Research on the Death Penalty

On the Liberating Virtues of Irrelevance

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The analyses of the death penalty reported in these pages, while diverse in both subject and method, are part of a distinctive post–*McCleskey v. Kemp* (1987) generation of studies in which the social science literature on capital punishment has begun to stand separate from ever present constitutional litigation on death penalty issues. This independence of scholarship from litigation has come as a consequence of rejection: A majority on the U.S. Supreme Court has forcefully rebuffed the attempts of social scientists to influence the constitutional law of capital punishment.

As is often the case, however, rejection has its liberating aspects. Freed from preoccupation with current Supreme Court cases, scholars are now considering a wider and richer range of issues than a litigation focus would allow and are free to consider questions without regard to whether they might threaten embarrassment to advocates of an anti–capital punishment position. The post–*McKleskey* scholars can speak in their own voices rather than phrasing both questions and answers in the carefully chosen phrases of tomorrow's expert witnesses. Rejection by the Supreme Court thus has rekindled the independence of the social and behavioral sciences. In the long run, this independence could both illuminate the administration of the death penalty in the United States and help hasten its end.

I will pursue this theme in three short installments. Section I sets forth a capsule history of the involvement of social and behavioral scientists in the campaign against capital punishment and will speculate on how close involvement with litiga-

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tion might influence the conduct and reporting of research. Section II surveys the contributions in this volume, with special emphasis on their independence from ongoing constitutional litigation. A third section lists a few of the issues I hope future research on the death penalty will address. Section III closes by suggesting that social science's broad understanding of the death penalty may yet serve the ends of its abolition in the not distant future.

I. The Litigation Era

For two decades, from the mid-1960s through the mid-1980s, social and behavioral scientists who investigated death penalty issues were preoccupied by questions that opponents of the death penalty were raising in constitutional litigation. This pattern of effort is not difficult to explain. Most sociologists and psychologists are opponents of capital punishment, as are the large majority of criminal law scholars. Most of the scholars actively engaged in death penalty research throughout this period were death penalty opponents, and much of their research was conducted in consultation with lawyers involved in the death penalty challenges.

The one-sided distribution of social science expertise in death cases was one reason that such litigation did not usually become the "clash of experts" associated with many civil trials in areas that range from antitrust through products liability. Instead, the typical pattern was social scientists testifying in support of a challenge to a state death penalty procedure, with the state's lawyers (and frequently the judge) seeking to question the validity of the social science evidence or the link between that evidence and the constitutional challenge. From the "death-qualified" jury work of Hans Zeisel (1968) and Cody Wilson (1900) to the "race of victim" studies of David Baldus et al. (1990), Samuel Gross (1993), and their associates, most of the social scientists were on one side of the argument. Expert testimony for state systems was usually limited to criticism of the methods and inferences of the social science challenge. Rather than make the clash of social science experts the center of litigation, the usual strategy in opposition to death penalty challenges was to first defend the system from the social scientists by questioning the inferences drawn from the evidence and then try to state the legal standard in ways that would immunize the operation of a death penalty systems from statistical challenge.

The first line of defense in this analysis was to question the quality of the social science work or its applicability to the constitutional dispute at hand. The second line of defense, if that first sort of rejection was not credible, was to state the law in a

way that the demonstrated effect did not threaten the legitimacy of the death penalty system. In this way, careful and thorough social science evidence—the Baldus study in *McCleskey* is a case in point—might because of its technical merit provoke a more extreme doctrinal restatement from a constitutional court than more vulnerable social science research.[1]

When compared to the ethical and scientific profile of other expert witnesses, the social scientists against death seem paragons of virtue. They seemed without evident exception convinced not only of the righteousness of an anti–capital punishment position but also of the particular factual evidence they presented and the correctness of the inferences their attorneys were attempting to draw from the evidence.

But if the litigation context did not compromise the ethics of social and behavioral scientists, the dominance of litigation-oriented research did constrain the scope and nature of death penalty work in several ways. The issues to be raised in litigation dominated the social science agenda, and this not only dictated which specific issues would receive attention but also allocated resources to the narrow questions that are suited to litigation and away from more global questions. "Are death-qualified jurors more prone to convict?" is the sort of narrow issue that a litigator searches for. "What is a death penalty jury's frame of reference and how does it differ from the tasks of other criminal and civil juries?" is the sort of question that the litigator rarely considers important. When pending litigation dominates the research agenda, narrow questions are favored over broad ones. I suspect also that litigation focuses more attention on procedural issues to the detriment of substantive issues.

