

# *Symposium: Race-ing Justice*

**I**ncreasingly, the central racial problem of the twenty-first century is the problem of race-ing justice: the massive expansion of the U.S. prison-industrial complex as a primary means of social and economic control and political repression that is now experienced by millions of African Americans, other racialized minorities, and poor people; and the increasingly destructive role of the police and the court system in denying justice and equality under the law to the majority of American people. The immediate challenge for African-American studies scholarship is to understand the dynamics of racialized oppression under postindustrial, globalized capitalism and to present progressive alternatives to these socially destructive processes.

On Friday, April 16, 1999, the Institute for Research in African-American Studies sponsored a day-long symposium titled "Race-ing Justice: The Prison Industrial Complex vs. Black America." The event brought together over 650 people from around the country to examine the destructive impact of the police, the courts, and the prison system on the African-American community. Bringing together academics, activists, community leaders, and practitioners, the symposium provided a medium to critically analyze and explore the social features, political dimensions, and policy implications of the prison-industrial complex and crime policy in the United States generally. This symposium was organized largely out of a need to provide a greater level of public attention to current expansion of the prison-industrial complex and the persistence of racial bias in the criminal justice system. Through a series of panel discussions, workshops, and discussion groups, the symposium helped provide critical inquiry and analysis into the role that race plays at all levels of the criminal justice system and an examination into how that role shapes and influences our conceptions of racial equality and justice. Following are selected excerpts from participating panelists.

## Race and the Death Penalty

**This panel explored the larger social, political, and cultural forces that shape thinking about criminal behavior and examined the influence of racial bias in the death penalty context.**

*Tonya McClary:* Right now, as of January [1999], we have 3,549 people awaiting execution in this country. Of the over 3,500 people on death row, the majority are people of color. The largest majority in that minority population are African Americans. Currently African Americans make up over 42 percent of the people on death row in this country even though, according to our own government statistics, African Americans make up only between 12 and 14 percent of the national population. When you combine African Americans with Latinos, who make up about 8 percent of the people on death row; Native Americans, who make up about 2 percent of the people on death row; and Asians, that make up a little less than 1 percent, people of color are over 50 percent of the people on death row in this country. But a lot of what goes into who is going to get the death penalty also depends on who the victim is. And in many of these cases, even the cases of the people that are white on death row, many of them killed somebody that was white.

Since 1976 we've had about 530 executions in this country, and out of those 530 executions, there have only been 11 whites who have been executed for killing someone black. As of January of this year there are seventy-four children on death row, all young men. There are no female children or juveniles on death row, although the one female child that was on death row in recent years

was an African-American woman, Paula Cooper. Of the seventy-four juveniles, the majority are also people of color. So our government and society has also said that our children of color are not worth redemption, that somehow if you are sixteen or seventeen years old, there is no redemption for you, that there is nothing else that we can do except put you to death. And those numbers are definitely starting to increase. For example, in a few recent death penalty cases originating from Southern states, judges played a numbers game during sentencing where the defendants were juveniles of various ages and the jury recommended life sentences. In each of these cases, where one or more of the juveniles was under sixteen, the judge let the life recommendation stand. However, if one or more of the juveniles was sixteen or seventeen years old, the judge overrode the jury's recommendation for life and imposed the death penalty. In all of those cases, the children were African American.

*George Kendall:* I would like provide a little historical context into this very important question about the influence of race and the administration of the death penalty in our country. The Michigan state legislature is [currently] pondering whether or not to reintroduce the death penalty in that state. Many of you might now know that Michigan was the first state in this country that, in 1853 I believe, abolished the death penalty. It's never [been] brought back, and we hope that it won't be. Some of the arguments that are being used by supporters of the death penalty in that state is that the citizens of Michigan

