

The Future of the Death Penalty: Do All Black Lives Really Matter?

If black lives matter, then eliminating death row as a vestige of institutionalized racism that marks American law will be a fitting legacy of George Floyd and those who march in his name.

BY MARK MACDOUGALL

I first noticed it in a South Carolina courthouse 20 years ago. Our client was on trial for capital murder, and the State was seeking the death penalty. The defendant as well as the victim were black. The prosecutors, the judge and most of the jury were white. But so were the two South Carolina defense lawyers and so am I—a partner in a Washington law firm.

Walking back to the defense table after a bench conference, I glanced at the burly African American deputy sheriff seated beside the door to the holding cell. We locked eyes, and he nodded. In capital murder trials the courtroom is heavily guarded. The deputies and police officers—black and white—were on the county prosecutor’s home team. They would mostly glare at the defendant and at us. We were the ones slowing down the process. I didn’t think about that nod for long—maybe just a small touch of Southern courtesies.

The next day it happened again. I finished a long cross-examination of one of the state’s experts and turned from the witness stand. Walking past that same deputy, I was sure that I heard a muffled “Amen.”

A few days later, as I finished my closing argument in the first part of the trial—to determine guilt or innocence—12 unimpressed citizens stared back at me. When I turned, momentarily blocking the holding cell from the view of the prosecutors, I glanced at the same black deputy. A thumb sprang up out of a massive fist and then disappeared as quickly.

I never had a real conversation with that deputy, and the trial ended with a death sentence in a chaotic courtroom.

There were several more trials in South Carolina, each involving a black defendant accused of a vicious homicide. There was a pattern—the nod, the smile, the occasional pat on the arm from African American law clerks, court reporters and police officers. I finally started to get the message. “Thanks for doing this,” they seemed to tell me. “But don’t be fooled—your client is black, and that’s why he is here.”

If there is a place in the American legal system that says loudly that black lives do not matter, that place is how we administer capital punishment. Only 12.7% of the U.S. population is African American, but in the 28 states that still sentence defendants to death, 41.6% of inmates facing capital punishment are black. The situation in the federal system—which has had the death penalty available since 1988—is substantially the same, with black inmates comprising slightly less than 42% of the population of federal death row in Terre Haute, Indiana.

Today, right now, in the only place in our constitutional system that empowers the government to



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lawfully take a human life—black lives matter a whole lot less than white lives.

The slow-motion killing of George Floyd was horrific in every way. The history of race in the United States is at the heart of that horror and of this moment of near-national consensus. But the same racial dynamic that was at work on that street in Minneapolis is played out daily in courtrooms throughout the United States—where a black defendant is nearly four times more likely to face the death penalty than a white person charged with the same crime, according to *Race and the Death Penalty*, published by the Capital Punishment Project of the American Civil Liberties Union. On June 28, the U.S. Supreme Court cleared the way to renewed executions by denying the petition of four federal inmates who are scheduled to die later this year (*Bourgeois, Alfred v. Barr*).

If black lives really do matter, we can begin to bring an end to a system in which the most fundamental human decision—life or death—is based largely on the color of a person's skin. That may not be as difficult as it first seems. Capital punishment has been on the road to natural extinction in the United States for a while. In 1999, a total of 279 defendants received death sentences in this country. By 2010, that number had fallen to 114. Last year only 34 death sentences were imposed in the United States, according to a Death Penalty Information Center fact sheet. Before Attorney



Demonstrators, including members of the anti-death penalty Abolitionist Action Committee and faith leaders, protest on the steps of the U.S. Supreme Court, marking the 40th anniversary of the first execution since the death penalty was reinstated, on Jan. 17, 2017.

General William Barr announced in July 2019 that the Trump administration had selected five federal inmates for execution, the death penalty had not been carried out in the federal system in more than 17 years.

Legal scholars may debate the reasons but, as this week's U.S. Supreme Court decision makes clear, the death penalty as an artifact of racism in America will not end in a courtroom any time soon. The only other way to begin the process of eliminating what Justice Harry Blackmun called in his 1994 dissent in *Callins v. Collins* "the machinery of death" from our national life is at the ballot box. For the first time in modern history, the presumptive presidential candidate of a major party—Joe Biden—has committed to seek the legislative elimination of capital punishment, starting with the federal death penalty. As we rename buildings and purge

Confederate symbols, the question of race and the death penalty should be asked of candidates at all levels—and should weigh on the minds of voters in November.

I don't know the name of that South Carolina deputy, but I hope he followed the case after the trial ended. In a unanimous decision in 2006, the U.S. Supreme Court reversed our client's conviction and vacated his sentence. He never returned to death row.

If all black lives matter, then eliminating death row as a vestige of institutionalized racism that marks American law and society will be a fitting legacy of George Floyd and those who now march in his name.

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