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RACE BIAS IN THE ADMINISTRATION OF THE DEATH PENALTY: THE FLORIDA EXPERIENCE

Hans Zeisel*

TWICE in the past fifteen years, federal courts of appeals have been urged to reverse death sentences on the ground that the death penalty was administered along racially discriminatory lines. The first time, in *Maxwell v. Bishop*,¹ a petitioner submitted data to show discrimination against black offenders. The second time, in *Spinkellink v. Wainwright*,² a petitioner submitted data to show bias against murderers of white victims. The *Spinkellink* data indicated that such offenders were substantially more likely to end up on death row than were murderers of black victims.

Both times, the courts refused to find proof of racial discrimination. Data that have since become available, provided by the criminal justice system itself, make it clear that both kinds of discrimination existed.

I. THE CHARGES OF BIAS

In 1972, in *Furman v. Georgia*,³ the Supreme Court invalidated virtually all of the death penalty statutes then in force, primarily on the ground that they failed to provide sufficient safeguards against the arbitrary infliction of capital punishment.⁴ All five of the Justices who supported this result expressed concern that the pre-1972 statutes were not being administered evenhandedly. Justices Douglas and Marshall explicitly suggested that the death penalty was being discriminatorily imposed against racial minority defendants.⁵ Justice

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¹ 398 F.2d 138 (8th Cir. 1968), *vacated on other grounds*, 398 U.S. 262 (1970).

² 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979). As noted by the court of appeals, the correct spelling of the petitioner's name is "Spenkelink," 578 F.2d at 582 n.1, and I will use that spelling when referring to the man.

³ 408 U.S. 238 (1972).

⁴ As the Court's wholesale reversal of death sentences in pending cases from other states indicated, its intent in *Furman* was to invalidate all state capital statutes in force in 1972. *See, e.g.,* Pope v. Nebraska, 408 U.S. 933 (1972) (mem.) (vacating Nebraska death sentence); Johnson v. Louisiana, 408 U.S. 932 (1972) (mem.) (vacating Louisiana death sentence); Stewart v. Massachusetts, 408 U.S. 845 (1972) (per curiam) (vacating Massachusetts death sentence); Moore v. Illinois, 408 U.S. 786, 800 (1972) (vacating Illinois death sentence).

⁵ 408 U.S. at 255-57 (Douglas, J., concurring); *id.* at 364-66 (Marshall, J., concurring).

Stewart said that "racial discrimination has not been proved" but that "if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race."⁶ Although the other two concurring Justices were silent on the subject of race, it is difficult to conceive that any Justice concerned with arbitrariness would knowingly tolerate a system of capital punishment in which race affects the decision who will live or die. Under the equal protection clause, which was written against the backdrop of the Civil War, differential sentencing based on race is obviously the ultimate affront to evenhandedness, the clearest example of arbitrariness in a legal sense.

Four years after *Furman*, the Court in *Gregg v. Georgia*,⁷ *Proffitt v. Florida*,⁸ and *Jurek v. Texas*⁹ allowed newly enacted state death penalty statutes to stand. The *Gregg* opinions said that "[o]n their face these [new] procedures seem to satisfy the concerns of *Furman*"¹⁰ and that, "[a]bsent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts."¹¹ The Justices declined to strike down the new laws, to quote Justice White's concurrence in the judgment, "on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner."¹² The data in the present study suggest that the Court's faith in the fairness of the system may be misplaced.

We begin with an observation about *Maxwell v. Bishop* and then go on to review the data presented in *Spinkellink* to show racial discrimination. *Maxwell* involved a claim that the death penalty was being inflicted with disproportionate frequency upon black offenders convicted of the rape of white

⁶ *Id.* at 310 (Stewart, J., concurring).

⁷ 428 U.S. 153 (1976) (upholding Georgia's death penalty statute).

⁸ 428 U.S. 242 (1976) (upholding Florida's death penalty statute).

