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Michael Fraser  
*Western Connecticut State University*

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# Crime for Crime: Racism and the Death Penalty in the American South

Michael Fraser

In his seminal 1903 work, *The Souls of Black Folk*, W.E.B. Du Bois stated: “The problem of the twentieth century is the problem of the color line” about the future of America.<sup>1</sup> This statement was more prophetic than Du Bois himself could ever have imagined. Race relations were brought to the forefront of American culture in the twentieth century; indeed there had never been a time when the color of one’s skin bore greater significance. It goes without saying that many institutions, as evidenced throughout America, have progressed towards racial equality: there are now teachers, mayors, doctors, and a United States (US) President of color. However, there is one crucial institution that despite years of social activism and progress is still burdened by the heavy yoke of discrimination. The criminal justice system is the one part of American society that has been least affected by the social progress that has virtually transformed other areas of society. Nowhere within the criminal justice system is this lack of progress more evident than in the practice of the death penalty. Furthermore, nowhere in the US is this inertia more evident than in states south of the Mason-Dixon Line. Yet the justice system has remained viciously inert in the face of the seemingly overwhelming momentum of equality that has plowed through American politics, culture, and society in the last fifty years. This defiance of popular sentiment must be eradicated. Educating people about the futility and corruption that is rife within the application of the death penalty in the American South must become a social imperative.

Since the US Supreme Court reinstated the death penalty in 1976 there has been 1,188 executions in the US; 80 percent of which have taken place in southern states, 46 percent in Texas and Virginia, and a jaw-dropping 37 percent in Texas alone.<sup>2</sup> One would be hard pressed to find a more pernicious and universally corrupt institution in modern America than the death penalty, with its usage based upon an archaic system of white supremacy, control and legal ineptitude. To find evidence of the racial disparity in the death penalty’s application in the South one need not look much further than a history textbook.

## From Slavery to the Killing State: The Death Penalty in Southern History

There is no need to be reminded of the 250 years of race-based chattel slavery endured by African Americans in this country. In March 2008 Senator Barack Obama stated, “This nation’s original sin of slavery,” is the antecedence for the death penalty as it is used in the modern American South.<sup>3</sup> Without a doubt, American slavery was the cruelest and most inhumane labor system ever devised by humankind, the sheer horror of it cannot accurately be described by words alone. In a social sense, American slavery was more than just a labor system. It was the scaffolding that supported a complex and unjust racial hierarchy. Through the shackles of bondage and by unerringly subjecting blacks to debasement, labor, and torture, whites were able to assert themselves as the dominant race in America. There is an indelible connection between the pervasiveness of the death penalty in the southern states today and the reprehensible institution that served as the foundation of those states 150 years ago. The Civil War and the subsequent emancipation of four million Southern slaves threatened to turn the racial hierarchy upon its head. The judicial system had always augmented white hegemony in the South; but after the war, Southern whites were fearful Northern influence would disrupt the established order of their society, and for a time that was exactly what happened. From 1865 to 1877, the South was still occupied by Northern troops, which was a period of American history known as Reconstruction. During this brief ten-year period, there were 333 executions in the Southern states.<sup>4</sup> However, after Reconstruction African Americans were once again subjected to the Southern white supremacist regime. During the time period from 1877 until 1945, excluding lynching, there were over 5,000 executions in the Southern states, or approximately five per month. Roughly four out of five of those executed in the South during this time period were African American.<sup>5</sup> With their system of absolute control now gone, Southern whites were forced to utilize another tool to exercise oppression: the criminal justice system. In particular, the death penalty provided them with precisely the tool for which they were looking. The cor-

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<sup>1</sup> W.E.B. Du Bois, *The Souls of Black Folk* (Boston, MA: Cambridge University Press, 1903).

<sup>2</sup> Amnesty International, “Death Penalty,” *Amnesty International USA*, January 2010, [www.amnestyusa.org/abolish](http://www.amnestyusa.org/abolish) (accessed March 15, 2010).

<sup>3</sup> Barack Obama, *Organizing for America: His Own Words*, March 18, 2010, <http://my.barackobama.com/page/content/hisownwords> (accessed March 15, 2010).

<sup>4</sup> Howard W. Allen and Jerome M. Clubb. *Race, Class, and the Death Penalty: Capital Punishment in American History* (Albany: State University of New York Press, 2008).

<sup>5</sup> *Ibid*, 69.

relation between the end of the Northern occupation of Southern states and the rise in the execution of African Americans is irrefutable proof of the racism inherent in the institution of capital punishment.

