DEATH & DISCRIMINATION

Racial Disparities in Capital Sentencing

Samuel R. Gross & Robert Mauro

with a foreword by Marvin Wolfgang

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Foreword

Having had the privilege of working in the 1960s with Norman Amaker, Anthony Amsterdam, Jack Greenberg, Michael Meltsner, and others associated with the NAACP Legal Defense and Educational Fund, I became more precisely aware—legally and statistically—of the character and amount of racial discrimination in death penalty sentences. I also became much more sensitive than I had been previously to the many different levels of legal and statistical sophistication used in analyzing what at first appears to be a relatively simple working hypothesis: blacks, compared to whites, are disproportionately sentenced to death. The classic scientific requirement of holding constant as many relevant variables as possible, or to use the more commonly worded phrase, "all other things being equal," loomed especially large in examining the basic hypothesis.

From my contact with these brilliant, socially conscious lawyers, I also learned that the logic and language of the law and of social science have a relatively small degree of overlap, like a Venn diagram showing two circles with only a small section of interaction between them. The disparity between the two mind-sets increases from direct examination to cross-examination, from lower court opinions to those of the United States Supreme Court. And, until the last

moment under direct examination, I learned to use the relatively benign and factual phrase "racially disproportionate sentencing" instead of the more emotionally laden "racial discrimination in sentencing," which requires "intent" when bound to the Fourteenth Amendment.

Having learned these and other lessons of legal research on race and the penalty of death, I came to this volume by Samuel Gross and Robert Mauro with sharpened claws of critical analytic sensitivity and found the reward of reading similar to the delight a mathematician finds in the elegance of a particular proof. This work is the most comprehensive, thoroughly documented, carefully analyzed I have yet encountered on the topic of racial disparities in capital sentencing. Their review of the literature, through text and notes, is complete; their reasoning and conclusions are compelling; their analyses of Supreme Court opinions and of statistical evidence in their own study of sentencing under post-*Furman* death penalty laws in eight states and in review of the statistics from *Maxwell v. Bishop* to *McCleskey v. Kemp* are as compact and solid as the tightly fitted layers of a heavy onion.

Particularly informative for social scientists are the legal discussions and interpretations of the Eighth and Fourteenth Amendments. Equally valuable for lawyers are the statistical interpretations of multiple regression, multiple logistic (or "logit") regression, and other techniques. I can think of no other book or article that helps more than *Death and Discrimination* to reduce the logical and linguistic gap between legal and social science thinking and research.

MARVIN E. WOLFGANG

Preface

When we began this project in 1980, it seemed a straightforward task. Eight years earlier, in the landmark case of *Furman v. Georgia* (408 U.S. 238 [1972] the Supreme Court had declared all existing capital punishment laws in the United States unconstitutional and had vacated all death sentences then in effect. The basis for this decision (as best it can be deciphered) was the Court's conclusion that the use of the death penalty under these pre-*Furman* laws was "arbitrary" (meaning that there were no adequate legitimate distinctions between cases that received death sentences and those that did not) and "discriminatory" (meaning that death sentences were imposed in part on the basis of impermissible distinctions, in particular race). Four years later, in *Gregg v. Georgia* (428 U.S. 153 [1976]) the Court reversed its apparent course and approved several new death penalty statutes (and by implication, dozens of similar ones) on the ground that they promised to eliminate the arbitrariness and the discrimination that had troubled the Court in 1972. By 1980 several of these new laws had been in effect for five years or longer, and hundreds of new death sentences had been pronounced. The time seemed right to try to determine whether the new capital sentencing

schemes did in fact cure the problems that led to the *Furman* decision.

In one respect, we were right. It was a good time to investigate the effects of the post-*Furman* reforms on capital sentencing in the United States. With regard to the scope of the task, however, we were off by quite a bit. Like many empirical research projects, this study took on a life of its own and grew beyond our original vision both in scope and in detail. In addition, soon after we started our work the issue of racial discrimination in capital sentencing became a major focus in the long-running constitutional controversy over the use of the death penalty in America. In the process, the empirical studies on this issue—including our own—became the central elements in a series of legal cases, culminating in 1987 in the Supreme Court's decision in *McCleskey v. Kemp* (107 S.Ct. 1756 [1987]. As a result, we extended our work to include a description and critique of the courts' use of this research, and of their treatment of the underlying legal issues. The end result is this book.