⁹ 428 U.S. 262 (1976) (upholding Texas' death penalty statute).

¹⁰ 428 U.S. 153, 198 (1976).

¹¹ *Id.* at 225 (White, J., concurring in the judgment).

¹² *Id.* at 226. Pre-*Furman* statutes typically left the decision to impose the death sentence to the unguided discretion of the jury, which made the decision at the end of a single-stage trial on both guilt and penalty issues. The new statutes provide for bifurcated or two-stage trials; the jury's attention is directed first to the question of guilt or innocence and only afterwards to the appropriate sentence. During the sentencing stage, the jury's discretion in determining whether to impose the death sentence is limited by legislatively chosen factors deemed to aggravate or mitigate the defendant's crime. Finally, each of the states has adopted some form of appellate review of the propriety of each death sentence imposed.

victims. The Court of Appeals for the Eighth Circuit rejected the claim as unproved. It found unpersuasive the petitioner's evidence, which consisted of a study of the administration of the death penalty for rape in Arkansas over a twenty-year period.¹³ Yet when the results of that study were later cited by the petitioners in *Gregg*, the Solicitor General of the United States, in his amicus curiae brief supporting capital punishment, conceded that: "This is a careful and comprehensive study, and we do not question its conclusion that during the 20 years in question, in southern states, there was discrimination in rape cases."¹⁴ The Solicitor General then added: "The research does not provide support for a conclusion that racial discrimination continues, however, or that it applies to murder cases."¹⁵

We see here the beginning of what has since become a pattern — government officials admitting, after it no longer matters legally, that discrimination has affected capital sentencing and executions, but professing that such discrimination is all a matter of the past and that the current data are too scanty to support conclusions of continuing racial discrimination. The implication is that one has to wait for more executions before evidence of discrimination will be considered.

This brings us to John Spenkelnik. In the course of preparing Spenkelnik's case in Florida, Stephen D. Stitt¹⁶ and S. Kay Isaly¹⁷ serendipitously discovered a statistical pattern that had not been perceived before. In September 1977, when Spenkelnik's habeas corpus petition was argued before the United States district court in Tallahassee, Florida, there were 114 men on the Florida death row. Ninety-four percent of them had killed only white victims, two percent had killed white and black victims, and four percent had killed only blacks.¹⁸

This surprising statistic invited further analysis. The question was whether the racial discrepancy was caused by the

¹³ The study, conducted by Dr. Marvin E. Wolfgang and coworkers, was subsequently published. Wolfgang & Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS 119 (1973).

¹⁴ Brief for the United States as Amicus Curiae app. A at 5a, *Gregg v. Georgia*, 428 U.S. 153 (1976) (No. 74-6257).

¹⁵ *Id.*

¹⁶ Professor of Law, Holland Law Center, University of Florida, Gainesville, Florida.

¹⁷ Paralegal at Sheppard & Carithers, Jacksonville, Florida. Sheppard & Carithers has compiled a detailed record of the composition of the Florida death row. See *infra* note 18. The death row data cited in this Comment are based on that record.

¹⁸ Unpublished Data collected by Sheppard & Carithers, Jacksonville, Florida (1972-1981) (on file in Harvard Law School Library) [hereinafter cited as Sheppard & Carithers Data].

fact that murders of whites occur more frequently or are more often the heinous sort that justifies the death penalty — or whether the discrepancy was indeed caused by an unconscious or conscious belief that killing a white person is a more serious crime than killing a black one.