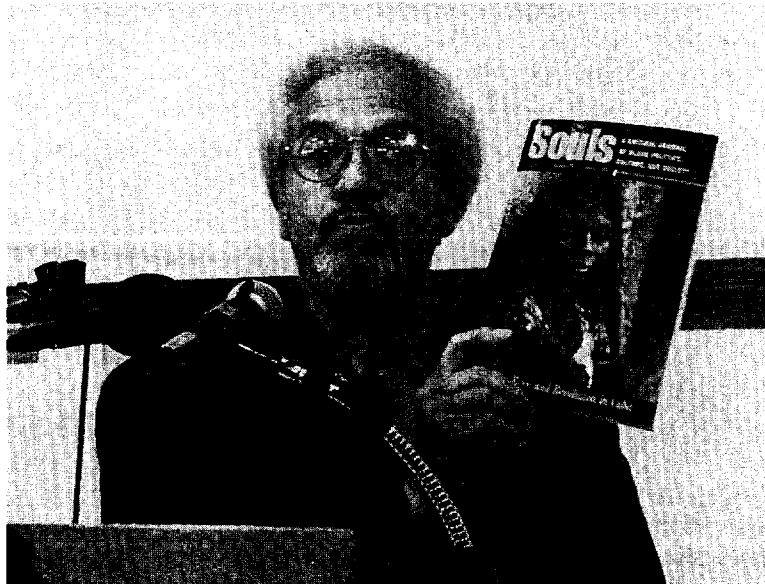
should not have fear that racism continues to mar capital punishment because in that great state the proponents of the bill are telling the citizens of Michigan that we can write a statute that will prevent race from influencing death. I'm sure that a majority of the citizens out there know better, because a quick review of the role that racism played in the administration of death in this country leaves little doubt that we have got a long way to go for that fact to be true.

Race and the administration of the death penalty have been like peas in a pod, in the same pod as history, since the beginning of our country. As many of you know, for more than half of our country's history, race was a factor that had to be considered during sentencing proceedings. If you were black and you killed a white under the slave codes in this country, the sentence was one—mandatory death. If you were white and you killed a black in many of these same jurisdictions, the punishment for the first murder oftentimes was a small fine or no punishment at all. The only time when there was any discussion about a sanction was if there was a second black killed by a white or a third black killed by a white. This was all supposed to change after the Civil War with the adoption of the Thirteenth Amendment, which of course barred slavery. But in fact it did not. Because many of the states that had slave codes simply changed their name to black codes and reenacted these same statutes. And Congress was somewhat startled to see this, and in fact the history under these black codes, the history in 1865 or 1866, caused Congress to go back and see that the Fourteenth Amendment became law, which barred discrimination and which guaranteed all citizens, white or black or any other color, equal protection under the law.

For the first time African Americans were sitting as jurors in many states, and blacks became governors and senators and congresspersons and judges for the first time. To

a great degree that all ended beginning in the 1880s, and black participation in the criminal justice system virtually ended by the 1900s, except if you were a defendant. We look and see the period of lynching in this country that began in the 1880s, hundreds and hundreds and hundreds of African-American men were lynched, often on the mere suspicion that they had committed a crime against a white. This only began to change when the NAACP came together—one of the main reasons why the NAACP was formed was to end lynching in our country. Yet even when the practice of lynching faded away, what rose in its place was a practice which historians now refer to as legal lynching. It was not at all unusual for a black person charged with a crime of murder or rape of a white to be charged on a Monday, tried on a Wednesday, convicted on Thursday and hung on Friday on the courthouse lawn. Oftentimes, and there are hundreds of these cases, the sheriff begged with the mob, please don't break in, please don't burn down our jail, we will see that justice prevails. And it prevailed: Oftentimes with the mob outside, there would be a sham trial and the person would be convicted, sentenced to death, and hung.

These practices only began to change in the early fifties and sixties when the United States Supreme Court under Chief Justice Warren decided that it could no longer turn a blind eye to this and rendered some decisions that at least slowed down the ability of state judicial officers to guarantee that only whites would sit on juries. In 1963 the court ordered that, in felony cases, if you were too poor to have a lawyer, it was the responsibility of the state to provide you one. There were people being charged with capital cases back in the thirties, forties, and fifties who oftentimes had a lawyer who was paid fifty dollars for the case, had no investigator, had no other resources to defend somebody. And so, not surprisingly, when that Supreme Court looked



*Dr. Manning Marable, Race-ing Justice.*  
Photo by Delphine Fawundu

honestly at the practice of the administration of the death penalty in 1972, it struck down every death penalty statute in this country in large part because of the huge continuing influence that racial discrimination played in its administration.

And I think that when the court issued that judgment in June of 1972, many members of the court felt that they would never again have to deal with death penalty cases. How wrong they were. Within a year after the Supreme Court struck down the death penalty, over thirty state legislatures had enacted new death penalty statutes. And some of those statutes came back to the Supreme Court in 1976. And when those statutes came back, the state lawyers stood before the court just as I'm standing before you now and pledged to the court that we accept your judgment, we accept the fact that race and poverty were playing large roles in the former administration of the death penalty, but we have solved the problem. If you give us a chance, if you have approved

these new statutes, we will show you that race and poverty, and other arbitrary factors, will cease to play any role whatsoever in these cases.

