GPSL Racial Geography of the Death Penalty

Jim Schacht

Audience 1

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Charlene Koski

Thank you all so much for coming. My name is Charlene Koski I’m the outgoing editor-in-chief of the Washington Law Review and we’ll be publishing Ben and Rob’s piece in our August book and that was kind of the impetus for this whole event. I’m gonna turn it over very quickly over to them but before I do I just wanted to say a couple of thank yous for making this possible. I want to thank the Minority Law Student Association, the Innocence Project Northwest, and the Gates Public Service Law Program for all of their help and support in bringing Steve, Rob and Ben out to Seattle and for helping us organize this event. And with that I will turn it over to Joel Ngugi who is going to introduce our speakers.

Joel Ngugi

Thank you very much Charlene. So, my task is very simple today it’s just to introduce our very distinguished panelists. But I wanted to announce after we did research of their bios, we came up with about one hundred and fourteen pages. So we just decided we will read this instead of our panel today. Seriously, though we are quite excited to invite our distinguished speakers here today. And I’ll just introduce them I’ll start with the authors of the piece and then I’ll introduce the other panelists.

First we’ll have Rob Smith who is seated five from my right. Rob Smith is the legal and policy advisor to the Harvard Law School’s Charles Hamilton Houston Institute for Race and Justice at Harvard Law School. He’s also remotely started a Capital Appeals Project in New Orleans, Louisiana. He provides arrest and amicus representation to clients in criminal matters instead of in Federal Court. In his spare time, an oxymoron I believe, he is building and trying to maintain a comprehensive online resource center for indigent defense lawyers. He’s a graduate of the University of California in Berkeley and got his JD from the Harvard Law School.

His co-author is Ben Cohen seated right next to him. Ben is currently off council of the Capital Appeals Project in Louisiana. He has handled capital cases at the trial level, appellate level, as well as post conviction cases since 1997. Cohen has secured the exoneration of one client, the outright reversals for clients in five capital cases. Sentencing first relief in four other instances. Ben has been involved in litigation in three cases before the United States Supreme Court including the case of Kennedy vs. Louisiana which foreclosed the expansion of the death penalty to non-homicide offenses. I should mention that Ben taught for Justice Edwin Cameron later on elevated to the South African Constitutional Court. Ben is a graduate of the University of Michigan School Law where he graduated in 1996.

Then beginning at the other end we have Professor Jacqueline McMurtrie who is our own
staff from the Law School. I’m glad at least we have one. Jackie is an associate professor of Law here at the Law School and she is the founder and director of the Innocence Project Northwest. Since its fruition in 1987 the Innocence Project Northwest has overturned the convictions of at least 15 wrongly convicted inmates. Professor McMurtrie has taught criminal law, criminal procedure and evidence. Professor McMurtrie’s research and teaching interests revolve primarily around criminal law and appellate post conviction practice with a particular emphasis on wrongful convictions.

Next to Professor McMurtrie is Jim Schacht. Jim is a deputy prosecuting attorney for Pierce County. He has served as a Pierce County prosecutor for twenty years handling felony prosecutions and appellate matters. Jim has participated in two death penalty prosecutions neither of which proceeded to the penalty phase. Before or during the prosecutor’s office he worked Seattle law firm of George, Hull, and Porter handling civil litigation. So I guess that’s before he became a criminal lawyer. He received his JD, we will try to forgive him, from the University of Puget Sound School of Law and he received his undergraduate degree from Pacific Lutheran University. We thought very hard before inviting him.

Next to Jim is Jeffrey Robinson who in Seattle legal circles requires very little introduction. He’s a legend around here and we are glad to have him in our Law School Actually, we did discover after very arduous research assistance into his bio that we missed at least one award that he has received. And so I exercised my discretion as an introducer to stalk him last Friday where I realized he actually did receive one more award. So Jeffrey Robinson is a criminal defense attorney who has been in practice as Schroeter, Goldmack, and Benderin Seattle since 1988. He started his career at the Defendants Association in Seattle representing indigent clients in state courts. He then spent two and a half years as an Assistant Federal Public Defender for the Western district of Washington. He has tried, wait for this, over two hundred cases and he has successfully represented individuals and corporations in state and federal courts on charges ranging from first degree murder to health care fraud. He also has extensive experience representing clients in lengthy grand jury investigations that have resulted in no indictment. Mr. Robinson is also a respected teacher of trial advocacy and has lectured on trial skills all over the United States. And he is a faculty member of the National Criminal Defense College in Macon, Georgia. Among other awards, Mr. Robinson had been listed in best lawyers in America since 1983. He has been selected as one of the top one hundred black lawyers in America by the Black Enterprise Magazine and is an elected fellow of the American College of Trial Lawyers. He graduated from Harvard Law School in 1981.

Lastly, but certainly not least, we have our moderator Mr. Stephen Bright seated immediate to my right. Mr. Bright is the Harvey Carp visiting lecturer in law at Yale Law School. He is also the president and senior council of the Sultan Center for Human Rights, a human rights organization that deals with human rights in the criminal justice and prisons systems. He served as a director of the center from 1982 through 2005. He has represented people facing the death penalty at trials and on appeals and prisoners in challenges in inhumane conditions and practices. Mr. Bright has twice argued and won cases before the United States Supreme Court. He is the recipient of numerous awards including the American Bar Association’s Thurgood Marshall Award in 1988 in addition to Yale he’s taught courses in criminal law and capital punishment at Harvard, University of Chicago, Emory, Georgetown, Northeastern and other Law Schools and hopefully UW will be added there soon. Mr. Bright has a BA and a JD from the University of Kentucky. And I will save you the other one hundred thirty-five pages of the bio and invite you back to... okay so we’re straight onto our order.
Stephen Bright

Thank you very much. I have the easiest job here this evening that is to introduce Ben Cohen who is going to start and talk about the study that he and Rob have done and they’ll talk about that and then we’ll ask each member of the panel to react to that and some discussion and then we’ll have an opportunity for you to ask questions and hear more about it. This is Ben Cohen who will talk first.