The overwhelming majority of the offenders on death row, 85 out of 114, were convicted of murders committed during the course of a felony such as rape, robbery, or burglary. These murders during felonies are similar enough to constitute an appropriate universe against which to compare the relative frequency of commitments to death row. Table 1 relates the number of arrests¹⁹ for homicides committed during a felony

TABLE I
FLORIDA ARRESTS FOR MURDERS DURING A FELONY AND
FLORIDA DEATH ROW POPULATION GROUPED BY RACE OF
OFFENDER AND RACE OF VICTIM²⁰

Race Offender — Victim	Arrests for Murders During a Felony	Offenders Reaching Death Row After 1972 and Before September 1977
Black — White	78 } 268	37 } 83
White — White	190 }	46 }
Black — Black	102 } 110	1 } 1
White — Black	8 }	0 }
Total:	378	84 ²¹

¹⁹ Arrests are the relevant statistic to consider here, because, as will be shown, *see infra* p. 466, the decision whether or not to impose the death penalty may be made at many different points prior to trial or conviction.

²⁰ See FBI Supplementary Homicide Reports (1976–1977) (on file at the Center for Applied Social Research, Northeastern University, Boston, Massachusetts) [hereinafter cited as FBI Homicide Reports]; Sheppard & Carithers Data, *supra* note 18. The FBI began compiling homicide arrest figures in January 1976. By the time of the *Spinkellink* hearing in September 1977, the FBI had recorded 189 Florida arrests for homicides committed during a felony. Because the Florida death row population as presented in this table derives not from these recorded 21 months, but from a period roughly twice that long, I have estimated the approximate number of arrests by doubling the FBI numbers from the available 21-month period.

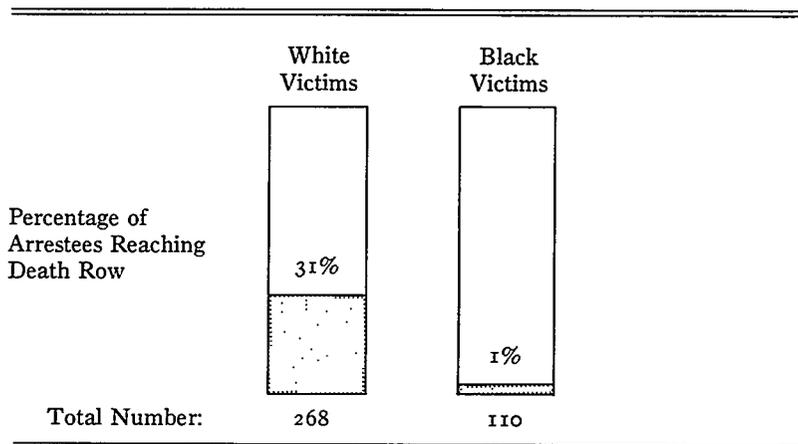
Three remarks are in order. First, such doubling is justified by the fact that the distribution of murder arrests by race of victim and offender remains fairly constant, as the FBI Homicide Reports make clear. Second, this doubling does not affect the position of the four victim-offender race combinations with respect to their relative likelihood of reaching death row. Third, the doubling of the numbers approximates the likelihood that a person arrested for murder during a felony will end up on death row. Because it is only an approximation, however, I have used the term “ratio” in Figures 1 and 2 and not “likelihood” or “probability.”

²¹ In addition, two offenders, one black and one white, had killed both a white and a black victim.

to the respective numbers of offenders on death row in four race-of-offender and race-of-victim combinations.

The data in Table 1 suggest that the victim's race makes a difference in the likelihood of receiving a capital sentence. Figure 1 expresses these data in percentage terms.

FIGURE 1
RATIO OF OFFENDERS ON FLORIDA DEATH ROW TO ARRESTEES
FOR MURDER DURING A FELONY, BY RACE OF VICTIM



The ratio of offenders on death row to arrestees for murder during a felony is thirty-one percent for murderers of white victims as compared to one percent for murderers of black victims, a ratio of 31 to 1. Figure 2 breaks down the data in Figure 1 into the four race-of-offender and race-of-victim combinations.

