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Introduction

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In his keynote address to the Race to Execution Symposium on which these articles are based, Bryan Stevenson spoke for many of us who work for reform in the death penalty context when he said: "I have not yet recovered from reading the *McCleskey* decision."[1] He was deeply troubled by the Court's "fear of too much justice"[2]—its claim that it could not acknowledge racial bias in the capital context because it would then have to deal with racial bias in other criminal contexts as well. But, he went on:

> It was the second thing the Court said that broke my heart, that did something to me that I'm still trying to recover from. The second thing the Court said was a certain amount of bias, a certain quantum of discrimination . . . is in the Court's opinion inevitable. . . . And so we are gathered in this room talking about race and the death penalty while the United States Supreme Court has already said it's pointless for [us] to be here.[3]

We gathered together to discuss a problem the Supreme Court has essentially written off as inevitable and intractable. To further complicate matters, the very invocation of the topic of racial injustice is increasingly regarded as suspect, both in the courts and elsewhere—as accusatory and, through a kind of looking-glass logic, racially divisive. The aversion to discussing race extends not merely to reaching conclusions or identifying problems,[4] but even to seeking information about the extent to which those problems exist.[5] In this context, so inhospitable not only to achieving the ideal of racial justice, but even to

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1. McCleskey v. Kemp, 481 U.S. 279 (1987); Bryan Stevenson, Keynote Address at DePaul University College of Law's Race to Execution Symposium (Oct. 24, 2003), *in* 53 DEPAUL L. REV. 1699, 1706 (2004).

2. *McCleskey*, 481 U.S. at 339; Stevenson, *supra* note 1, at 1706.

3. Stevenson, *supra* note 1, at 1706.

4. For an excellent discussion of this issue, see Donna Coker, *Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 NW. J. CRIM. L. & CRIMINOLOGY, 827, 827 (2003) (describing courts' assumption of a raceless society in criminal procedure cases). *See also* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 336-38 (1997). ("Powell's *McCleskey* opinion was haunted by anxiety over the consequences of acknowledging candidly the large influence of racial sentiment in the administration of capital punishment in Georgia.").

5. *See, e.g.*, The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* 57, *at* http://www.constitutionproject.org/dpi/MandatoryJustice.pdf (last visited Apr. 6, 2004)

broaching the topic, what are the proper goals and strategies for a conference on race and the death penalty?

As the speakers at this powerful and galvanizing conference emphasized again and again, and as the articles in this issue so articulately explain, it is necessary to break free of a number of anachronistic constraints in order to effectively name and tackle the problem. Any strategy focused solely on litigation, or on convincing the courts, will have limited efficacy. For lawyers and legal academics, this means that our most familiar and comfortable avenue of attack is simply no longer adequate. For academics, it is also necessary to avoid the pitfalls of territoriality—questions of racial justice are too complex and wide ranging to respect academic subject areas or unhelpful distinctions between the theoretical and the practical.

Even figuring out the right questions turns out to be a wholly collaborative and interdisciplinary endeavor. What is the face of racial injustice today? Has it changed over the years? At what junctures in the system does it reside, and where and how is it best attacked? What information do we have on these questions, and what remains to be discovered? Criminal law scholarship has been famously insular and thus, in many respects, poorly suited to address these questions. It has tended not to connect to other areas of legal scholarship,[6] and it has tended, like much of legal scholarship, to eschew the empirical. Again like much of legal scholarship, it has resisted the insights of other disciplines. Thus a field that is concerned with areas of human behavior such as jury decision making, the role of victims, and the purposes of punishment has been, until recently, remarkably uninterested in the lessons of psychology, anthropology, or emotion theory.[7]

The articles that follow in this Symposium issue model an approach that crosses disciplinary and methodological boundaries and bridges divisions between abolition and reform, theory and practice, lay and professional. The synergies among these areas enabled participants to examine the capital punishment system as a whole, as a series of interlocking systems, as a dynamic among numerous actors and the larger society within which they operate, and, most of all, as an institution with power over the fates of people: victims, survivors, defendants, lawyers, judges, and jurors. Those who attended the Symposium came

(dissenting statement of Timothy Lynch to recommendation calling for collection of statistics on the role of race in capital punishment).

6. AKHIL AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 115 (1997); Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. CAL. L. REV. 1019, 1020-21, 1053 (1987); Susan Bandes, *"We the People" and Our Enduring Values*, 96 MICH. L. REV. 1376, 1376 (1998).

7. Susan A. Bandes, *Introduction* to THE PASSIONS OF LAW 1, 2 (Susan A. Bandes ed., 1999).

away with the sense of a shared community of interest, focused on a daunting but not insoluble problem, composed of people who have already made a tremendous difference, and intend to continue to do so.