Ben Cohen

Thank you, I’m grateful and humbled to be here with this panel. And I’m gonna speak very quickly because I’m gonna try to read the entirety of our article with the footnotes and the charts. What we focused on was the operation of the Federal Death Penalty. And just as a moment of background for those who haven’t been focusing on this for the last thirteen years. Federal Death Penalty came into existence in 1988 after Furman in 1972 had set aside the death penalty in the states and the Federal Government, it came back in 1988. It wasn’t until 1984 that the expansion of the crime act that a whole slew of federal offenses became death penalty eligible. I had always thought that it was simply air piracy, treason, hijacking they were federal offenses. The 1994 amendments made essentially any offense with a handgun committed during another felony a potential federal capital offense. It was a huge expansion, and I’ll talk about that, because it left the government trying to figure out who amongst these individuals should live and who should die. There were some problems at first and this is a chart of the federal death sentences race of defendant this is as it is currently but the map is essentially the same as it was in 2000 when Eric Holder left office as deputy attorney general and he said that this is incredibly disappointing and we have to figure out why this is essentially as it was when then deputy general Holder left office where the race of victims are opposite, mirrored the race of defendants. And so John Ashcroft commissioned a study that looked at this, this was after the Reno study and, John Ashcroft said there is no problem with race in the federal death penalty because look all of our authorizations it essentially mirrors the map of the federal death sentences. So everything is fine and no further inquiry is necessary. But we’re still not determining how these one hundred fifty thousand felony murders these murders with a handgun turn into what is now sixty-seven individuals sentenced on the federal death row. There’s a process that the US attorney’s manual sets out where in every case the local attorney goes to the Department of Justice in Washington D.C. and asks for authorization. And that was process supposed to impose some sort of uniformity in the application federal death penalty. And what our article discovered or what we discovered in representing a man named John Johnson in the Eastern District is anything but the case. Just so you see, this is from their statistics how many federal cases there are. Now this isn’t how many cases in total. These are cases where they’ve ultimately decided to prosecute and to look at this small sliver of sixty-seven individuals and how they got there. I think it’s actually a much smaller sliver because this is one hundred fifty thousand essentially potentially federal cases and how did we come to these individuals And there’s some instances, to make it clear, there’s some instances where there is no state jurisdiction to secure a death sentence but for the vast majority of federal capital offenses there’s dual jurisdiction that means that both the States and Federal Government have jurisdiction to prosecute this is not a murder in a post office or murder in a federal penitentiary but these are murders that can be prosecuted and often are prosecuted in state court every day. How do you come to these numbers? There are ninety-four judicial districts. Twenty-four have never authorized a capital case some thirty-seven have authorized and never secured it. So what you have is the majority of the districts have not returned the Federal death sentence so if what the government was looking to do is
to establish some sort of uniformity that’s not what’s occurring because when you look at where the death sentences arrive from. So this has been in my mind for a long time. This is as I see it, the murders in the United States and you begin to look at where the federal death sentences are and my AT&T map is slightly off the wall, but they’re not distributed in any manner that reflects...California has as we’ll see the vast majority of handgun murders, a much higher percentage than any other state has two federal death sentences. This is essentially where the death sentences come from. This is our death sentences map. What you see here is that some jurisdictions are returning multiple, repeated death sentences, others none at all. And this was in response to the department of justice’s effort to secure uniform application of Federal Death Penalty. Where they said, and the Federal Manual says, ‘we’re not going to seek the death penalty we’re not going to seek the Federal Death Penalty unless there’s an overriding state interest.’ Apparently there’s an overriding state interest to seek it in Missouri. This is my competing slide to the AT&T and Verizon slide. And this is what is to me the most troubling reminder of Justice Stewart’s statement in the Furman, when he concurred with a decision to overturn the death penalty; he described death sentences, at the time of Furman, to be cruel and unusual in the way that being struck by lightning was cruel and unusual. And this is the statistics from being struck by lightning. And it is essentially as random as it is to get a ticket on what we describe as the Federal Death Penalty lottery. And what Justice Stewart says and he doesn’t go so far as Justice Marshall, the only thing that explains this strike by lightning mentality is race. And I think that when you begin to look at the Federal Death Penalty these are the jurisdictions that return the majority of Federal death sentences. They have returned more than half of the Federal death sentences.

I want to talk a little bit about John Johnson. I came to this the opposite way you are supposed to come to a law review article. This is not a researched premise that I then found application in an actual case but I represent a man in the Eastern District of Louisiana named John Johnson and he committed a murder during the course of a bank robbery. It was a bungled bank robbery and everybody was caught as they were fleeing and his case was prosecuted in Federal court. He had as a result a 10:2 white, black jury. Because if he had been prosecuted in New Orleans where the offense occurred, he would have had a seventy percent African American jury. But the government’s decision to prosecute him federally transformed the veneer from a majority black to a majority white jury. And you say but maybe they prosecute all bank robbery capital cases federally. I represented another guy in state court who committed a bank robbery in the eastern district of Louisiana in Assumption Parish right up there at the top and he and his were caught just the same way John Johnson was, just the exact same bungling bank robbery but they don't prosecute it in state court after FBI secured the evidence needed to prepare a conviction death sentence in state court after FBI secured the evidence needed to prepare a conviction death sentence because in state court they could get an all white jury. This map of Louisiana and the Eastern district of Louisiana it gives pause of the discretionary decisions that the department of justice makes to determining when to prosecute and when not to prosecute. This is just the simple version of that. And this is Orleans and what you see is that offenses in Orleans has had a single death sentence imposed by a state jury since 1996. That death sentence was overturned in less than ninety days by the trial court they found that it was based on perjured testimony. Orleans juries are reluctant to impose the death penalty because they understand the interrelation between police misconduct and police violence and what that means. But then, you go outside New Orleans Parish and you get to Jefferson Parish where in Steve argued the case of Snyder versus Louisiana in the United Supreme Court where David Dupe had a majority of the electorate when he ran for state senate. Where prosecutors Cameron Murray and now Judge Donny Rowen did not understand that it might be inappropriate to wear a tie with a hanging noose as they went to prosecute a sixteen year old
African American defendant charged with capital murder. And so that’s Jefferson Parish. St. Tammany, involved in a KKK trial last week. These are the surrounding white flight parishes. And the Federal Government’s decision to prosecute John Johnson Federally non State court transformed the veneer into one which, not only was it made predominantly of white people but it was made of predominantly white people who had fled New Orleans as part of the white flight to the suburbs. And I thought maybe this is one thing and maybe this is one place. But it turns out this is repeated over and over again in a number of the jurisdictions that have returned multiple death sentences. And so Richmond, Virginia which has returned four or five Federal death sentences. None in state court they have transformed the jury veneer by prosecuting in the Eastern District of Virginia. This is the map of the Eastern District. I’m going to fly through some of these because I want you to just get a sense. St. Louis is this tiny city of St. Louis with a majority African American population and by deciding to prosecute federally there is these white flight suburbs that the government secures into their jury pool. Prince George’s Maryland which has returned both of the federal death sentences out of Maryland. It’s the same they come back to this question and attorney General Holder’s, what’s at stake?

And I think about Justice Kennedy’s opinion in Kennedy v. Louisiana where he talks about these competing requirements in how we determine who lives and who dies. But I think you have to have and what role race is playing in those decisions. I think the underlying question whether race matters? And by choosing to expand the veneer and securing this advantage, how they take away from the legitimacy of the Federal government’s prosecution. This is an easy fix, from my perspective. There’s a statutory provision that allows them to select the jury from the county of the offense, as Rob finds out in the article. They’ve gone back and forth since 1787. It’s an easy fix, but instead they’re exploiting this or at least susceptible to the charge of exploiting this racial demographic to secure what I think are troubling statistics. And they were troubling to Attorney General Holder when he was a deputy and they’re just as troubling today. So, I think I turn this over to one of you all to tell me what I’m missing.

Stephen Bright

Alright let me ask Jeff Robinson to respond.