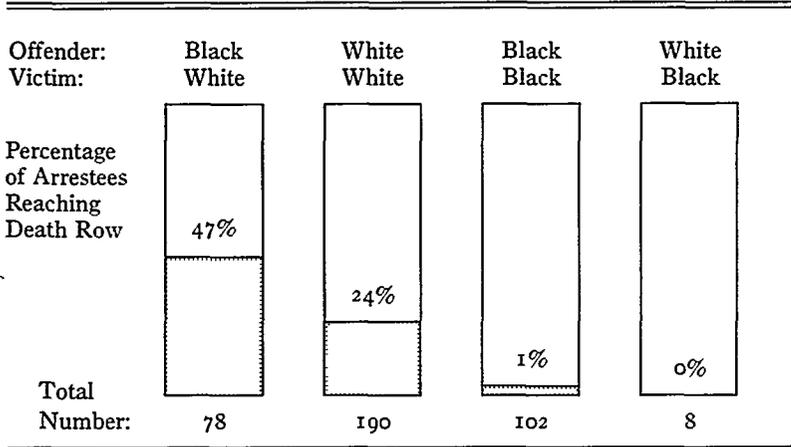
Forty-seven percent of the black defendants arrested for murdering a white victim were sent to Florida's death row; only twenty-four percent of the white defendants arrested for murdering a white victim received the same sentence. When both the victim and offender were black, the ratio sank to one percent. There were no white persons on death row for killing only a black person; there had never been such a person on Florida's death row in living memory.

These data, strongly suggesting the effect of race upon administration of the death penalty, were presented to the *Spinkellink* federal district court with the following comments:

- (1) There is a widely-held sentiment that killing a black person (particularly since the killer is usually also black) is not quite as serious a crime as killing a white person; it is indeed a standard argument of defense lawyers in the sentencing phase of trials for a violent crime by a black

FIGURE 2

RATIO OF OFFENDERS ON FLORIDA DEATH ROW TO THE NUMBER OF FLORIDA ARRESTS FOR MURDER DURING A FELONY, BY RACE OF OFFENDER AND RACE OF VICTIM



offender upon a black victim to ask for leniency because "among black folks violence is a more accepted way of life."

- (2) The statistics provide prima facie evidence of bias, strong enough to suggest that the burden of proving that no such bias exists should shift to the prosecutor. He should be required to show that the statistical discrepancy is the result of some factor other than bias.²²

Neither the district court²³ nor the Fifth Circuit court of appeals was impressed; the Fifth Circuit dismissed the argument, saying: "The allegation that Florida's death penalty is being discriminatorily applied to defendants who murder whites is nothing more than an allegation . . ." ²⁴ And in due course John Spinkellink went to the electric chair.

II. A SEEMING DETOUR: THE DR. SPOCK EFFECT

Before proceeding further, we shall make what may seem a detour. That detour, however, will aid our understanding of what follows.

When Dr. Benjamin Spock was tried in 1969 before Judge

²² See Transcript of Evidentiary Hearing at 203-04, 277, 296, Spinkellink v. Wainwright, No. 77-0895 (N.D. Fla. Sept. 21, 1977).

²³ Spinkellink v. Wainwright, No. 77-0895 (N.D. Fla. Sept. 23, 1977).

²⁴ Spinkellink v. Wainwright, 578 F.2d 582, 613 (5th Cir. 1978).

Ford in the federal district court²⁵ in Boston for conspiracy to violate the Military Service Act, there were only nine women in the 100-member jury venire from which the eventual jury was chosen. The two women who reached voir dire were an easy prey for the prosecutor's preemptory challenges, and Dr. Spock was tried before an all-male jury and convicted. Of all defendants, Dr. Spock, who had given wise and welcome advice on childrearing to millions of mothers, would have liked to have seen women on his jury.

