Michigan Law Review

Volume 90 | Issue 6

1992

The Death Penalty in the Nineties: An Examination of the Modern System of Capital Punishment

Thomas L. Shaevsky
University of Michigan Law School

THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT. By *Welsh S. White.* Ann Arbor: University of Michigan Press. 1991. Pp. 223. Cloth, $34.50; paper, $17.95.

During the 1990-1991 Term, the U.S. Supreme Court held in *Tennessee v. Payne*[1] that the Eighth Amendment does not prohibit a prosecutor from arguing, nor a capital sentencing jury from considering, victim impact evidence concerning the victim's personal characteristics and the emotional impact of the murder on the victim's family. During the same Term, in *McCleskey v. Zant,*[2] the Court limited a prisoner's right to file a second petition for a writ of habeas corpus if the petition contains a claim presented for the first time.

While these cases are too recent to be included in Professor Welsh S. White's book, *The Death Penalty in the Nineties: An Examination of the Modern System of Capital Punishment,*[3] they arguably reinforce White's two major themes. First, White emphasizes the continuing arbitrariness of the death penalty's application. He declares that "[t]he death penalty is arbitrarily imposed if it is imposed on the basis of factors that have no relationship to either the crime committed or the character of the offender" (p. 157). Under this analysis, the *Payne* decision, by allowing increased attention on the victim rather than on the offender, appears to contribute to continuing arbitrariness. Second, despite such arbitrariness, the Supreme Court is placing greater priority on expeditious executions at the cost of a criminal defendant's Eighth Amendment guarantee (pp. 8-23). Under White's rubric, the *Zant* decision represents another step in this direction.[4]

According to White, the arbitrary application of the death penalty

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1. 111 S. Ct. 2597 (1991).

2. 111 S. Ct. 1454 (1991).

3. Welsh S. White is Professor of Law, University of Pittsburgh. Professor White is the author of THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT (1987) and LIFE IN THE BALANCE: PROCEDURAL SAFEGUARDS IN CAPITAL CASES (1984).

In the introduction to *The Death Penalty in the Nineties,* White notes that his latest book differs from his earlier work, *The Death Penalty in the Eighties,* primarily due to the addition of two chapters: one discussing the Supreme Court's monitoring of the capital punishment system and the other discussing which convicted murderers are most likely to receive the death penalty. P. 1.

4. In arguing that the Supreme Court has placed a higher priority on the smooth function of the capital punishment system than on protecting capital defendants' rights, White relies on Wainwright v. Sykes, 433 U.S. 72 (1977). In *Sykes,* the Supreme Court limited a defendant's ability to allege a constitutional claim in a federal habeas corpus petition when he has failed to raise that same claim in the appropriate manner in the state courts. P. 16. In *Zant,* the Court adopted the *Sykes* standard as the same standard limiting a defendant's ability to present a claim for the first time in a second habeas corpus petition. *Zant,* 111 S. Ct. at 1470.

continues today despite the Supreme Court's pronouncements in *Furman v. Georgia*[5] and *Gregg v. Georgia*[6] regarding the unconstitutionality of arbitrary capital punishment procedures. As an example, White points to the Baldus study that concluded the killer of a white victim is more likely to receive the death penalty than the killer of a nonwhite victim (p. 150). In *McCleskey v. Kemp*,[7] the Supreme Court stated that even though race might play a role in the criminal justice system, racial discrepancies revealed in the Baldus study fall short of the procedural defects identified in *Furman* (p. 158). Contrarily, White argues that because the victim's race has nothing to do with the nature of the crime or the character of the offender, taking such a factor into account results in arbitrariness (p. 157). A victim's race "has no more relevance to the nature of the crime or the character of the offender than the color of the defendant's eyes or the day of the week on which the crime was committed" (p. 157). One can surmise from White's analysis that allowing a capital sentencing jury to consider victim impact statements would result in arbitrariness as it would focus the jury's attention on the victim rather than on the nature of the crime or the character of the offender. Nonetheless, in *Payne,* the Supreme Court stated that a victim impact statement informs the sentencing authority of the harm caused by the convicted defendant and that such harm is an appropriate factor in determining punishment.[8]

