Journal of Criminal Law and Criminology

Volume 79
Issue 1 *Spring*

Article 6

Spring 1988

Book Reviews

0091-4169/88/7901-240
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 79, No. 1
Printed in U.S.A.

BOOK REVIEWS

DEATH PENALTY FOR JUVENILES. By *Victor L. Streib*. Bloomington and Indianapolis: Indiana University Press, 1987. $28.50 (cloth). Pp. 189.

In 1962, the authors of the Model Penal Code suggested that "civilized societies will not tolerate the spectacle of execution of children." As of 1986, however, thirty-seven persons convicted of committing crimes when they were fifteen, sixteen, or seventeen years old sat on death row awaiting execution. If their sentences are carried out, they will join the ranks of the 281 others who have been put to death in this country for crimes they committed as juveniles.

Death Penalty for Juveniles offers a carefully researched, painstakingly detailed, and often chilling look at the history of capital punishment for children in America, beginning with the execution in 1674 of Benjamin Gourd for the crime of bestiality and ending with Jay Kelly Pinkerton, who was executed for murder by the State of Texas on May 15, 1986. This book, however, is more than an historical account of the application of the death penalty to juveniles. It also stands as a forceful and persuasive statement in favor of ending the practice of putting children to death for their criminal acts.

In Part I, author Victor Streib, who has written extensively on juvenile law matters, presents an overview of the history and philosophy of juvenile justice in the United States. A separate legal system for children who commit crimes has developed from a longstanding assumption that a minor lacks an adult's capacity to control behavior, to form moral judgments, and to appreciate the full consequences of his or her actions. For these reasons the juvenile court system has traditionally treated and rehabilitated children rather than demanded retribution from them for their deeds. Imposition of the death penalty stands as a stark exception to this general rule.

Due to its harshness, capital punishment is a rarity in juvenile cases. According to Streib, only 0.4 percent of juveniles arrested for murder in the ten-year period between 1975 and 1984 received the death penalty. He concludes that this small number refutes the ar-

cided with oral arguments in a case currently pending before the U.S. Supreme Court, *Thompson v. Oklahoma*. The issue before the Court in *Thompson* is whether imposition of the death penalty on a minor convicted of a crime committed when he was fifteen violates the Eighth Amendment's proscription against cruel and unusual punishment.

Even if the Court does not find a constitutional limitation on the power of the states to impose the death penalty on juveniles, Streib argues that there are clear indications that American society has reached a point where capital punishment for children is no longer compatible with what the Supreme Court has termed "the evolving standards of decency that mark the progress of a maturing society." Of the thirty-six jurisdictions which allow capital punishment, fourteen expressly prohibit its application to juveniles. Fifteen additional jurisdictions do not have a death penalty statute. Thus, a majority of legislatures have now rejected the practice of capital punishment for minors.

This legislative trend parallels jury sentencing patterns which reflect a substantial decline in the number of juveniles sentenced to death since 1982, a period during which adult death sentences remained stable. Additionally, recent public opinion polls indicate that two-thirds of those polled oppose the death penalty for minors. Perhaps the United States is prepared to join with more than three-quarters of the nations in the world, including all those in Europe, and set eighteen as the minimum age for the death penalty. In any case, *Death Penalty for Juveniles* makes an important contribution to the ongoing dialogue over this important public policy issue.

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THE ARBITRARINESS OF THE DEATH PENALTY. By *Barry Nakell and Kenneth A. Hardy*. Philadelphia, PA: Temple University Press, 1987. $39.95. Pp. 299.

The Arbitrariness of the Death Penalty was published a few months before the United States Supreme Court handed down *McCleskey v. Kemp* [1], the case challenging the imposition of capital punishment in

[1] McCleskey v. Kemp, 107 S. Ct. 1756 (1987) was decided on April 22, 1987. The five member majority, in an opinion by Justice Powell, held that the death penalty did

Georgia on the basis of a comprehensive statistical study conducted by Professor David Baldus and his colleagues at The State University of Iowa. The five member majority in *McCleskey* rejected a statistical offer of proof of racial discrimination based upon a sophisticated analysis of over two thousand homicide cases.[2] Why, then, do we need another study of capital punishment in yet another jurisdiction? Isn't it all now beside the point? The United States Supreme Court has rejected once and for all the argument that statistics can prove that the death penalty is applied arbitrarily. Hasn't this case ruled out statistical arguments that race is a significant factor in death penalty decision making? The answer is yes and no.