Nine women out of 100 persons seemed to me at the time an odd draw from a jury box containing 350 names, alleged to have been randomly selected from voter lists on which women were in the majority. Puzzled, I began to investigate Judge Ford's jury selection methods.²⁶

The investigation revealed that twenty-nine percent of the 350 persons in the jury box had been women. The difference from the more than fifty percent proportion of women on the voter lists was explained during pretrial testimony by the clerk of the court, who admitted that he had violated the rules of random selection by skipping some of the female names. He defended the practice by saying that in his experience women were so much more often excused than men that it was prudent to have fewer of them invited in the first place.²⁷

The odds against drawing only nine women by chance out of 100 names from a pool that contained twenty-nine percent of women remained substantial. Still, these were only odds; anything was possible. The next step in the investigation, however, revealed odds so high that for all practical purposes chance was excluded as an explanation for Judge Ford's poor yield of women. When I examined the jury venires of Judge Ford in earlier trials, the same curious discrepancy emerged. As Figure 3 shows, although the venires of the other judges normally centered around the true twenty-nine percent average for women in the jury box, Judge Ford's venires centered around an average of fourteen percent.

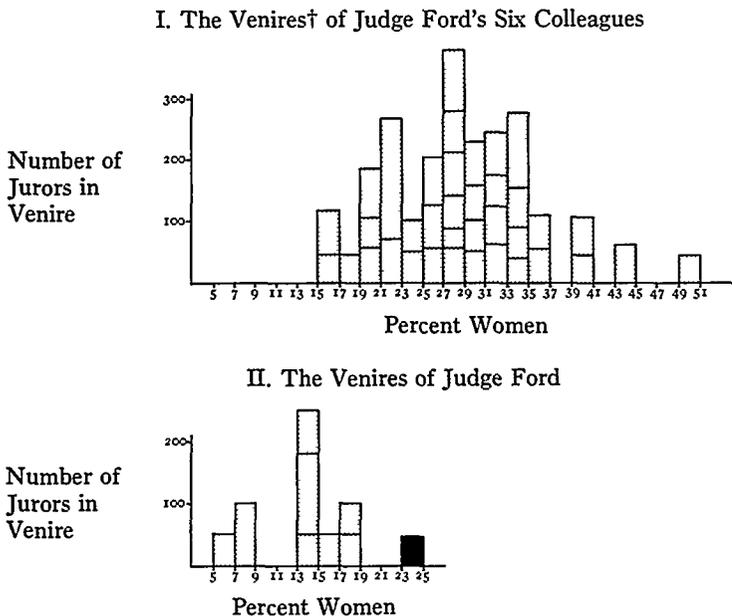
The likelihood that chance accounted for such consistent discrepancies in the proportion of women jurors in the venires of Judge Ford and those of his colleagues is microscopic. Still, even these were only odds. But then came the event that removed the last remnant of doubt, if there was any, that Judge Ford had improperly manipulated jury selection. After

²⁵ *United States v. Coffin*, Crim. No. 68-1-F (D. Mass. 1968), *vacated sub nom. United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).

²⁶ See Zeisel, *Dr. Spock and the Case of the Vanishing Women Jurors*, 37 U. CHI. L. REV. 1, 1-18 (1969).

²⁷ See *id.* at 2, 9.

FIGURE 3
DISTRIBUTION OF JURY VENIRES ACCORDING TO THE PERCENT OF
WOMEN IN THE VENIRES²⁸



† Horizontal lines in bars separate individual venires.

Judge Ford learned of my investigation, he selected a venire for his next trial. The black square in Figure 3 indicates the proportion of women jurors in that venire. It was twenty-four percent, the first of Judge Ford's venires in which the proportion of women was within the normal range around the average of twenty-nine percent.²⁹

From that time on, Judge Ford's selections of jury venires lost their peculiarity. But by mending his ways, he completed the proof that the drawing of prospective jurors for his court had been improper. First, there was the highly improbable

²⁸ Venire lists of the Federal District Court of Massachusetts (1966-1968) (collected by Hans Zeisel), *discussed in Zeisel, supra* note 26.

