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## Introduction to a Frank Conversation: Media, Race, and the Death Penalty: Eighteenth Annual DePaul Law Review Symposium

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## INTRODUCTION TO A FRANK CONVERSATION

*Emily Hughes\**

What a difference a year makes. When we convened in Chicago in March 2008 to discuss the interplay of race, the media, and the death penalty, little did we know that when this symposium issue went to press, the newest President of the United States would be Barack Obama. It is too early to understand the ways in which President Obama's own race is reshaping our nation's understanding of race, as well as the ways in which that reshaping may impact the media's portrayals of race and how we as a society understand the interplay of race and the death penalty. But it is not too early to discuss how the articles in this symposium issue on race, the media, and the death penalty are moving that conversation forward.

Take, for example, President Obama's appointment of Eric Holder as the 82nd Attorney General of the United States—the first African American to head the Department of Justice and serve as chief law enforcement officer of the federal government.<sup>1</sup> Shortly after he was sworn in on February 3, 2009,<sup>2</sup> Holder spoke at the Department of Justice African American History Month Program, where he startled the status quo by observing that “in things racial . . . [the United States has] always been and continue[s] to be, in too many ways, essentially a nation of cowards.”<sup>3</sup> He went on to say that “if we are to make progress in this area we must feel comfortable enough with one another, and tolerant enough of each other, to have frank conversations about the racial matters that continue to divide us.”<sup>4</sup> The articles in this issue are the backbone to beginning a frank conversation about how the media perpetuates and problematizes our understanding of race, and how the media's portrayal of race interweaves with racial discrimination in capital cases.

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1. United States Department of Justice, Office of the Attorney General, <http://www.usdoj.gov/ag> (last visited May 26, 2009).

2. *Id.*

3. Eric Holder, U.S. Attorney General, Remarks at the Department of Justice African American History Month Program (Feb. 18, 2009), *available at* <http://www.usdoj.gov/ag/speeches/2009/ag-speech-090218.html>.

4. *Id.*

Justin Levinson's *Race, Death, and the Complicitous Mind* frames this discussion by exploring how social science research may help to reveal how people's automatic and unintentional cognitive processes either reinforce or mask racial disparities in the administration of the death penalty.<sup>5</sup> After explaining important developments in social cognition research, Levinson proposes significant new hypotheses that may explain why capital cases are infused with racial bias and why the research to date has covered up existing racial disparities instead of revealing them.<sup>6</sup>

His first hypothesis, which he names the Death Penalty Priming Hypothesis, posits that the death qualification processes involved in selecting jurors to serve on capital cases are not nearly as race-neutral as they are assumed to be.<sup>7</sup> Rather, Levinson suggests that the voir dire process itself automatically elicits implicit racial bias in the final jury panel.<sup>8</sup> Levinson names his second hypothesis the Racial Bias Masking Hypothesis.<sup>9</sup> In it he proposes that complex empirical studies examining race and the death penalty may unintentionally mask racial bias because they rely on racially biased sources of case facts.<sup>10</sup>

Levinson's hypotheses are important contributions to a frank discussion of race and the death penalty because they complicate our understanding of the very contours of the problem. For example, the Death Penalty Priming Hypothesis is based on the social cognition concept of priming, which explains how questions we believe to be race-neutral may actually elicit racial bias in jurors.<sup>11</sup> He suggests that this automatic activation results from "deep historical associations between capital punishment and race"<sup>12</sup> as well as from "the continuing propagation of racial stereotypes in the media and in the American culture generally."<sup>13</sup>

While Levinson's hypothesis assumes that priming results from these deep historical associations are perpetuated in the media—and then he explores the implications of those associations through social science research—Michael Brown explores a similar question through the lens of history and the media. In his article, *The Death Penalty and the Politics of Racial Resentment in the Post Civil Rights Era*,

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5. Justin D. Levinson, *Race and the Complicitous Mind*, 58 DEPAUL L. REV. 599 (2009).

6. *Id.* at 602–03.

7. *Id.* at 619.

8. *Id.*

9. *Id.* at 632.