### **Southern Justice: The Death Penalty Today**

The American South is almost 50 years removed from the Jim Crow Era and almost 150 years removed from institution of slavery. The general consensus is that America is now a post-racial society; the last vestiges of slavery and institutional racism were purged from America with the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. A quick review of the facts surrounding the death penalty causes one to find that this is simply not true. Case in point: Harris County, Texas, according to a 1994 study, has sent blacks to death row twice as often as whites and has accounted for more executions than most states.<sup>6</sup> As big as Texas is, it still seems absurd that one county would be responsible for so many deaths, especially considering the racial makeup of the county. According to United States Census information from 2008, Harris County is 73.5 percent white and 18.7 percent African American.<sup>7</sup> The people of Harris County need not worry, although they are driving this metaphorical bus, they are not alone.

A study performed by the Florida Supreme Court Racial and Ethnic Bias Study Commission in 1991 said, "The application of the death penalty in Florida is not colorblind, inasmuch as a criminal defendant in a capital case is, other things being equal, 3.4 times more likely to receive the death penalty if the victim is white than if the victim is an African-American."<sup>8</sup> Even though the Florida study makes little distinction in regard to the race of the defendant, it is still significant in that it brings to light a few very important facts. First, those that execute justice: judges, juries, prosecutors, etcetera are human and not without flaws. In the case of a juror, although it is in his or her mandate to leave any prejudices or preconceived notions out of the courtroom there is simply no way to guarantee that such a thing will happen. In his essay, *Traces of Slavery*, Stuart Banner asserts that since the moratorium on executions was lifted in 1976; many states have updated their death penalty statutes in order to lessen the racial disparity. As a result of the Civil Rights movement of the 1960s, and subsequent congressional legislation, African Americans are now more equally represented in the composition of juries, thus leading to less racism in the application of the death penalty.<sup>9</sup> In the case of judges and prosecutors, when human beings are responsible for carrying it out, it is impossible to ensure that justice is truly blind. An important aspect of the courtroom scenario is that, in many cases the prosecutor, judge, and many members of the jury are white. Despite Civil Rights legislation, it is still common for the defendant to be the only person of color in front of the bar of the court.<sup>10</sup>

Second, the findings of the Florida Commission also shed light upon the importance of the victim's race in the application of the death penalty. This fact is extremely important whenever the intersection of race and the death penalty are discussed. Statistics referring to the race of the victim show an alarming disparity. "Although African Americans are the victims in half of the murders that occur each year, in the United States, 85 percent of the condemned were sentenced to death for the murders of white persons."<sup>11</sup> There are countless cases in many states throughout the South that indicate blatant racial discrimination taking place in the courtroom. There is a case in Georgia, in which the prosecutor and the judge consistently referred to the defendant as "colored" or that "colored boy."<sup>12</sup> Through signed affidavits by the jurors another Georgia case mentions racial slurs being used by jurors during deliberations. After these two trials, this information was presented to federal courts on appeal and in both cases the death sentence issued during the trial was upheld.<sup>13</sup>

<sup>6</sup> Stephen B. Bright, "Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty," *Santa Clara Law Review* (Santa Clara University) 35 (1995): 434.

<sup>7</sup> United States Census Bureau, *Harris County QuickFacts from the U.S. Census Bureau*, 2008, <http://quickfacts.census.gov/qfd/states/48/48201.html> (accessed May 10, 2010).

<sup>8</sup> Florida Supreme Court Racial and Ethnic Bias Study Commission, "Public Information: Court-Related Public Documents," *Florida Supreme Court*, 1991, [http://www.floridasupremecourt.org/pub\\_info/documents.shtml](http://www.floridasupremecourt.org/pub_info/documents.shtml) (accessed May 10, 2010).

<sup>9</sup> *Ibid.*, 109.

<sup>10</sup> Stephen B. Bright, "Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty," *Santa Clara Law Review* (Santa Clara University) 35 (1995): 12.

<sup>11</sup> *Ibid.*, 2.

<sup>12</sup> *Ibid.*, 13.

<sup>13</sup> *Ibid.*, 15-16.

Another scenario not brought to light by the Florida Commission but still related to the findings, is best exemplified by the case of Leo Edwards. Edwards' case takes place in Jackson, Mississippi. At the time of Edwards' trial, the city of Jackson was within the territory of district attorney Ed Peters. Mr. Peters had publicly announced that he made sure to do all that he could to remove African Americans from the pool when he selected a jury. Mr. Edwards, an African American, was on trial for murder and was sentenced to death by an all white jury. Jackson, Mississippi is in a county that is 34 percent African American.<sup>14</sup> Should not the composition of the jury be representative of the population? If it were, Mr. Edwards' jury should have been comprised of roughly four African Americans. Mr. Edwards' sentence was upheld on appeal and he was subsequently executed by the state of Mississippi in 1989.<sup>15</sup> The scars of the death penalty, and the racism intrinsic within it, have fundamentally flawed the façade of the criminal justice system in the American South. Dixie is still uncomfortably close to the days of legal lynching and black bodies hanging from the poplar tree. Southern justice has not changed all that much; it has only traded in the noose for the electric chair.