Despite arguments that the court should not be so naïve, that the court should not be fooled by these mere cosmetic changes in death penalty schemes, the court approved some of these statutes and gave the states a chance to show the court that in fact

these ugly factors would play no role.

Since that time the question about race's role in the administration of the death penalty has turned largely into an empirical question. Well, what are the cases showing, what are we seeing in these cases? I can report that almost every study that is done right that attempts to really look at all the factors that influence why one person gets the death penalty and why another person doesn't all come to the same conclusion: Racial discrimination continues to play a very large role in determining who is charged with a capital offense and who ultimately receives that sentence.

One of the best sentencing studies ever completed in this country looked at the state of Georgia and looked at every homicide case over a seven-year period and reached the conclusion that if the victim was white, your chances of receiving the death penalty were more than four times as high than if your victim was nonwhite.<sup>1</sup> Despite that stunning, stunning disparity, consider this: The same

kind of statistics were used to prove the link between smoking and lung cancer. Most of us in this room I think will have accepted the proposition that if you smoke, you are increasing your chances of developing lung cancer. Well, that sort of conclusion has proven only that you are doubling your chances of getting lung cancer if you smoke. The data from the Georgia study showed that you were four times as likely to receive the death penalty if your victim was black. And just recently another very thorough study done in Philadelphia, the cradle of liberty in this country, has shown that simply being black is as much an aggravating factor as if you were to have a prior homicide conviction on your record.

Now, why do we continue to see race having such a powerful influence in the administration of the death penalty? There are several reasons. First of all, despite some significant changes in education and in other areas of public life, in part started in the sixties, the criminal justice system has remained largely immune from that progress. What many people fail to appreciate is that in every state of the country where the death penalty is used, there is never a case where the death penalty *has* to be sought. The prosecutor in the given county, our judicial circuits, always has discretion to either seek the death penalty or not. If you look at a map of any state in this country that uses the death penalty, it will look like a weather map with lightning strikes when you just put on that map where people committed crimes that led to the death penalty and where they did not. There are counties in Georgia and Alabama where in one county there will be ten people on that state's death row who committed crimes. In the next county, because it's a different district attorney, there will be no people on death row. So the DA has a tremendous influence to see who gets the death penalty and who does not. A study that came

out last year shows that over 98 percent of the persons who have served as district attorneys in this country since 1976 have been white, and so overwhelmingly these judgments initially are being made by whites.

Secondly, the media in this country continues to tell us that white life is more important than nonwhite life. We all know about the case of JonBenet Ramsey. We have all heard endless stories about that. It's a great tragedy. How many people in this room know of the young children of color who were killed in Colorado during that same month of that same year? I dare say there isn't anyone here who can report that. There were more kids of color who were victims of murder in that state than kids who were white.

I think another reason why race continues to play a large role is that our courts, and in particular the Supreme Court, has been willing to issue rulings that create a perception of fairness, but which, in practice, have absolutely no influence in reducing racial discrimination. In the major death penalty case on race from this court in *McCleskey v. Kemp* (1987), the court was confronted with this study from Georgia that showed if your victim was white, you were more than four times as likely to receive the death penalty. No one quarreled with the integrity of that study. But on a vote of five to four, the court held that that showing was not enough to entitle Warren McCleskey to any relief whatsoever, and that unless he could show that his judge, that his jury, or that the prosecutor had acted with racial animosity in this case, that he could be put to death. Warren McCleskey was put to death in 1991.

In 1986 the court issued a ruling, *Batson v. Kentucky*, which struck down an earlier decision which has allowed prosecutors in many cases just to strike people of color and women from juries. Oftentimes, the only people who can sit on these juries, particularly in white victim cases, would be whites. And

there was great promise when *Batson* came down that finally in individual cases, we can stop the practice of excluding minorities and others from these very important cases.