²⁹ By the time these data were ready for presentation to the courts, Dr. Spock had already been convicted and the case was on appeal. An effort by his lawyers to obtain an interview with Judge Ford remained unsuccessful. The data were then submitted in affidavit form to the court of appeals, which had the memorandum sealed. Eventually, the court of appeals reversed Dr. Spock's conviction on first amendment grounds, *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969), so that the selection of his jury became a moot issue.

statistical anomaly. Then came the removal of the anomaly once it was known to be under critical scrutiny — a plain admission of impropriety. This two-step proof — we called it the Dr. Spock effect — might deserve a place in the law of evidence.

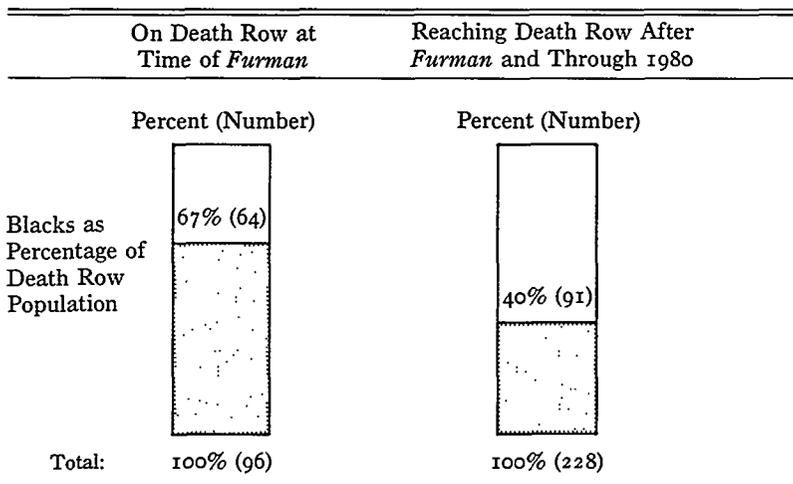
III. THE ADMISSION

We now return to our story of the administration of the death penalty and to the data that emerged from Florida, first at the time of *Furman* and then after *Spinkellink*.

State officials had hotly denied that the figures submitted in *Maxwell* and *Spinkellink*,³⁰ and similar data presented to the Supreme Court in the *Furman* briefs, demonstrated racial discrimination. Here then, in Figure 4, are the proportions of black offenders on death row first at the time of *Furman* and then during the years following *Furman* (1973 through 1980).

At the time of *Furman*, sixty-seven percent of the persons on Florida's death row were black; during the eight-and-a-half years that followed, only forty percent of the offenders who were sent to death row were black.

FIGURE 4
PROPORTION OF BLACKS ON FLORIDA'S DEATH ROW AT THE TIME OF *FURMAN* IN 1972 AND DURING THE EIGHT-AND-ONE-HALF YEARS THEREAFTER³¹

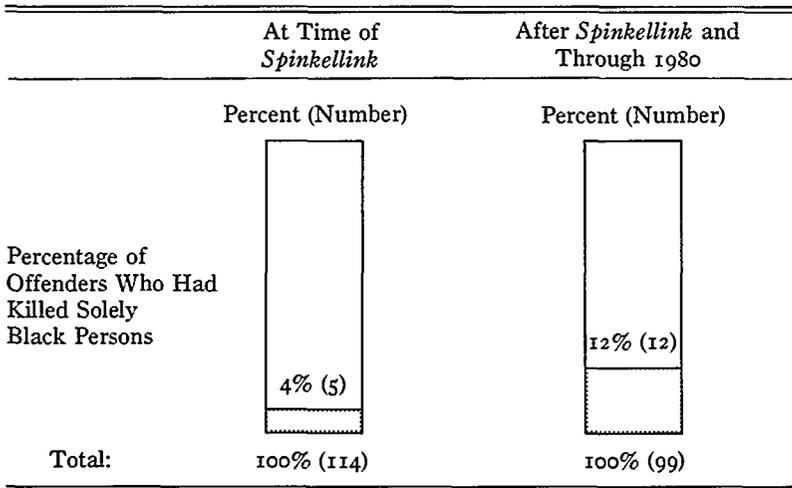


³⁰ See, e.g., Brief for Respondents at 60-66, *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) (No. 77-2940); Brief for Respondent at 7-17, *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968) (No. 18746).