Jeffery Robinson

Whoa. Well I think anybody that works in the criminal justice system is not going to have be convinced of the concept that race matters in any criminal case, especially a death penalty case. And you know there is a fundamental issue with any death penalty prosecution when you’re trying to fit it into this concept that we have of fair and equal justice that’s going to be applied without a relationship to bias. And when you look at the race relations in this country I don’t know who could credibly claim that we’re going to be able to do that. I don’t think I could do it. The majority of my friends here in Seattle here are white. And I got to tell you if I was charged with capital I would not want a lot of white people on my jury. And it’s interesting, I just walked out of Federal court before I came here taking a butt kicking in a selective prosecution case. And in talking about selective prosecution you know, the judge who is a very good judge is throwing great questions at us about you know, read the law on selective prosecution based on race and look at all the crack cocaine cases where we said it doesn’t matter that’s not race. Look at the death penalty case basically which had the most incredible statistical analysis you could ever want and the Supreme Court said that’s not selective prosecution. So there is a desire of the justice system, it
seems to me, in all cases, not just in death cases, to say race doesn’t matter because if we acknowledge that race matters then how are we going to carry out these prosecutions? I mean, it’s almost if you admit that race can make a difference in who lives and who dies then it’s very difficult to justify any death penalty prosecution federal, or state. So, I think there is a vested interest not just among judges, but among lawyers prosecutors and defense lawyers, who try these cases to try and imagine or try and convince that it really doesn’t matter. And I’ll give you an example of trying to do jury selection in a capital murder case. I know there are some lawyers in this group who have actually done that before. And I would just like to see a show of hands of anybody in this room who would feel comfortable voir-diring a jury panel of fifty white jurors on whether they’re racist of not. And if you don’t feel comfortable doing it as a defense lawyer if you have hurdles that you have to get over to try and convince yourself to do it just think of what that means as you kind of play that out through the system. And I think there is something there that’s very ugly that we are afraid to confront and I’m not criticizing anybody for it, I’m terrified of doing that stuff I don’t like it any better than anybody else does, but I think that’s one of the fundamental problems that we see in capital litigation especially given the study that you guys are doing showing that if we want to put our heads in the sand but race really, really does matter. And I think that it’s not just race but the intersection of race and class in the United States which to this day in 2010 is still inexorably intertwined and not separable. So that when you talk about white flight and I’m listening to those words and I feel like I’m like eleven years old again back in Memphis Tennessee and it’s like Daddy how come all the white people are moving out of the city? And if you think about the notion of white flight and what it means: I want to leave the inner-city because it’s dangerous, because it’s violent, because I don’t feel safe there. Because I feel more comfortable around people that look like me or that I relate to there’s nothing evil about any of those feelings. I mean that’s the way human beings operate but when you take that concept of the jurors that we’re collecting when we charge a federal death penalty case and leave the inner-city, if you will, and go out to the suburbs, we are collecting people who have looked at defendants that look like me and say I want to move away from you. You know, I am the kind of person that if I’m standing on the corner and somebody drives up and it’s at night they reach over and lock their door. And you know, I’m not saying that’s a bigoted or a racist thing but it’s just something that happens and if you have a group of people who have moved away from African American or other minorities because they don’t feel comfortable in that setting, Think about what you are doing when you ask twelve of those people to come in and judge the life of somebody who they don’t feel comfortable with. So I think the concept of expanding the jury panel outside the area where the crime was committed especially if we’re talking about an area that has a heavy minority population it has an impact that can be devastating and the thing that bothers me that I can’t believe that Federal Prosecutors don’t understand that this is what’s going to happen. So for example, in the Western district of Washington and Jeff I don’t know if you can help me, I can’t remember the last Federal Death Penalty case where the prosecutors pursued the death penalty, I can’t remember it. And that’s because in the Western of Washington, typically speaking, in cases involving homicides ,and that’s what Jim and I were just talking about, they leave it to the states, so Pierce County is going to get the case, or King County is going to get the case and it’s not going to go to Federal Court and that means that you’re having in King County a King County jury and in Pierce County a Pierce County jury that would include people from the City of Tacoma and the City of Seattle. Very, very different in the Western District of Washington you have jurors from, you know, Forks and Port Angeles. And I’m not saying there’s anything wrong with those folks but I am saying you’re not going to find many folks that look like me in Forks or Port Angeles, if you’re looking for jurors. So those are the things that as I listen to this conversation that just really reach out and grab me and it’s I guess, at one level we are
trying to do an incredibly difficult thing in a country that has race and class mixed up and in such turmoil as we have it in this country, number one. Number two when you are looking for jurors as a person representing a capital defendant, when you’re looking at jurors who may be able to look at your client and see more than a killer or a rapist. I tried a capital case in Kitsap County many, many years ago and the wife of one of my law partners, a woman that I admire and respect probably one of the warmest, sweetest, nicest people in the world, happened to come through the court room because she lived in Kitsap County. And her husband told me the next day, ’yeah my wife walked in the courtroom and she said your client was the most frightening looking person that she had ever seen.’ And all he was doing was sitting at council table talking to me. And so I thought, you know, what is it? Very dark-skinned man, very large, what is it that makes her look at this person and immediately become afraid, not that she is a bigot or a racist. You know there was a study that was just publicized in the press, one of the most depressing things I’ve read in my time about showing children dolls and asking them which one is the smarter one? And how black kids are pointing at the white doll as the one that’s smartest. And I go back to the mid-nineties when Jesse Jackson was quoted as saying this, ’I get really depressed when I’m walking down the street late at night and I hear foot steps behind me and I get afraid and I turn around and I see it’s three white kids and I feel relieved.’ If Jesse Jackson is going to say that the color of somebody’s skin is going to make him more or less afraid, I think it goes to show you how deeply the dynamic of race and violence is played out in this country. So these are the challenges that it seems to me you are facing when you’re representing a minority defendant in a capital case, no matter where you are. And with what we’ve heard about the impact of charging these cases as Federal cases what we’ve heard about that just makes it very concerning that Federal prosecutors might decide to charge a case knowing that they’re going to get a jury that’s more likely going to be white and more likely return a death sentence.

Stephen Bright

Mr. Schacht, could I ask you to give us your perspective?

Jim Schacht

After that? I’m not an academic at all. I’m a practicing prosecuting attorney. I’m not a Federal prosecutor, but there are a couple of things about the study that leaped out at me. Number one, the idea of death penalty cases rising in in the county in which the crime occurred appeals to me. I think Mr. Robinson’s comments about our experience here in the Western District in Washington bears that out. And I think an interesting thing for the authors of the study to pursue would be to look at Western Washington as a case study for their thesis in action because what we have in the Western District in Washington is by and large the US Attorneys deferring to the state prosecutors death penalty cases. And in some respects...are there any US Attorneys here?

Jeffery Robinson

I looked I didn’t see any.

Jim Schacht

Good. I have a perspective on US Attorneys because they seem to have cushy jobs, low case loads and everything they do seems to run through Washington. And I can get a chuckle out
of that but there’s something serious about it too and it’s this: running things through another agency higher up insulates one from the gravity of what one does. It provides someone an excuse, if you will, a lack of personal responsibility and a lack of gut level decision making that should go into deciding when to pursue a death penalty. And I think that is a flaw in the federal system. I can’t speak for my office this is a personal opinion but there is something to be said for keeping it as a local decision and for the authors’ sake I would say that pursuing and seeing how a jurisdiction that largely defers to county or state prosecution fares in terms of race issues and death penalty cases. It would be a very interesting study.

I have a couple of interesting, when I read the article. I’d like to move on to a little bit different perspective. One thing I did not see in the article was anything talking about venue. If we talk about centralization of death penalty decisions say, in Washington or by the United States attorney or the Attorney General and if we look at things such as venue I think that probably the most common motion probably change of venue. And why is that? Well it’s because the seriousness of the offense, the publicity that surrounds it inevitably has an impact on the jury pool. And the jury pool as a result, from the defense perspective, it seems to me, often times I’d like a jury from somewhere else. And that’s the essence of the change of venue motion in death penalty cases and other types of cases as well. And so change of venue if my friend Mr. Robinson probably has a much better perspective on, when he would seek a change of venue for instance if he represented someone in Pierce county it’s very likely he’d like to change venue to Seattle.

Jeffery Robinson

I wouldn’t have to drive as far.

Jim Schact

I’m told that Gary Ridgeway when he was showing the places where he had dumped bodies stopped at the Pierce County line and that may have been because Roberts Yates preceded him. So there is a certainly some impact of local prosecution and from the defense perspective venue is an extremely important and difficult decision to make. And that ’s against the thesis that we should prosecute and select juries from the county where the county where the crime occurred. If it’s true that the county where the crime occurred is a county that abhors what happened in that crime, if I were a defense attorney I’d be very reluctant to pick a jury from that county.