10. *Id.*

11. Levinson, *supra* note 5, at 603.

12. *Id.*

13. *Id.*

Brown tracks the American public's support of the death penalty over time, explaining that it is wrong to assume that most Americans have always been in favor of the death penalty.<sup>14</sup> He posits that "[c]ontemporary public support for the death penalty and repressive crime control policies, and hostility toward welfare are part of an ideological and cultural syndrome that defines the post civil rights racial order."<sup>15</sup> While acknowledging that "there is never a one-to-one relationship between shifts in public opinion and policy changes,"<sup>16</sup> he maintains that capital punishment, crime, and welfare policies "continue to have broad public support at the same time as they have had devastating consequences for African Americans."<sup>17</sup> Indeed, when Brown observes that "racial attitudes, racist stereotypes, or both are the most important factors explaining white support for the death penalty and white opposition to welfare,"<sup>18</sup> he seems to be responding directly to Holder's call to discuss the current state of American race relations with honesty and frankness.<sup>19</sup> Brown ends his article by considering ways in which the post racial order is changing, concluding that such changes are imperative first steps in order to alter public support for the death penalty.<sup>20</sup>

Following Brown's article is a forceful analysis of an aspect of death penalty litigation that is so common as to be almost innocuous: the plea bargaining process. In *Plea Bargaining and the Death Penalty*, Albert Alschuler describes the interaction of plea bargaining and capital punishment as "two dreadful monsters of American criminal justice."<sup>21</sup> In no uncertain terms, Alschuler argues that the plea bargaining process "devalues the death penalty."<sup>22</sup> Alschuler asserts that allowing plea bargaining in capital cases ensures inequality between capital defendants, and he asks whether the elimination of plea bargaining in capital cases would "leave the number of executions constant but produce a criminal justice system in which killers were selected for execution more on the basis of what they did and less on the basis of whether they exercised their rights."<sup>23</sup> By concluding that

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14. See Michael K. Brown, *The Death Penalty and the Politics of Racial Resentment in the Post Civil Rights Era*, 58 DEPAUL L. REV. 645 (2009).

15. *Id.* at 646.

16. *Id.*

17. *Id.*

18. *Id.* at 648–49.

19. Holder, *supra* note 3.

20. Brown, *supra* note 14, at 667.

21. Albert W. Alschuler, *Plea Bargaining and the Death Penalty*, 58 DEPAUL L. REV. 671 (2009).

22. *Id.* at 674.

23. *Id.* at 676.

“[p]lea bargaining perverts the role of counsel as it trivializes the purposes of the death penalty,”<sup>24</sup> Alschuler challenges the reader to envision what the capital litigation process would look like if plea bargaining were removed from it.

After the first three articles of this Symposium issue, a rather radical groundwork is established to challenge the typical conversation about race and the death penalty. Alschuler envisions radically changing the capital trial process by eliminating plea bargaining. Brown advocates for changing the post racial in order to alter racial hostility imbedded in public support for the death penalty. And Levinson challenges us to understand how the very processes we employ in capital voir dire may unconsciously exacerbate underlying racial hostility. Against this bold backdrop, Andrea Lyon’s article, *Mixed Media: Popular Culture and Race and Their Effect on Jury Selection*, adds a pragmatic perspective to the mix: Given that capital defense attorneys must ask prospective capital jurors questions during jury selection, what kinds of questions should they ask?<sup>25</sup> Lyon answers this question by first admitting that jurors are inherently biased and that we have no hope of changing them through voir dire.<sup>26</sup> Instead of trying to change jurors, Lyon suggests ways that attorneys can do a better job listening to jurors and identifying inherent racial biases that jurors may harbor.<sup>27</sup>

To do this, Lyon discusses ways to ask questions that may help the jurors themselves understand their own biases. She posits that news and television crime dramas have had an enormous influence on creating specific expectations in jurors’ minds.<sup>28</sup> One difficulty in discovering the extent of this influence is that jurors may not be consciously aware of it. So attorneys must not only ask good questions, but they must listen well to the answers they receive and follow up with specific questions that probe what jurors are actually saying. Only by asking good questions and creating space to listen to the answers, Lyon explains, will capital attorneys be able to discover racial bias through the jurors’ own self reporting.<sup>29</sup>

Craig Haney continues this line of questioning by considering in greater detail exactly how the media has distorted jurors’ understandings of crime-related policies and decisions. In *Media Criminology*

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24. *Id.* at 680.

25. Andrea D. Lyon, *Mixed Media: Popular Culture and Race and Their Effect on Jury Selection*, 58 DEPAUL L. REV. 681 (2009).

26. *Id.*

27. *Id.*

28. *Id.* at 683.

29. *Id.* at 685.

and the Death Penalty, Haney explains that it is dangerous to “be-moan[ ] only the overall bias and distortions that collectively characterize the messages that are conveyed”<sup>30</sup> to the public. By focusing on the generalized bias to the exclusion of the particular detail that forms the bases of those biases, “legal analysts and death penalty attorneys . . . overlook the truly extreme content and unsettling tenor of many of the ubiquitous criminological lessons that the media regularly disseminate to citizen-jurors throughout the country.”<sup>31</sup> Haney thus focuses on the particular details of media criminology by taking an in-depth look at some of the specific examples that citizen jurors regularly absorb from the media.<sup>32</sup>

