1992

# Book Review: Death and Discrimination: Racial Disparities in Capital Sentencing. by Samuel R. Gross and Robert Mauro.

Franklin E. Zimring

Gordon Hawkins

political theory of a constitution. Throughout the book she argues that private property serves as an expression of the tension between individual and collective self-rule. Private property provides a domain within which each of us can choose how to live while simultaneously allowing us to operate independently in the public sphere (if we want to). Yet, because private property is not pre-political, its precise contours depend on collective decisions about how extensive that domain ought to be. Nedelsky suggests, in a sketchy discussion, that we might "reshape constitutionalism" by focusing directly on human autonomy, making interdependence "the central fact of political life" so that "patterns of relationship . . . develop and sustain both an enriching collective life and the scope for genuine individual autonomy." She does not pretend that this sketch is a substitute for the Madisonian private property regime. She does insist, and I think properly, that political theorists need not accept private property as the sole expression of the tension between individual and collective self-rule.

Nedelsky's book is a provocative contribution to political and constitutional theory. Her readings of Madison, Morris, and Wilson are persuasive. Even if they do not sweep the field clear, anyone who addresses the property foundations of the constitutional order or takes part in the discussion of the republican revival will have to address Nedelsky's arguments.

## DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING. By Samuel R. Gross[1] and Robert Mauro.[2] Boston: Northeastern University Press. 1989. Pp. xvi, 268. $32.50.

*Franklin E. Zimring*[3] and
*Gordon Hawkins*[4]

The problems of arbitrariness and discrimination in the imposition of the death penalty have been the focus of a large body of litigation. Not unrelated to this constitutional contest, there has emerged a substantial body of published research on racial discrimination in the use of capital punishment. *Death and Discrimination:*

1. Professor of Law, University of Michigan.
2. Assistant Professor of Psychology, University of Oregon.
3. Professor of Law and Director, Earl Warren Legal Institute, University of California at Berkeley.
4. Senior Fellow, Earl Warren Legal Institute, University of California at Berkeley.

*Racial Disparities in Capital Sentencing*, the product of collaboration between a law professor and a psychologist, addresses both the legal and empirical issues involved in the debate about racial discrimination in the use of the death penalty in America.

Those who have been following that debate closely will find much that is familiar here. Indeed, a large part of the material in the book is drawn from the authors' prior publications: Samuel Gross and Robert Mauro's *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*,[5] and Samuel Gross's *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*.[6]

But the reader will also encounter a good deal that is new and unfamiliar. *Death and Discrimination* contains more than a substantial reworking and reanalysis of those earlier publications. It includes also a description and critique of the courts' use of the relevant empirical studies (including the authors' own) on the issue, together with their discussion of the underlying legal questions. Moreover, the book also presents a remarkably comprehensive review of the legal and social science literature.

The book is divided roughly into two portions, with the first half reporting on the empirical study of racial patterns in capital sentencing, and the second half describing the legal issues raised by these and similar statistics and the resolution of the issues in the litigation that became *McCleskey v. Kemp*.[7] These sections are well integrated, not showing the seams that frequently result when a lawyer and a social scientist each writes one half of a book. The legal analysis and the social science material do not clash but coalesce, and the authors have achieved a notable unity of writing style in this book. In this review, we focus first on the design of the study they report; second, on the presentation of the empirical material in Part Two of the book; and, third, on the legal analysis and argument in Part Three of the book.

This is not the only study to be used in litigation on the issue of what has been called "race-of-victim" effects in capital sentencing. David Baldus at the University of Iowa and his associates conducted a meticulous multi-year analysis of the path of potentially capital homicide charges through the Georgia criminal justice system.[8] The Baldus study, which was the centerpiece of the *McCles-*

5. 37 Stan. L. Rev. 27 (1984).

6. 18 U. Cal. Davis L. Rev. 1275 (1985).

7. 481 U.S. 279 (1987).

8. See David C. Baldus, Charles A. Pulaski, Jr., and George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. Crim. L. & Criminol. 661 (1983); David C. Baldus, George Woodworth and Charles A. Pulaski, Jr.,

*key* litigation, was a *longitudinal* study, one examining the same cases as they pass through different decision points in the criminal justice system. That longitudinal approach is, no doubt, the best way to do such research, but it is enormously expensive and time-consuming. At the time the Baldus and the Gross teams began their work, there was only one modern longitudinal study of homicide cases through the legal system, and the prospect of using this method as a tool to discover racial patterns in capital sentencing over a broad cross-section of states was not good.

Instead, the Gross and Mauro study was designed to provide multi-jurisdictional breadth to accompany the detailed Baldus study. In each study, the question was whether particular racial combinations of victim and offender were more likely to result in death sentences than homicides reflecting the same situational characteristics but with different racial configurations. A longitudinal study would start with a group of homicides at the beginning of their criminal justice system career and follow them through the system over time. By contrast, the method used in the Gross and Mauro study was to match up the detailed information reports by the police in eight states with detailed information for the same states on death sentence cases reported by the NAACP Inc. Fund.