³¹ Sheppard & Carithers Data, *supra* note 18.

The story of the second bias, which the courts at the time considered an unproven allegation, is essentially the same, as shown in Figure 5. The proportion of offenders on death row who had killed black victims rose from four percent at the time of *Spinkellink* to twelve percent during the following three years.

FIGURE 5
 PROPORTION OF OFFENDERS ON FLORIDA'S DEATH ROW WHO
 HAD KILLED SOLELY BLACK PERSONS AT TIME OF THE
SPINKELLINK HEARING IN 1977 AND DURING THE THREE YEARS
 THEREAFTER³²



Some of the details of this “reform period” in the administration of the Florida death penalty are illuminating. Figure 2 above shows that the likelihood before September 1977 that a white offender who had killed only a black victim would reach death row was exactly zero. In an obvious effort to correct the imbalance, Florida prosecutors have recently demanded the death penalty in two such cases. In one case, the defendants, who had no major criminal records, had killed a clerk during the holdup of a convenience store. The public defender had asked the jury, “If we kill for this, what do we do for career criminals, torture murderers?”³³ In rediscovered fervor, the prosecutor told the all-white jury in the sentencing phase of that trial: “Our founding fathers talked about equal

³² *Id.*

³³ Florida Times Union, July 3, 1980, at B3, col. 3.

justice and today you have a chance to say we have equal justice The case is crying out for justice to be done."³⁴

The jury understood and recommended the death penalty. Subsequently questioned by a reporter, the prosecutor denied "that race played a part in the trial."³⁵ The judge who presided over the trial did not accept the jury's recommendation and sentenced the defendant to life in prison.³⁶

In the second case, William Middleton, a white man, had killed an elderly black woman following an argument. He was put on trial in September 1980. Again, the prosecutor demanded the death penalty. This time jury and judge agreed, and Middleton became the first white offender in memory to enter Florida's death row for the crime of killing solely a black victim.³⁷

IV. TENTATIVE EXPLANATIONS

The foregoing data have shown that a defendant's chance of going to death row has been affected by the race of his victim and by his own race. There remains the intriguing task of explaining this differential treatment. I offer here for further study a number of tentative explanations that focus on the role of the prosecutor. I concentrate on the role of the prosecutor, and not on the role of the judge or jury, because the prosecutor has overpowering control over the flow of offenders to death row. His power stems from three crucial opportunities to intervene in the criminal process. First, he formulates the charge that determines whether or not the death penalty is permitted if a conviction is obtained. Second, the prosecutor has almost unbounded discretion to offer a life sentence in exchange for a guilty plea in cases for which capital punishment is possible. Third, even after conviction at trial the prosecutor may or may not demand the death penalty, or may demand it only perfunctorily. Jury and judge come into play only if the prosecutor, by his first three decisions, invites them to participate in the process.

(1) One explanation centers on the prosecutor's concern for managing his caseload in a manner that will maximize public acceptance. Trying a capital case is an onerous, time-consuming, and costly job for the prosecutor. When his calendar is

³⁴ Jacksonville J., July 3, 1980, at 10, col. 1.

³⁵ *Id.*

³⁶ State v. Graham, No. 80-43-CF (Nassau County Ct., Fla., Sept. 25, 1980).

³⁷ State v. Middleton, No. 80-3289 (Dade County Ct., Fla., Sept. 25, 1980). I could not help noting that the judge who refused to follow the jury's recommendation was black; the judge who concurred with the jury's view on the death penalty was white.

crowded, he might consider avoiding trial by offering a life sentence for a guilty plea. If a case has received little publicity, even a community eager to punish such crimes by death would not criticize the prosecutor for accepting a life sentence. Such a case is more likely to involve a victim who is a member of a racial minority because the press, and thereby the community, is less likely to pay attention to a minority-victim case.

