, Thomas J. Keil and Gennaro F. Vito, University of Louisville, in *American Journal of Criminal Justice*, Vol. 20, No. 1, 1995.

Discrimination and the death penalty: an international concern

On 21 October 1994, the USA finally ratified the International Convention on the Elimination of all Forms of Racial Discrimination, 28 years after they signed it. Under the terms of the Convention, the US is obliged to report initially within one year and every two years thereafter on legislative, judicial, administrative and other measures taken to give effect to the Convention. To date, the US government has failed to submit any of these reports.

In a report addressing racism in the USA, the United Nations Special Rapporteur on Racial Discrimination noted:

“...racism and racial discrimination persist in American society...sociological inertia, structural obstacles and individual resistance [are] hindering the emergence of an integrated society based on the equal dignity of the members of the American nation...various political and social components of American society also provide opportunities for residual racism and racial discrimination to linger on...”⁴⁴

The report declared in Recommendation 6 that measures “should be taken to abolish the death penalty, or failing that, to eliminate discriminatory application of the penalty.” Characteristically, there was no response from the US authorities to the report.

When international bodies have found the United States to be guilty of discriminatory use of the death penalty, the nation’s political leaders have reacted with scornful indignation. In 1997, the UN Special Rapporteur on extrajudicial, summary and arbitrary executions conducted a research mission to the USA. In a letter to the US ambassador to the United Nations, the chairman of the Senate Foreign Relations Committee, Jesse Helms, asked: “Is this man confusing the United States with some other country, or is this an intentional insult to the US and our nation’s legal system?”

The letter went on to urge the ambassador to “reverse all State Department cooperation with this absurd UN charade.” The ambassador displayed his own contempt for the work of the Rapporteur when he replied to Senator Helms that the report would “gather dust”. Based on his own investigations, the Special Rapporteur found that: “race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a death sentence” in the United States.⁴⁵

⁴⁴*Report to the UN Commission on Human Rights, Fifty-first session (E.CN.4/1995/78/Add.1), January 1996.*

⁴⁵Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr Bacre Waly Ndiaye, submitted pursuant to Commission resolution 1997/61. Addendum: Mission to the

The UN Special Rapporteurs are not the only international monitors to detect prejudice in the use of the death penalty. In 1996, the International Commission of Jurists published a report of its own investigative mission to the USA.⁴⁶ Among its findings, the report concluded that “the administration of the death penalty in the United States will remain arbitrary, and racially discriminatory, and prospects of a fair hearing for capital offenders cannot (and will not) be assured” without substantial remedial steps, such as controlling prosecutorial discretion in seeking death sentences, ensuring jury selection procedures were free from racial or class bias and providing adequate legal representation to indigent defendants.

In 1996, the Organization of American States (OAS) Inter-American Commission on Human Rights found that the USA had violated William Andrews’ right to equality before the law and his right to an impartial hearing, pursuant to Articles II and XXVI of the American Declaration of Rights and Duties of Man. The OAS based its decision on grave evidence of racial bias which undermined the fairness of his trial.

During Andrews’ trial in Utah, court officials were handed a note that one of the jurors came across while having lunch. The note included a crude drawing of a man being hanged, alongside the words “Hang the nigger’s”(sic). Andrews’ attorneys requested a mistrial and the right to question jurors about the note; both requests were denied by the judge. Instead, the judge simply instructed the jurors to “ignore communications from foolish people.” At no point did the judge, or any appeal court, attempt to discover who had authored the note or what effect it had upon the jurors.

The all-white jury sentenced Andrews to death, despite testimony from a survivor of the crime who swore that Andrews had already left the store by the time his co-defendant shot the victims. The witness testified that Andrews said “I’m afraid. I can’t do it”, before leaving the store.

White people convicted of committing appalling crimes in Utah frequently avoid the death penalty, even when charged with being the actual killers. According to the juries which convicted them, Richard Worthington took a hospital nurse and infants hostage before shooting the nurse; Lance Wood sodomized a male hitch-hiker and attached electrodes to his testicles before slitting his throat; Edward Deli shot three people as they returned home from Christmas shopping; Mark Hofmann used a car bomb to kill two leaders of the Mormon Church; Paul Franklin, an avowed racist, shot two young black men because they were jogging with white women. All of these defendants received terms of imprisonment; all were white.

United States of America. E/CN.4/1998/68/Add.3. 22 January 1998.

⁴⁶*Administration of the death penalty in the USA. Report of a Mission.*

The Inter-American Commission on Human Rights recommended that the US provide adequate compensation to Andrews' next of kin. US authorities replied that Andrews had received an impartial trial free of racial bias and that they therefore "could not agree with the Commission's findings, or carry out its recommendations."

Conclusion: a problem with only one solution

*"When it comes to grappling with racial issues in the criminal justice system today, often white Americans find one reality while African Americans see another."*⁴⁷

Racism has played an appalling and destructive role in the short history of the USA. Although there have been substantial efforts to confront racial discrimination in US society since the 1950s, the country's capital justice system continues to resonate with the racist echoes of the past. The death penalty, for reasons of politics and public opinion, is the one area of public life in which the majority of US authorities remain unwilling to confront this continuing racial divide. Their reluctance to take a constructive leadership role on this issue only compounds the immorality of judicial executions.

This reluctance may stem in part from an inability to see the problem. The judicial officials of the USA - the people actually sitting in judgement on minority defendants - remain overwhelmingly white: of the 1,838 District Attorneys in the USA (the individuals responsible for overseeing the decision on whether to seek a death sentence), a mere 44 are non-white.⁴⁸ A recent opinion poll of lawyers illustrated how far apart the races are in their perceptions of the judicial system. Only 6.5 per cent of white lawyers thought there was "very much" racial bias in the justice system, compared with 52.4 per cent of black lawyers.⁴⁹ So long as these attitudes remain entrenched and ethnic minorities continue to be under-represented in the justice system, there is little probability that judicial bias will ever be adequately addressed.

In past reports on the death penalty in the United States, Amnesty International has detailed widespread and numerous examples of racially-motivated prosecutions, convictions and death sentences. On numerous occasions the organization has called for full and impartial

⁴⁷Justice Leah Sears, a black member of the Georgia Supreme Court. *The Georgia Supreme Court Commission on Racial and Ethnic Bias: Let Justice Be Done: Equally, Fairly, and Impartially* (published in August 1995).

⁴⁸Source: study by Professor Jeffrey Pokorak of St. Mary's University Law School, Texas.

⁴⁹The poll, conducted on behalf of the American Bar Association and the National Bar Association, questioned 1,002 members of the organizations. The poll was published in *The Journal* in February 1999.

reviews of US death penalty procedures, with emphasis on the elimination of racial bias.⁵⁰ State and federal officials in the USA have consistently responded to Amnesty International's concerns and recommendations by brazenly denying that the problem exists.

However, racial discrimination pervades the US death penalty at every stage of the process: any political leadership which can ignore this reality is incapable of instituting meaningful reforms.

There is only one way to eradicate ethnic bias, and the echoes of racism, from death penalty procedures in the United States -- and that is by eradicating the death penalty itself.

⁵⁰For example, see: *USA: Open letter to the President on the death penalty*, AI index AMR 51/01/94, January 1994.