The Arbitrariness of the Death Penalty is a study of North Carolina homicide cases from June 1, 1977 to May 31, 1978, the first year of the reimposition of the death penalty in North Carolina. The statistical analysis begins with 604 identified defendants and proceeds to analyze 489 defendant-victim case units. There were eight death sentences in the group. Barry Nakell and Kenneth Hardy contribute an entirely new data set and a fresh statistical approach to the constitutional questions addressed in *McCleskey*. A different state, a different time period, a somewhat different methodology, and a totally independent research team are some of the factors unique to their study. Yet the conclusions do not contradict the Baldus study. Race of the victim and race of defendant and victim combined were not insignificant effects.

There now have been a number of totally independent studies finding a race of victim effect in capital case processing. This book summarizes the evidence presented. Researchers first studied Florida, Georgia, and Texas, all of which reinstituted the death penalty early. Researchers later examined sentencing patterns in Arkansas,

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not violate the defendant's constitutional rights under the fourteenth and eighth amendments. In dissent, Justices Brennan and Marshall reiterated their long standing position that the death penalty is in all circumstances cruel and unusual punishment and, hence, violates the eighth and fourteenth amendments. These Justices went on to detail how the Baldus data proved a racially discriminatory effect. Justices Blackmun and Stevens concurred with all parts of the dissent except the conclusion that the death penalty was in all circumstances unconstitutional. Justice Blackmun's separate dissenting opinion, which was joined in part by the other dissenters, concluded that the imposition of the death penalty in the circumstances of this case violated both the eighth amendment and the fourteenth amendment's equal protection clause. Justice Stevens separately stated that the offer of proof in *McCleskey* indicated a presently operating system, which was constitutionally intolerable, but that a death penalty applied only to certain categories of extremely serious crimes, would not necessarily be constitutionally impermissible.

[2] A recognized expert in the field conducted the study in *McCleskey*. *See* D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980).

Mississippi, Oklahoma, and Virginia. Studies are in progress in New Jersey and California. Independent researchers examined different states, different stages of the process, and different jurisdictions, using a wide variety of methods. Neither individually nor cumulatively does this research describe decision-making institutions that are neutral with respect to race.

This study has an additive and cumulative effect, but is exceptionally careful and well documented. The methodology is particularly valuable for its inclusion of variables that attempt to measure the degree of culpability, the strength of the evidence, the seriousness of the case, and the defendant's criminal record.[3] These variables are typically cited as the immeasureable explanation for the consistent race effects found by researchers. While others may objectify these variables differently or quarrel about the scaling, the attempt to quantify what everyone knows is important is commendable. Controlling for these variables did not eliminate significant and unexplained differences for race and jurisdictional boundaries. Race and judicial district persist as significant factors in the decision to seek the death penalty.

Does the Supreme Court opinion in *McCleskey* mean that lawyers and social scientists are no longer going to consider statistical evidence in death penalty cases? I hope not. There were other courts, some with the authority to strike down all death sentences within a single statewide jurisdiction. Although few think it likely that Justice Powell will be replaced by a justice opposed to the death penalty, there will be other capital cases before the United States Supreme Court. The *McCleskey* opinion will be modified; it will be clarified. The dissenting opinions in *McCleskey* provide new ammunition for those who continue to contend that race and other impermissible factors enter into the decision of whether to seek the death penalty. The courts have not put this issue to rest. Will other appellate courts take the position that it is advisable to ignore facts and statistics in deciding what is just? The *McCleskey* Court seemed concerned about the implications of reversing McCleskey's death sentence. Indeed, at the time of the Court's decision, over 1800 individuals were on death row. In all likelihood, a significant number of these individuals would have challenged their death sentences if the Court had reversed McCleskey's sentence. The majority of the Court undoubtedly considered those statistics very seri-

[3] For a detailed discussion of the methodology see L. Bienen, N. Weiner, B. Benno, P. Allison, and D. Mills, "The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discression," Rutgers L. Rev. Vol. 41, No. 1 (1988).

ously. When the Warren Court declared all pending death sentences unconstitutional in *Furman v Georgia*,[4] only about 600 people were awaiting execution.

