

Keynote Address: The Death Penalty Dialogue Between Law and Social Science

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I have followed the Capital Jury Project since its inception at a meeting of the American Society of Criminology several years ago. The Project continues a long tradition of collaboration between lawyers and social scientists on important legal issues. I also believe the Project will make a significant contribution to the dialogue on the death penalty between law and social science. In my remarks today, I would like to discuss some features of this dialogue, and highlight them with a few examples.

The concept of a dialogue is particularly appropriate because it is truly a two-way conversation. The law, by articulating its assumptions and justifications, sets the research agenda for social scientists. Indeed, on some occasions, courts invite social science research, and even give social scientists advice about how to put together a proper research design. The resulting social science research in turn influences opinions and beliefs about the death penalty, which impacts death penalty decision-making at many levels.

To be sure, the outcomes of that process are not always what some of us would like to see. But this should come as no surprise since, for many decision-makers in this process, the "facts" about the death penalty, as we know them, have little impact on the way in which they cast their votes.

Nevertheless, the knowledge we produce strengthens some arguments and weakens others. And among public officials who are concerned with the facts, some minds and some votes are actually changed. In addition, the knowledge that we produce impacts courts and legislators by making even more difficult the hard cases that death penalty issues present to them. The knowledge that we produce also spawns counterarguments and counterclaims designed to reduce the implications of this new knowledge, and to reduce the discomfort of public officials facing the dilemmas of death penalty issues. Further, the justifications and decisions offered by courts and legislators, when confronted with evidence about how the system actually operates, can expose more clearly the values that are driving the decisions of legislators and judges. These revelations in turn affect the perceived rationality and legitimacy of the legal system.

Social science research is relevant to death penalty decision-making because these institutions purport to be rational, principled, and guided by facts. And when the facts are in dispute, the basic idea is that the side with the better evidence should carry the day.

The problem with the death penalty, however, is that there is often a conflict between, on the one hand, widely held common sense understandings

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of how things work—this is what Lindblom and Cohen call “ordinary knowledge” in their very important book *Usable Knowledge*¹—and, on the other hand, the specialized knowledge and expert opinion that flows from the kind of research we do. Lindblom and Cohen correctly argue, I believe, that expert knowledge generally provides only a small proportion of the knowledge base for most decision-making. They explain that the principal contribution of social science research to public policy analysis is to refine, focus, and quantify the ordinary common sense understandings of decision-makers. I also agree with their assessment that the congruence of the knowledge we produce and ordinary understanding is an important determinant of the perceived legitimacy of the specialized knowledge we generate.

Over the last two years, I have become particularly sensitive to the law and social science dialogue. In my home state of Iowa, there is a campaign to reinstate the death penalty, which was abolished in 1965. What strikes me—as an active participant in this debate—is how much different the rhetoric is today from what it would have been in 1973.

First, consider deterrence. The social science research on deterrence has had a significant influence on popular opinion. Although that research does not prove conclusively that the death penalty does not deter crime, it provides very strong support for the proposition that if there is any marginal deterrent effect from the death penalty, it is beyond our capacity to measure and document.

This research has strongly affected the opinions of academics and the general public. There are several reasons for this impact. First, the research is of very high quality, and there is much of it. It employs alternative research designs, and has been widely replicated in many states over many different years;² and there is a nearly complete consensus on the findings of this body of research—with the notable exceptions of Isaac Ehrlich³ and Stephen Layson.⁴ While much of this work is based on multivariate statistical analysis, much of it is also extremely straightforward and understandable—in the tradition of Thorsten Sellin⁵—using time series and matched comparisons.

1. CHARLES E. LINDBLOM & DAVID K. COHEN, *USABLE KNOWLEDGE: SOCIAL SCIENCE AND SOCIAL PROBLEM SOLVING* 10 (1979).

2. See generally Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1196-1224 (1981) (reviewing the empirical research and literature on deterrence).

3. See Isaac Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 J. POL. ECON. 741 (1977) (reporting the results of a multiple regression analysis which suggests that each execution on average saves seven to eight innocent lives through deterrence); Isaac Ehrlich, *The Deterrent Effect of Capital Punishment*, 65 AM. ECON. REV. 397, 414 (1975).

4. See Stephen K. Layson, *Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence*, 52 S. ECON. J. 68, 80 (1985) (reporting the results of a multiple regression analysis which suggests that each execution saves 18.5 lives).

