

CHAPTER FOUR

Race and the Death Penalty: The Inescapable Conclusion

I. Introduction

Capital punishment in the pre-Furman era was disproportionately visited upon black men. Not only were black men disproportionately sentenced to die, but among the community of the condemned, black men were far more likely actually to be executed,¹ and defendants of any race convicted of killing whites were the most likely to be executed.² In fact, taking into account age, race, location, occupation, prior arrests, education of the defendant, age of the victim, and whether a weapon was used, the combined races of victim and offender were the strongest predictors of a death sentence in Texas.³

Though new “guided discretion”⁴ statutes were enacted after *Furman v. Georgia*,⁵ racial disparities continue to exist both nationally⁶ and in Texas.⁷ Thus, the question that remains

¹ Of the 510 death sentences handed down from 1923 to 1972, 56% of the defendants were black, 34% white, and 9% Latino. While only 61% of those whites were actually executed, 82% of condemned blacks met their fate in the electric chair. JAMES W. MARQUART, *THE ROPE, THE CHAIR AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS 1923-1990*, 20-23 (1994). There were 361 executions in Texas from 1924 to 1964. Sixty-three percent of those killed were black (the black population during this time period rose from 10% to 12%), 30% were white, 6% Latino, and one (.27%) was Native American. WILLIAM J. BOWERS, *EXECUTIONS IN AMERICA* (1974).

² Eighty percent of Texans executed prior to 1972 were convicted of offenses against whites, 15% involved black victims, and 5% Latino victims. The defendant was actually executed in 73% of the cases where the victim was white, but in only 62% of the cases where the victim was black and 46% of cases involving a Latino victim. JAMES W. MARQUART, *THE ROPE, THE CHAIR AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990*, 24 (1994).

³ *Id.* at 39-57.

⁴ When reinstating the death penalty, the Court rejected mandatory sentencing in favor of statutes that provide the sentencer with guidelines for considering the defendant “as an uniquely individual human being.” *Woodson v. South Carolina*, 428 U.S. 280, 304 (1976).

⁵ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁶ See, e.g., United States General Accounting Office, *DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES* (1990); DAVID C. BALDUS, GEORGE WOODWORTH AND CHARLES A. PULASKI, *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990); David C. Baldus, George Woodworth and Charles A. Pulaski, *Arbitrariness and Discrimination in the Administration of the Death Penalty*, 15 STETSON L. REV. 133 (1986); Samuel R. Gross, *Race and the Judicial Evaluation of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275 (1985); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984); David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); William Bowers, *The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); Raymond Peternoster, *Race of the Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983); Michael Radelet and Glenn Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLORIDA L. R. 1 (January 1991).

⁷ See e.g., TEXAS JUDICIAL COUNCIL, *CAPITAL MURDER STUDY: JUNE 14, 1973-FEBRUARY 4, 1976* (1976)

today is not *whether* discrimination exists, but *how* it is made manifest and by whom.⁸ In this report, we examine three discretionary aspects of the criminal justice system that produce disturbing racial disparities: the prosecutor's decision to seek the death penalty; the prosecutor's decision to remove black jurors from capital trials; and the jury's decision to sentence a defendant to die.

II. "Misdemeanor Murders:" The Decision to Seek Death

At one point, with a black-on-black murder, you could get it dismissed if the defendant would pay funeral expenses.

Fred Tinsley, veteran defense attorney in Dallas.⁹

Racial disparity in the Texas death penalty surfaces in the discretionary charging decisions of District Attorneys. Because prosecutors are invested with the authority to decide

(unpub., on file with University of Texas Library) (capital murder data on race of defendants, victims, and jurors for the first 74 post-Furman capital murder indictments); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 596 (1980) (study based on Texas homicide data from 1973-78); Jim Henderson, & Jack Taylor, *Killers of Dallas Blacks Escape the Death Penalty*, DALLAS TIMES HERALD, November 17, 1985, at A1; Ronnie Dugger, *The Numbers on Death Row Prove that Blacks Who Kill Whites Receive the Harshesht Judgment*, TIME, Spring 1988, Special Issue, at 88 (discussing University of Texas Law Professor Ed Sherman's analysis of Harris and Dallas County, Texas death penalty data from 1978-80); Sheldon Eckland-Olson, *Structured Discretion, Racial Bias, and the Texas Death Penalty*, 69 POL. SCI. Q. 853 (1988) (study based on Texas capital murder statistics from 1974-88); Jonathan R. Sorenson, *The Effects of Legal and Extra-legal Factors on Prosecutorial and Jury Decision Making in Post-Furman Texas Capital Cases*, (1990) (unpublished Ph.D. dissertation, Sam Houston State University, (Huntsville)) (study based on Texas capital murder statistics from 1974-88); Jonathen R. Sorensen & James Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CH. 743 (1990-91) (study based on Texas capital murder statistics from 1980-86); Alan Widmayer & James Marquart, *Capital Punishment and Structured Discretion: Arbitrariness and Discrimination After Furman*, CORRECTIONAL THEORY AND PRACTICE 178-96 (1992) (capital murder statistics from Harris County, Texas, from 1980-88).

⁸ Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13; Joseph F. Sheley, *Structural Influences on the Problem of Race, Crime, and Criminal Justice Discrimination*, 67 TUL. L. REV. 2273, 2275-76 (1993); Alan J. Tomkins, *Subtle Discrimination in Juvenile Justice Decisionmaking: Social Scientific Perspectives and Explanations*, 29 CREIGHTON L. REV. 1619, 1632 (1996); Douglas Smith, et. al., *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234 (1983) (Race discrimination found in "the police's differential responsiveness to victims. In general, police arrest more often in encounters in which whites have been victimized."); Michael Radelet & Glenn Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 10 L. & SOC'Y R. 587 (1985) (In selecting homicide defendants for death, "race, in effect, functions as an implicit aggravating factor."); Jonathan R. Sorenson, *The Effects of Legal and Extra-legal Factors on Prosecutorial and Jury Decision Making in Post-Furman Texas Capital Cases*, (1990) (unpublished Ph.D. dissertation at 6, Sam Houston State University (Huntsville)) ("Prosecutors seek capital punishment in cases where they are most likely to win . . . cases involving the killing of whites, especially by blacks, because these cases fit the category of crimes that elicits the most fear from white jurors who identify with the victims."); Ray F. Herndon, *Race Tilts the Scales of Justice*, DALLAS TIMES-HERALD, August 19, 1990, at A1 (former Dallas District Attorney John Vance openly admitted that such case typification occurs in Texas).