Part One describes the background of the issues we explore. In Chapter 1 we introduce the legal and empirical questions, and in Chapter 2 we summarize and evaluate the research on discrimination in capital sentencing that preceded our own.

Part Two contains the core of the book, an empirical study of death sentencing patterns in eight states from 1976 through 1980. In Chapter 3 we describe the sources of our data and the methods that we used to analyze them. In Chapter 4 we describe in detail our findings for the three states in our sample that had the largest numbers of death sentences in the period we studied: Georgia, Florida, and Illinois. In this chapter we also describe our findings on the effect of appellate review on racial patterns in capital sentencing in two states, Georgia and Florida. Chapter 5 contains a brief review of our findings for the other five

states in the study. (These findings are displayed in detail in Appendix 2.) And in Chapter 6 we consider and reject several alternative explanations that could account for our findings in the absence of racial discrimination, and we discuss the relationship between our findings and other related recent research.

Part Three is addressed to the causes and consequences of racial discrimination in capital sentencing. In Chapter 7 we discuss possible psychological explanations for the racial patterns that we found. In Chapter 8 we describe the legal context of this issue prior to the *McCleskey* case. And finally, in Chapters 9, 10, and 11, we discuss the *McCleskey* case itself, in the lower federal courts and in the Supreme Court, and its implications.

In a word, these implications are grim. The Supreme Court has more or less acknowledged that race continues to play a major role in capital sentencing in America; in any event, this is an undeniable fact. But the Court has decided to do nothing about this form of discrimination and to refuse to hear future claims based on it. We think we can explain why the Court reached this conclusion, but we cannot justify it. Whatever the reasons for the Supreme Court's decision in *McCleskey*, it is wrong.

This should not be the end of the story. Recently, Representative John Conyers, chairman of the Subcommittee on Criminal Justice of the House Judiciary Committee, responded to *McCleskey* by introducing a bill in Congress that both outlaws racial discrimination in capital sentencing and specifies a method of proving a violation of its provisions (H.R. 4442, 100th Congress, introduced April 21, 1988). Perhaps Congress will enact this bill or some similar law. Perhaps other legislatures or executives will attempt to address this problem now that the courts will not touch it. If not, someday perhaps the Supreme Court itself will overrule its own misguided decision. It is no small comment

on our society that we openly and consciously tolerate a system in which race frequently determines whom we execute and whom we spare. Let us hope that this soon becomes a thing of the past.

June 1988

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Numerous colleagues helped our work with thoughtful comments on earlier versions of various parts of this book. A complete list would be embarrassingly long, but even an abbreviated one must include Hugo Bedau, William Cohen, Thomas Grey, Jerold Israel, Yale Kamisar, John Kaplan, Randall Kennedy, Michael Laurence, Richard Lempert, Robert Mnookin, Eric Multhaup, Frederick Schauer and

Robert Weisberg. Joseph Kadane and Lincoln Moses gave us excellent advice on statistics, Marty Mador provided essential help in organizing our computerized data, and Patrick Adair, Connie Beck, Kenneth Diamond, Kenneth Dintzer, Bryan Ford, Martin Koloski, and David Sprayberry were invaluable as research assistants. Countless drafts of the elements of this book, and (worse) uncountable tables were typed and retyped with precision and care by Judy Dearing, Moana Kutsche, and Marcea Metzler. Finally, Phoebe Ellsworth, a most valued colleague, provided regular aid and advice from start to finish.