### **Race, the Death Penalty, and Activism: A Brief Synopsis**

Death penalty activists have been trying for years to abolish the death penalty for a myriad of reasons. They have fought this battle with their statistical knives, rhetorical guns, and moral cannons. However, in the American South, racism is the one significant topic that is often overlooked or pushed aside in most death penalty discourses. Stuart Banner, in his essay *Traces of Slavery*, maintains that most modern abolition activists do not see racism as a valid criticism of, or substantial reason for abolishing, the death penalty. Instead, it is merely a rhetorical weapon to be added to their argumentative arsenal.<sup>16</sup> The resignation of the race argument to the proverbial back burner should not be overlooked. Is it representative of a sea change within the abolition movement, or more likely, a collective apprehension to openly discuss race? Once again the history of the death penalty in the American South may contain answers. The fight for abolition of the death penalty came to prominence as a derivative of the Civil Rights movement of the 1960's and 1970's.<sup>17</sup> Led by the National Association for the Advancement of Colored People (NAACP), specifically the NAACP Legal Defense Fund, the abolitionist movement of the 1960s and 1970s effectively argued that race was the wellspring of corruption in the use of the death penalty, basing their entire campaign on racial discrimination. Stuart Banner has stated, "It was race that lurked beneath the Court's decision in *Furman v. Georgia*, finding capital punishment unconstitutional."<sup>18</sup> This is evidence that the death penalty will never be abolished using moral arguments alone. In fact, it could be seen as support for a position that moral arguments have no place within the discourse surrounding abolition. The presentation of evidence purporting that the death penalty is racist led to the only moratorium on executions our country has ever seen. This fact cannot be overlooked. It must be once again brought to the forefront of the death penalty debate. This is evidenced by the NAACP Legal Defense Fund's quarterly study of death row in America. According to this study, as of October 2009 there were 3,263 inmates on death row in America. Of those on death row, approximately 44.35 percent are white and 55.63 percent are non-whites. Of the non-whites, approximately 41.53 percent are African American.<sup>19</sup> Yet according to U.S. Census Bureau data from 2008, African Americans account for approximately 12.8 percent of the population.<sup>20</sup> Percentage wise, the African American population on death row is almost four times greater than the population on the outside. If that fact is not enough evidence that race should be at the center of the death penalty debate, then nothing is.

### **Conclusion**

There are two questions that must be answered whenever the death penalty in the American South is discussed. First, is it morally justifiable to kill someone in order to teach that killing is wrong? This argument tackles the morality of the death pen-

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<sup>14</sup> Ibid, 16.

<sup>15</sup> Ibid, 41.

<sup>16</sup> Stuart Banner, "Traces of Slavery: Race and the Death Penalty in Historical Perspective." From *Lynch Mobs to the Killing State: Race and the Death Penalty in America*, pp.109 -110 (New York: New York University Press, 2006).

<sup>17</sup> Howard W. Allen and Jerome M. Clubb. *Race, Class, and the Death Penalty: Capital Punishment in American History* (Albany: State University of New York Press, 2008).

<sup>18</sup> Ibid, 108-109.

<sup>19</sup> Deborah Fins. *Death Row U.S.A. - Fall 2009*. Quarterly Study, NAACP Legal Defense Fund, National Association for the Advancement of Colored People (NAACP) (New York: NAACP, 2009), 1.

<sup>20</sup> United States Census Bureau, *USA QuikFacts from the Census Bureau*, 2008, <http://quickfacts.census.gov/qfd/states/00000.html> (accessed May 11, 2010).

alty, as a form of punishment, and by itself is not strong enough to ensure abolition. The abstract nature of this moral question disallows empirical manifestation; therefore, abolition by this means is an exercise in futility. A discussion of this nature will inevitably reach an insurmountable impasse. This is because the moral questions regarding the death penalty unfortunately are without answers. The second question addresses the death penalty in practice. Is the death penalty racially non-discriminatory as it is practiced in the American South today? This question creates a socio-cultural discourse on the death penalty that could ultimately be the vehicle of abolition. The role of the racial inequity argument in the death penalty discourse is paramount. Not only is this argument more convincing than any moral one could ever be, but it is also fundamentally stronger because it is supported by 350 years of history.

Our history shows that the death penalty in this country is the last bastion of an inequitable system of “southern justice,” historically comprised of unfair punishments, public hangings, and lynch mobs. The death penalty as it is practiced today, is an affront to civil, political, and human rights in this country, and simply cannot be allowed to continue. How much longer will the American people allow their government to trade crime for crime?

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