5. See CAPITAL PUNISHMENT (Thorsten Sellin ed., 1967); THORSTEN SELLIN, *THE DEATH PENALTY: A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE* (1959) (employing cross-sectional comparisons of homicide rates in otherwise comparable states that do and do not use the death penalty, and comparisons of homicide rates within given jurisdictions before and after repeal or reinstatement of the death penalty).

Second, the deterrence research conforms and resonates with common sense understanding about the kind of cost-benefit analysis that killers go through in making their decisions.

A third important point is that the National Research Council has endorsed the validity of this research—and also undercut the perceived legitimacy of the work of Isaac Ehrlich.⁶

Finally, the deterrence research touches a core moral justification for the death penalty. For this reason, it is avidly endorsed by opponents of the death penalty.

You will remember that in *Gregg v. Georgia*,⁷ the United States Supreme Court said that the deterrence research was inconclusive and that there was “no convincing empirical evidence either supporting or refuting” the deterrence claim.⁸ I will leave it to you to speculate whether the Court would feel comfortable making that statement today.

What about the cost of the death penalty? For years it was assumed that the death penalty saved money, but now that proposition is in serious doubt. The widely quoted figure today is that each execution costs approximately \$2 million. As Frank Zimring put it so nicely the other day, the reason is simple—lawyers cost more than prison guards.

The consensus on this cost issue, however, is not nearly as strong as it is on deterrence. The reason for this lack of consensus is that much of the work is speculative. The principal exception is a recent study by Phil Cook and Donna Slawson in North Carolina,⁹ which supports—very convincingly—the \$2 million estimate. But their study has not been widely replicated. Also, that study, which I think is the best on this topic, is complex and difficult reading. For example, a key finding of the study is that the most important determinant of the average cost of an execution is the proportion of death sentences imposed that are actually carried out. Cook’s \$2 million estimate rests on the assumption that only ten percent of the death sentences imposed in North Carolina actually result in an execution.¹⁰ If that figure is increased to, say, thirty percent, the cost of each execution will decline dramatically; indeed, if we executed everyone who was sentenced to death, the death penalty would cost less than a system of long term imprisonment.

There are other problems as well. As noted earlier, if the results of a study do not conform to common sense, or if they seem counter-intuitive, then they are not likely to be influential. On the cost issue, I have found that the “numbers can prove anything” argument maintains its legitimacy. In addition, the cost problem appears to be something that can be fixed by changing the

6. See Lawrence R. Klein et al., *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, in *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* 336, 338-49 (Alfred Blumstein et al. eds., 1986).

7. 428 U.S. 153 (1976).

8. *Id.* at 185 (joint opinion of Stewart, Powell, and Stevens, JJ.).

9. PHILIP J. COOK & DONNA B. SLAWSON, *THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA* 98 (1993).

10. *Id.* at 93.

post-conviction process, so why not fix it? Finally, cost does not implicate fundamental moral values in the same way that the deterrence research does.

I add, however, that with changing social values, and in particular the growing public hostility toward taxation and government spending, the cost implications of capital punishment are becoming increasingly important in a way that I would never have predicted in 1973.

The empirical research of the last decade on miscarriages of justice has given abolitionists one of their strongest arguments. Until ten years ago, the evidence was quite speculative. Of course it was probable that innocent people had been sentenced to death and executed, but it was not until the work of Radelet and Bedau on this issue¹¹—work I consider to be squarely in the great social science tradition of quantifying and refining ordinary knowledge—that we learned not only the number of likely miscarriages, but also how and why they occur.

Opponents of the death penalty can now persuasively argue that more than one percent of the approximately 5000 death sentences imposed since 1973 involved a miscarriage of justice. Specifically, Radelet and Bedau have shown that fifty-five of those sentences were imposed against people, innocent of any crime, who were eventually released from prison, often with their lives terribly shattered.¹²

This is elegant and meticulous research. It provides not only numbers and rates, but also a deep understanding of how these errors occur, how difficult they are to avoid, and how nearly impossible they are to fix in terms of their consequences for individuals. The work has withstood criticism very well, particularly concerning the errors since 1973. The main counterargument appears to be that at least none of these wrongly convicted people has actually been executed. We hope this is true, but we do not really know. Nor do we know how many death sentences falsely imposed since 1973 remain uncorrected.

The Radelet and Bedau research has another strength in the sense that it is understandable and consistent with common sense understanding of the inadequacy of governments and the imperfect ways in which important decisions are often made. In truly striking ways, it implicates core moral values and fears concerning the execution of innocent people.

