

# Death Penalty, Still Racist and Arbitrary

By David R. Dow

HOUSTON

**L**AST week was the 35th anniversary of the return of the American death penalty. It remains as racist and as random as ever.

Several years after the death penalty was reinstated in 1976, a University of Iowa law professor, David C. Baldus (who died last month), along with two colleagues, published a study examining more than 2,000 homicides that took place in Georgia beginning in 1972. They found that black defendants were 1.7 times more likely to receive the death penalty than white defendants and that murderers of white victims were 4.3 times more likely to be sentenced to death than those who killed blacks.

What became known as the Baldus study was the centerpiece of the Supreme Court's 1987 decision in *McCleskey v. Kemp*. That case involved a black man, Warren McCleskey, who was sentenced to die for murdering a white Atlanta police officer. Mr. McCleskey argued that the Baldus study established that his death sentence was tainted by racial bias. In a 5-to-4 decision, the Supreme Court ruled that general patterns of discrimination do not prove that racial discrimination operated in particular cases.

Of course, the court had to say that, or America's capital justice system would have screeched to a halt. Georgia is not special. Nationwide, blacks and whites are victims of homicide in roughly equal numbers, yet 80 percent of those executed had murdered white people. Over the past three decades, the Baldus study has been replicated in about a dozen other jurisdictions, and they all reflect the same basic racial bias. By insisting on direct evidence of racial discrimination, the court in *McCleskey* essentially made the

fact of pervasive racism legally irrelevant, because prosecutors rarely write e-mails announcing they are seeking death in a given case because the murderer was black (or because the victim was white).

In Texas, though, they do come close. In 2008, the district attorney of Harris County, Chuck Rosenthal, resigned after news emerged that he had sent and received racist e-mails. His office had sought the death penalty in 25 cases; his successor has sought it in 7. Of the total 32 cases, 29 involve a nonwhite defendant.

Since 1976, Texas has carried out 470 executions (well more than a third of the national total of 1,257). You can count on one hand the number of those executions

## Bias pervades capital punishment, 35 years after it was restored.

that involved a white murderer and a black victim and you do not need to use your thumb, ring finger, index finger or pinkie.

Well, you might need the pinkie. On June 16, Texas executed Lee Taylor, who at age 16 beat an elderly couple while robbing their home. The 79-year-old husband died of his injuries. Mr. Taylor was sentenced to life in prison; there he joined the Aryan Brotherhood, a white gang, and, four years into his sentence, murdered a black inmate and was sentenced to death. When Mr. Taylor was executed, it was reported that he was the second white person in Texas executed for killing a black person. Actually, he should be counted as the first. The other inmate, Larry Hayes, executed in 2003, killed two people, one of whom was white.

The facts surrounding Lee Taylor's ex-

ecution are cause for further shame. John Baldentine, a black inmate, was scheduled to die in Texas the day before Lee Taylor's execution. Mr. Baldentine's lawyers argued that his court-appointed appellate lawyer had botched his case, and that he should have an opportunity to raise issues the lawyer had neglected. Less than an hour before Mr. Baldentine was to die, the Supreme Court issued a stay.

Lee Taylor's lawyers watched the Baldentine case closely; their client too had received scandalously bad representation, and, they filed a petition virtually identical to the one in the Baldentine case. But by a vote of 5-to-4, the justices permitted the Taylor execution to proceed. If there were differences between the Baldentine and Taylor cases, they were far too minor to form the boundary between life and death. But trivial distinctions are commonplace in death penalty cases. Justice Lewis F. Powell Jr., one of the five justices in the *McCleskey* majority, retired from the court in 1991. Following his retirement he said he had voted the wrong way. If Justice Powell had changed his mind a year sooner, Warren McCleskey, who was executed in Georgia in 1991, would still be alive.

And because of a vote from a single Supreme Court justice, John Baldentine lives while Lee Taylor died. When capital punishment was briefly struck down, in 1972, Justice Potter Stewart said the death penalty was arbitrary, like being struck by lightning.

It still is, and it's the justices themselves who keep throwing the bolts. □

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