

Detecting bias essential in death penalty cases

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By Frank Baumgartner

With news that the N.C. Conference of District Attorneys has petitioned the legislature to revise the Racial Justice Act, it is important to consider whether we need such a law. The law allows a judge to review a death sentence for evidence of statistical patterns of bias in jury selection or other elements of the application of the death sentence within a given jurisdiction. If the judge finds in favor of the inmate, the sentence of death is replaced by a sentence of life in prison with no possibility of parole. No inmate can challenge the legality of their conviction through the RJA; it is solely concerned with the death sentence. So while no one can go free through the RJA process, some death sentences could possibly be replaced by a hard life sentence.

Most remarkably, and this is the part that the district attorneys would like to see revisited, the law does not require that the inmate demonstrate that there was a racially discriminatory intent in his or her particular case. A pattern will do.

In 1987 the U.S. Supreme Court reviewed the claims of a Georgia inmate, Warren McCleskey, in which his lawyers made a statistical argument on the basis of a review of some 2,500 murder cases in that state. They showed that the odds of receiving a death sentence were over four times greater for black inmates convicted of killing white victims. The Court ruled (5-4) that while it invited the legislature to pass a law allowing consideration of patterns of discriminatory application of the law, that until that day the Justices could consider only the intent to discriminate against the particular individual before them. McCleskey was executed in 1991. Retired Justice Lewis Powell, when asked if he regretted any vote during his tenure, mentioned this one.

North Carolina passed the RJA, granting exactly the right that McCleskey did not have, in order to guarantee that the application of the ultimate punishment should be free not only from overt bias applied to an individual, but also from invisible and unintended bias that might be demonstrated only by looking at larger patterns. The first cases are just making their way to trial now, and we do not know how judges will respond to the evidence.

A recent study designed to be similar to the one used in the McCleskey case suggests that North Carolina inmates are 2.6 times more likely to be sentenced to death if at least one victim is white. Perhaps even more striking was the finding that African-Americans were dismissed from service as jurors; 69 of 159 inmates on death row (over 40 percent) were sentenced by juries with not a single or only one African-American. At issue here is whether prosecutors may have used their pre-emptory challenges to exclude African-Americans from juries.

I have done a simpler study. Our state has executed 43 individuals since the death penalty was reinstated in 1976. The Department of Corrections website lists all 43 along with the race and gender of their victims. There are 56 victims: 24 white females, 20 white males, 8 black females, 2 black males, and 2 American Indian males. In percentage terms those numbers translate into 79 percent white victims.

From 1976 to 2008, according to official statistics, North Carolina had over 19,500 victims of homicide. All these murders were of course not “death eligible” crimes. But it is instructive to compare who are the victims of murder, and then which murders ultimately lead to an execution. Here the numbers are shocking: Among all victims of homicide, 42 percent are black males; 29 percent white males; 13 percent white females; 10 percent black females; and 5 percent other or unknown. While 79 percent of the victims of those executed are white, just 42 percent of victims overall are white. Blacks are 52 percent of the victims overall, but only 18 percent of the victims of those later executed. Only one inmate in our state has been executed for the crime of killing a single black male victim, and yet black males are by far the most common victims of homicide. These deaths, apparently, do not merit the death penalty.

We can debate about whether the RJA is a well-designed law. We can debate about whether we can ever expect our criminal justice to operate in a way that is truly neutral with respect to race, given our nation’s history. But it is hard to argue that the state should execute any individual if there is a pattern of racial bias in these decisions. That is the point of the RJA. Studies suggests that there may well be such a pattern. Rather than amend the RJA by eliminating the analysis of these patterns, the courts should be allowed to rule on whether we do indeed have such a pattern of discrimination, and if they find that we do then we should all applaud the decision to take corrective action.

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<http://www.unc.edu/~fbaum/Innocence/NC/Racial-discrepancies-NC-homicides-executions.pdf>

<http://www.thetimesnews.com/opinion/news-50047-bias-penalty.html>