In Iowa, the research on deterrence, cost, and miscarriages of justice has clearly influenced the debate. Critics have dismissed it as “academic” opinion, but for legislators concerned with how the death penalty system actually functions, this information—this new knowledge—has had a significant impact. In addition, this information has revealed how the reinstatement campaign in Iowa is being driven essentially by public anger, fear, and politics that have very little to do with crime control.

11. MICHAEL L. RADELET ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992).

12. This figure is based on Radelet and Bedau's ongoing research and is currently unavailable in published form.

Of course, the law and social science dialogue on the death penalty also includes the United States Supreme Court,¹³ and I would like to give you just a couple of examples. A very important one, I think, is the 1983 case of *Barefoot v. Estelle*.¹⁴ This case involved a challenge to the Texas statute which asks the jury, as a predicate for the imposition of the death penalty, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."¹⁵ These predictions were largely informed by psychiatrists who routinely offered the expert opinion that it was a virtual certainty that individual defendants represented a continuing threat to society.

The use of these experts' opinions was challenged on the ground that they are often erroneous, and that this use thereby introduces an unacceptable level of arbitrariness into the jury decision-making process. Well, everyone knows that expert opinion can be erroneous, but how often? This required proof, and the petitioner produced a sophisticated body of research that quantified the error rate and showed that, in fact, the experts were wrong two-thirds of the time.¹⁶

There was a strong consensus in the research community about these findings, which were beautifully pulled together by John Monahan, a psychologist.¹⁷ There were several reasons for the power of this body of research. First, it was of very high quality, and it had been widely replicated in many different contexts. There was no significant dissent as to the validity of the work. It was understandable and straightforward. And it was consistent with common sense understandings of how difficult it is for individuals to make decisions of this complexity under such uncertain circumstances. The research was also endorsed by a highly reputable organization, the American Psychiatric Association, which had no special interest in the death penalty. In addition, the research hit a strong moral chord, since the prediction of future dangerousness was virtually always the sole basis for the jury's death-sentencing decision in Texas.

It is very clear from reading *Barefoot v. Estelle* that these data greatly intensified the Court's dilemma. On the one hand, the Court had the choice of affirming a death-sentencing system heavily biased toward error. On the other hand, reversal and a declaration of unconstitutionality would have affected hundreds of Texas death-sentencing decisions, at great political cost to the Court. Also, some of the Justices very likely wondered whether there

13. See generally Phoebe C. Ellsworth, *Unpleasant Facts: The Supreme Court's Response to Empirical Research on Capital Punishment*, in CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES 177 (Kenneth C. Haas & James A. Inciardi eds., 1988) (examining the Court's responses to the empirical data on the deterrent effect of capital punishment, racial discrimination in sentencing, and the biases of death-qualified juries).

14. 463 U.S. 880 (1983).

15. *Id.* at 884 n.1 (quoting TEXAS CODE CRIM. PROC. ANN. art. 37.071(b)(2) (West 1981)).

16. See *id.* at 900 n.7 (citing JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES (1981)).

17. See JOHN MONAHAN, U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR (1981); MONAHAN, *supra* note 16.

would be any fewer errors if the psychiatrists were out of the picture and the matter were left entirely to the unguided discretion of jurors.

In my opinion, these considerations influenced the Court to rule in favor of the State. For an intellectually honest institution like the United States Supreme Court, however, a response to the social science research had to be found. The Court could not simply say that the prediction errors have not been proven, or that the research was flawed. Instead, it came up with what I believe to be one of the Court's most memorable rationalizations: "Neither petitioner nor the [American Psychiatric] Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time."¹⁸

*Lockhart v. McCree*¹⁹ presented the Court with a similar dilemma. The claimant presented high quality, well-replicated research showing that the process of "Witherspooning" jurors²⁰—which we have heard a lot about here today—often biases the guilt trial by making jurors more conviction-prone. The research record on this issue, however, was not as strong as it was in *Barefoot*, and the Court felt free to reject it (unfairly, I believe) as flawed in ways that were impossible to correct.²¹

Now I would like to turn briefly to the issue of race. There has also been a long dialogue in the courts on the issue of race and the death penalty. It started in 1966 when Marvin Wolfgang presented compelling evidence of race-of-defendant discrimination in the imposition of the death penalty for rape in Arkansas.²² His data were presented in *Maxwell v. Bishop*,²³ an Arkansas decision challenging an individual death sentence. Then-Judge Harry Blackmun, sitting on the Eighth Circuit Court of Appeals, denied relief to the black defendant on a methodological ground. The results showing a pattern of purposeful discrimination throughout the state against black defendants were based on a sample of cases that had been randomly drawn. The fatal flaw was that the sample did not include the claimant's case or any other cases from his county; therefore, no relief was available.²⁴

18. *Barefoot*, 463 U.S. at 901.