⁹ Telephone Interview with Fred Tinsley, private defense attorney (Sept. 30, 2000).

how to charge cases and when to seek the death penalty, they alone determine which cases are charged as capital crimes. In practice, far more African-Americans are charged with capital murder, and far more individuals (of all races) are charged with capital murder when the victim is white. Dallas defense attorneys Larry Mitchell and Fred Tinsley both remember that until the mid-1980s, black-on-black murders were known around the courthouse as "misdemeanor murder."¹⁰ As Mr. Tinsley recalled, "At one point, with a black-on-black murder, you could get it dismissed if the defendant would pay funeral expenses."¹¹ Mr. Mitchell noted that "[m]urder cases are still tried differently. If there is a black victim in a dope deal, they won't go capital. A white in the same situation and they would."¹² Attorney Peter Lesser agrees: "I'd be surprised to see a black-on-black crime go capital. I can't remember one in 26 years; you never see it."¹³ To test whether this remains the case, we conducted a detailed study of all murders in Montgomery County, Texas during the five years preceding our study: January 1, 1995 through December 31, 1999.

A. Montgomery County

The total population of Montgomery County is 287,644, approximately 85% of which is white.¹⁴ There were 55 murders in Montgomery County during the five-year period of our study.¹⁵ Twelve people have been condemned to die by Montgomery County juries since the reinstatement of the death penalty, all of them white men. At first glance, this might indicate that murder in Montgomery County is confined to the white community. On closer examination, however, it becomes clear that murder is actually most likely to befall black males. Why, then, the all-white death row population?

To answer this question, we examined the disposition of every murder case in Montgomery County in the five-year period from January 1, 1995 to December 31, 1999. In that period, there were 55 such cases, 31% of which involved non-white victims. This initial finding is significant in at least two respects. First, the non-white population in Montgomery County is just under 15% of the total population of the county. Proportionally, therefore, the number of non-white murder victims is more than double the number one would expect if homicidal violence were distributed evenly throughout the population. Second, and more important for this study, 31% of the homicides involved only non-white victims, but none of those cases led to a death sentence.¹⁶

¹⁰ Telephone Interviews with Larry Mitchell and Fred Tinsley, private defense attorneys (Sept. 30, 2000).

¹¹ Telephone Interview with Fred Tinsley, private defense attorney (Sept. 30, 2000).

¹² Telephone Interview with Larry Mitchell, private defense attorney (Sept. 30, 2000).

¹³ Telephone Interview with Peter Lesser, private defense attorney (Sept. 30, 2000).

¹⁴ DEPARTMENT OF RURAL SOCIOLOGY, TEXAS A&M UNIV. SYS., PROJECTIONS OF POPULATION OF TEXAS BY AGE, SEX, AND RACE/ETHNICITY FOR 1990-2025 (1988).

¹⁵ There were actually 60 total homicides but, because we are focusing on prosecutorial discretion, five have been eliminated from our study because the purported killer also died at the scene. Thus, no law enforcement agency was ever given an opportunity to exercise discretion in those cases.

¹⁶ Larry Allen Hayes was sentenced to die for killing his wife, a white female, in front of his nine year old

We also discovered that the murders of non-whites generally were statistically less likely to lead to arrest. There were arrests in 92% of the cases in which victims were white, but only in 58% of the cases in which victims were non-white.¹⁷ There was only one unsolved homicide involving a white woman, who was killed along with her husband during the robbery of their home.¹⁸ The slaying generated tremendous public concern; front-page newspaper articles tracked the investigation, which included a search of the countryside on horseback. As the Conroe Courier noted, the couple's family demanded that "no stones [be] left unturned," and the feeling of the community was that "good people are deserving of no less."¹⁹ The couple's daughter, Marcille Lawless, was grateful when the homicide detective promised to pursue the case until "the day he retired."²⁰

The families of several black male murder victims, on the other hand, did not receive such community support. Woody Arnsworth was also killed in a home-invasion murder, but his daughter said that the District Attorney's Office treated her rudely, never even acknowledging her loss. Though she was told the police had a suspect, no search warrant had been issued as of three months after the crime.²¹ And though seven Latinos were murdered during the period of the study, only one arrest was made.²²

Furthermore, when arrests were made in cases involving white victims, the cases were far more likely to proceed to trial. During the five-year period we studied, Montgomery County prosecutors tried only two cases with non-white victims. By contrast, a full 90% of the cases involving white victims went to trial. In every case in which the murder of a white woman led to an arrest, the case went to trial; three resulted in death sentences. In fact, all of the death sentences handed down in Montgomery County from 1995 through 1999 involved white female victims except one.²³ Overall, 67% of the cases resulting in death sentences coming from Montgomery County have involved white female victims.²⁴

The murders of non-whites in Montgomery County, by contrast, generally have been resolved by plea, often resulting in remarkably lenient sentences. In the summer of 1995, Jonathan Williams and Felipe Martinez, Jr. were attacked and abducted by a gang of armed men.

daughter, then killing a black female convenience store clerk in the course of his escape. Laura Christian, *Husband Found Guilty of Double Murder*, CONROE COURIER, Sept. 14, 2000.

¹⁷ Appendix Four, at Table A.

¹⁸ There is only one other unsolved case with white victims, that of William Gregory Odstreil. Of the cases involving white victims that were presented to the grand jury, only one was no-billed, in which Paul Dickson Vancalditz was shot by the police. See Appendix Four.

¹⁹ Jonathan Carter, CONROE COURIER, Aug. 29, 1995, at A1.

²⁰ Tracey, Lee, *Deadly Mysteries: Survivors of Murdered Loved Ones Try to Cope with Their Loss*. CONROE COURIER, September 15, 1996, at 16-A.

²¹ *Id.*

²² See Appendix Four.

²³ See Appendix Four.

²⁴ See Appendix Four.

