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NEW JERSEY OPINION

NEW JERSEY OPINION; OF RACE, CRIME AND PUNISHMENT

By Leigh Bienen
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THE United States Supreme Court has declared that it is unpersuaded by statistical evidence indicating that the capital-case processing system in Georgia may be significantly affected by race, in particular by whether or not the victim is white.

What part of the statistical study did the five justices who signed the majority opinion in McCleskey v. Kemp, decided on April 22, find unpersuasive? That a certain class of defendants whose victims are white are 11 times more likely to be sentenced to death than the same defendant with the same crime if the same victim were not white.

The study found that a defendant was four times more likely to be sentenced to death if the victim was white, after controlling for numerous other variables, including strength of the evidence and the presence of statutory aggravating and mitigating factors.

This kind of evidence should not have been surprising to our highest court. Nor are these results peculiar to Georgia.

There have now been a number of studies finding a race-of-victim effect in capital-case processing. Independent researchers first studied capital cases in Florida, Georgia and Texas, the states that re-enacted the death penalty early and had the largest numbers of people on Death Row.

The results were not inconsistent. The race of the victim persistently appears as a significant finding.

Later researchers looked at sentencing patterns in Arkansas, Mississippi, Oklahoma, North Carolina and Virginia. Different states, different stages of the criminal process and a wide variety of methods. But neither singly nor together do these studies describe systems that are neutral with regard to race.

In New Jersey, another such study is in progress. The initial findings suggest that the race of the victim and that victim/defendant race combinations are not insignificant. There also seem to be widely varying interpretations of the capital statute across counties.

A defendant in a death-possible case in Monmouth County has a 70 percent chance of being prosecuted for capital murder, while a defendant in an analgous case in Hudson County has a 19 percent chance of having his case designated capital.

Preliminary results from a data base of 568 homicide cases show that cases were designated capital in 28.9 percent of the cases if the victim was white, whereas 13.5 percent of all cases where the victim was black were designated death-eligible.

Cases involving white victims are 34.9 percent of all cases and 40.9 percent of all death-possible cases, but cases involving white victims comprise 61.1 percent of all death sentences.

Although 15.5 percent of all homicide victims were Hispanic, no Hispanic defendant has been sentenced to death, nor has any person been sentenced to death for the murder of a Hispanic person. Death-possible cases involving a Hispanic defendant and a Hispanic victim have a 9 percent chance of being designated capital, whereas death-possible cases involving white defendants and white victims have a 44 percent chance of being designated capital.

The significance levels that the researchers presented to the Supreme Court in McCleskey are routinely accepted by Federal courts in other contexts. The statistical offer of proof of discrimination in McCleskey would be sufficient in an allegation of racial discrimination in hiring or promotion.

The Federal courts have been persuaded in the area of employment discrimination that our time-honored social practices are hardly race-neutral, even when there is no evidence of overt or intentional discrimination by a particular person at a particular time.

But to demonstrate racial bias in the criminal-justice system, the Supreme Court has now held there must be proof that a state legislature enacted the capital-punishment statute to further a racially discriminatory purpose. Even the racially segregated and segregationist legislatures of the recent past would not have met that standard in the criminal context.

The majority opinion in McCleskey explains that the standard under Title VII, the 1964 Civil Rights Act, is different. Be sure to point out that legal nicety to Warren McCleskey as he walks to the electric chair.

The Supreme Court claims it is persuaded that no one who is not guilty will be executed. But that is not the point. The majority mentions in passing that no mitigating evidence was presented at the McCleskey sentencing trial.

How could the jury have returned any verdict but death if it had no mitigating evidence to consider? The jury is supposed to weigh aggravating factors against mitigating factors. That is the statutory scheme that the Court has found constitutional.

But if there was no mitigating evidence put forward, the death sentence was a foregone conclusion.

The McCleskey Court makes much of the sanctity of jury verdicts. What kind of a jury deliberation could that have been? The jury only considered one side: the prosecution's evidence.

No one is suggesting that Warren McCleskey and others on Death Row should go unpunished. But death is not the ordinary punishment for murder. It is an usual penalty rarely imposed for the thousands of murders that occur every year. And the pattern and practice associated with the imposition of death sentences doesn't seem to be race-neutral.

The point is not that this particular person committed a reprehensible crime. The point is that 4 others, or 11 others - or someone in the next county - committed murders that were just as terrible, where the victims are just as dead. But for reasons that have nothing to do with either the seriousness of the offense or the guilt of the defendant, those others won't be sentenced to death.

What, then, should we do with the 1,800 people on Death Row throughout the country? Never mind how they got there. The United States now has more people on Death Row than any other country except Pakistan.

Who are these 1,800 people our criminal-justice system has sentenced to death?

Many of those our Supreme Court says it is now willing to see executed are mentally deficient, perhaps so mentally impaired as not to have been able to participate meaningfully in their own defense.

There are increasing data to support that proposition. If the crimes don't tell you, their histories will.

Many of those on Death Row share few characteristics with the normal population. Is this what we have become - a country that executes the abberant and defective when they commit murder, although we don't execute other murderers?

The country's court of last resort, the court you're supposed to be able to turn to when you cannot get justice anywhere else, even if you are poor or black or mentally impaired, that court has handed down an opinion that says:

''Don't tell us about it. We don't want to hear it. Don't come to us with data on 2,000 homicide cases in a highly discretionary system. Let's pretend we're only dealing with one jury verdict.''

If you thought the country's highest court would not tolerate systemic racial effects in the criminal-justice system, you thought wrong.

In the teeth of all of those statistics about how race may have increased the likelihood of a death sentence, the Supreme Court has said:

Go ahead with the executions.