There are a couple of other observations and this is more general in nature but the statistics that were put up on the presentation. The statistics in the article are gratifying to me. I have a great deal of respect and trust in our institutions. I think we do a pretty good job. I think that when a lawyer of the caliber of Mr. Robinson holds my feet to the fire in a case, at the end of the case, no matter what the outcome of the case we can assure ourselves that the right outcome took place. And I think that’s by and large true nationwide. One of the things that I noticed is how do death penalty decisions are made. It’s an agonizing decision something that in the Federal system appears to be made by the attorney general in a remote location but even so very few by my count less than one percent of the eligible cases actually resulted in a request for the death penalty or in it being sought. So there is a winnowing down of cases in which there is eligibility. Cases in which by virtue of discretion the prosecutor did not seek that punishment and I’d like to conclude my remarks by pointing out one other bias that I have against some of the remarks that were made and
that is it is not the job of the prosecutor to decide who lives and who dies. It is the job of the prosecutor to decide when the facts merit the request for the death penalty. But it is not the job of the prosecutor to decide who lives and who dies. Ultimately, a jury who does that at least here in Washington and I am grateful that the juries are given that responsibility. I would not want it myself and I don’t know what I would do if I were put onto a death penalty jury. I have very little death penalty experience. One case that I tried in which it was possible I had a successful outcome despite the fact that the jury returned second-degree murder instead of aggravated murder and we never had a penalty phase. I can say in that case that my foreperson in that case was an African American gentleman who actually goes to my church. We’re both Catholic and he attends the same church I do. The defense knew about that at the time as well, But I’ve always believed that in that case justice was absolutely served despite the fact that we never went to a penalty. And I think that most prosecutors would have the same perspective that in the right case, my favorite is Charles Campbell. He’s kind of the poster child from my stand point but in most cases where it’s warranted they are very, very ,very rare. And the system is extremely careful before the execution is carried out and that is as it should be.

Stephen Bright

And finally Professor McMurtrie.

Jacqueline McMurtrie

Thank you. I have to say some disqualifications as well. I have never done death penalty work and I can’t imagine what it would be like and the fortitude that you have to have to defend a capital case. I think that Jim Schacht’s last remarks sort of lead into things that I might have to say about the accuracy of the system in assuring that we get it right. But before I go there in terms of comments about the article, I think as Jeff Robinson had said it’s very important that we talk about race within the criminal justice system and within our justice system period. And it’s not a comfortable conversation to have and I very much appreciate the fact that you have focused on this and brought it our attention and brought this to the Law School for more discussion. Because race mattered in 1987 when they decided McClusky and there was no question but that the death penalty was imposed. The greatest predictor whether or not somebody got a death penalty according to the Baldus study was race of the defendant and race of the victim. And listening to Jeff’s comments reminded me of the quote that you have from McClusky of Justice Brennan and the concern that what you would end up with would be a challenge of our entire criminal justice system and we would have too much justice. But to read this draft article and to see just the...it’s hard not to think that there’s some malevolent scheme going on in making these decisions about where to prosecute, and in taking jurisdiction away from the state courts and bringing the cases into federal court. And it’s especially distressing because as you pointed out in the article it takes away not only the legitimacy of the verdict but it’s made by people who aren’t held as accountable for the verdict. I’m sure when your office makes a decision that your citizens in Pierce County don’t agree with, they let it be known to the county prosecutor. And that is as it should be, that people within the county should have an impact on what the lawyers who are representing them do. And it’s hard to believe that the Federal prosecutors don’t recognize what is occurring when they take jurisdiction away from the local prosecutors. And I also think that we...I believe in our system too and I believe in juries and I think that we have a great system of law, but it does make mistakes. And the fact that we don’t have a great number of prosecutions in federal court death penalty prosecutions doesn’t make me feel comfortable that we’re not making errors and the
system’s not winnowing out good from bad. You see the impact of race not only in these cases but in the work that I do with Innocence Project cases. Of the two hundred and fifty-four people that have been exonerated thus far, seventy percent of these are people of color. Primarily African American, followed by Latinos, Asian American. But the seventy percent of folks that have been exonerated post conviction DNA testing are minority. And we know that some of that is implicit bias things that happen through eyewitness identification cross-racial identifications are particularly ripe for error. We know that there are instances where people are interrogated and they’re interrogated not in their own language and that leads to false confessions. We know that there is explicit bias. If anybody listened to NPR this morning about a guy, the detective in Chicago who is being prosecuted for having beaten and tortured defendants and exerted confessions out of those individuals. There’s a implicit bias and then when you add into that the explicit bias you get this terrible cauldron of racial inequity. Me, I’m just left after reading this article thinking, there the death penalty makes even less sense than it did before I read the article and the fact that one person although that person doesn’t impose the death penalty has the decision whether to prosecute it and where to prosecute it and what it ends up with is an extraordinarily disparate impact upon people of color is very distressing. Thank you for your article on this issue.

Stephen Bright

Let me come back to Rob and ask you if you want to respond and also if you want to say anything about the article that we haven’t talked about yet or respond to anything that anybody has said about it.

Robert Smith

I think both. First I think a lot of what Jeff said about race and first of all let me skip back for a second. Jim it’s refreshing to hear some of the things you’re saying as a prosecutor and let me guarantee you that your counter-parts in Jefferson Parish Louisiana and places across the South are coming from the same perspective you are coming from. And we’re all in Seattle, Washington and so when we hear stories about the prosecutor who wore a noose tie to the capital sentencing hearing and you look over here at Jim here with the tasteful red tie, we cannot imagine that happening here and I think for a second we can pat ourselves on the back that explicit racism isn’t commonplace or is less commonplace in Seattle Washington in 2010.

Jeffery Robinson

I have something to say about that.

Robert Smith

But one of the things that I think bears mentioning is the implicit bias point. Benaji, who is one of the professors who began this study of implicit bias, what she said is when she first took the test she was horrified, she spent her whole life standing up for injustice and believing in equality among the races. And when she came back and took the implicit bias test her results horrified her because she realized that she actually had these same processes that other people have. And what she said is to take that test and to realize that you actually have these implicit social cognitions that lead you to beliefs that will horrify you. Makes you not racist necessarily it makes you human. Everybody has them.
Stephen Bright

Back us up just a little and talk about the test, talk about the implicit bias test.