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Contents

PART ONE

1 Introduction: Arbitrariness and Discrimination

Homicides are common in America; death sentences are very rare. By FBI estimates, 101,960 nonnegligent criminal homicides were committed in the United States in the five-year period from the beginning of 1976 through the end of 1980,[1] and 96,170 arrests were made for these homicides.[2] In that same period, 1011 death sentences were pronounced by American courts,[3] a ratio of nearly 100 to 1. Some of these homicides were committed in states without active death penalties, but only a small minority,[4] and some of the suspects arrested for these homicides were never convicted. The most relevant proportion may be hard to define and its exact size may be impossible to calculate, but the basic pattern is clear: among those hundred thousand homicides, death sentences were highly uncommon events. In this book we examine patterns of capital sentencing in this period in several states to determine whether race was a factor that caused some killers to be sentenced to death while the vast majority were not.

There is nothing wrong, in the abstract, with the fact that the death penalty is rarely imposed. At the opposite extreme, the general use of the death penalty as the punishment for over 20,000 homicides a year, or any number approaching that, would be unthinkable. In 1935, 199 people

were executed in the United States, the highest total since accurate records have been kept.[5] In the past decade, a similar number have been sentenced to death annually, but far fewer have been executed.[6] We are not likely to return to the 1935 execution rate in the near future, if ever, and even that rate would be extremely selective.[7] It seems inevitable that we will continue to impose the death penalty as we have in the past, winnowing a small set of capital cases from a vastly larger number of homicides.

Some steps in this winnowing process are relatively easy. The death penalty, like any other criminal sanction, is available only in cases in which suspects have been apprehended and convicted; only about half of all homicides fall in this category.[8] Moreover, many homicide convictions are for manslaughter rather than for murder, and among murderers only some are found guilty of capital murder under the laws of the relevant jurisdictions.[9] Actual numbers are hard to come by, but these restrictions undoubtedly reduce the pool of possible capital homicides considerably. They do not, however, determine who is sentenced to death. If only one homicide defendant in ten is legally eligible for the death penalty, only about one capital-eligible murderer in ten actually receives it.[10] This further selection is accomplished by a process that is anything but obvious, by actors vested with wide discretion. Two discretionary choices are particularly important: the decision by the prosecutor to seek the death penalty, and the decision by the sentencing judge or jury to impose it.

In practice, this discretionary use of the death penalty creates two moral and legal dangers: arbitrariness and discrimination. When a handful of cases is selected from a large mass, there is a risk that the selection will not be based on any consistent normative criteria—that those chosen for execution will be indistinguishable from the rest on any legally appropriate basis—or, worse, that they will be distinguished only by legally improper criteria—

poverty, powerlessness, or race. Walter Berns, an articulate advocate for capital punishment, has summarized the problem well: however strongly one may favor the death penalty in principle, its propriety in practice "depends on our ability to restrict its use to the worst of our criminals and to impose it in a nondiscriminatory fashion."[11]

The problems of arbitrariness and discrimination in the imposition of the death penalty have been the focus of a large body of litigation on the constitutionality of capital punishment. In 1972, in *Furman v. Georgia*,[12] the Supreme Court held that all death penalty statutes then in force were unconstitutional in that they violated the Eighth Amendment prohibition of cruel and unusual punishments.[13] There was no opinion of the Court in *Furman*; each of the nine justices wrote separately, concurring in or dissenting from the Court's judgment. All the justices in the majority were concerned about the arbitrary or the discriminatory nature of the death penalty, but their analyses of these problems varied. Two—Justice Brennan[14] and Justice Marshall[15]—concluded that the death penalty is an inherently cruel and unusual punishment. Justice Brennan relied in part on the infrequency of the death penalty as evidence that it had been imposed arbitrarily by what amounted to "little more than a lottery system."[16] Justice Marshall, on the other hand, based his decision in part on evidence that capital punishment had been used discriminatorily against defendants who were poor, powerless, or black.[17] The other three members of the majority, Justices Douglas,[18] Stewart,[19] and White,[20] each stated that capital punishment was unconstitutional as it was then employed in the United States. Justice Douglas concluded that the capital sentencing laws before the Court were "pregnant with discrimination,"[21] and that such discrimination violated the Eighth Amendment ban on cruel and unusual punishments. Justices Stewart and White focused on the arbitrariness with which the death penalty had been imposed. Justice Stewart complained