19. 476 U.S. 162 (1986).

20. This refers to the constitutionally permissible practice of excluding from capital trials, for cause, prospective jurors whose views about the death penalty would prevent them from giving appropriate consideration to all sentencing options, including the death penalty. The term comes from the case of *Witherspoon v. Illinois*, which involved an earlier and stricter test for excluding death penalty opponents from the jury. 391 U.S. 510 (1968).

21. *Lockhart*, 476 U.S. at 168-73; see also Ellsworth, *supra* note 13, at 189-204 (reviewing the Court's treatment of the social science research on death-qualified juries).

22. See Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 119 (1973).

23. 398 F.2d 138 (8th Cir. 1968), *vacated and remanded on other grounds*, 398 U.S. 262 (1970).

24. *Id.* at 146-47. The evidence was also faulted for failure to show that "the petit jury which tried and convicted Maxwell acted in his case with racial discrimination." *Id.* at 147. The issue of racial discrimination in the use of the death penalty finally reached the Supreme Court in *Coker v. Georgia*, which challenged the constitutionality of death as punishment for rape. 433 U.S. 584 (1977). The petitioner presented evidence of racial discrimination in rape cases, Petitioner's Brief at 52-56, *Coker* (No. 75-5444), but the Court banned the use of the death penalty for rape as a disproportionate punishment without reference to the issue of racial discrimination. Ellsworth, *supra* note 13, at 185.

In the study of homicide cases, where we have seen the most extensive analyses of race discrimination, the pioneer was Bill Bowers. In some very creative work in the 1970's, he sensitized the courts and the entire research community to the nature and implications of race-of-victim discrimination.²⁵ Although Bowers' early work was persuasive, it was limited by small numbers of control variables in the FBI data set with which he was working. This gave the Fifth Circuit a methodological justification, when he presented his data in cases there in the 1970's and 1980's, to say that race-of-victim discrimination had not been proven.

This early research, including work in progress by Barry Nakell,²⁶ provided the foundation for the work that I did in Georgia with two colleagues, George Woodworth and Charles Pulaski. We also studied carefully the methodological critiques in *Maxwell* and in the Fifth Circuit cases that rejected Bowers' work. We were determined to do our best to overcome the omitted-variable problems that had weakened the persuasiveness of his work.

In the end, with the help of grants from the Justice Department and the Edna McConnell Clark Foundation, we developed empirical evidence suggesting that, on average, Georgia prosecutors were more likely to seek a death sentence and Georgia juries were more likely to impose a death sentence in white-victim cases.²⁷ We also found that these effects were particularly concentrated in what we characterized as the "mid-range" of cases—those cases where there truly was a close choice as to the life or death decision. It turned out that Warren McCleskey's was located in this category of cases.

McCleskey's lawyers argued that the statistical evidence we presented supported a presumption that race had influenced decisions in his case, and that the State had failed to rebut that presumption. As a consequence, McCleskey argued, his proof established a violation of the Eighth and Fourteenth Amendments.

The Court's dilemma here was real. Race discrimination is an important constitutional matter. In other contexts, under both the Constitution and the civil rights laws, the Court has generally upheld similar claims of racial discrimination. A grant of relief for McCleskey, however, could threaten the legitimacy of death sentencing in Georgia and possibly beyond. At the very least, such a ruling would complicate its administration.

In *McCleskey v. Kemp*,²⁸ five Justices voted to reject Warren McCleskey's claim. They could have done so on the methodological grounds suggested by the trial court, but that approach could have been construed as an invitation to the social science community to cure the defects and return to court another

25. See WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982* (1984).

26. See BARRY NAKELL & KENNETH A. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* (1987).

27. See DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 185-88* (1990).

28. 481 U.S. 279 (1987).

day. Instead, as it did in *Lockhart*, the Court, in an opinion written by Justice Powell, rejected the claim by establishing burdens of proof for the use of statistical evidence to establish discrimination in death penalty cases that were impossible to meet.