Unfortunately, some of White's arguments supporting the death penalty's continuing arbitrary application appear as masked attacks on the entire criminal justice system. One may assume that the entire criminal justice system is not perfect because it contains elements of arbitrariness. It naturally follows that the death penalty will have some of these unfortunate elements as well. Yet, White singles out the arbitrariness of capital punishment as if it is the only worm in the apple. For example, White asserts that court-appointed attorneys are often inexperienced, and as a result the indigent defendant will more

5. 408 U.S. 238 (1972). In *Furman,* the Court, in a five-to-four decision, struck down as unconstitutional the then-existing capital punishment system. As each Justice issued an opinion, there was no one opinion of the Court. Nonetheless, it has been commonly agreed that the decisive ground of the *Furman* ruling "was that, out of a large number of persons 'eligible' in law for the punishment of death, a few were selected as if at random, by no stated (or perhaps statable) criteria, while all the rest suffered the lesser penalty of imprisonment." CHARLES BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 20 (1981).

6. The plurality in Gregg v. Georgia, 428 U.S. 153, 199 (1976), read *Furman* as requiring that the decision to impose the death penalty "be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." Because Georgia's death penalty statute provided for a bifurcated proceeding in which the sentencing authority was provided with standards to guide its use of the information relevant to imposing the sentence, the death penalty statute was upheld.

7. 481 U.S. 279, 313 (1987).

8. 111 S. Ct. 2597, 2606 (1991).

likely be sentenced to death.[9] However, inexperienced court-appointed attorneys will increase the chances of a defendant being convicted of any crime. Perhaps the answer lies not with abolishing the death penalty but with revising the system of court-appointed attorneys.

White's discussion of plea bargaining provides another example of a masked attack on the criminal justice system. White contends that a prosecutor's willingness to enter into plea bargaining discussions in a capital case is affected by factors unrelated to the nature of the crime committed or the strength of the evidence against the defendant (p. 62). Instead, factors such as whether the prosecutor is seeking reelection, the location of the crime, and the funds available to the prosecutor to prosecute the case influence the prosecutor's decision to extend a plea bargain invitation to the capital defendant (p. 55). Yet, such factors may influence a prosecutor's decision whether to plea bargain in any criminal case. White also argues that, even if offered a plea bargain, a defendant may reject it because he distrusts his attorney who encourages acceptance of the offer or because the defendant believes a jury verdict will be more favorable than the plea bargain offer. Thus, the ones who receive the death penalty are more likely to be less culpable than the ones who plea bargain (p. 61). Accepting White's assertion as valid, the same can be said for any defendant charged with any crime who declines a plea bargain invitation. Thus, although White's assertions may be evidence of the arbitrariness of the entire criminal justice system, abolishing capital punishment will not resolve these systemic problems. He could have responded as one commentator does by saying that even though the entire criminal justice system may contain elements of arbitrariness, such arbitrary elements are much more severe with capital punishment due to its permanence.[10]

White also does not raise and discuss an interesting premise pro-

9. P. 37. Considerable time and money is required for defense counsel to discover and present mitigating evidence during the sentencing phase. Such presentation depends on the attorney's ability to understand the dynamics of the death penalty trial. Pp. 76, 91.

10. *See* BLACK, *supra* note 5, at 39 (our legal system has accepted "the specialness of death and the appropriateness of requiring, for death, more careful procedures than for any lesser punishment"). Dr. Ernest van den Haag, a death penalty proponent, responds to Black by saying: "In the application of any law some capriciousness is unavoidable. If this were to make laws unconstitutional, we would have to do without laws, indeed, without the Constitution, for it too is unavoidably applied capriciously." ERNEST VAN DEN HAAG, THE DEATH PENALTY: A DEBATE 206 (1983). Supreme Court justices have made similar observations:

> Petitioner's argument that there is an unconstitutional amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment, a lesser penalty, or are acquitted or never charged, seems to be in final analysis an indictment of our entire system of justice. . . . I decline to interfere with the manner in which Georgia has chosen to enforce [the death penalty] on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner.