The men mercilessly kicked and beat the two victims, demanding money.²⁵ Williams and Martinez were shot repeatedly in the back.²⁶ Williams, a black man, was killed, but Martinez survived. The grand jury indicted twelve people for capital murder. Though the severity of the crime would appear to merit capital prosecution, the Montgomery County District Attorney's Office reduced the charges against all twelve co-defendants to attempted murder, aggravated kidnaping, or attempted capital murder. Two of the defendants were sentenced to probation, one was sentenced to life, and the rest were sentenced to prison terms ranging from five to 20 years.²⁷ Five Asian males were murdered during the period studied, and only one case proceeded to trial. The defendant was sentenced to life. Two cases were pled, for 40 and 45 years, one was not indicted, and one remains unsolved.²⁸

While more information is certainly needed, the statistics seem to indicate that more cases in Montgomery County go to trial when the victims are white. Without further research it is impossible to learn whether this is because the prosecution refuses to settle for less than the death penalty in white-victim cases, or other reasons. Nonetheless, the statistics are cause for concern.

B. Statewide

A systematic study of all Texas murders, comparable to the study we conducted in Montgomery County, is beyond the scope of this report. Interestingly, however, the available data from other parts of the state suggests that the results in Montgomery County are not an aberration. Across the state, the loss of non-white lives is treated less seriously than the loss of white lives. Studies demonstrate that racial discrimination is considerably more pronounced in the exercise of prosecutorial (as opposed to jury) discretion, and that it is manifested more in the race of the victim than that of the defendant.²⁹

University of Texas Professors Sorenson and Marquart have concluded that, all other things being equal, a Texan who commits the capital murder of a white person is more than five times more likely to be sentenced to death than a Texan who commits the capital murder of an

²⁵ Indictment of Oscar Andres Vasquez (No. 96-1001462) (Montgomery Cty. Oct. 9, 1996).

²⁶ Indictment of Ernest Olivos (No. 96-1001458) (Montgomery Cty. Oct. 9, 1996).

²⁷ Indictment of Jesse Gilbert Gonzales (No. 96-1001456) (Montgomery Cty. 1996); Indictment of Quinton Leo Burford (No. 96-1001457) (Montgomery Cty. 1996); Indictment of Ernest Olivos, Jr. (No. 96-1001458) (Montgomery Cty. 1996); Indictment of Nick Ortiz (No. 96-1001459) (Montgomery Cty. 1996); Indictment of Ruben Esparza (No. 96-1001460) (Montgomery Cty. 1996); Indictment of Andrew Sanchez Selph (No. 96-1001461) (Montgomery Cty. 1996); Indictment of Oscar Andres Vazquez (No. 96-1001462) (Montgomery Cty.); Indictment of John Chris Hernandez (No. 96-1001463); Indictment of Gustavo Pena (No. 96-1001464) (Montgomery Cty. 1996); Indictment of Joseph Roger Valentine (No. 96-1001465) (Montgomery Cty. 1996); Indictment of Artemio Amado Aldivar (No. 96-1001466) (Montgomery Cty. 1996); Indictment of Lionel Pena, Jr. (No. 95-0800826) (Montgomery Cty. 1996); Indictment of Jose Luis Longoria (No. 98-1101277) (Montgomery Cty. 1996).

²⁸ See Appendix Four.

²⁹ Sheldon Eckland-Olson, *Structured Discretion, Racial Bias, and the Texas Death Penalty*, 69 POL. SCI. Q. 853, 858-61, 871 (1988), see also note 6, *supra*.

African-American.³⁰ Furthermore, with the rarest of exceptions, whites in Texas do not receive death sentences for the capital murder of blacks.³¹ Texas has never executed a white person for the murder of a black person. Only one white has ever been condemned for the rape-murder of a black woman.³² Ironically, the only whites currently on death row for crimes that did not involve white victims were convicted of racist hate crimes, including the two men convicted of the gruesome dragging murder of James Byrd,³³ and a member of the Aryan Brotherhood convicted of a racially-motivated stabbing in prison.³⁴ On the other hand, 23% of those executed in Texas were black men convicted of murdering whites.³⁵ The significance of these numbers is underscored by the fact that murder generally is committed within racial categories. From 1976 to 1998, for example, 86% of white victims were killed by whites and 94% of black victims were killed by blacks. In contrast, only 7.5% of homicides nationwide in 1998 were black on white.³⁶

Young black males continue to be the fastest growing group of murder victims. As of 1998, African-Americans were six times more likely than whites to be murdered.³⁷ Homicide is the eighth leading cause of death among both black Texans (18.7 in 100,000), and Latino Texans (9.6 in 100,000), but it is not even among the top ten causes of death for white Texans (4 in 100,000) or Asian Texans (6 in 100,000).³⁸ Yet a startling 80% of people executed in Texas since Furman were condemned for killing whites.³⁹

³⁰ See Jonathen R. Sorensen & James Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CH. 743, 765-72 (1990-91); Alan Widmayer & James Marquart, *Capital Punishment and Structured Discretion: Arbitrariness and Discrimination After Furman*, CORRECTIONAL THEORY AND PRACTICE 187 (1992) (capital murder statistics from Harris County, Texas, from 1980-88).

³¹ Sorensen and Marquart's data covering Texas capital murders from 1980-86 show that the a white who committed the capital murder of a black during those years had, statistically speaking, *no* chance of receiving the death penalty; while a black who committed a capital murder of a white stood a 25% chance of receiving the death penalty. See Sorensen & Marquart, 18 N.Y.U. REV. L. & SOC. CH. 743 at 765.

³² See, e.g., Rubert C. Koeninger, *Capital Punishment in Texas, 1924-68*, 15 CRIME & DELINQ. 132, 138-39 (1969). There is only one post-Furman Texas capital case involving a white-on-black rape; however, in that case, the prosecutors did not charge the defendant with murder in the course of a rape, but instead charged him with murder in the course of a robbery. *Vigneault v. State*, 600 S.W.2d 318 (Tex. Crim. App. 1979). Mr. Vigneault died of natural causes on death row.

³³ See *infra*, Appendix Four.

³⁴ See *id.* There is one white man on death row for killing his wife (a white female), and subsequently killing a convenience store clerk (a black female).

³⁵ See Death Penalty Information Center, *Death Row U.S.A.*, (July 1, 200), at <http://www.deathpenaltyinfo.org/DRUSA-ExecBreakDwn.html>.

³⁶ United States Department of Justice, Bureau of Justice Statistics, *Homicide Trends in the U.S.: Trends by Race*, at <http://www.ojp.usdoj.gov/bjs/homicide/race.htm>.

³⁷ United States Department of Justice, Bureau of Justice Statistics, *Violent Crime Trends* (1987) and *Homicide Trends in the U.S.: Age, Gender, and Race* (1998), at <http://www.ojp.usdoj.gov/bjs/homicide/homtrnd.htm>.