Robert Smith

Sure, so the implicit bias test, Implicit social cognition is you automatic processes that you’re not aware of happening, they just happen automatically. And so in the traditional implicit association tests, folks are asked to associate white or black with words like good or bad, kind, malevolent, all sorts of different things. This is sort of the first generation of tests and they’re a little bit sloppy. Where it starts to get interesting is the folks like Jennifer Eberhardt at Stanford University she has looked at, she took the Baldus stats we talked about Baldus’s numbers are used in McClusky a little bit. And what David Baldus did is he took a data set over a long period of time in Philadelphia and he looked at both the people who were sentenced to death and those folks who went to capital trials and did not receive a death sentence. So what Jennifer Eberhardt did was she took that data set and then she took a group of students and other people in the Stanford community and had them look at African American faces and rank them on a scale of one to ten how stereotypically black they looked. And then she came back to this data set of all these cases that went to capital trial and she didn’t tell the people who were ranking them, for stereotypical blackness, she didn’t tell them that they were convicted of anything, they were just people and they said rank them on a scale of one to ten. And the results were that you were much, much more likely to be sentenced to death if you have features that render you stereotypically black, in fact at the top quartile you were twice as likely, I’m sorry the numbers are a little rough it’s either twice or four times as likely I can’t remember right now, to be sentenced to death. The point is that these implicit biases really do matter. A guy named Justin Levinson from the University of Hawaii started looking at this in a criminal justice context, specifically and what he found was that when you give a story a narrative of a serious events of the crime and you asked people to remember the facts, that people not only miss-remember facts but they miss-remember facts in stereotypically consistent ways. So they’ll remember events for an African American person who did something violent, they will not remember when it was a white person who did it, but perhaps the most scary thing is they will remember the African American person who was the victim actually doing the violent act in the sequence. So, we talked about cross-racial identification a little bit there have actually been studies, they put people through FMRI and they look at the area of your brain that negotiates recognition and it showed that people’s brains actually begin to shut off in the area when they’re making cross-racial identifications. I mean the level this is happening in is scary. And so we get to the question of what do we do about this? I mean it does pervade the entire criminal justice system and I don’t think that many of us here that are familiar with McClusky really think that the reason why the Supreme Court didn’t strike it down is because the statistics weren’t good enough. Is this too much justice problem? Some of the things we can do to remedy this. What we can do is when the attorney general makes a decision whether or not they’re going to authorize a Federal death case. The race, the defendant is actually masked when the attorney general is looking at these cases. But the fact that it happened in New Orleans and you’re going to prosecute in Eastern district Louisiana is something that is not masked. And so for all intents and purposes the attorney general has all of the identifying demographics that he needs to have in order to make a decision whether or not to seek a case federally. We could mask those characteristics and actually accomplish what the Attorney General said he was going to do in the first place, or his predecessors said they were going to do, which is to make this a system that we can guarantee as much as possible isn’t influenced by race.
The other thing at the founding, the relevant community was from the county of offense. It was the first act passed by the first congress in all capital cases not only the venue, not only the jury selection were from the county where the crime occurred, the reason why it wasn’t in the constitution, and they debated it back and forth, was because they thought that the county might be too restrictive. And it turns out that the county actually only had six hundred fifty-six people on average at the time of the founding, but across the seas who were modeling it after had about a hundred eighty thousand people in a county so they said you know the county it’s pretty restrictive. The state on the other hand is too flexible. Now the state populations were actually smaller than the average county across the ocean and now we’re at the point where counties are actually much bigger than counties were in Europe in the first place, so we can move back to a situation where the jurors are coming from the county of offense.

The last thing that I want to say is that race actually it’s not only implicit bias that’s happening or explicit race bias. A lot of it is where the crimes are happening so you have the victim, it’s not just the race of the victim, the race of the defendant, the murder victims like African Americans twelve to thirteen percent of the population, Murder victims, almost fifty percent and they’re not coming from the streets of suburbs of the white flight areas, they’re coming from inner-cities by and large and in the inner-city they’re coming from areas of concentrated poverty. So the folks who live in these areas of concentrated poverty, they know violence, they know aggressive police tactics, they know what it’s like to live in circumstances without the kind of basic resources that other people have. Then, we move the jury out to Jefferson Parish, Louisiana and in areas where they have gated subdivisions and you go through the worst thing that really happens is somebody might steal your bicycle but you watch in the news all the time what’s happening in Orleans Parish down in New Orleans and the housing complexes where the violence actually happens and you’re scared. And then you put these people on the jury and they just don’t know what it’s like to live in that life and you’re asking them to make a determination about facts that just don’t reflect their world at all. So part of this is race is a proxy for really experiential living not something that returning local control over helps to solve.

Stephen Bright

Jeff do you want to make a comment?

Jeffery Robinson

There were two things that I thought of. One is I think it’s the desire that we all have to want to feel like the system can work and so there is the concept that if the defense lawyer is good enough, then everything will be okay. And I feel like I’m a pretty good criminal defense lawyer and the things that I did in the capital case that I tried are humiliating. The mistakes that I made haunt me to this day and I still think I’m a pretty good lawyer, but my experience in that case taught me that the pressure that is brought to bear on lawyers who are representing someone whose life is on the line are radically different than any other kind of case that you can ever try. If it’s a civil case, I don’t care how much money is involved, I don’t care what other kind of criminal case there is. We actually had in this capital case I tried, the client had a prior conviction and jurors are told about the client’s prior conviction. He got an exceptional sentence above the standard range for his prior conviction and the judge signed that judgement and commitment essentially saying I find that this man is extremely dangerous. That judge who sentenced him on his prior was the same judge in the death penalty trial. And so when they put that prior conviction document in, the judge’s
signature was on that document and it went to the jurors telling the jurors I the trial judge sitting on this case have already found that this defendant is an exceptionally dangerous person. I tried this case almost twenty years ago, I still can’t give you an excuse for why I let that document go to the jury. There’s no way that document would have gone to the jury if I had just looked at it and said hey judge you’ve got to take your signature off this or we’ve got to change this some kind of way. And so I don’t think it’s because I’m a bad lawyer. I think it’s because there is no lawyer good enough, in my view, to handle, competently, the kind of things that come up in a capital case. And when we think that there is no racism because, believe me, I understand. I live out here, and it’s kind of like, Seattle’s perfect right, that’s kind of what we all think and the way we behave. And I even feel it myself sometimes, 'Eh, racism isn’t an issue in this case I’m in Seattle.' In the middle of this capital case in Kitsap County the elected prosecutor came up to me and said, where did you get your ethics? In Harlem? Now he didn’t call me a nigger, but that statement had racial impact that can’t be denied and I sat through about a week of hearings where a judge from out of county came to hear evidence about whether race had infected the decision to seek the death penalty against our client an African American man who was accused of killing a twelve year old white girl who was picking flowers in the woods. Guess what? He got the death penalty and he’s in Walla Walla right now on death row. It was one of the most frustrating thins of my life to sit in that courtroom not as the lawyer but as a witness as the litigation went on to say did this comment have a racial impact, and I’m sitting there going, pardon my French, what the fuck, do you mean? What are we even talking about in terms of whether this comment was racially based? And the judge found it was but if it didn’t in fact infect the case and so the case went on and Jonathan Gentry was convicted and he’s on death row right now. My point is that there are things that we tell ourselves, if we could just fix this, it would be better. Or if we could just fix that, then the system would work. And I think, I at least would posit that there’s a question I have about whether we as a society are capable of having capital litigation that is actually fair. And I don’t think it’s because we are bad people, I think it is because that’s the way it is. So, those are two of my frustrations is that I understand that what Ben and Robert are doing is wonderful in trying to figure out a way, is there a way that you could tweak the system so that we could make this more fair? And you know, I applaud that, but at a sort of base level I feel like these tweaks would be great but we’re still left with a problem that is not comparable.

Stephen Bright

I want to ask Ben if he could explain just a little more this map because it all came by pretty quick and then I’ll take whatever questions people have about. I want to see just a little bit more about what the colors mean and so forth, maybe that’s obvious to everybody, but just in case it isn’t.

Ben Cohen

The different shades of green are the number of homicides with firearms in those jurisdictions. I wanted you to be able to see that Texas and Illinois and Michigan and Pennsylvania, and New York, and Florida essentially have the same number of murders with a firearm and the folks in Montana and Wyoming and North Dakota have essentially the same number of homicide with a firearm and California is the outlier in terms of how many homicides in total with a firearm and you look at these red circles and there’s four districts in Texas and Texas has a death penalty system maybe unlike any other country outside of China. And all I’d add about that big circle in the Northern district of Texas which is not in our article but two of the individuals in that northern circle are actually the
offense began and the homicide occurred in Arkansas and they then drove across the border into Texas and the jurisdiction that they committed the bulk of the offense in, in Arkansas is not a predominantly jurisdiction but has a significant minority of African Americans. They were prosecuted in the Northern District of Texas so the decision to prosecute federally and then the US attorney got to decide which district to prosecute in, in that instance. So you can see the Eastern district of Virginia, which is Richmond and Missouri, Louisiana, these places that I described.

Stephen Bright

And you just pointed at New York which would probably had the most, I would guess right? In terms of homicides with a gun?

Ben Cohen

California...

Stephen Bright

California has the most, I guess, that’s right, but New York would certainly as a district, would...