Starting from the shared assumption that race discrimination in the American system of capital punishment is unacceptable, the Symposium embarked on an exploration of what we already know about the role of race in that system, what we still need to learn, and how we can act on the knowledge we possess. Assumptions about race, it becomes clear, affect every aspect of the criminal process, including who gets charged, who gets a break, who gets to plead, who gets a good lawyer, how that lawyer interacts with his or her client, how the jury and judge see the defendant, how the jury deliberates, how the case is presented in the media and understood by the public, and, of course, who gets sentenced to death. More accurately, as Craig Haney eloquently reminds us, the "point at which the criminal justice system directly intervenes in the lives of African Americans . . . occurs long *after* some of the most potent and destructive racialized forces at work in our society have already taken their life-altering toll."[8]

The first task is to gain a more complex and focused understanding of the junctures at which racial variables enter and skew the system. One theme that quickly emerged was that studying the criminal justice system without regard for its larger societal context would not be productive. The death penalty, as an institution generally, and in terms of its implementation, is peculiarly susceptible to the influence of societal attitudes on multiple levels. Attitudes shape implementation at a number of crucial junctures—legislative, prosecutorial, and adjudicative, for example.[9] More generally, deeply ingrained assumptions about race will affect the dynamics of the process in ways the law is both ill-equipped and highly reluctant to identify.[10]

The black box of prosecutorial charging decisions has always presented a formidable challenge in this regard. Both Kevin McNally and Rory Little closely examine the available data on charging deci-

8. Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1561 (2004).

9. Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. (forthcoming 2004) (on file with author).

10. For example, Professor James Liebman and his coauthors, in their groundbreaking study, *A Broken System*, found a significant correlation between the African-American population of a jurisdiction and its rate of serious error in capital cases. *See* James S. Liebman et al., *A Broken System Part II: Why There Is So Much Error in Capital Cases and What Can Be Done About It* (Feb. 11, 2002), *at* http://www2.law.columbia.edu/brokensystem2/index2.html (last visited Apr. 24, 2004).

sions in federal capital cases. The federal system presents the question of whether a race-blind charging system is possible, and McNally and Little are in disagreement on this point.[11] However, a deeper question underlies that one: Is a race-blind system, at least in current circumstances, even a worthy goal? McNally argues that such a system would make it impossible to take cognizance of and address the disparities that will, inevitably, continue to exist.[12] Rory Little sheds light on the prosecutorial process in an additional, valuable way, by providing a window into the prosecutorial psyche. He suggests that prosecutors tend to view their cases individually rather than systemically. When convinced that a particular defendant is worthy of a death sentence, they are unlikely to accept arguments of broader systemic inequality as relevant to that decision.[13]

Overt racial bias is rarely the demon to be slain, either in the prosecutorial context or elsewhere in the system. It is the covert, or unconscious, biases and assumptions that need to be addressed.[14] In light of this reality, Little quite rightly suggests the need for more study of the dynamics of race bias. Several of these articles explore this terrain and also map out directions for further study.

David Baldus, who has contributed so much to our knowledge about the precise shape of racial discrimination in capital cases, reminds us here to be attentive to the evolving forms of discrimination. As he sensibly points out, naming the problem accurately is a necessary predicate to dealing with it. His article draws on his recent empirical research on this topic and the related topic of how accurately the public perceives the problem. He contends that the early forms of discrimination in capital cases, which were largely dependent on the race of the defendant, are no longer significant problems. He finds that the public (at least the attentive public) correctly perceives the decline in race-of-defendant discrimination. However, the race-of-victim discrimination flagged in his groundbreaking Baldus study[15] remains a significant factor in sentencing disparities. He states that "race-of-victim discrimination is both unconstitutional and immoral"

11. *See* Kevin McNally, *Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL L. REV. 1615 (2004); Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591 (2004).

12. McNally, *supra* note 11.

13. Little, *supra* note 11.

14. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321 (1987) (discussing difficulties with purposeful discrimination requirement). *See generally* Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988).

15. For judicial description of the Baldus study, see *McCleskey*, 481 U.S. at 286-89.

and contends that the execution of many offenders, who would be serving terms of life imprisonment but for the race of their victim, seriously impairs the legitimacy of the death penalty systems in which it exists.[16] As to this more subtle form of discrimination, he finds the general public unaware of it. More problematic, perhaps, is his finding that the attentive public is aware of it but divided, not only about its pervasiveness, but about its morality. As he rightly argues, public perception of the way the punishment works, and of its legitimacy, is crucial to reform efforts. It will affect not only strategies for reform, but also the approach of those who make, apply, and enforce the law.[17] His message is ultimately hopeful: the problem of race-of-victim discrimination is less pervasive and more amenable to correction than the race-of-defendant discrimination that once plagued the system.

Raymond Brown also focuses on the importance of public perception and our duty to address it. Public perception inevitably shapes and reflects juror perception; and juror perception on issues like what counts as mitigation or who poses future danger, for example, will affect juror deliberations on core issues of guilt and sentencing. As Brown illustrates with his comparison of the coverage of the "Beltway Sniper" cases with that of the "American Taliban" case, media coverage of the death penalty is heavily influenced, and indeed distorted, by the race of those covered. He suggests that these media distortions both reflected and helped shape the conduct of the judicial proceedings in these cases. Thus, reformers who limit their efforts to the narrowly defined legal arena at the expense of the broader arena of public opinion do so at their clients' peril.