I would like to report to you that not long ago the Supreme Court issued another ruling, which in their words said that all the prosecutor has to do when they are challenged for striking the first four or five people of color is to simply have a race-neutral reason. They can be silly, they can be funny, they can be stupid, but as long as it's race neutral, that's the only burden the prosecutor has to meet in justifying excluding those jurors. In some jurisdictions we continue to see what we saw 10 years ago, what we saw 30 years ago, what we saw 100 years ago—that in these very important cases, for the most part, whites are the ones who are sitting on these juries. And there have been a series of other cases where the court has given the police wide discretion. In 1996 the *Wren vs. U.S.* case said that racial profiling is permitted so long as the officer can state that the driver was violating a traffic law regardless of how minor or insignificant it was. I dare anyone in this room, you cannot drive your car three blocks without violating a traffic ordinance. If you look at the traffic laws of the city of New York and anywhere else and you look at the IRS code, the traffic ordinances are larger and more complex. This decision has given the police unfettered, unchallengeable power to stop anyone they want. And certain African-American people in New Jersey are feeling the full brunt of that. They can't drive down the New Jersey Turnpike without either risking or in fact being stopped and shot at. The Supreme Court shoulders a great deal of the responsibility here as to why we're continuing to see the amount of discrimination that we have.

Now, I want to underscore in my closing remarks a comment that Tonya made. Is it conceivable in our country, with these tradi-

tions and with this history, that we can have a death penalty without race playing a role? My almost twenty years of work in this area persuaded me no. But at the same time, if we are going to have a death penalty, are there things that we can do to lessen this influence? And the answer is yes.

Just this last year the state of Kentucky, of all places, became the first jurisdiction in this country to pass a law called the Racial Justice Act. It's a very simple, very straightforward law. It says that if somebody charged with a capital offense can show that his or her prosecutor over a period of time has used race in his or her decisions to seek the death penalty or not, then that individual is entitled to a hearing to prove it.

Kentucky, I regret to report, is the only jurisdiction that has such a law. In every other state, if you can show mass discrimination like that, you are not entitled even to a hearing. This statute became law in Kentucky only because when the legislature looked to see how people got the death penalty, they saw that everyone, everyone on that state's death row was charged with killing a white despite the fact that year in and year out about 50 percent of the homicide victims in that state have been people of color.

What else can be done? In New Jersey, just earlier this week, the New Jersey Supreme Court held that in mixed-race cases where the victim and the defendant are of different races and there is a question of whether or not the defendant was the perpetrator, then the trial judge has to instruct the jury on the difficulties of making interracial identification. This will be an advance for accuracy in cases, and at least with regard to that question when that instruction is given, it will be a better day in New Jersey, not a worse one.

There are many rules like this that we could adopt that would lessen the influence of race, but tragically I can only report to you a very short list because by and large we are

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in, at least in the white community in this country, we are in a huge state of denial still about the influence of racial discrimination, and tragically the criminal justice system remains largely in the hands of whites.

**James Forbes:** I stand as a speaker here on the panel, but I do not stand alone. It's important for me on this occasion to indicate that my presence as a local pastor is largely due to the presence in my congregation of a group of people who have declared they will not rest until the issue we are discussing has been addressed in a substantive way.

[Many years ago] I was sitting at Union Seminary across the street in a course being taught by George Kelsey. The course was about his book, entitled *Christianity or Racism and the Christian Understanding of Man*. [His argument] was that the logic of racism is genocide. It does not mean that just being black you are going to die right off. But if the logic at the heart of racism is followed, [it will become] genocide. People raise the issue of race to ontological standards. It is the view as reflected in white supremacist understanding that whatever God was making in the cookie shop, that a batch of the cookies were spoiled and were burned and the burned [were] clearly not going to be fit to put on the table.

The ontological affirmation of the closeness of whiteness to godliness and the corresponding assertion that blackness is the opposite of godliness makes it possible to feel and think that

one is actually doing God a favor to participate in the elimination of the defective form of humanity which blackness is. This understanding, coupled with what is now obvious, that being white actually carries with it certain privileges which suggest that the white brand of humanity is clearly the definitive form next to the creator, such that whites themselves being so close to the creator can participate in the denigration of the significance and the worth of black presence and, by the way, the purpose here is not to offend. The purpose is to recruit. And the reason why I'm saying it as I am saying it is because there is a notion that whiteness is of a higher value than the other forms of human existence, a whole faith system to enact the claim of the superiority and the power-deserving quality and the controlling mechanisms of whiteness get all sorts of mechanisms operating all the time. It just so happens today that we are talking about the death penalty. And I am saying that the death penalty as it operates in America may really be applying to criminals all over the place. But the way it functions, it is an instrument



**Rev. James Forbes.**  
Photo by Delphine Fawundu

for living out the theology of the supremacy of whiteness along with God, who is also white.