³⁸ Calculated using Population estimate for Texas, U.S. Census Bureau, *USA Counties 1998 General Profile*, at <http://txsdc.tamu.edu/>; Texas Department of Health, Bureau of Vital Statistics *1998 Annual Report*, Table 18: Texas Resident Mortality From Selected Causes 1994-1998 & Table 16: Leading Causes of Death by Race/Ethnicity, at <http://www.tdh.state.tx.us/bvs/stats98/annrpt.htm>.

³⁹ See Appendix Four.

Indexing race and gender together paints an even clearer picture. While most recent statistics indicate that 23% of all Texas murder victims are black men, only 0.4% of those executed since the reinstatement of the death penalty were condemned to die for killing a black man. Conversely, white women represent 0.8% of murder victims statewide (based upon 1998 figures), but 34.2% of those executed since reinstatement were sentenced to die for killing a white woman.⁴⁰

Some might suggest this problem is being solved; that treating all post-Furman cases as a group provides a distorting picture. To be clear that racial disparity in the charging of potentially capital cases is alive and well, we calculated the rates of race/gender combinations for those arriving on death row in the five years between January 1, 1995, and December 31, 1999. As discussed above, as of 1998, only .8% of murder victims were white women. In the five years of our study, however, 19.3% of those arriving on Texas's death row were convicted of killing white women. Similarly, 11% of the newly condemned were convicted of killing black men, half of what one would expect in light of the fact that black men represent 23% of all murdered Texans.

III. Jury Selection: The Decision to Remove Black Jurors

If you ever put another nigger on a jury, you're fired.

Dallas County District Attorney Henry Wade
reprimanding Assistant District Attorney Hampton
for seating a black man on a jury.⁴¹

The U.S. Supreme Court twice found Dallas County's method of selecting jury pools unconstitutional, forcing the county to include minorities in the venire.⁴² In response, Dallas County, under the direction of the legendary Henry Wade, developed a system of training prosecutors to excuse minorities, women, Jews, and the physically challenged from criminal juries. In 1963, Bill Alexander, one of Henry Wade's top aides, wrote a treatise on jury selection in criminal cases. That treatise instructed prosecutors as follows: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well

⁴⁰ Murder rates from Texas Department of Health, Bureau of Vital Statistics *1998 Annual Report*, Table 20C: Deaths from Selected Causes, Texas residents by Race/Ethnicity, Sex and Age, Homicide and Legal Intervention at <http://www.tdh.state.tx.us/bvs/stats98/annrpt.htm>. The race and gender of the victims of defendants on death row are nowhere available in a single source, and were compiled through a combination of Texas Department of Corrections records; trial transcripts; newspaper articles; attorney interviews; and appellate opinions.

⁴¹ Andrew Hammel, *Discrimination and Death in Dallas: A Case Study in Systemic Racial Exclusion*, 3 TEX. F. ON C.L. & C.R. 187, at 191 (Summer 1998). Jack Hampton, who later became the Presiding Judge of the 283rd District Court of Dallas County, remembers an incident in the late 1950s when, as a prosecutor, he allowed an African-American woman to serve on a jury hearing a DWI case. When the jury hung because of the woman's reluctance to find the defendant guilty, Henry Wade personally reprimanded Hampton, warning him: "If you ever put another nigger on a jury, you're fired." *Id.*

⁴² Hill v. Texas, 316 U.S. 400, 403 (1942); Cassell v. Texas, 339 U.S. 282, 286 (1950).

educated.”⁴³ Soon after the Alexander memo was written, then-Assistant District Attorney Jon Sparling wrote the now-infamous Sparling memorandum, entitled “Jury Selection in a Criminal Case.” This memo advised prosecutors to exclude from juries “any member of a minority group which may subject him to oppression – they almost always empathize with the accused.” Sparling instructed prosecutors to avoid women (“I don’t like women jurors because I can’t trust them”); Jews (“Jewish veniremen generally make poor State’s jurors...Jews have a history of oppression and generally empathize with the accused.”); and the physically challenged (“Look for physical afflictions...These people usually sympathize with the accused.”).⁴⁴

The Sparling memo was incorporated into a training manual distributed to all Dallas County District Attorney’s Office personnel. Throughout the 1970s, this manual was used in a training program that became progressively more popular, eventually drawing prosecutors from as many as 220 different Texas counties.⁴⁵ Former prosecutors⁴⁶ and defense attorneys alike agree that the Dallas County District Attorney’s Office has long practiced a policy of systemic racial discrimination in jury selection. In hearings on the jury selection practices of the county, defense attorneys have testified that they never “wasted” a defense strike on minority jurors, no matter how undesirable to the defense, because they could rely on the “assumption that the State would strike the black and Latino jurors.”⁴⁷ Dallas County judges also have publically acknowledged discrimination they observed in their courtrooms. Harold Entz, Judge in County Criminal Court No. 4, testified that he had granted a prosecutor’s request to shuffle a jury in his Court, and as the jurors were reseating themselves in accordance with the shuffle, “the State volunteered the information that they requested a shuffle because a predominant number of the first six, eight or ten jurors were blacks.”⁴⁸

In 1985, the *Dallas Morning News* published a lengthy front-page exposé of the jury selection tactics of the Dallas County District Attorney’s Office, which revealed the results of a study of 4,434 jurors called for service in 100 randomly-selected felony trials in Dallas County

⁴³ Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, March 9, 1986, at 28A. See also *Batson, v. Kentucky*, 476 U.S. 79, 104 n.3 (1986) (Marshall, J., concurring) (quoting newspaper article).

⁴⁴ See Memo reprinted in: J.D. Arnold, *Wretched Excess in Dallas*, TEXAS OBSERVER, May 11, 1973, at 9; *Women, Gimps, Blacks, Hippies Need Not Apply*, TIME, June 4, 1973, at 67.

⁴⁵ *Hammel*, 3 TEX. F. ON C.L. & C.R. 187 at 194-201 (citing, *inter alia*, testimony of Larry Mitchell and Ron Wells). See also *Ex Parte Clarence Lee Brandley*, 781 S.W.2d 886, 926 (Tex. Crim. App. 1989) (Trial Court findings of fact include: “At the time of Petitioners first and second trials, the District Attorney’s Office in Montgomery County utilized several prosecution manuals. The manuals were resource or reference books which instructed the prosecutors on all aspects of how to try a criminal case. The manual recommended that black persons not be allowed to serve on any criminal jury”).