Ben Cohen

Since 1994, California and New York, Pennsylvania, and Detroit, I think, it’s in our article have some forty thousand separate murders with a handgun results in maybe four or five death sentences.

Stephen Bright

And New York you only have one, right?

Ben Cohen

New York you only have one, Pennsylvania...

Stephen Bright

Michigan only has one Detroit, you only have one in Detroit, right?

Ben Cohen

And there’s no shortage of murders in these places. You know, there’s a murder problem in St. Louis and New Orleans, but the number of federal capital offenses dwarfs, exponentially, all of these other places: Los Angeles, Sacramento, in terms of where we’ve gotten these death penalties.

Robert Smith

The disparities in Texas between the county the fence and the jury pools actually it’s still
about twenty percent but it’s lower than other places. But Texas prosecutors are actually incredibly good at getting African Americans off the juries, we know that at least three or four of the cases that we were able to track down they were all white juries.

**Stephen Bright**

Okay, we have some time for questions. What questions does anyone have for anybody who is here on our panel and also if anybody want s to say anything else who is on the panel.

**Audience 1**

First of all I would like to thank you all very much for very informative and reflective comments. I am not a lawyer but I believe ti was Mr. Robinson who asked the question which defense attorney would have the guts, the chutzpah. if you will, to ask anybody about their racism? Is there any way you could use the Jennifer Eberhardt Study to in some ways to have jurors take some of those tests about implicit biases and have that be a tool in the voir dire process?

**Jeffery Robinson**

Well I got to say that while I was sitting here listening to Robert I thought, man having the jurors take an implicit bias test that would be very interesting. And there are certainly techniques that lawyers can use to try and talk to jurors about race to try and make jurors comfortable about race and so there are Jeff Ellis, Mark Laranaga, there are people in this room who have done it before and who can do it, and so I’m not saying that lawyers won’t do it or that they are afraid at least In my view I know I am. I just don’t know very many people who do it very well and so I would be interested in whether a judge would allow an implicit bias test to be given to a jury. That’s a really interesting question and I’ve made a note of it. If I get a chance to try it I’ll let you know.

**Audience 1**

Stay tuned, yeah.

**Robert Smith**

There’s a judge in one of the districts of Iowa, Northern district of Iowa. There’s good news and bad news about this the good news it he’s fine implicit bias he’s begun to try to enter it in the courtroom, he’s given some presentations he’s really open to trying it out. The bad news is the only death sentences in Iowa have come out of his courtroom.

**Stephen Bright**

Judge Gertner, Nancy Gertner, in Massachusetts in Boston the district in Massachusetts I don’t want to say she’s done it she’s talked about it. There’s a Supreme Court case, that your law students can plug in on Westlaw, Turner v. Murray. Which is a case in which the Supreme Court, probably the only case in which the Supreme Court, recognizes unconscious racism and they have a great introduction to the case where they talk about jurors bring these unconscious, these attitudes, stereotypes, feelings that come into play when they make these decisions about deciding between life or death and they do say that in
an interracial crime you have a right to ask the jurors about it, As Jeff said most lawyers are afraid to do it because it’s a very ticklish kind of thing and a lot of lawyers don’t feel very comfortable with it and the ones who do you can find out some information the problem is time, if you’ve got a time to pick a jury which some jurisdictions do, you can ask questions and you can figure out why the juror sends their children to private schools. Or why they’re a member of clubs that don’t allow racial minorities to join or things like that which tell you a bit about people’s racial attitudes. But if you’re in a place where they pick the jury in the morning and then start a trial after lunch, What are you going to ask a whole room of people like this that’s really going to tell you anything? Or can you ask questions on a jury questionnaire that’s really going to tell you anything? But there are some ways to try to do it but anyway.

Any other questions? Yes, right next door there.

**Audience 2**

I figured I didn’t have to go very far. I have more of a comment than I do a question and I’ll be quick. I want to thank everybody on the panel and I’m very excited about reading the article because as Jeff mentioned, we have never had a Federal capital case in Washington State and very few in the Northwest in general and so I’m fascinated to read an article about jurisdiction shopping in order to do juror shopping however I do have a lot of experience in Washington’s capital litigation and history because when I ran a resource center we studied that and before we give our status slap on the back of being lacking any racial overtones, since Washington’s death penalty there’s been 31, now 32, one just recent, death sentences a third of them have been against an African American defendant, male and every single one of those individuals was convicted by an all-white juror. So I don’t want to lose sight of the fact that we may not have this kind of jurisdiction shopping but the results are no less different. So before we are so proud of being green and polite here and politically correct in the Northwest, we do have that history still.

**Stephen Bright**

Keep passing it down, everybody in that row gets to ask a question.

**Audience 3**

Well I think we can add another statistic to that, and Mark will correct me if I’m wrong, but as I recall death has never been imposed when the defendant is white and the victim is black in Washington State. And I think that really speaks volumes. And I think it goes back to the issue of prosecutorial discretion in seeking the death penalty. So I frankly, don’t have any comfort that the US attorney in Washington has not sought death. While it has never been authorized by either AG Holder or anybody preceding him, I don’t think anything has come up under Holder here. But the case that came to mind for me was a multi-cult defendant, the Hell’s Angels case is what everybody called it, and I can’t remember the leading defendant’s name, but as I recall every single one of those defendants was white and Jeff was one of the, Jeff Fells, was one of the attorneys for the defendants and maybe he could talk to us about what was the race of the victim. But I frankly, again, I don’t feel any comfort that it goes back to the counties in Washington State making this discretionary decision. I think in some other states you might have a situation where a poor county seeks to have it boot strap into the federal courts so that the feds can take over and end up prosecuting the case but I don’t see that being a situation in Washington State because of
greater populations I think that it’s more likely that you’re going to have these decisions being made in Pierce County, King county and even Snohomish County although in Eastern Washington some of the homicide rates are going up but homicide cases aren’t being authorized as capital in Eastern Washington as much because they are poor counties so there’s tons of disparity here and those are my comments.

Ben Cohen

Can I respond for just a moment?

Stephen Bright

Yes, of course.

Ben Cohen

I wouldn’t want anyone to leave here with the idea that our article was an endorsement, when you look at Assumption Parish and the bank robbery case that came out out of Assumption Parish that I showed you these things operate in tandem it’s not that the feds are better or that the feds are worse it’s a heads: you lose, tails: we win system for securing the death penalty. So I wouldn’t want you to come away with the thought that we’re saying let’s just return these things to the state jurisdiction, that’s all.

Audience 3

No, absolutely understand this point and I basically with any belief that prosecutors exercise discretion in Washington State made it a fair system here.

Audience 4

I guess my comment would be more of a question to Jim Schacht. I know that Norm Maley during his tenure here in King County, he had a policy of trying to correct for racism. I wasn’t ever a prosecutor so I don’t know how that worked. I noticed that you didn’t say anything about race in our topic, so I want to ask you what Pierce County does to consider the race of the victim and the defendant in making its charging decisions?

Jim Schacht

What do we to consider it? We make pains not to.

Audience 4

Do you have any conscious policy?

Jim Schacht

There is no policy in respect to race and the death penalty in Pierce County. We don’t take it into account at all. I can say this, with respect to the death penalty in Washington the last person who was put to death from the state system against his will was Charles Campbell. And I believe that was, I think he was a white male and I have no idea what the race of his
victims were.

Jeffery Robinson

They were white.

