Numbers Can Mislead on Race and Death

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In his article "Senate Blinks at Death and Race" (May 28, 1990, Page 23), Benjamin Civiletti poses two questions: "Should the race of the victim be relevant to the decision whether to execute a defendant convicted of murder? Should the race of the defendant?" Civiletti's conclusion – "that the overwhelming majority of Americans would answer 'no' to both questions" – surely is correct.

But that the answer to these questions is "no" does not resolve the issue of the wisdom of the proposed Racial Justice Act, which Civiletti seeks to support. The bill, which is before the House Judiciary Committee, would permit capital defendants to challenge their death sentences on the basis of evidence of racial bias in their jurisdiction's application of the death penalty.

The wisdom of adopting such a law can be better evaluated by two additional questions: If the race of the victim influences the decision whether to impose the death penalty, should the death penalty be *abolished*? If the race of the defendant influences the decision whether to impose the death penalty, should the death penalty be *abolished*?

Most Americans might well respond "yes" to the second question, regarding defendants. But it is far from clear that they would also respond "yes" to the first, concerning the race of victims.

As the data cited by Civiletti indicate, convincing evidence demonstrating the influence of race on capital sentencing has involved the race of the *victim*, not of the *defendant*. For example, the study by University of Iowa College of Law Professor David Baldus, which Civiletti cited, found that, all other things being equal, the chance that a death sentence would be imposed in a case having a white victim is 330 percent greater than in a case having a black victim.[i]

By contrast, the Baldus study found that the chance that a black defendant would be sentenced to death was just 10 percent greater than the chance for a white defendant. Similarly, a sophisticated study described in *Death and Discrimination*, a recent work by Samuel r. Gross, a professor at the University of Michigan Law School, and Robert Mauro, a psychology professor at the University of Oregon, found that while the race of a murder victim substantially influenced the likelihood of a death penalty, the race of the suspect "is not a significant predictive variable."

Black defendants are not among those groups systematically disadvantaged by a system that treats the murder of a white person more seriously than the murder of a black person. (On the contrary, because white murders are far more likely to have killed whites than are black murderers, it is white murders who, other things being equal, are disproportionately sentenced to death) Yet much of the support for the Racial Justice Act is animated by concerns that black *defendants* are being discriminatorily sentenced to death.

It is black murder victims and potential murder victims who have the compelling complaint against a system that fails to take the same measures to protect (or avenge) their lives that it takes for white lives. And were society to become truly just with respect to matters of race, it would impose the same punishments for the murder of a black person that it imposes for the murder of a white person.

In an ideal world, prosecutors and jurors, apprised of the injustice suffered by black victims, would correct the problem by seeking or imposing death sentences as frequently in cases having black victims as in cases having white victims. No one is counting on this happening soon. But even in the absence of internal reform of the capital-sentencing system, a law like the Racial Justice Act is not the answer.

It is not the answer because the proposed law would, contrary to the claims of proponents, effectively outlaw capital punishment, at least in those states where defendants prove racial disparities in the

death-penalty system. (The reason is simple: Once a racially discriminatory pattern is established, it will be nearly impossible to show that the pattern has ceased, except in the very long term.) And the question must be asked: Is it sensible to respond to the capital-sentencing system's failure to accord the same incremental protection for black lives as for white lives by eliminating altogether the incremental protection provided by the death penalty – particularly when blacks may be in even greater need of the protection than whites? I think not.

Punishing the Unprotected

If it were shown that burglary sentences were more severe for the burglary of white homes than black homes, few would argue that we should decriminalize burglary. Admittedly, the analogy is inexact, because the elimination of the death penalty would leave other severe penalties for murder. But it nevertheless raises the issue of whether it makes sense to make black victims worse off because it is impossible to assure that they are treated as well as whites.

Probably the only time so drastic a measure is warranted is when it can effectively force a system to respond equitably. For example, it might make sense in certain circumstances to close all schools until a school system ensures that resources are equitably distributed to predominantly black and predominantly white schools.

But that rationale would not apply to the death penalty. For, although Civiletti and others maintain that the death penalty may be reinstituted in a state where it has been struck down under the Racial Justice Act – once the sanction can be administered without regard to race – that seems highly unlikely. Apparently, these proponents assume that death sentences would continue to be imposed by courts and juries, although not carried out so long as a racial disparity is observed. Thus, in theory, the system could eventually yield a non-discriminatory pattern in the imposition of death sentences, and those sentences could once again be carried out.

Yet, once a racially disparate sentencing pattern has been demonstrated in statistically significant terms, defendants would argue – properly – that any non-significant pattern in the same direction should be assumed to be a continuation of the observed significant pattern. Thus, even assuming that prosecutors will continue to devote the substantial resources required in capital cases to seek death sentences that will not be carried out, it could take generations before a state could prove that racially disparate capital sentencing had been eliminated.

And, of course, it may well be that the disparity simply would not disappear, returning us to the question of whether the black community should be made worse off because it is impossible to ensure that every black murder is punished in the same manner as every white murder.

There are, to be sure, powerful arguments that the death penalty has no place in a humane society. But if the death penalty is to be eliminated it should be attacked on the basis of these powerful arguments. Its elimination is not a sensible response to a pattern in which only the race of the victim is shown to have an improper influence.

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[i] The discussion of the percentage increase should be read in light of the discussion in my June 13, 1994 Legal Times article explaining that the increase involved odds rather than likelihood. The letter explains that the author of the study has elsewhere indicated that the relative increase in likelihood was between 60 and 70 percent. The treatment of increases in likelihood should be read in light of my subsequent work maintaining that rate ratios and the relative differences they reflect are illogical measures of association. See the Illogical Premises and Illogical Premises II subpages of the Scanlan's Rule page of jpscanlan.com. See also my Goodbye to the rate ratio. BMJ Feb. 25, 2013 (responding to Hingorani AD, van der Windt DA, Riley RD, et al. Prognosis research strategy (PROGRESS) 4: Stratified medicine research. BMJ2013;346:e5793).