⁴⁶ *Hammel*, 3 TEX. F. ON C.L. & C.R. 187 at 194-201.

⁴⁷ *Id.* at 192-97 (describing testimony of Ralph Tait, Ron Goranson, and Richard Anderson); *Ex parte Haliburton*, 755 S.W.2d 131, 133 n.4 (Tex.Crim.App. 1988). See also Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, March 9, 1986, at 28A (“The practice of prosecutors excluding blacks is so commonplace that defense lawyers say they routinely incorporate it into their trial strategy, rarely dismissing even prosecution-minded blacks, anticipating that prosecutors will use one of their peremptory challenges to do the job for them.”).

⁴⁸ *Hammel*, 3 TEX. F. ON C.L. & C.R. 187 at 203.

from 1983-84.⁴⁹ The study found that the prosecution used peremptory challenges to strike 405 of the 467 African-American jurors qualified to serve in these trials.⁵⁰ Although the population of Dallas County was 18% African-American at the time of the study, only 4% of the jurors on Dallas County criminal juries were of that race. Seventy-two percent of the trials, including over 96% of those involving black defendants, were tried by all-white juries.⁵¹ The study further found that prosecutors used peremptory challenges to strike 92% of the total number of blacks stricken from juries. Blacks were excluded from juries at almost five times the rate of white jury candidates and twice as often as Latino candidates.⁵²

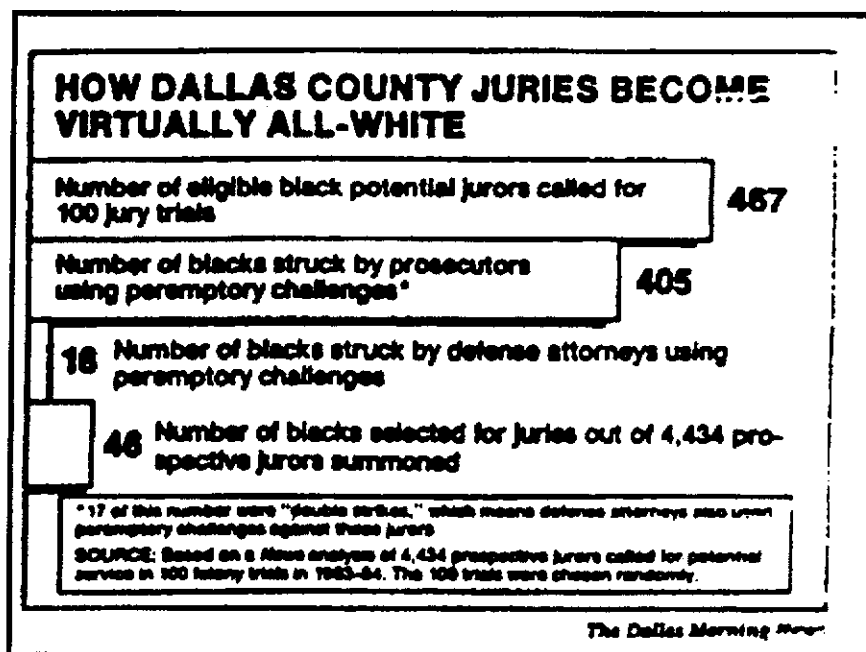


Figure 1: Dallas Morning News Graph

On December 21, 1986, the *Dallas Morning News* published a similar study of the fifteen capital murder cases tried in Dallas County between 1980 and December 1986.⁵³ Only 2.8% of the jurors were of African-American descent. Moreover, of the 62 African-American jurors qualified to serve, the prosecution struck 56, or 90.3%, with peremptory challenges. Five of the 15 cases involved an African-American defendant, and four of those were tried by all-white juries. African-Americans had a 1 in 12 chance of being selected to serve on a death penalty

⁴⁹ Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, March 9, 1986.

⁵⁰ *Id.* The article notes that 17 of these challenges were "double strikes," meaning that defense attorneys used peremptory challenges against these jurors as well – suggesting that, but for their race, these were prospective jurors the State might have welcomed.

⁵¹ *Id.*

⁵² *Id.* The series of articles written by Steve McGonigle and Ed Timms concerning race bias in Dallas County criminal jury selection won the Gavel Award from the State Bar Association of Texas, the Headliners Club of Austin award for investigative journalism, the Katie Award for investigative journalism from the Press Club of Dallas, and the Emery A. Brownell Award from the National Legal Aid and Defender Association. See *Three News Reporters Receive Awards from Bar Association*, DALLAS MORNING NEWS, Nov. 15, 1986, at 42A; *Ten News Staffers Win Headliners Journalism Awards*, DALLAS MORNING NEWS, Feb. 8, 1987, at 34A; *The News Takes 17 Awards in Dallas Press Club Contest*, DALLAS MORNING NEWS, Nov. 16, 1986, at 33A; *2 News Reporters to Get Award for Series on Juries*, DALLAS MORNING NEWS, Oct. 24, 1986, at 31A.

⁵³ Ed Timms & Steve McGonigle, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, DALLAS MORNING NEWS, Dec. 21, 1986, at A1.

case, while Latino jurors had a 1 in 4 chance, and whites had a 1 in 3 chance. Frank Williams, a criminologist at Sam Houston State University, estimated that the probability that the pattern of exclusion arose by chance was one in 10,000.⁵⁴

The use of racially discriminatory strikes is not limited to Dallas County.⁵⁵ The Montgomery County (Conroe) District Attorney's Office also had a firm policy excluding blacks from all criminal juries. As the trial court found in *Ex parte Brandley*:

At the time of Petitioner's first and second trials, a routine or practice existed in the Montgomery County District Attorney's office that all black persons were to be stricken from the jury panel when there was a black defendant. Had any Assistant District Attorney allowed a black person to serve as a juror, the District Attorney, James Keshan, would have required that assistant to explain why he departed from standard practice by allowing a black person to serve on a criminal jury. No lawyer having practiced in Montgomery County can recall a black person ever being permitted to serve on a jury when there was a black defendant except one instance in 1978 when a black Conroe police officer was allowed to serve on a jury.⁵⁶