Gregg v. Georgia, 428 U.S. 153, 225-26 (1976) (White, J., concurring); *see also* McCleskey v. Kemp, 481 U.S. 279, 315 (1987) ("The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with simi-

posed by one death penalty proponent — Dr. Ernest van den Haag. Van den Haag initially makes his point in a non-death penalty context. He argues that selecting only bearded speeders for ticketing while allowing the clean-shaven to escape is not unjust; what is unjust is the escape of the clean-shaven. To restate it in a more relevant context: "No murderer becomes less guilty, or less deserving of punishment, because another murderer was punished leniently, or escaped punishment altogether. . . . A group of murderers does not become less deserving of punishment because another equally guilty group is not punished, or punished less."[11] Thus, the distribution of punishment is offensive because some of those who deserved the death penalty did not receive it, not because some who deserved it did receive it.

Perhaps one can argue van den Haag's assertion is not constitutionally relevant. The Supreme Court seemed to say in *Furman* that the death penalty is unconstitutionally administered when certain convicted defendants receive it as if by random chance.[12] The constitutional concern seems to be that of selective punishment: the courts focus on why a convicted defendant was sentenced to death rather than focus on why a convicted defendant was not sentenced to death. Although van den Haag proposes an interesting philosophical argument, it may not exist as a constitutionally relevant inquiry because it may ignore the ruling in *Furman.* A book analyzing the death penalty almost seems incomplete without raising this particular assertion by van den Haag and then, perhaps, refuting it in a manner suggested above.

In addition to arguing the death penalty's continuing arbitrary application, White suggests that the Supreme Court is now more interested in the smooth functioning of the capital punishment system than in protecting the rights of capital defendants (p. 207). He argues that *Lockhart v. McCree,*[13] in which the Supreme Court held that the Sixth Amendment does not prohibit prosecutors and defense attorneys from asking prospective jurors about their attitudes toward the death penalty during voir dire in capital cases, exemplifies the Court's new priority (p. 207). White cites studies that suggest a pro-death penalty

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lar claims as to other types of penalty.") (citations omitted). But other commentators have taken issue with this analysis:

> [T]hough death is the most severe punishment in our legal system, it appears to be unnecessary for protecting citizens, while punishments generally are thought to promote our safety and well-being. . . . Most of us believe that if all punishments were abolished, there would be social chaos . . . . Hence, even though the system is not a just one, we believe that we must live with it and strive to make it as fair as possible. On the other hand, if we abolish capital punishment, there is reason to believe that nothing will happen.

Stephen Nathanson, *Does It Matter if Death Penalty Is Arbitrarily Administered?,* 14 PHIL. & PUB. AFF. 149, 162 (1985).

11. Ernest van den Haag, *Refuting Reiman and Nathanson,* 14 PHIL. & PUB. AFF. 165, 174 (1985).

12. *See supra* note 5.

13. 476 U.S. 162 (1986).

jury will give less protection to a defendant during the guilt trial; for example, a death-qualified jury (one in which no juror is opposed to the death penalty on principle) may be more likely to convict a defendant (pp. 191-92). Yet, as White states, because the Court is reluctant to take action that would temporarily frustrate the operation of the capital punishment system, the Court went out of its way to decide that a death-qualified jury does not offend the Sixth Amendment (p. 207).

White discusses other recent Supreme Court cases to support his contention that capital punishment jurisprudence is now engaged in what he calls Phase II — a period begun in 1983 in which the Supreme Court started promoting expeditious executions.[14] Phase I, by contrast, was the period from 1976 until 1983, in which the Court defined protections for the defendant (p. 5). However, by declaring the existence of two distinct and perhaps somewhat divergent phases of Supreme Court death penalty jurisprudence, White does not seem to have contemplated that perhaps Phase II is merely an extension of Phase I. Expediting executions may promote a prisoner's Eighth Amendment rights. As one opponent of the death penalty has noted: "It would be an obvious violation of the letter and the spirit of the eighth amendment to keep prisoners under a sentence of death for many years, even decades, with only the slightest probability that they will ever be executed."[15] This quotation suggests that White's contention that an emphasis on expediting executions results in a deemphasis on a convicted murderer's constitutional rights (pp. 11, 21) may not always be correct.

