

BOOK REVIEW

THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT

by Welsh S. White, Ann Arbor: The University of Michigan Press, 1987. Pp. 198. \$34.95 hardcover.

*Reviewed by Jack Greenberg**

Welsh S. White takes us on a guided tour of the leading doctrines of modern capital punishment law in *The Death Penalty in the Eighties: An Examination of the Modern System of Capital Punishment*.¹ White's principal starting point is the 1976 Supreme Court decision, *Gregg v. Georgia*.² He outlines the reasoning of *Gregg* and its companion cases, decisions which substantially restricted the use of the death penalty, and follows with an analysis of more recent decisions in which the Court, in parallel with or influenced by public frustration with the infrequency of executions, has facilitated the execution of death row defendants. Professor White writes, however, that the period in which we now find ourselves is not simply one of rush-to-judgment. He says that "it would be an oversimplification to suggest that the court is simply adopting a more permissive attitude toward the use of capital punishment. Rather, its view of capital punishment is deeply ambivalent. Indeed, decisions decided no more than a year apart often seem to manifest totally different priorities."³ The description at all points is thoroughgoing and accurate.

Death Penalty accurately and concisely describes issues relating to plea bargaining,⁴ the penalty trial,⁵ the defendant's right to present evidence and arguments at the penalty trial,⁶ the prosecutor's closing argument at the penalty trial,⁷ racial discrimination in the imposition of the death penalty,⁸ defendants who elect execution,⁹ and death qualification of jurors or the exclusion of jurors with scruples against capital punishment.¹⁰

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1. W. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* (1987) (*Death Penalty*).

2. 428 U.S. 153 (1976).

3. *Death Penalty*, *supra* note 1, at 21.

4. *Id.* at 31 (Chapter 2).

5. *Id.* at 51 (Chapter 3).

6. *Id.* at 75 (Chapter 4).

7. *Id.* at 90 (Chapter 5).

8. *Id.* at 113 (Chapter 6).

9. *Id.* at 140 (Chapter 7).

10. *Id.* at 162 (Chapter 8).

Professor White not only reads the cases, statutes and death penalty statistics, but he has, refreshingly, interviewed counsel in many death cases in order to present information that does not appear in the usual legal sources. For example, in discussing plea bargaining, he tells of Robert and Susan Morrow, lawyers in Harris County, Texas, who persuaded the prosecutor to dismiss the capital charge against a defendant charged with the rape, kidnapping, and murder of his niece in exchange for a plea of guilty to the rape charge. The defendant, however, refused to go through with the deal because he was ashamed to admit that he had raped his niece. The prosecutor would not reopen the bargain and so the defendant went to trial, was convicted, and sentenced to death.¹¹ Such a quirky reaction is one of a vast number of irrational responses which frustrate efforts at even-handed imposition of the death penalty.

In the course of informing his discussion of legal issues with information gathered from counsel, Professor White occasionally explores issues of professional responsibility. He tells the story of Bruce Ledewitz, a Duquesne University law professor, whose "unyielding opposition to any form of killing leads him to use whatever means he can to dissuade the defendant" from going through with a decision to acquiesce to being executed.¹² He quotes Professor Ledewitz as saying, "[W]hen I represent a capital defendant, I'm not there to let him kill himself."¹³ Professor White adds, "[O]f the attorneys with whom I spoke, not one indicated that he could imagine a case in which he would voluntarily allow a capital defendant to submit to execution."¹⁴

The most interesting part of *Death Penalty* deals with racial discrimination in the imposition of the death penalty. This was an issue which the Supreme Court addressed in *McCleskey v. Kemp*.¹⁵ At the time of the publication of *Death Penalty*, *McCleskey* had been decided in the court of appeals but not yet in the Supreme Court of the United States. The Supreme Court decision proceeded on the assumption that the facts asserted by defendant were accurate. Indeed, the sense of the opinions is that the assertions of fact were indeed correct. These facts, as measured by the best available scientific techniques, revealed that capital punishment is administered in a racially discriminatory fashion. The numbers were marshalled in a considerable variety of combinations. But no matter how one looked at the numbers, the unavoidable conclusion emerged that blacks who murder whites are sentenced to death significantly more frequently than defendants involving cases of any other racial combination. The fundamental basis of the Supreme Court's decision was that no racially discriminatory intent had been demonstrated in the case of the particular defendant or in the administration of the system generally. Of course, aberrations of this sort (not solely racial and perhaps not so egregious) were the basis of the Court's decision in *Furman v. Georgia*,¹⁶ and the reason why in that case the death penalty was held unconstitutional.

11. *Id.* at 37.

12. *Id.* at 144.

13. *Id.* at 145.

14. *Id.*

15. _____ U.S. _____, 107 S.Ct. 1756, 95 L.Ed. 2d 262, 55 U.S.L.W. 4537 (1987), rehearing den. _____ U.S. _____, 107 S.Ct. 3199 (1987).

16. 408 U.S. 238 (1972).

The conclusion is inescapable that the Court was principally motivated in *McCleskey* by the overwhelming public support for capital punishment and that to uphold *McCleskey*'s claim would have made it extremely difficult to administer the death penalty at an acceptable cost. The national reaction to *Furman*, i.e., the reenactment of capital statutes in thirty-five states, taught the Court that it was dealing with an institution so popular that it should think twice before once more prohibiting its use. Nevertheless, if the Court was rebuffed by the national reaction to *Furman*, it is possible that it also misguaged the response to *McCleskey*. There is a way to find out. Congress could enact legislation implementing section five of the fourteenth amendment which would prohibit administering capital punishment in a racially discriminatory way. Legislation was the route by which Congress in the Voting Rights Act Amendments of 1982,¹⁷ overruled the Supreme Court decision in *Bolden v. City of Mobile*.¹⁸ *Bolden* held that to establish a voting rights violation, the plaintiff had to prove an intent to discriminate. The 1982 Act required only that discriminatory effect be shown. Congress could do the same with regard to *McCleskey*. It could find that the death penalty is administered in a racially discriminatory pattern. Indeed, the facts in *McCleskey* demonstrate that this is true. Congress could declare that it is unlawful to impose or execute sentences of death in a racially disproportionate pattern and could declare which statistical methods of proof would suffice, what constitutes a *prima facie* case and what a state must prove to rebut that case. It is one thing to support capital punishment. It is quite another to tolerate its administration in a racially disproportionate way. Congress now, or some day in the not too distant future, could agree.

Death Penalty, of course, does not deal with the possibility of such legislation. But the book is a useful guide for those who want to understand the intricacies of capital punishment law and litigation and the future course of the death penalty in America. Any objective understanding of how the death penalty works must support efforts to abolish it.

17. 42 U.S.C. §§ 1973(b) and (aa).

18. 446 U.S. 55 (1980).