This book is valuable to teachers in a variety of criminal justice related disciplines, because it combines sophisticated social science material with knowledgeable legal analysis. It is truly interdisciplinary in the best sense. The death penalty decisions and the political and philosophical debates which surround them offer an all too vivid example of the contradictions and confusions of the American legal system in the context of our present culture: we want justice, but we also want retribution. We are scared of crime and distrust our courts and legal system, but we believe that a person is innocent until proven guilty. We want to punish, but only after a full adversarial trial.

This book's organization suggests that Nakell and Hardy designed it for use in a variety of courses at both the undergraduate and graduate professional level. The empirical model is described in detail in one part, the discussion of United States Supreme Court opinions in another. Most valuable is the opening description of capital case processing with decision makers identified at each case processing stage. Nonlawyers will find that it makes the criminal system comprehensible. Lawyers will see their world from a systems perspective. Another useful section summarizes the results of statistical studies in other jurisdictions. If anything, the book is a bit too fragmented in its organization. The results of the empirical study are described in a section which is too self contained. Similarly, the section on the law is too compartmentalized. The findings of the empirical study are relevant to the discussion of the constitutional principles and the individual opinions. These deficiencies may be corrected by later academic commentators and by those trying to persuade courts to postpone or forestall death sentences. In the classroom or out, the authors' exposition of the procedural stages of the death decision making process is a real contribution. For those who like charts, the discretionary stages are outlined in boxes. For those who prefer their explanations in prose, the myriad and complex factors which combine to finally produce a death sentence are described neatly, completely, and accurately in the book's opening chapters. In sum, it is a fine teaching tool for inside the classroom and out.

State criminal justice systems are institutions with thousands of actors, beginning with the first police officer who arrives on the

[4] Furman v. Georgia, 408 U.S. 238 (1972).

crime scene and ending with the final juror who accedes to the death verdict. This description does not even include the Byzantine process of appeal and commutation. When the majority in *McCleskey* relied upon the autonomy and sanctity of jury verdicts, they deliberately ignored all but the final stage of a long and porous process. The *McCleskey* majority held that in order to meet the standards of the fourteenth amendment, racial discrimination must be purposeful. Actual or inferential intent to discriminate must be established. An intent to discriminate must be found or inferred. In addition, the discriminatory intent must be lodged within the head or at the hands of an identified individual actor. The *McCleskey* majority, backed into a corner by its own far from inexorable logic, found that the State legislature would be the place where that discriminatory intent must originate. To imagine the collective body of the State legislature as the sole, responsible decision maker in the criminal system, however, is to beg the question. The segregated and segregationist state legislatures of the not so recent past would not meet the standard announced in *McCleskey*, as long as the statute was race-neutral on its face and no legislator publicly announced racist intentions.

This book will not turn supporters of capital punishment into abolitionists. The position of the supporters is not necessarily to deny the arbitrariness, but simply to say arbitrariness or unfairness is either irrelevant or justified by other considerations. Indeed, the baldness of such statements in *McCleskey* shocked many soldiers in the field: Justice Powell: "At most, the Baldus study indicates a discrepancy that appears to correlate with race,"[5] "Any mode of determining guilt or punishment has its weaknesses and the potential for misuse. . . . There can be no perfect procedure for deciding in which cases governmental authority should be used to impose death." This apparent discrepancy which is correlated with race in fact showed that blacks who killed whites were twenty-two times more likely to be sentenced to death than blacks who killed blacks. The capital sentencing rate for all white victim cases was almost eleven times the rate for all black victim cases. In fact, when other variables were controlled, the race of the victim was almost as significant a predictor of a death sentence as the statutory aggravating factor of the defendant's previous convictions of murder. The race of the victim was more significant than whether the defendant was the "prime mover" in the homicide. When the data were separately analyzed for murder during the course of a robbery, the racial differ-

[5] McCleskey v. Kemp, 107 S. Ct. at 1777-78 (internal citations omitted).

ences were even more pronounced.[6]