The Bowie County (Texarkana) prosecutor's office also excluded almost all blacks from jury service. Capital defendant Delma Banks presented the state and federal courts with overwhelming statistical proof establishing that in scores of Bowie County criminal cases tried between the mid-1970s and the mid-1980s, black citizens regularly qualified for jury service, but rarely sat on criminal juries.⁵⁷ The numerical data demonstrated that from January 1, 1975 to September 30, 1980, the prosecutor's office (under the direction of two different District Attorneys) had used peremptory strikes to exclude exactly 94% of blacks eligible to sit on juries.⁵⁸ As a result of this discriminatory practice, 1.8% of eligible blacks served on juries in the 37 felony cases tried, while they comprised over 21% of the county population.⁵⁹

⁵⁴ *Id.*

⁵⁵ See *Tompkins v. State*, 774 S.W.2d 195, 203 (Tex.Crim.App. 1987) (“[B]lack jurors have been relatively uncommon on capital murder juries in Harris County during the past several years.”); *Black Killers Overwhelmingly Face White Jurors, Study Finds*, UPI WIRE, December 21, 1986 (two-thirds of blacks from Harris County on Texas's death row had all-white juries; four-fifths of blacks from Dallas County on Texas's death row had all-white juries).

⁵⁶ *Ex parte Brandley*, 781 S.W.2d 886, 926 (Tex. Crim. App. 1989).

⁵⁷ *Banks v. Johnson*, No. 5:96-CV-353 (E.D. Tex).

⁵⁸ *Id.*, at Exh. 7.

⁵⁹ See Appendix Four, Table D. Dr. Kent Tedin of the University of Houston, an expert on statistics, conducted four different tests on the available data. He analyzed percentage differences between blacks in the jury pools and in the adult county population, the registered voter population and the pre-peremptory strike pool population. He also analyzed the percentage differences between blacks and whites struck by the State. In each instance, Dr. Tedin asked how likely was it that the differences in percentages could be the result of chance alone. He concluded that the odds of these differences happening by chance alone were less than 1 in 10 million. It was Dr. Tedin's expert opinion that this disparity could only be the product of race discrimination. *Banks v. Johnson*, Exh. 8.

Both Bowie County prosecutors used race-coding markers – for example, “C,” “N,” or “B” – to identify the names of blacks who were on venire lists. These codes became markers for the prosecution’s use of peremptory strikes, for no similar race-identification markers were placed above or next to the names of whites. Former Assistant District Attorney Rick Rogers explained that once a prosecutor had race-coded a black person, he would not normally care to learn any other information about that person, since it was already determined that the person would be struck from the jury.⁶⁰

Mr. Banks’ statistical showing is corroborated by affidavits from six defense attorneys – including a former prosecutor – who tried cases in Bowie County during the relevant time period and who were familiar with the prosecutor’s systematic and intentional practice of excluding blacks citizens from jury service through the use of peremptory challenges.

Mark Leshner, a twenty-year member of the Texas Bar and a former Assistant District Attorney, stated that “from 1975 to 1980, it was the obvious practice of the District Attorney’s office to use its peremptory strikes to remove otherwise qualified blacks from the jury venire.” Mr. Leshner further commented that the prosecutor’s use of peremptory challenges to remove blacks from juries “was simply the way things were done in the criminal justice system in Bowie County, and was the accepted practice at that time.”⁶¹

Five other senior Bowie County defense attorneys agreed with Mr. Leshner’s assessment.⁶² Attorney Jim Davis further noted that District Attorney Cooksey’s office was open and nonchalant about its practice of excluding blacks through peremptory strikes:

While Lynn Cooksey was District Attorney, he invariably struck black prospective jurors from the panel. In fact, he usually noted the race of the black jurors on his copy of the jury list (placing an “N” beside the name of each black venireman) to facilitate the use of his peremptories in removing them.⁶³

Joan Fisher, a former Harris County (Houston) Assistant District Attorney who prosecuted serious felonies, including a capital trial, recalls that she was “trained to the effect that you avoid young people, blacks, postal employees, and elderly women because they were

⁶⁰ Petition for Writ of Habeas Corpus, *Banks v. Johnson*, No. 5:96-CV-353 (E.D. Tex), at Exh. 9, 10 & 20.

⁶¹ *Id.*, Exh. 11.

⁶² See affidavits of Jim Hooper, Tom Newman, (“[t]he striking of every otherwise qualified black venireperson by the district attorney’s office through peremptory challenges ... was simply the unwritten rule governing such trials in Bowie County, Texas during this time.”); Sherman Kusin, (he could not “remember trying a murder case in Bowie County in which a black person was allowed to sit on the jury. Every otherwise qualified black venireperson was stricken by the State through the use of peremptory challenges.”); James Davis, (during the period 1975 to 1980, “it was the evident practice of the District Attorney’s office in Bowie County to exercise peremptory strikes against otherwise qualified black prospective jurors.”); Clyde Lee, (it was no secret that at the time of Mr. Banks’ trial, “the district attorney’s office had an ironclad policy of using its peremptory strikes to remove all black prospective jurors from the jury pool.”) *Id.*, Exhibits 12-16, respectively.

⁶³ *Id.*, Exh. 15.

supposed to be more sympathetic to the defendant.”⁶⁴ Fisher specifically remembers that when Felony Section Chief Keno Henderson selected a black man to sit on a murder trial and the jury could not reach a unanimous verdict, Henderson immediately assumed it was that man who prevented the jury from reaching a verdict, exclaiming that he “should have known you should never put them on the jury.”⁶⁵ Though Fisher left the Harris County office before the Sparling memo was in use around the state, she remembers the policy was already in place because “I know I did it and I’m not a racist. Somebody told me to do it.”⁶⁶

Though the Sparling memo is long gone, the practice remains. “Sparling didn’t put anything in there that’s different from what people think; only now they don’t say it out loud.”⁶⁷ Defense attorneys still plan their jury selection strategy assuming that the State will strike all the black venire-members. “Everybody knows what is going to happen.”⁶⁸ “When I pick juries, I assume they will strike black jurors except where there is a black victim of a black-on-black murder, there might be a tendency to exercise a little more discretion.”⁶⁹ “They got a little gunshy [about putting blacks on juries] after O.J.”⁷⁰

