The Soft Evidence Behind the Hard Rhetoric of ‘Deterrence’

OCT. 20, 2015

First Words

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In the small city of Rome, Ga., in 1986, a retired schoolteacher named Queen Madge White was strangled to death by a young man who broke into her home. After his girlfriend turned him in to the police, Timothy Foster confessed to the crime. Foster lived in a housing project a few blocks from his victim. He was 18 and black. She was 79 and white. Choosing the jury that would decide whether Foster deserved to be executed, the prosecutors sent home four potential black jurors. They gave reasons that they said were unrelated to race, as the Supreme Court requires, but that seem unconvincing. The prosecutors said they struck one black woman from the jury because, at 34, she was too close to Foster’s age. They said they excluded a black man because his wife worked at a hospital. But so did a white woman who was asked to sit on the jury, which, in the end, was entirely white.

In early November, the Supreme Court will hear Foster’s appeal, to address whether he should have a new trial because racial bias infected the selection of jurors — and ultimately their decision to vote for execution. Since then, the prosecutors’ notes for jury selection have come to light. The names of
the black prospective jurors were marked with a B and highlighted in green. “If it comes down to having to pick one of the black jurors, Ms. Garrett might be O.K.,” an investigator for the prosecution wrote of the 34-year-old woman. Foster’s new lawyers say the prosecution wanted an all-white jury that would respond to its closing plea: to sentence him to death “to deter other people out there in the projects,” where 90 percent of the residents were black.

The prosecution’s use of “deter” before the jury was deliberate. Americans were familiar with the Cold War meaning of the word: to contain Soviet aggression. The prosecution invoked it to make an argument for containing crime, which was then on the rise in White’s neighborhood and across the country. As politicians competed to show their determination to protect the public, “deterrence” was positioned as the respectable rationale for cracking down on criminals. Proponents used the dry, dispassionate terms of economics to describe robbers, drug dealers and murderers as “perfectly rational men and women” responding to lenient sentencing that made the cost of committing crimes “shamelessly cheap,” as Senator Phil Gramm of Texas wrote in a Times Op-Ed article in 1993. Gramm, a Republican, used the language of deterrence to crusade for mandatory minimum sentences for drug offenders: “When a potential criminal knows that if he is convicted he is certain to be sentenced, and his sentence is certain to be stiff, his cost-benefit calculus changes dramatically.”

Today, the conversation about deterrence has become far more contested, because of the social and fiscal costs of mass incarceration. In October, the Justice Department announced it would free 6,000 nonviolent drug offenders who were behind bars, often because of the mandatory minimum sentences that Congress was eager to pass in Gramm’s day. Freeing prisoners has for decades been seen as politically perilous, but now there is increasing bipartisan agreement that lengthy sentences are used too frequently. Perhaps the country has hit a limit for ratcheting up punishment in the name of deterrence.