One irony of *McCleskey* is that inferring racial discrimination in jury selection and in hiring and promotion is now easier than inferring racial discrimination in the application of the death penalty,[7] where past racial discrimination has been proved by overwhelming evidence. Our federal jurisprudence now stands for the proposition that while it constitutes cruel and unusual punishment to inflict certain fines and corporeal punishment, but not to kill a man.[8] Our federal courts can digest reams of complex statistics in the area of asbestos and anti-trust. Courts can calculate to the penny the value of a woman's life, including the value of her sexuality, to her husband, but our highest court has refused to accept as a reliable fact that a black defendant is more likely to be sentenced to death in Georgia if the victim is white than if the victim is black. Other contradictions abound. Can those who want executions to be carried out maintain that their position is not influenced by the fact that over 1800 persons are on death row? The *McCleskey* majority assures us that no innocent persons will be executed. Although he continuously asserted his innocence, Edward Earl Johnson, the first inmate put to death in Mississippi in four years, was executed on May 21, 1987, shortly after the *McCleskey* decision. It is a statistical certainty that some fraction of those 1800 people on death row are indeed innocent of the crimes for which they have been convicted. This has always been the case, and it will always be so. No institutionalized system of decision-making is completely without error. Would we trust our lives to the computers of the Internal Revenue Service? Perhaps the most valuable contribution of statistics is the concept of measurement of error, the ability to estimate inevitable error. Those numbers are only statistics, the critics of social science say. Yes, they are only approximations of error, or probabilities. Yet, is there anything better? Such evidence is relied upon in a variety of contexts where life and death are at issue, from highway safety to drug testing. Why shouldn't we not rely on such figures for justice? Is it better to rely on our ignoranceand prejudice?

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[6] See discussion, dissenting opinion of Justice Brennan, in McCleskey v. Kemp, 107 S. Ct. at 1781-1794, and dissenting opinion of Justice Blackmun, 107 S. Ct. at 1794-1805.

[7] In the words of Justice Blackmun, "The court today seems to give new meaning to our recognition that death is different." *Id.* at 1796 (Blackmun, J., dissenting). The result in *McCleskey* is especially difficult to square with the same court's holding in Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986). In *Batson*, the Court did not allow the exercise of preemptory challenges on the basis of race and referred to increasing efforts to eradicate racial prejudice from our criminal justice system.

[8] Weems v. United States, 217 U.S. 349 (1910).

The debate over capital punishment in America is hardly over. It will not be settled by this book, although the introduction of a new data set and another independent study reinvigorates the discussion. The *McCleskey* opinion only adds fuel to the fires, opening up new and productive lines of argument. *McCleskey* teaches that social scientists and lawyers cannot work at arms length. A variety of statements in the *McCleskey* opinions indicate that the lower courts were exceedingly frustrated by the statistical evidence before them, and these courts frequently misinterpreted the statistical results laboriously presented to them. If courts are to be allowed to ignore social science data and strong empirical studies such as this one, the fault is not merely with the statisticians and academics. The numbers cannot speak for themselves. Lawyers must make the methodology comprehensible to judges. Lawyers must translate the numbers into meaning and give figures a context. *McCleskey* places studies such as this one at the center of the debate, where they will stay for several decades. The issue is not going away. The debate will simply be addressed to audiences other than the United States Supreme Court, for the time being.

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CORPORATE CRIME UNDER ATTACK: THE FORD PINTO CASE AND BEYOND. By *Francis Cullen, William Makestad,* and *Gray Cavender.* Cincinnati: Anderson Publishing Company, 1987. Pp. xii, 398.

In the early 1970's, the Ford Motor Company knowingly marketed an automobile with a gas tank that would explode in flames if impacted even at low speeds from the rear. Ford decided not to recall the automobile after comparing the cost of repair to the cost of human life as estimated by the National Highway Traffic Safety Administration. The figure given ($200,000) was used in an internal company memo arguing that it would be more profitable to leave the tank in a dangerous condition than to spend about $12 (actually $5.80) per car to insert a rubber bladder inside the tank. On August 10, 1978, three teenage girls were killed when a rear-end collision caused their Pinto to burst into flames. About a month after the incident, an Indiana grand jury indicted Ford on three charges of