In addition to his two themes criticizing current death penalty application, White discusses propositions and tactics of interest to practitioners. Defense attorneys reading his book will find Chapter Four particularly helpful, as it suggests death penalty trial strategies for them. For example, White recommends provoking jury empathy for

14. P. 8. *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880 (1983); Blystone v. Pennsylvania, 494 U.S. 299 (1990). In *Barefoot*, the Supreme Court allowed appellate courts to adopt summary procedures in death penalty cases such as deciding the merits of an appeal together with the application for a stay. The Court declared that capital defendants do not have a right to use habeas corpus to delay executions indefinitely. 463 U.S. at 887. The statute at issue in *Blystone* stated that the capital sentencing jury must choose the death sentence if it finds at least one aggravating circumstance and no mitigating circumstances. The defendant argued that the requirement of individualized sentencing signifies that a jury must be allowed to determine whether the aggravating circumstances are sufficiently serious to warrant the death penalty. The Court stated that allowing the sentencing jury to consider mitigating evidence satisfies the Eighth Amendment's individualized sentencing requirement. 494 U.S. at 307. White says that "[t]he tone of the Court's opinion exemplifies its present approach to capital punishment issues. Although *Blystone* was a five-to-four decision, the majority made no effort to elaborate the basis for its decision. . . . The majority's tone was curt, conclusory, and final." P. 13.

15. Victor L. Streib, *Executions Under The Post-Capital Punishment Statutes: The Halting Progression From "Let's Do It" to "Hey, There Ain't No Point In Pulling So Tight,"* 15 RUTGERS L.J. 443, 487 (1984).

the defendant and having the defendant express his remorse at murdering human beings (p. 87). Unfortunately for prosecutors, he only offers advice for the defense; nonetheless, a prosecutor can discover what tactics a defense attorney might employ at a death penalty trial. White's discussion is also presented from the defense side as he devotes much more analysis to the types of mitigating evidence a defense attorney can present during the penalty trial (Chapter Five) than to the types of aggravating evidence a prosecutor can present. White notes that although a defendant has broad rights to present mitigating evidence at a penalty trial,[16] the constitutional limits are not so clear (p. 108). Because of the unclear constitutional restraints, he suggests that states can limit the type of mitigating evidence the defendant can present, such as preventing the disclosure of lie detector test results and prohibiting arguments about the appropriateness of the death penalty in general (pp. 108-09).

A prosecutor also may be unhappy with White's recommendation that courts should impose a more rigorous restraint on a prosecutor's closing argument at the death penalty trial than on a defense attorney's closing argument (p. 113). White suggests courts should limit a prosecutor to commenting on mitigating and aggravating circumstances in the case at hand and on how a jury is to weigh these circumstances; courts should prohibit a prosecutor from appealing to emotions during the closing argument, such as arguments that arouse a jury's fear of the defendant.[17] A jury's weighing of aggravating and mitigating circumstances, as required by statute, is to ensure that the jury will condemn only those capital felons the legislature considered the most heinous; a closing argument that diverts the jury's weighing of such circumstances undermines the goal of obtaining an even-handed application of the death penalty (p. 121). By contrast, a defense attorney, whose role is to argue for mercy, should have more leeway in arguing emotions to the jury. White predicts his suggestions will lead to an objective determination and weighing of the circumstances by the jury (p. 120). A prosecutor can breathe a sigh of relief, though, as White acknowledges that the Supreme Court is unlikely to adopt his recommendations (p. 121).

White also presents an intriguing exploration of convicted defendants who actually desire the death penalty (Chapter Eight). He gives illustrations of convicted murderers who desire execution in order to preserve their macho image (p. 177). Alarmingly, White proposes that individuals might commit murder in the first instance in order to re-

16. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978).

17. Pp. 120-21. White bases these suggestions on his reading of Caldwell v. Mississippi, 472 U.S. 320 (1985). In *Caldwell*, the Court held it is a violation of the Eighth Amendment for a prosecutor to tell the jury that its decision was automatically reviewable by the state supreme court; this is because such a statement diminishes the jury's sense of responsibility and misleads a jury into believing appellate review is less limited than it actually is.

ceive the death penalty (pp. 178-79). Under such a scenario, the death penalty may be a less effective deterrent than life in prison. He warns, though, that a convicted murderer who says he prefers the death penalty does not mean he preferred it before he committed the crime (p. 180); thus, there is no accurate way of determining the deterrence effect of capital punishment in such situations (p. 179). Nonetheless, White's hypothesis that capital punishment is a less effective deterrent in such circumstances is something death penalty proponents do not consider.[18]