To be sure, the Supreme Court in 1986 held that prosecutors cannot remove a black juror without articulating a “race neutral” explanation.⁷¹ That protection, however, has proven illusory. Attorneys practicing in Dallas County before and after *Batson* say that the decision has had little impact. “Nothing has changed,” says Larry Mitchell, a criminal defense attorney in Dallas County for twenty-seven years. Mr. Mitchell described the current situation as follows: “Now that we have lists from driver’s licenses, the State has to work harder to keep blacks off. They may use eight or nine strikes now when they used to use two or three, but they keep them off. Blacks simply do not serve on juries in Dallas County except where there is a black victim. Even then, it’s one or two black jurors at most.”⁷²

Prosecutors also know they will not be reprimanded for striking African-American jurors. As veteran attorney Peter Lesser reported: “The State knows they can get away with it. We all know the appellate courts won’t do anything anymore on this issue. . . . *Batson* challenges are rarely sustained because the State has gotten better at hiding what they are doing.”⁷³

Defense attorney Fred Tinsley recently explained that “[a]t the present time, *Batson* is no longer recognized. When issues are raised, the CCA [Texas Court of Criminal Appeals] just

⁶⁴ Telephone Interview with Joan Fisher (Sept. 25, 2000).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Telephone Interview with Larry Mitchell, private defense attorney (Sept. 30, 2000).

⁶⁸ *Id.*

⁶⁹ Telephone Interview with Peter Lesser, private defense attorney (Sept. 30, 2000).

⁷⁰ *Id.*

⁷¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁷² Telephone Interview with Larry Mitchell, private defense attorney (Sept. 30, 2000).

⁷³ Telephone Interview with Peter Lesser, private defense attorney (Sept. 30, 2000).

looks the other way, so the State is free to do whatever they want and they know it. There is no question they are still striking blacks off juries just like before.”⁷⁴ As Larry Mitchell has observed, “Nobody wins on Batson and the prosecutors know that. I always thought that if you were any kind of lawyer you could get around Batson. All you have to do is say anything that sounds race neutral.”⁷⁵

The consensus on Batson claims is clear: the exception swallows the rule. The race-neutral explanations offered by prosecutors almost always succeed in fending off an assertion of racial discrimination. For example, attorney Ron Goranson recalls one case in which the State struck a Hispanic juror by saying she “paid too much attention.”⁷⁶ And Larry Mitchell described one of his cases in which the prosecution removed a prospective juror “because she looked at the defendant in a sympathetic way.” Another time, Mitchell recalled, “they kicked a minister off because they said he might be too forgiving.”⁷⁷

Attorney Fred Tinsley aptly summarized the current situation as follows:

The State doesn’t even have to worry about coming up with Batson excuses anymore because it is not politically popular to do anything for a defendant, so the objection is never going to be sustained. In Dallas, where all the judges are Republicans, we still had a judge defeated because he lowered the bond on a defendant where the victim was a well-known person. He’s no longer a judge because he did the right thing. And, if the appeals courts do anything to uphold the law, they know the CCA will overturn them, so why should they risk their political careers if the ruling isn’t even going to stick?⁷⁸

To test the anecdotal experience of these Dallas County practitioner, we examined every Batson decision in a published capital case in Texas. Only one capital case has been overturned by the Texas Court of Criminal Appeals on Batson grounds in the last fifteen years.⁷⁹ The CCA has found racial discrimination in at least five additional cases but declined to grant relief for various technical reasons.⁸⁰ In other cases, courts have endorsed the prosecutors’ reasons for

⁷⁴ Telephone Interview with Fred Tinsley, private defense attorney (Sept. 29, 2000).

⁷⁵ Telephone Interview with Larry Mitchell, private defense attorney (Sept. 30, 2000).

⁷⁶ Telephone Interview with Ron Goranson, private defense attorney (Sept. 28, 2000).

⁷⁷ Telephone Interview with Larry Mitchell, private defense attorney (Sept. 30, 2000).

⁷⁸ Telephone Interview with Fred Tinsley, private defense attorney (Sept. 30, 2000).

⁷⁹ *Chambers v. State*, 742 S.W.2d 695 (Tex. Crim. App. 1988); *Chambers v. State*, 784 S.W.2d 29, 32 (Tex. Crim. App. 1989).

⁸⁰ *Alexander v. State*, 866 S.W.2d 1 (Tex. Crim. App. 1993) (trial Court overruled Batson challenge on timeliness issue; CCA reversed on timeliness, but found trial court’s ruling was not clearly erroneous even though it had not ruled on the merits); *Adanadus v. State*, 866 S.W.2d 210 (Tex. Crim. App. 1993) (although the appellate court found that the State’s removal of the only remaining black on the venire was “clearly disparate treatment by the State,” it held that the trial court’s actions were not clearly erroneous since not all of the traits cited by the State to exclude her were also shared by whites seated on the jury); *Cantu v. State*, 842 S.W.2d 667 (Tex. Crim. App. 1992) (despite the fact that white jurors had the same traits cited by the State for striking a Latino venire woman, trial court’s denial of Batson challenge was not clearly erroneous); *Jones v. State*, 833 S.W.2d 118 (Tex. Crim. App. 1992); *Hernandez v. State*, 819 S.W.2d 806 (Tex. Crim. App. 1991).

removing black jurors at face value,⁸¹ even when it was clear that the prosecutors accepted similarly situated whites.⁸²

IV. Future Dangerousness: The Decision to Vote for Death

Under the post-Furman Texas capital sentencing statute, the pivotal question posed to capital sentencing juries – whether a convicted capital defendant poses a future danger to society – has been inherently biased against minority defendants, particularly African-Americans who face predominantly white juries. The future dangerousness question creates a situation in which a white juror's racism is particularly likely to influence his sentencing decision. Studies indicate that, all other things being equal, an all-white jury is more likely to perceive a black defendant as a "future danger to society."⁸³

Some prosecutors in Texas, however, have resorted to active racial stereotyping to increase the likelihood that minority defendants will be sentenced to die. During the punishment phase of Victor Hugo Saldaño's trial, the prosecution called Walter Quijano, a clinical psychologist, to testify regarding Saldaño's future dangerousness. Dr. Quijano testified that one of the twenty-four factors used to establish future dangerousness was Saldaño's race. The Texas Court of Criminal Appeals apparently was untroubled by this appeal to race as a factor in assessing future dangerousness, and affirmed Mr. Saldaño's sentence without addressing the issue.⁸⁴ After Mr. Saldaño sought review in the U.S. Supreme Court, however, the Texas Attorney General conceded error.⁸⁵ Quijano offered this opinion in seven capital cases.⁸⁶