This nonlongitudinal method is inferior to the longitudinal approach in a number of respects. First, one cannot get any sense of how the more than ninety percent of all cases that were reported as homicides but that did not become capital sentences dropped out of the picture. Observers also cannot get a solid sense of what does happen to such cases. Second, for reasons of timing as well as data imperfections, the observer will not be able to find all the death cases back in the broader sample of FBI-reported homicides. In an odd way, however, this weaker methodology is a stronger challenge to the skills of the researchers than a longitudinal study or, for that matter, a controlled experiment. A larger number of relatively ad hoc decisions must be made and justified in this kind of study. The researchers must always bear in mind what the essential logic of comparison in the design is or catastrophic errors can be made. In this instance, a very good job was done.

The methods used in the study were the best available for a study involving eight states and a small budget. The authors selected the least objectionable data sets and comparison logic. They

---

*Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U. Cal. Davis L. Rev. 1375 (1985); and David C. Baldus, Charles A. Pulaski, Jr., and George Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 Stetson L. Rev. 133 (1986).

executed the study in convincing fashion. They found that homicides with white victims were much more likely to result in death sentences than homicides involving black victims. This was true regardless of the race of offender, and with controls inserted to assure that a comparison was made between homicides that are similar in other respects. Consistently white-victim homicides were more than twice as likely to be in the death sentence category than apparently similar black-victim killings, and this pattern held for a large northern state like Illinois as well as for border states and the South.

The second part of the book presents an impressive amount of statistical material in first-rate fashion. While the study involves both cross-tabular analyses and estimates based on correlational analysis, the presentation is devoted to the tabular analyses. While some of the tables are perhaps a little too busy, patient readers can see the basis for each inference in the tables, follow the logic of the argument, and pose their own alternative explanations, which the text usually then considers.

It comes as no surprise that the legal analysis in the book is an argument, rather than a dispassionate assessment of the pros and cons of granting relief in capital cases based on race-of-victim effects. The authors spent years gathering their data and clearly believe in both the magnitude and persistence of race-of-victim effects. They also believe that such effects should be the basis for constitutional relief. The legal argument is well written and, in our view, convincing.

There are aspects of the race-of-victim issue which could have been more dispassionately discussed. Any court that confronted race-of-*offender* effects of the magnitude of the race-of-*victim* effects shown in this study would almost surely find fourteenth and eighth amendment arguments compelling. The different texture of the race-of-victim effect as a constitutional issue is something to which the authors might have given more consideration. Further, they could have put more emphasis on the arbitrariness that produces this pattern.

The book's concluding suggestion regarding the system for allocating death sentences—that "It's not broken because it can't be fixed"—is both telling and probably accurate. The case analysis and doctrinal command exhibited in these last chapters is of high quality. There is, of course, some irony in the fact that one of the things that may have convinced the Supreme Court that race-of-victim patterns are so pervasive as to be beyond correction is the study reported in the pages of this book.

Nevertheless, it has to be said that the authors' work has what might be called the defects of its virtues. Perhaps inevitably, they have been captured by the argumentative context of their research and legal analysis. The study may have used the best data available for a survey of this scale, but the information provided is both insufficiently rich and insufficiently coordinated for extensive exploratory analysis.

Stitched-together estimates derived from the Supplementary Homicide Reports that local police agencies file with the Uniform Crime Reporting section of the FBI and death penalty data gathered by the NAACP Legal Defense and Educational Fund do not become a unified data set for social science purposes. This methodology not only weakens the authors' conclusions but renders the whole exercise narrower in scope than one would hope for in law-related social science. The authors cannot pursue peripheral analyses that might produce new hypotheses because of the data limitations.

Together the argumentative context and the problematic character of the data impose limits on this scholarship in three important respects. In the first place, the litigation context distorted the authors' sense of the importance of *this* issue in the broad range of questions that arise in connection with capital punishment, criminal justice, and race. The selection of one in every hundred homicide offenders for a death sentence is inherently arbitrary in ways that would be offensive to constitutional principle even without the race pattern noted.[9] But this is not explored in the study.

In the second place, the litigation focus creates a deterrent to the examination of other novel and difficult aspects of the matter. The type of racial differentiation put in issue by *McCleskey* is the greater likelihood of a death sentence for defendants, be they black or white, if the homicide victim is white. An extensive and probing discussion of this type of racial differential would represent a significant increment to legal scholarship. But once the litigation process has tied an advocate to maintaining the moral equivalence of sentencing a man to death because his victim is white and sentencing a man to death because *he* is black, a searching exploration of this question by the advocate in after-the-fact scholarship seems unlikely.

Third, the experience of being involved in the litigation process distorts the authors' discussion of the Supreme Court's *McCleskey* opinion. To be sure, the majority opinion in that case is far "the

9. See Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* Ch. 4 (Cambridge U. Press, 1986).

jewel in the crown" of the Court's shoddy death penalty jurisprudence. Moreover, these authors cannot be expected to conceal their displeasure with the Court's cavalier treatment of a substantial issue. But their proprietary attachment to particular arguments deprives them of rhetorical and critical tools that would surely help their cause. Unfortunately, any potential for irony and wit in Chapters 9 through 11 is overwhelmed by the righteous indignation that is the hallmark of the rejected advocate with a publisher.

So *Death and Discrimination* does display some evidence of the occupational hazards of advocacy scholarship. But it also shows the distortive influence of capital punishment on both the criminal justice system and the work of constitutional courts.