By interviewing various defense attorneys, White reports tactics that defense attorneys who are personally opposed to capital punishment employ to change their clients' insistence on seeking the death penalty. By developing a close rapport with a client, some defense attorneys are able to change a client's mind (p. 166). White discusses how one attorney, when faced with a client who insists on accepting execution, persuades the client to change his decision by suggesting the effect the execution will have on his family members (p. 166). Shockingly, some defense attorneys will attempt to change a client's mind by saying that confinement in the general prison population offers a better chance for escape than on death row (p. 167). One attorney tells alcoholic clients that alcohol can be obtained through illegal sources in the general prison population but not on death row (p. 167). Another attorney, who is also a law school professor, completely ignores a client's wish to seek the death penalty; the client's wish is unimportant to the attorney because he believes that capital punishment is immoral (p. 168). Even when a client tells the professor not to present mitigating evidence or not to appeal a death penalty sentence, the professor responds that the state law requires him to do so; yet, the professor admits to White that the state law is unclear on these matters so his representations to his client may be incorrect (p. 168). These stories are all appalling and require strong condemnation. However, White does not explicitly criticize the attorneys who encourage their clients to break the law nor does he state that the proper forum for the law school professor to express his personal opposition to death penalty is the state legislature. White also neglects to mention that the professor's questionable behavior unnecessarily clogs the criminal justice system as the professor insists on adjudicating measures for his own pleasure rather than fulfilling his client's needs and desires.

Although White quotes the relevant section of the ABA Code as declaring that "the lawyer should always remember that the decision whether to forego legally available objectives or methods because of

18. P. 179. White notes that this proposition may undermine van den Haag's incessant advocacy of the death penalty's deterrence factor. P. 179.

non-legal factors is ultimately for the client and not for himself,"[19] White states that the ethical guidelines do not specifically identify the decision to seek the death penalty as one to which the defendant has ultimate authority (p. 166). Eventually, White states that protecting a capital defendant's individual autonomy is an important consideration (p. 171). Thus, only implicitly and using the weakest possible language does White disapprove of the attorneys' behavior he vividly describes. Such questionable defense counsel behavior deserves much more analysis of potential violations of ethical (and even criminal) codes. Otherwise, in the absence of strong condemnation of such deplorable activity, defense attorneys reading such accounts may not feel any remorse at trying such controversial techniques themselves.

Intriguing as White's analysis is of why defendants desire the death penalty, other commentators also have suggested and analyzed this phenomenon.[20] Additional themes that White discusses similarly have been analyzed by other commentators.[21] Rather than viewing *The Death Penalty in the Nineties* as a book full of original, thought-provoking ideas, one can view White's book as a collection of sources illustrating the vices of the death penalty. White supplements his summary of the works of others with lively and descriptive case studies which maintain the reader's attention, and he gives his own analysis of some Supreme Court decisions[22] as well as recommendations on death penalty trial tactics for defense attorneys (Chapter Four). At first glance, White's book can be viewed as an introduction to the vices of the death penalty; however, it lacks too many arguments and counterarguments to be considered a comprehensive work.

Most unfortunately, White's book lacks a solid conclusion. The reader does not know what to do with White's assertions. One commentator who argues, as does White, of the continuing arbitrariness of the death penalty declares that, " 'guided discretion' is not working and, perhaps, cannot work. If this is correct and if the argument from arbitrariness is accepted, then it would appear that a return from *Gregg* to *Furman* is required. That is, the Court should once again condemn capital punishment as unconstitutional."[23] The reader of White's book can only infer such a conclusion. White's book would

19. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1981).

20. *See, e.g.*, William J. Bowers & Glenn L. Pierce, *Deterrence or Brutalization: What Is the Effect of Executions?*, 26 CRIME & DELINQ. 453 (1980).

21. White's theme of the Supreme Court's current emphasis on expediting executions has been discussed by other commentators such as Streib, *supra* note 15, at 484. White's theme of the death penalty's continuing arbitrary application has been discussed by other commentators such as BLACK, *supra* note 5; William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563 (1980); Nathanson, *supra* note 10.

22. In chapter 5, for example, White discusses his own interpretation of Supreme Court cases as to what a defendant can present as mitigating evidence at the death penalty trial.

23. Nathanson, *supra* note 10, at 150.

have a more powerful effect on the reader if White had linked all his different assertions together to form one grand conclusion.

— *Thomas L. Shaevsky*