Haney’s tour-de-force analysis of the bombastic reign of crime-oriented media leaves no stone unturned. From the emergence of the “police procedural” drama to “true” police reality shows, to crime-focused documentaries and news programs, the specificity of his study of media criminology is both astounding and disturbing. It is thus fitting that at the end of his analysis—when the reader is quite literally swimming in crime-related references and bemoaning the thought of what’s on television tonight—that Rachel Lyon’s article, *Media, Race, Crime, and Punishment: Re-Framing Stereotypes in Crime and Human Rights Issues*, steps into the conversation.<sup>33</sup> Lyon is a filmmaker and a professor who has produced two recent documentaries about criminal justice. The first of these films—*Race to Execution*—explored race and the death penalty by focusing on the life stories of two men who had been tried for capital cases and sentenced to die: one in Chicago and one in Alabama.<sup>34</sup> As Lyon explains, her work on that film revealed disturbing research on how the ultimate decision of who is sentenced to death in the United States interweaves with the race of the victim, the race of the defendant, and the race and gender of jury members.<sup>35</sup>

Her second documentary in this series, *Juror Number Six*, is an outgrowth of questions that arose while Lyon was filming *Race to Execution*.<sup>36</sup> After becoming increasingly intrigued with the depth of fear that the media propagates through the very media criminology that Haney documents in great detail, Lyon focused her second film on the

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30. Craig Haney, *Media Criminology and the Death Penalty*, 58 DEPAUL L. REV. 689 (2009).

31. *Id.* at 691–92.

32. *Id.* at 692.

33. Rachel Lyon, *Media, Race, Crime, and Punishment: Re-Framing Stereotypes in Crime and Human Rights Issues*, 58 DEPAUL L. REV. 741 (2009).

34. *Id.* at 742.

35. *Id.* at 742–43.

36. *Id.* at 743.

convergence of media, race, crime, and punishment.<sup>37</sup> Her film and accompanying article explain how the crime-related media that Haney describes may not *generate* fear in the minds of the audience, but they nevertheless *increase* a climate of fear in the minds of their audience.<sup>38</sup> Because that fear then finds its way into the jury box, Lyon challenges us to understand how various sources of media—from crime dramas to television news shows—capitalize on and distort latent racist fears in the minds of their viewers.<sup>39</sup>

Underlying her argument is the assumption that we must understand how fear and falsity are perpetuated in the media if we are to begin the process of someday dismantling them. But the process of dismantling the destructive force of the media is trickier than it first appears. For example, Lyon points out that primetime crime dramas depicting black judges, prosecutors, and jurors are not necessarily the way to correct other distortions in the media.<sup>40</sup> Such primetime dramas may give views the false perception that latent racism no longer exists in our society—“that the courts are fair and that our justice system is working”<sup>41</sup>—when in fact, “97.5% of district attorneys in states that use the death penalty are white and male, while African Americans make up only 3.9% of all lawyers in death penalty cases.”<sup>42</sup>

Although the solution to the problem is not easy, Lyon concludes with optimism by suggesting that the media itself may prove to be instrumental in “changing the frame” with which we understand crime and punishment.<sup>43</sup> She discusses the rise of citizen journalists and the concomitant slashing of newsrooms jobs as two factors that may have a hand in deconstructing the complex issues surrounding fear, crime, and race.<sup>44</sup>

And thus the issue ends by moving this frank conversation about race, the media, and the death penalty forward, out of the pages of the text and into the minds and voices of its readers. Eric Holder himself acknowledged that frank conversations about the racial matters that continue to divide us are only the first steps toward progress. “We must do more,” Holder explained, than simply talk.<sup>45</sup> Holder believes that real change will only come from work and from the example that

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37. *Id.*

38. *Id.*

39. Lyon, *supra* note 33, at 743.

40. *Id.* at 752.

41. *Id.*

42. *Id.*

43. *Id.* at 757.

44. *Id.* at 758.

45. Holder, *supra* note 3.

that such work sets for others.<sup>46</sup> As our first mixed-race President of the United States himself stated, “[W]e cannot solve the challenges of our time unless we solve them together—unless we perfect our union by understanding that we may have different stories, but we hold common hopes; that we may not look the same and we may not have come from the same place, but we all want to move in the same direction—towards a better future for our children and our grandchildren.”<sup>47</sup>

The articles in this issue are part of a frank conversation that begins the process of moving us in the same direction. How we get there is up to us.

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46. *Id.*

47. Barack Obama, Remarks at the Constitution Center in Philadelphia, Pennsylvania: A More Perfect Union (Mar. 18, 2008), available at [http://www.huffingtonpost.com/2008/03/18/obama-race-speech-read-th\\_n\\_92077.html](http://www.huffingtonpost.com/2008/03/18/obama-race-speech-read-th_n_92077.html).