In addition, more blacks than whites are opposed to the death penalty.³⁸ When a member of a racial minority is the victim, in over ninety percent of the cases the offender is also a minority group member. Given the lack of sympathy for the death penalty among blacks, allowing such a defendant to plead guilty with a life sentence is unlikely to offend public opinion. Public opinion is more likely to be aroused if the victim is white, especially since roughly one-half of the murders of white persons are committed by minority members; these cases are likely to receive greater media attention, making it more difficult for the prosecutor to offer a deal.

(2) The second possible explanation is less generous. The prosecutor may have a racial bias that affects his decision to seek the death penalty. The grim lawyers' joke about the law of homicide in Kentucky might also have roots in other states:

If a black man kill a white man, that be first degree murder; if a white man kill a white man, that be second degree murder; if a black man kill a black man, that be manslaughter; but if a white man kill a black man, that be excusable homicide — unless a woman was involved, in which case the black man died of apoplexy.

(3) Finally, there is the explanation proposed by the French sociologist Durkheim that the crossing of social boundaries into tabooed areas within a society invokes the society's most punitive and repressive responses.³⁹ In American society there are some low-status whites and a few high-status blacks. But race is a key determinant: most blacks are low status on grounds of race alone. Therefore, if the death penalty is reserved for the most tabooed border crossings — the low-status person's crime against the high-status person — the expected pattern will be exactly what we see: virtually no death sentences for the murders of blacks (because black victims are generally low-status); some death sentences for murders of

³⁸ The Gallup polls in recent years consistently show the proportion of white persons who favor the death penalty to be roughly twice as high as the corresponding proportion among blacks. See Zeisel, *The Deterrent Effect of the Death Penalty: "Facts v. Faith,"* 1976 SUP. CT. REV. 317.

³⁹ See E. DURKHEIM, ON THE DIVISION OF LABOR IN SOCIETY (G. Simpson trans. 1947).

whites by whites (where the victims are high-status but the defendants are low-status whites — outlanders, riffraff, white trash); and a still higher proportion of death sentences for the murder of whites by blacks.

V. CONCLUSION

Whatever the explanation, none excuses the documented differential treatment; each explanation only confirms the treatment's racial character. Instead of denying the significance of the pattern, the courts should ask prosecutors to show, if they can, how this pervasive pattern of differentiation is justified in light of *Furman* and the Constitution.

Prosecutors may try to present the post-*Spinkellink* statistics as proof that they have put their house in order, whatever injustices may have been committed earlier. They may claim that their hands are now sufficiently clean and that there is no reason for further concern. That argument should not be accepted in view of the consistent pattern, revealed in this Comment, of official denial of bias followed by changes that tacitly admit that very bias. First, the prosecutors were confronted with proof of racial offender-bias. After vigorously denying its existence, they set out to reduce it. Next, the prosecutors were confronted with proof of racial victim-bias. Again they denied its existence, only to acknowledge it by subsequently changing their ways. Yet these changes in no way guarantee that the racial bias has ended. The changes have been in the direction away from bias, but it is highly unlikely that bias has been eliminated. Whether the changes have been more than cosmetic is a subject that will require further inquiry.

In the process of responding to these charges of bias, moreover, the prosecutors have proved a general and more damaging proposition: namely, that they can change the character of the death row population at will and that their discretionary power to determine the death row population is not within any legal boundaries.

This Comment has dealt only with evidence of racial bias, because that bias is at the center of the law's concern and would seem to be most easily discoverable. Yet the serendipitous character of the discovery of the racial victim-bias makes clear that other inequities are bound to emerge in due time or, worse, remain undiscovered.

There simply is no way to ensure the evenhanded administration of the death penalty. That alone should be sufficient reason for its abolition.