A litigation emphasis also affects the boundaries of analytic inquiry and the degree to which the social scientist can be candid in her judgment about the current state of the law. On the way in which a litigation context might constrain analytic inquiry, one recent example concerns the distinctive nature of race of victim effects in capital sentencing. Being more likely to sentence a defendant to death because he is black may or may not be the same type of racial animosity as being more likely to sentence a white or black defendant to death because his victim was white. Since the successful litigation of race of victim effects is easier to achieve by assuming the race of victim difference carries the same degree of racial animus as race of defendant, it is not likely that we will encounter a searching and extensive discussion of this question in the work of a social scientist preparing for litigation.

[1] Compare *Witherspoon v. Illinois* (1968) with *Lockhart v. McCree* (1986). Samuel Gross thus labeled Justice Powell's response to the Baldus work, "It's not broken because it can't be fixed." See Gross & Mauro 1989.

The social scientist contemplating the use of data in litigation may also feel some pressure to be polite to the legal system. Is race of victim influence an isolated phenomenon or one by-product of an essentially arbitrary and lawless process? When one is phrasing one's conclusion with the litigation process in mind, the former interpretation would seem the more prudent, quite apart of the truth value of the rival hypothesis.

As long as social scientists were preoccupied with the relevance of this work to constitutional litigation, there were constraints both in the type of questions that become research priorities and the way in which research findings could be discussed. The dismissal of social science evidence by a court majority committed to the legitimacy of the death penalty has set the social scientist interested in the death penalty free of the constraints that might apply if such work was relevant to immediate decisions on executions.

II. The New Regime

The five studies reported in these pages demonstate their healthy post-litigation research tendencies in a number of ways. Signs of autonomy can be observed in the rich variety of topics, the tone of the reports, and in the texture and vocabulary used in the analysis.

In Professor Sarat's "Speaking of Death" (1993), the focus is on the rhetoric of the capital trial rather than its procedures. This study also leaves the defense table to observe both the state and the defense at work from a distance, in contrast to litigation-oriented social science where an exclusive emphasis on the state's conduct is necessary.

A further indication of independence can be seen in the article's explicit links to academic legal and social theory. A concern with litigation means necessarily that the categories and contexts of the investigator will be dominated by the courts. This has probably reduced in recent years the amount of death penalty research that reflects major themes and trends in other areas of social and legal scholarship. Independence from litigation can be expected to increase the amount of capital punishment research that is theory driven.

Professor Acker's (1993) study of the uses of social science in the Court's capital punishment decisions treats the social science submissions to the Supreme Court on capital punishment as a chapter in the legal history of the death penalty. He shows a pattern of rejection by Court majorities and favorable mention in dissent. Treating the opinions of the Court as data, "A Different Agenda" is conducted with a detachment that is much more easily achieved after the decisive battles of the influence of social science data on the constitutional law of capital pun-

ishment have been fought. The study is removed from the controversies described in time as well as perspective, intimating that the press of the social scientist on the Court is a now concluded chapter of American legal history.

"Chance and the Death Penaty," by Professors Berk, Weiss, and Boger (1993), shows its independence from the litigation process in several ways. First, the primary audience of the research is social scientists, as is apparent both from the tone and the complexity of the analysis. Second, while the conceptualization and empirical data are argued to be relevant to constitutional questions of the capriciousness of capital sentencing, the authors are satisfied to persuade themselves of this and spend little time and effort trying to draw constitutional conclusions from their investigation. Finally, rather than trying to isolate a particular aspect of the process to fault, this analysis tries to comprehend the entire process, to see it whole in a statistical sense. Judgments that broad about the capital charging process are not high percentage litigation theories in the current constitutional climate. But the discouraging prospects for any broad challenge to the death penalty these days generates less compunction about phrasing one's jurisprudence in narrow and politic ways.

The issue considered in the research reported by Finkel and Smith (1993) was central to constitutional litigation in the 1980s. But this article declares its independence from the litigation process in two respects. First, "Principals and Accessories in Capital Felony-Murder" directly challenges the conclusion supported in the dispositive Supreme Court opinion. There is no attempt to downplay the inconsistency between the Court's conclusions and that of the study. Nor is this study an appeal for a rehearing of the litigation. Instead, the reference community for this study is behavioral scientists where the authors hope to establish the validity of their explanations independent of the pronouncements of the Supreme Court. This shift of target audience is no small matter. The notion of an empirical realm independent of the judicial pronouncements of the federal courts is an important step toward a social science of capital punishment that stands apart from the courts in deciding both the questions to be asked and the most plausible conclusions to be drawn from current evidence.

For the same evident reasons, the Research Note by Bowers restates the public opinion issue, with none of the qualified deference that characterizes the advocate at the bar. The Court has been transformed from umpire to adversary.

III. Future Prospects

The diversity of topics and methods in this collection of studies is only suggestive of the range of important questions to be investigated once social science is no longer preoccupied with litigation of death penalty challenges. Let me mention six questions that merit the attention of the social sciences and then argue that these broader questions for research may be relevant to constitutional litigation in the future.