⁸¹ *Satterwhite v. State*, 858 S.W.2d 412 (Tex. Crim. App., 1993) (prosecutor used two of six strikes to remove two of only three blacks on the venire; both were "unsure" of themselves according to the prosecutor); *Camacho v. State*, 864 S.W.2d 524 (Tex. Crim. App. 1993) (juror apparently struck because he was too qualified; prosecutor cited the venireman's repeated answer that his vote would depend on the facts and circumstances to argue that the man was too eager); *Fuentes v. State*, 991 S.W. 2d 267 (Tex. Crim. App. 1999) (all minorities struck from the pool by the State, reasons were not offered for all strikes, but reasons offered included that venirewoman would require premeditation before voting for death); *Harris v. State of Texas*, 827 S.W.2d 949 (Tex. Crim. App. 1992); *Morris v. State*, 940 S.W.2d 610 (Tex. Crim. App. 1996); *Earhart v. State*, 823 S.W.2d 607 (Tex. Crim. App. 1991); *Pondexter v. State*, 942 S.W.2d 577 (Tex. Crim. App. 1996); *Chambers v. State*, 866 S.W. 2d 9 (Tex. Crim. App. 1993); *Kemp v. State*, 846 S.W.2d 289 (Tex. Crim. App. 1992); *Trevino v. State*, 864 S. W. 2d 499 (Tex. Crim. App., 1993).

⁸² *Mines v. State*, 852 S.W.2d 941 (Tex. Crim. App. 1992); *Fuentes v. State*, 991 S.W.2d 267 (Tex. Crim. App. 1999)

⁸³ See H. BLALOCK, RACE AND ETHNIC RELATIONS, 21 (1982); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1645-47 (1985) (discussing numerous studies which support the characterization of white attitudes towards blacks as "overwhelmingly negative").

⁸⁴ *Saldaño v. Texas*, No. 72,556 (Tex. Crim. App. Sept. 15, 1999) (en banc) (unpub.) (The Court failed to reach the issue for "technical reasons," although the Court can, in its discretion, reach such claims when "the interests of justice" require).

⁸⁵ On June 5, 2000, the U.S. Supreme Court vacated Mr. Saldaño's death sentence after the Texas Attorney General made the unprecedented move of conceding that the use of race in Mr. Saldaño's punishment phase seriously undermined the fairness and integrity of the judicial process. *Saldaño v. Texas*, 120 S. Ct. 2214 (2000).

⁸⁶ TEXAS LAWYER, Vol. 16, NO. 14, pg. 1, June 12, 2000.

Rather than appealing to explicitly racist stereotypes, the State has also relied on coded language. For example, the prosecution argued the following to a Jefferson County jury in the case of Walter Bell, a mentally retarded black man:

We've lost the streets to them. We're losing the battle. . . . The whole community is in fear of them. Everyone of us, who put bars on or windows and loaded our guns and everyone of you ladies who has refused to go to the convenience store at night after dark, and everyone of you men who refuse to let your wife go out at night, you're a hostage. People like him are holding you and I in abeyance. No one is untouched by fear of being a victim today. It's no longer something that happens in the ghettos or in the impoverished areas. The curse of violent crime reaches the city and the bedroom of 1920 Las Palmas, a quiet suburban addition, and the curse of violent crime reaches 1806 Franklin, and in Port Neches, and in the northern parts of Beaumont. It doesn't have to be that way. We don't have to stand in fear. It's not their world. It's my world, and it's your world, and. . . . Now is the time to reassert the proper order of things in society, and I believe, and I hope you share my view, that swift and certain punishment that fits the crime is a part of the answer.⁸⁷

Finally, prosecutors can often rely on the fact that a black defendant is more likely to have a criminal history than a white defendant. Black men have four times the incarceration rate of white men.⁸⁸ Thus, the use of prior convictions as a standard for moving the jury toward death will necessarily have a racially disparate impact. Though a criminal history might seem to be an objective indication of likely future behavior, because a conviction is the end product of a series of discretionary acts, each of which presents an opportunity for racially discriminatory decision-making,⁸⁹ the use of prior convictions to justify a death sentence presents an unacceptably great risk of racial discrimination in that decision.

⁸⁷ Trial Record, Vol. 18, pp. 4536-4539, *State v. Bell* (CCA No. 71,843).

⁸⁸ United States Department of Justice, *Bureau of Justice Statistics, Race of Prisoners Admitted to State and Federal Institutions, 1926-86* (1991).

⁸⁹ See *supra* notes 6-8, and William T. Pizzi, *Understanding Prosecutorial Discretion in the Untied States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 Ohio St. L. J. 1325, 1344 (1993); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. Miami L. Rev. 425, 427 (1997); David A. Harris, "Driving While Black" and All Other Traffic Offense: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology 544, 546 (1997); Tracy L. McCain, Note, *The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System*, 25 Colum. J. L. & Soc. Probs. 601, 639 (1992).

V. Conclusion: Racism

You're the nigger, so you're elected.

Conroe police officer, to Clarence Brandley, who ultimately served nine years, four months, and 25 days on Texas's death row for a crime he did not commit⁹⁰

The unjust conviction and sentence of Clarence Brandley is but one example of the distorting effect of race on the fairness and reliability of our criminal justice system. Because, as Professor Charles Lawrence has noted,⁹¹ racism is imbedded in the very fabric of our social relations, informing both consciously and unconsciously all interaction between the races, racial bias pollutes our justice system at every juncture where discretion is exercised.

Like any human endeavor, the effort to identify and punish those responsible for the most heinous crimes is subject to all our human frailties, biases and limitations. And, like any human endeavor, some risk of error must be tolerated. But, there comes a point at which our collective vision is so profoundly impaired – as it is by race – and the consequences of failure are so grave and irreversible – as with the use of the death penalty – that the probability of error becomes intolerable. The question is not whether racial disparity plagues the imposition of the death penalty in Texas, but whether we will continue to allow it to do so.

⁹⁰ NICK DAVIES, *WHITE LIES: RAPE, MURDER, AND JUSTICE TEXAS STYLE* 23 (1991). For further information about the unjust prosecution of Clarence Lee Brandley, see Chapter Two.

⁹¹ LAWRENCE, CHARLES R. III. *THE ID, THE EGO, AND EQUAL PROTECTION: RECKONING WITH UNCONSCIOUS RACISM*, pp. 696-700; Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 *Cornell L. Rev.* 1016 (1988).