

Racial Disparities in the Application of Capital Punishment

A core principle of the US justice system, enshrined in the Constitution, is equal treatment under the law. The death penalty in the US, however, time and again has failed to live up to this principle.

A History Plagued by Racial Bias

In 1972, the US Supreme Court declared the death penalty, as implemented, to be unconstitutional. Part of the motivation for this decision was the stark racial bias present in the death penalty during the Jim Crow era.

- When some states still allowed the death penalty for rape, it was reserved almost exclusively for African-Americans. Between 1930 and 1967, 455 individuals were executed for rape—90% were black defendants convicted of raping white women.
- Before 1972, over 50% of individuals executed in the US were minorities.
- In a case that garnered international attention, an all white jury in Alabama sentenced Jimmy Wilson to death in 1958 for stealing \$1.95 (Wilson ultimately avoided execution).

Failure to Correct an Injustice

One of the most significant challenges to the death penalty that came to the Supreme Court after it reinstated the death penalty in 1976 was the case *McCleskey v. Kemp* (1987).

- A statistical analysis presented to the Court found that, in Georgia, defendants charged with killing white victims were 4.3 times more likely to receive a death penalty than defendants charged with killing black victims.
- The Court did not question the pattern of racial disparities in the death penalty, but in a close 5-4 decision upheld the constitutionality of the death penalty unless intentional racial bias is demonstrated in a specific case (which is often difficult to prove).
- The troubling implication of *McCleskey v. Kemp* is that, even when a life is on the line, systemic racial disparities in the criminal justice system are to be tolerated and are compatible with the Constitution.

Former Chief Justice Lewis Powell was part of the slim majority voting to uphold the death penalty in *McCleskey*. Here is Justice Powell's response when asked if there was any case that he would change his vote on: "Yes, *McCleskey v. Kemp*."

"The simple matter is that the death penalty has an extensive history of overt bias. As America has been reshaped, thanks in part to the civil rights movement, many laws have since been repealed or reformed that once permitted conspicuous racism within the justice system....While the U.S. has taken great strides, we still have not been able to banish the bias that permeates the justice system."

Arthur Rizer and Marc Hyden, R Street Institute, in "The American Conservative", Nov-Dec. 2018

Racial Disparities Persist

Tinkering by the courts and legislatures with death penalty statutes has failed to eliminate the racial bias that has plagued the death penalty throughout its history in the US.

- Nationwide, murder victims are white 50% of the time. In capital cases ending in an execution, however, the victim is white 76% of the time. That means that prosecutors are more likely to seek the death penalty when the victim is white, implying that some lives have more value than others in the justice system.
- In some jurisdictions, blacks continue to be statistically more likely to receive the death penalty than whites. A Department of Justice review of the federal death penalty found that 72% of defendants approved for death penalty prosecution were minorities.
- A disproportionate percentage of minorities are wrongfully sentenced to death. Of the 164 inmates exonerated since 1973, 102 are minorities. That is 62%. These wrongful convictions sometimes result from mistaken cross-racial eyewitness identification which studies show to be particularly unreliable.

“What...[if] Germany was executing people, especially if they were disproportionately Jewish?... It would be unconscionable. And yet, in this country, in the states of the Old South, we executed people—where you’re 11 times more likely to get the death penalty if the victim is white than if the victim is black, 22 times more likely to get it if the defendant is black and the victim is white—in the very states where...people...were lynched.” —*Bryan Stevenson, Founder and Executive Director of the Equal Justice Initiative*

Kansas’ Imperfect Death Penalty

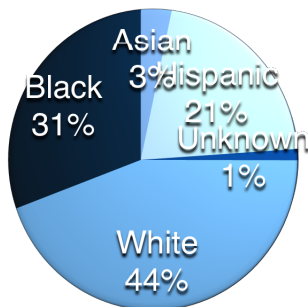
The problem of racial disparity in the death penalty is not relegated to the South. It is also found in Kansas.

- In 2017, 44.3% of Kansas homicide victims were white, 30.7% Black, Hispanic 20.5%, Asian 3.4%, and unknown 1.1%.
- In the 15 cases that have resulted in a death sentence in Kansas, over 85% of the victims have been white.

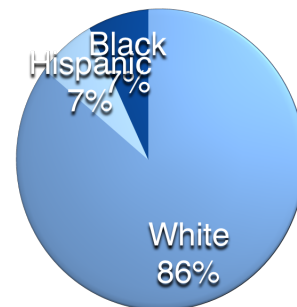
- Asian
- Unknown
- Black
- Hispanic
- White

- White
- Hispanic
- Black

Race of Victim in 2017
Kansas Homicides



Race of Victim in Kansas
Capital Cases



“I hear that we need the death penalty for the most ‘heinous’ murders. Although people who make this argument often have good intentions, the argument itself can strike many murder victims’ families as disrespectful. If some murders are particularly heinous, then are others not heinous and merely ordinary?” —*Candice Reed, whose cousins Dessa Ford and Quincy Williams were murdered in Wichita in a quadruple homicide*