1. *The cross-national anatomy of abolition*. The pace of abolition of the death penalty in the industrial West since World War II has been quite rapid and the impetus of abolition has carried over to post-Communist Eastern Europe. Public opinion is opposed to removing the death penalty in most democracies, yet once governments abolish, there is almost never reversion to executions (Zimring & Hawkins 1986:chs. 1, 8; Zimring 1992). How to explain this pattern?

2. *The determinants of execution policy in the United States*. During the 1980s, almost half of the states in the United States had capital punishment laws but conducted no executions. When compared with the states that did execute during that period, nonexecuting states had much less extensive histories of execution in the years before federal court involvement in capital punishment (see Zimring 1990). So it appears that there was substantial self-selection that produced the pattern of the 1980s rather than just the random restraints of the federal courts. Will this pattern continue? If so, how will the pressure for executions be deflected in ambivalent jurisdictions? The question of what elements of government and society influence execution rates should be an important priority for social scientists.

3. *Victim impact*. What is the effect of capital punishment on the families of homicide victims? The close relations of homicide victims are frequently identified as the intended special beneficiaries of a death penalty (see Gross 1993). Is this the case? Or does the death penalty delay closure and healing for those close to victims in cases where death penalty trials and sentences take place? Do victim families in death penalty jurisdictions feel devalued in the much larger number of cases where their homicide is punished with less? In noncapital punishment jurisdictions, does the pattern of adjustment taken by close relatives seem different? A comparative study would be the most direct method of assessing the issue, with stratified samples of death eligible and non–death-eligible homicides.

4. *Systemic effects of reintroduction*. A great variety of studies waiting to be done can be organized under this heading. What are the levels of jury use in homicide cases in death penalty jurisdictions, and with what outcomes? What is the experience

of the jury in such cases? The jury's role in the capital punishment decision is larger than in any other issue in American criminal law. How is that experience perceived by its participants, and how does it affect them?

How does the reintroduction of executions into a criminal justice system affect those persons whose professional roles touch its administration? What is the impact of executions on prosecutors, prison administrators and guards, judges, and defense counsel. Field studies in northern industrial states that begin to execute would be a valuable addition to the modern sociology of law.

5. *The capital punishment bar*. The litigation of death penalty issues has produced in some states a group of appeals lawyer who are a full-time capital punishment bar. How do attorneys in this sort of practice define their roles and what are their attitudes toward the legitimacy of the criminal justice system? This study is the most immediately interesting, but not the only, research undertaking that would investigate the role of capital punishment as an influence on the legal profession.

6. *Executions and public opinion*. If executions begin in earnest in northern states, how will this affect the public support for capital punishment now found by survey research? Does differential survey support for capital punishment in various northern and southern states predict which states will resume executions? If not, what does?

The list of issues just proposed is both partial and idiosyncratic. But these are the kinds of basic questions that invite the attention of field specialists ranging from social psychology through political science as the United States persists in trying to maintain executions in a Western democracy. The conflicts produced in the legal and social system make the administration of the death penalty a context that should be of special interest to a wide variety of social scientists.

None of the general questions raised above is the sort of issue that is likely to be central to the constitutional litigation of the next several years. But the fact that issues of this broader sort reflect a social scientist's priorities rather than those of a litigator does not necessarily mean that answering such questions will be irrelevant to the constitutional fate of the death penalty. It may well be that good social science directed to the broad issues posed by capital punishment in the 21st century will have a more substantial influence on a future constitutional court than the most justiciable bite-sized questions researched in the 1970s and the 1980s. One reason the swing justices on the Court retreated from abolition as constitutional doctrine in the years between *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976) was incomplete understanding of the nature of public reaction to abolition wherever the death penalty is stopped.

The justices were worried about public opinion polls that showed 70% opposition to ending the death penalty and knew that 35 states passed new death penalty laws as the ink was drying on the *Furman* opinion (Zimring & Hawkins 1986:ch. 3). What was not known then is that this kind of public reaction was an almost universal immediate product of steps toward abolition occurring in Germany, Great Britain, Canada, Australia, and many other countries. But nowhere else in the Western world where such backlashes occurred with regularity did the reaction lead to reintroduction of the death penalty and rejection of the abolitionist trend. If government persisted, abolition won after some years the grudging consent of the public, and this turned to solid support of a system of criminal justice without execution in about a generation.

Knowledge about the public reaction to abolition of capital punishment is not the sort of information that litigators seek out. It is instead the kind of broad understanding that is likely to come from the comparative study of criminal justice by social scientists.

Would knowledge of this process have made a difference in *Gregg v. Georgia*? This cannot be known, but I suspect that what the social scientist regards as the key issues to investigate about the death penalty could turn out to be of critical importance when the next chapter of the constitutional history of the death penalty in the United States comes to be written.

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