Jim Schacht

But Charles Campbell, I talked about him being the poster child and I agree with Mr.
Robinson about one thing that the said, I agree very deeply about it. And it’s this, that we’re
humans and our institutions are human institutions and they are not perfect and they never
will be perfect and we can’t make them perfect but with that having been said, I know the
prosecutor who prosecuted Charles Campbell because inaudible in Pierce county and
Charles Campbell’s crime in my view calls out for the death penalty because he raped a
woman and he went to prison for it and he got out of prison for it. He tracked her down and
her murdered her, he murdered her eleven year old daughter and he murdered her next door
neighbor and then with the blood dripping from his hands, he walked down the center of the
street in Clearview, singing at the top of his lungs. And in some gut sense it seems to me
that our institutions need to have the ability to deal with people who do those things and I
can’t speak to racism or anything of that kind because it just doesn’t play a part in any of
the crimes I prosecute. I can differ with Mr. Robinson it’s regular that race is questioned in
cases that I pick juries about I regularly ask people about bias. I regularly have defense
attorneys ask about bias. I think it’s a necessary component to looking at a jury to looking
and finding out what they are all about and so it comes up frequently in jury selection that
cases that I...but going back to the real problem, there are some cases that allow for capital
punishment, in my view, and our institutions need to be able to sort out those cases from the
cases that don’t call out for capital punishment.

Stephen Bright

Yes.

Audience 5

Can I sleep easier at night if I believe that this is largely the product of the Bush
administration and is being corrected now?

Stephen Bright

I’d be glad to answer that. The interesting thing is that the practices with regard to the
federal death penalty have not changed at all the same people are in charge Margaret Biffy,
is the head of the capital unit at the department of justice that all the requests to seek the
death penalty come into and for any death penalty case to be resolved it has to be approved
there so that there can be a plea bargain they decide whether a case goes to trial or whether
it can be solved with a plea bargain. Very often, this was determined by Attorney General
Attorney general will over rule that and say you must take this case to trial in fact the
Vermont case, the United States V. Fell, was a case where the department even went so far
as to send its people in from Washington to prosecute the case in Vermont because they
didn’t think the united States Attorney in Vermont was sufficiently gung-ho about it. And
obtained the death penalty in that case so that is all controlled there by committee which
then makes recommendation to the head of the criminal division which then makes recommendation to the attorney General which basically as best as I can tell so far and I’ve had a good bit of dealing with them, I’m sorry to say. And it’s basically the same practice that we have basically whatever the committee decides, the Attorney General, Attorney Holder, I don’t think likes the death penalty very much, I just think he does not want to fool with it. So whatever they decide is pretty much what goes and so we’ve got five death penalty cases going on in the country right now, federal death penalty cases. And they lose most of the time. The federal takes three death penalty trials to put one person on death row because two out of three times the juries reject the federal death penalty it has been the most probably inefficient because as they say two out of three times the juries reject it I tried a number of Federal death penalty cases in Puerto Rico where the constitution of Puerto Rico prohibits the death penalty they’ve never been successful in getting them It does not really make a lot of sense to prosecute the death penalty in Puerto Rico, but they’ve done it and not been successful. But they have been successful, as you can see, in Richmond and New Orleans, and in St. Louis. So, those are the places where they’ve been the most effective but that has not changed with this administration.

Ben Cohen

In John Johnson’s case when we brought this to the attention of the US Attorney, they said well you have three similarly situated African Americans in the county outside who have been prosecuted by state we can prosecute. That’s not sufficiently similar because they’re a little bit different, in one instance it’s a guard and in another it’s a teller. And so we said can we get discovery from the department of justice which tracks every single bank robbery, every single robbery of an armored car can we get discover? And while we’re getting discover of that do you mind giving us any e-mails or memos between you and the district attorney of New Orleans that references race? Not all of their personal communications, just any that reference race? And they said no to the data this is in August of Obama’s tenure, ‘No’ to the data and ‘no’ to the e-mails and so we said will you at least state under oath that the decision to prosecute federally was not based upon race and they said it’s governed by privilege, we will not provide you with that information.

Robert Smith

There are a couple of points that have been spinning around I’d like to address them quickly if that’s okay? The first thing is I think that in most federal cases the facts are horrible, nobody is denying that, but the Supreme Court has said that you need to have only the worst of the worst people sentenced to death. That means that they’re people who not only commit the worst crimes but they’re also the most culpable what that means is that when we look at the number of horrible crimes that are out there, we need to be able to look at them and rationally say, ‘What is it about this group of people, this small number of people who got a death sentence out of the group of people who already committed a horrible crime versus the people who didn’t?’ And I think race is a powerful story. Another powerful story is the quality of your defense council makes a difference, most people don’t get Jeff Robinson, they don’t get Jeff Ellis, they don’t get Mark Laranaga. We have a case right now in direct appeal where the lawyer asked for a continuance because duck hunting season was just about to end at the trial. We have lawyers who fell asleep who turned in their bar cards at the end of trial. These aren’t horror stories they’re more common place than you would ever want to imagine. Our clients are people who if they’re not mentally retarded, they’re in the low seventies, they’re mentally ill, they were beaten, raped and abused and these are factors that need to be taken into consideration. When it comes to race I think one of the things that
Jim said and I believe him, I think we have every reason to is that he doesn’t explicitly take race into consideration I think there’s some things we need to think about there and unpack. The first thing is that you don’t have to take race explicitly into consideration in order for race to have a impact and there are several ways. The first way that it happens is when we pick juries and we know that a presence of a single African American on a capital jury makes a difference. They’re much less likely to sentence somebody to death and as a prosecutor if you’re trying to pick a jury and what your goal is to win the case or get a death sentence, let me give you a tip: getting rid of as many African Americans as possible is probably a good strategy in most places. So when you ask a question like ‘on a scale of one to ten how do you feel about the Jefferson Parish police department?’ Now if you’re an African American who lived under regime where Sheriff Harry Lee stopped folks from fleeing Katrina into Jefferson Parish, how would you feel about the Jefferson Parish Police Department? So you say one and you’re struck and they say you have no respect for the Jefferson Parish Police department. And you get to the trial and you go through and first of all here’s a happy note: John Johnson’s death sentence was reversed last week. And the reason that it was reversed was based on inappropriate victim impact evidence in capital cases you get to bring in what you get to do and what actually happens are two different things. A lot of times you bring it in and they have videos that are narrated, they have songs going on and the jurors watch it and it’s just heart breaking. What you see is again like remember the concentrated poverty with a lot of violence in the suburban, gated neighborhood and you see a white little girl with blue eyes and blond hair and you see them you know playing at the park together and the little league baseball games and people are crying and Celine Deon’s in the background and you can relate to that because as a juror you’re like that’s your kid and that’s your neighbor’s kid but then you see in a situation that’s just different like when you see someone that doesn't look at you, they talk like you, they don’t dress like you and you say that would never be me I’d never make the choice to be in that circumstance and it’s a way that race gets into the decision without anybody being a racist.

The final point is that when we talk about community resources and prosecuting cases in Puerto Rico, The Federal government has a lot of money we get that. But in places like North Carolina where they prosecute capital cases and it costs eleven million dollars more per year than to seek life without the possibility of parole. And you have the most murders in the state happen in Charlotte, Raleigh, several other places and in these places the vast number of murders happen there they had one death sentence combined in ten years. In a place where there are an average of three murders for that county comprised almost half of their death row population the question becomes when we spend this much money on capital cases what resources aren’t we putting in those communities where the murders actually happen because when somebody is the victim of a crime, they’re more likely to lose their job because the victims or the relatives of somebody who was lost in a murder case they’re likely to lose their job, become addicted to substances, suffer post-traumatic stress disorder and we don’t have enough money to put in there for victim resources. When we, I know I’m way over time. Thirty more seconds. One of the things we were talking about last night at diner is Youth Build and in North Carolina and other places across the country Youth Build costs roughly eighteen thousand dollars per student. Most of these people have been in trouble with the law they have not achieved their GED they have not done much of anything positive in their life. They get into Youth Build they’re given a training program, they’re given skills they are building houses in poor communities, most of them graduate with a GED. There are stories they walk back through their communities, they have the tool kit on, they’re dirty they’re sweating from a hard day’s at work and people are saying it feels good that people in the community look at me as something other
than a thug. And we benefit because when they graduate they graduate with their GED, they
have job skills, they’re less likely to commit a crime, they’re less likely to commit a violent
crime. They’re less likely to need welfare assistance and for eighteen thousand dollars per
year that’s all it takes to get one other person. There are waiting lists like you wouldn’t
believe and we spend money prosecuting capital cases when we don’t get death sentences. I
think that’s a tremendously poor waste of resources.