The issue of racism is so volatile when you even name it that sometimes people even have to apologize for having called people racist. But the better term, the better term I understand, is tribalism and that connects with the second item that I want to mention. It was Erich Fromer who said that there comes a time when people are suspicious of those who are not of their

own tribe. Persons who have not eaten the same food, have not played the same music, have not spoken the same language are viewed as threatening. Which gets me to the heart of what I want to say today.

The most serious issue in America today so far as I can see is what I have come to call insecurity-itis. That is to say, there is an epidemic spread of insecurity. Poor people in the light of welfare reform think nobody cares for them. Rich folks in the light of the market that keeps on galloping and galloping, and they know that there is a curve and it ain't bell curve here, that bull will turn to bass sooner or later. And the ones who are at the top are insecure. When will the tremor actually be an earthquake of seismic levels 6, 7, or 8? And the middle folks think they are being squeezed. But something is happening in white Americans that carries with it such a fundamental insecurity about the capacity to sustain the hegemony and the power and the control that used to be the case, that it is now necessary to reinforce the walls which separate them and protect them behind gated communities on many different levels. And it results in the erosion of affirmative action, the

celebration of finally getting the welfare queen off the roll, of letting job situations begin to be much more racialistic in terms of the assignment of power, and it's a deep thing. The way I test it out is in many settings I ask folks who are black to say black is beautiful. And I'll ask you that. Everybody who is black say black is beautiful.

In a society where it is for some reason difficult for whites to celebrate their humanity under the rubric of their whiteness, you will expect that every instrument of social arrangement will have some tendency to reflect that either we would have to make a decision that we are going to live with folks that are not like us or we will consent, even if we were not the absolute perpetrators, to the steady erosion of the capacity of the other to generate power that people will have to deal with. Therefore the death penalty is a funny thing. Decent people, both black and white, have to make up their minds whether they are going to be willing to use a mechanism which inadvertently will reflect the desire for the power and the control of one group of people and the steady erosion of the power on the way to the elimination of the other. We know that that's ludicrous. Except the ludicrous is increasingly beginning to be what we observe on every hand.

Black and white people who do not want to use instruments that clearly perpetuate a sense of supremacy of some people over the other, and black and white people who are not any longer confident that they will be more secure as they quarantine themselves within the power arenas of their own making, have to make up their minds, because the culture is saying steadily that if white people

**(The way (the death penalty) functions, it is an instrument for living out the theology of the supremacy of whiteness along with God, who is also white. —Rev. James Forbes**



want to be in charge of things, they had better get together and begin to close the door. And there are blacks who also at times buy into the same ideology. And to be together and to be a society that is deciding that as black and white and Latin and Asian and Hispanic people we are going to work together, you can no longer assume that that is Americanism. That choice has to be made all over again, and for that reason the issue of the death penalty provides a good place to begin. To decide that we in the light of all of the data that's been spoken about here, that we want to live together, we want to work on the social and human problems we have got and we want to do it together and that the future of America is likely to be better served by somehow learning the difficult lessons of collaboration across the lines of class and race and religion. If you believe that together holds a better prospect for us than apart, then the death penalty provides an excellent way to say maybe we ought to consider that the death penalty does not provide the security that it promises. And that a greater prospect will come if we first of all decide no more death penalties until we can get somebody qualified to execute it.

My final remarks are humorous. I call it my bird story. It's a story of a soldier in a far-off region, a tropical region, who wanted to send his mother a gift. The only gift he saw in the shop that he could send was a tropical bird. So the mother received the bird and the son called and said, did you get the gift? She said, son, I got the gift. And the son says, did you like it? She said yes. The bird was delicious. Just delicious. And the son said, mom, that was a talking bird. You are not supposed to eat him. He said, the man said that this bird actually could speak four different languages. And the momma said, well, he should have said something.

Now, I challenge you, brothers and sisters. Either you are for togetherness or you are for apartheid. And if you are for togetherness when it comes to the death penalty, you should have said something.

### **Notes**

1. David C. Baldus, Charles A. Pulaski, and George Woodworth, "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," *Journal of Criminal Law and Criminology*, Vol. 74 (1983), p. 661.