Bill Bowers and Marla Sandys[18] present recent findings from the Capital Jury Project (CJP) that continue their important work[19] of delving into the black box of the jury room. Specifically, the authors looked at jury dynamics, how they are affected by racial composition

16. David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1414, Part III (2004).

17. Based on Kevin McNally's examination of the current Justice Department, a similar dynamic may operate at the federal administrative level; McNally found that the current administration has ignored or blurred the race-of-victim issue. McNally, *supra* note 11.

18. Bowers and Sandys presented their paper at the Symposium. It was written in conjunction with a third author, Tom Brewer of Kent State University.

19. *See, e.g.*, William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 260 (2001) (reporting findings that, in juries studied, whites were more likely than blacks to see black defendants as dangerous to society in the future and as likely to get back on the streets if not sentenced to death).

of the jury, and the implications of these dynamics for the capital sentencing process. Bowers and Sandys found that the racial composition of the jury had a significant effect on the likelihood of a death sentence, with a dominance of white males on the jury strongly correlated with imposition of a capital sentence.[20] The findings are significant on many levels. They provide a window into the jurors' understanding (or lack thereof) of the meaning of a bifurcated trial in which a decision on guilt must precede a decision on punishment. In short, attitudes toward guilt and punishment often seem inextricably intertwined. Moreover, the jurors' perception of the crucial aspects of the defendant's presentation relevant to both guilt and sentencing, such as the defendant's demeanor, level of remorse or arrogance, future dangerousness or rehabilitative potential, or the strength of mitigating evidence, was found to vary widely depending on the jurors' race. The CJP findings (which are preliminary—the authors plan to continue to gather data on these issues) reaffirm the importance of acknowledging racial variables and their effect on the core functions of the capital jury. Unfortunately, the CJP also found that this very acknowledgement is lacking: juries and judges are deeply reluctant to recognize or deal with issues of race in the jury room, or in the relationship between jury and defendant.[21] Yet, as their findings alongside those of David Baldus make clear, these issues will not go away for being ignored, and they will not stay neatly cabined in doctrinal categories like "mitigation" or "future dangerousness."

Craig Haney's analysis of the "empathic divide" and its effects on the administration of capital punishment continues his important work on the deeply pernicious psychological effects of racial inequality in the capital context. His analysis for the Symposium beautifully complements the work of Baldus, Bowers, and Sandys, and once again underscores the necessity of bringing together diverse disciplinary perspectives. Haney traces the myriad structurally determined obstacles that cause the disproportionate number of minority defendants in the criminal justice system.[22] He then illustrates, with reference to psychological theory and his own research, the fatal inability of the current system of mitigation to take account of this "biographical racism."[23]

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20. William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Blank and the Victim in White*, 53 DEPAUL L. REV. 1497 (2004).

21. McNally, *supra* note 11.

22. Haney, *supra* note 8.

23. *Id.* at 1557.

Andrea Lyon's article faces this issue head on, and with highly useful pragmatism. Lyon draws on her broad experience in capital cases to address the ways in which defense attorneys can talk to jurors about race.[24] She emphasizes the importance of acknowledging the issue. Her talk, like so much of the Symposium, emphasizes the futility of separating the legal, practical, and emotional aspects of capital lawyering. She advises that it is essential to explore which potential jurors are open to hearing mitigation evidence, and to attempt to identify those who are not. While exploring this uncomfortable topic, the lawyer must establish a rapport with the jury and set the stage for a conversation that will occur throughout the guilt and penalty phases of the trial. As she emphasized, setting the stage to talk openly about race is essential whether the issue appears salient or not.

Sheri Lynn Johnson and Ted Eisenberg explore a rarely discussed aspect of the problem of racial attitudes: the extent to which these attitudes affect defense attorneys and the representation they provide. As they point out, because the defense bar is usually the source of inquiry about racial bias, scrutiny of defense bias is unlikely. It is, however, crucially important because it affects the attorney-client bond, the ability to choose and direct experts and to understand mitigation, and other essential strategic and legal choices.[25] Their empirical research on the topic of unconscious bias among defense attorneys is fascinating and affirms what ought not be surprising: despite their ideological commitment, defense attorneys are not exempt from pervasive attitudes about race.

The Symposium articles that follow, coupled with the transcripts of two eloquently moving speeches—Bryan Stevenson's luncheon address and the closing remarks of former Illinois Governor George Ryan—convey some sense of the spirit of collaborative inquiry that pervaded the Race to Execution Symposium. In addition, they provide an important step in the ongoing interdisciplinary effort to identify, address, and ultimately eradicate racially-biased capital punishment.

24. Andrea D. Lyon, *Naming the Dragon: Litigating Race Issues During a Death Penalty Trial*, 53 DEPAUL L. REV. 1647 (2004).

25. Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004).