Stephen Bright

Well, let me do this. I think my responsibility here is to sort of bring us to a close at a
reasonable time and people can come up here and continue to engage this wonderful panel
that we have had. Let me just saying closing and then we can do that. To put these things
things a little bit into perspective a couple, three things occur to me and let me just mention
them quickly. It was mentioned how many death sentences you’ve had here in Washington
in this state since the death penalty or since you adopted it in I think you said 1981, thirty-
one death sentences and I understand there are about ten people on death row now and there
have been four executions. In Louisiana by contrast, there are eighty-four people on death
row right now and they have been twenty-seven executions, but if you look at where the
death penalty is really going, and of course that’s a state that’s really seriously in the death
business. Of course the state is most seriously in the death business is Texas where there are
three hundred and fifty-eight people waiting to be executed and four hundred and fifty have
already been executed so that’s there is a difference that I have noticed in places like
Connecticut where I spend some of my time where we have a death row of ten and the death
penalty is taken very seriously in Connecticut. There’s a capital defender office and the
cases go there and the courts when they have those courts and the appellate court take them
very seriously because they come along very seldom. In the confederacy where I practice in
Alabama, Georgia, Texas, Louisiana, Arkansas, the death penalty is very common they’re
not any different than any other kind of cases. The death penalty case will occasionally be
tried in a day. The jury will be picked, the trial will be tried, the jury will come back after
dinner consider the penalty phase and literally you can go from the presumption of
innocence to death by midnight but often it’ll take two or three days but it’s not at all
unusual to try death cases in less than a week but in those kind of cases the kind of care and
so forth that you hear talked about does not take place. Now that’s not true in the federal
cases, but I just want to make it clear that the sort of care that we’ve talked about is not
common everywhere and the kind of representation that we’ve talked here is not common
everywhere and of course that’s something that’s not our subject tonight but just something
that is a factor here that this is not just a matter of race which has just bedeviled this country
from the time it first captured people and brought them here against its will but as Jeff
eluded to with regard to these studies recently of the dolls and so forth is just one of the
great of our society. DuBois said that the color lines are the greatest in the last century and I
think it still is and the criminal justice system that seems to be the institution probably least
affected by the civil rights movement because it’s just so few people of color in it and are a
part of it and you come into the courtrooms where I practice and communities that are
anywhere from ten, twenty, even twenty-five, thirty percent African American and yet
everything is the same, the judge is white, the court appointed lawyers are white, the
prosecutors are white and even the jurors are all white the only person of color in the front
of the courtroom is the person on trial. And I think race still plays a great role there. I
always tell my students when they come for the first class; everything in this class is about
race everything is about race and about poverty. And poverty has really been court
appointed lawyers and what kind of lawyers you get when lawyers are paid by the case or
paid by the hour at a very low hourly rate. And that’s another subject to look at on another
day. But the two most important decisions in most capital cases is the decision whether to seek the death penalty made by the prosecutor or whether to plea bargain almost all the cases are resolved in those two decisions and I think race enters into those decisions in the state courts. I think what’s important about this study and so important is that this is where race explicitly without any question enters into the decision because when the prosecutor in Orleans Parish or the prosecutor in Richmond, Virginia or the prosecutor in St. Louis, Missouri, when the state and federal prosecutors decide we’re going to try this case in federal court because we're going to get a veneer we’re going to get a jury that is going to be eighty percent white and therefore we’re going to be able to get the death penalty because we know if we try in the state court we are not going to be able to get the death penalty, that’s as explicitly racial as it gets. Now when it comes time to pick the jury and you strike the jury you will see, as we all know, in jurisdictions which have large African American populations, the prosecutions going to strike all of the blacks and the defense is going to strike all the whites and everybody knows why that’s going on. And one of the other places where history catches up with us is when we ask people in death penalty cases is anybody conscientiously opposed to the death penalty. And the more people who are people of color will raise their hand and say yes I’m opposed to the death penalty the reason of course is because the death penalty has been used in a racially discriminatory manner so there your history is catching up with you and last time I had picked a jury, we lost fifteen people because they were conscientiously opposed to the death penalty. Eleven of the fifteen were people of color, African Americans. Well they were already in the minority to begin with now eleven are gone. So it’s very easy for the prosecutor to then strike the rest and we have an all-white jury even in an jurisdiction that has a fairly substantial. And we all know that jury selection that’s the ballgame of course and I talked at lunch today many of these cases are tried in these white flight counties that we talked about here where there are no black people in any county, nobody lives there. And so no people of color live there, so you don’t have to engage and that’s where a prosecution And finally I would just say this about the capital what the Baldus Study found is that you’re going to have some people in these really heinous cases, the Timothy McVeighs, the Campbells, the, well, you would have had the Green River Killer, but of course he didn’t get the death penalty. That’s your most aggravated case here in Washington and he did not get the death penalty. Our most aggravated two cases in Georgia is the Atlanta Child Killer and a fellow who killed a judge and a court reporter and a deputy sheriff and another person, those two people didn’t get the death penalty. So everybody who gets the death penalty are less heinous crimes than those, but normally, at least in theory, the most heinous crimes get the death penalty and then there’s a group of crimes, I will say crimes that are not particularly aggravating that almost everybody agrees don’t get the death penalty but then there’s that middle group and that’s where you see race come into play and that’s where you’re going to have the cases be robberies of seven-elevens, burglaries where people wake up in the middle night, bank robberies that are botched, those kind of cases and that’s where race comes into play and I’ve noticed one of the most remarkable things that William Brennan was able to do as a member of the Supreme Court, in McClusky’s in his dissent he writes about there had to come a day where Marvin McClusky had to ask his lawyer what the chances were that he was going to get the death penalty and he said that conversation had to be a painful one because if the lawyer was candid he had to tell McClusky that no two factors would influence his likelihood of getting the death penalty as much as the race of his victim and as much as his race, that all the other things that happened in the case, all the circumstances what his prior record was, what happened in the case all of that would not matter as much and he concluded his dissenting opinion by saying of all the dissents of all the criticisms that are written about this opinion the most eloquent dissents will be those conversations that lawyers have with their clients. Now those conversations, I read that and I thought gosh
how does some guy up there in the Supreme Court of the United States in some marble palace up there know what lawyers are talking to their clients about in jails all over Georgia, Alabama, Mississippi, Louisiana are pretty remarkable in my opinion and those types of conversations continue to go on to this day.

This article I think will help people understand part of why that is the case and it will add a great deal of understanding and also the fact that the Federal death penalty when it was brought back far from being what people thought it would be for airplane hijacking national security issues or whatever. Really the main purpose that the federal death penalty or certainly one of the main purposes is been the most arbitrary death penalty that we’ve had and that one of its main purposes has been and continues to be to be used in this way to discriminate on the basis of race. And it is a great public service that Ben Cohen and Robert Smith have provided by this and I think it’s great that your law journal is publishing it and is to be commended for doing so and thank you all for coming this evening.

[Applause]