The Court's justification, based on federalism concerns, had some plausibility. But the methodological arguments about the impossibility of proving discrimination in a death-sentencing system were quite unpersuasive.

So also were the suggestions that these disparities are inevitable in the system, and that abolition is the only real cure for the problem. On these points, an internal memorandum by Justice Scalia is particularly relevant. His memo surfaced recently in Justice Marshall's papers when they were opened at the Library of Congress. It was a short note to all the Justices, written three months before the *McCleskey* decision. In it, Justice Scalia rejects Justice Powell's methodological arguments, but goes on to state that race discrimination in the death penalty is "real, acknowledged in the decisions of this Court, and ineradicable."²⁹

Where did the *McCleskey* data figure into all this, particularly for Justice Powell, the key swing vote and author of the majority opinion? Even though the Court accepted the validity of our research, the trial court's very strong criticism of the methodology left lingering doubts, which were carried over into Justice Powell's footnotes. Also, the research was complex and difficult to understand. Further, it has been reported to me that Justice Powell was uncomfortable basing any decision on statistical evidence.

But perhaps most important, in my estimation, is that race-of-victim discrimination does not raise the same sort of moral concerns as race-of-defendant discrimination—even though, from a constitutional standpoint, discrimination on the basis of any racial aspect of the case is illegitimate. Justice Powell may well have voted differently if the evidence had shown race-of-defendant discrimination rather than race-of-victim discrimination. After all, it is the defendants who pick their victims.

In addition, the core race-of-victim findings do not conform to ordinary knowledge about race discrimination. In this regard, it is worth noting that most lay and many professional people who know anything about the case think that what we actually established was race-of-defendant discrimination, not race-of-victim discrimination.

After *McCleskey*, the dialogue on race and the death penalty shifted to Congress. In 1991 and again last year, the House of Representatives approved what is known as the Racial Justice Act,³⁰ which would have bypassed *McCleskey* and permitted condemned prisoners to raise statistical challenges

29. David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 371 n.46 (1994) (quoting Memorandum from Antonin Scalia, Justice, U.S. Supreme Court, to the Conference of the Justices, U.S. Supreme Court (Jan. 6, 1987), at 1 (copy on file with the *Washington & Lee Law Review*)).

30. See H.R. 4092, 103d Cong., 2d Sess. § 901 (1992); see also Baldus et al., *supra* note 29, at 426-27 (providing a chronology of the legislative action with respect to H.R. 4092).

to their death sentences on the ground of race. Those challenges would have been evaluated under standards and presumptions similar to those used in Title VII employment discrimination cases and jury discrimination cases under the 14th Amendment. In both those years, however, the measure was killed in a conference committee.

Supporters of the Racial Justice Act gathered some strength for their position from a General Accounting Office study which reviewed all of the literature on race-of-victim discrimination and put its imprimatur on it—the whole corpus of twenty-eight studies—suggesting that it showed real effects.³¹ Also, during the period since *McCleskey*, no one has repudiated or invalidated any of the findings in this research.

Nevertheless, most opposition to the new legislation was based on three key *McCleskey*-like themes. First, existing race-of-victim discrimination research is unreliable and does not establish the reality of race-of-victim discrimination. Second, for methodological reasons, race discrimination simply cannot be proven. And third, even if you could prove it, racial discrimination cannot be corrected, without either de facto abolition of the death penalty, or a requirement that prosecutors use “quotas” to guide their charging decisions. My research colleagues and I think that these are specious claims, which we address in a recent *Washington and Lee Law Review* article.³²

In closing, the recent statements of Justice Powell and Justice Blackmun provide additional evidence of the long-term percolating effects of social science research on elite and public opinion. Both Powell and Blackmun now believe that the death penalty experience of the last twenty years was a failure, and that the system should be declared unconstitutional. Justice Blackmun was clearly influenced by the cumulative evidence of the arbitrariness, discrimination, and miscarriages of justice documented since 1973.³³ In contrast, Justice Powell seems much more concerned that the death penalty system cannot be made to work properly, and that the public attributes this failure to the Court, which has the effect of undercutting the legitimacy of the institution he loves so dearly.³⁴

I have every expectation that the findings of the Capital Jury Project will further legitimate the opinions of Justice Powell and Justice Blackmun, and substantially enrich the dialogue I have described. The challenge for you, as researchers and litigators, is how best to use this new and exciting resource.

31. See U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990).

32. See Baldus et al., *supra* note 29.

33. See *Callins v. Collins*, 114 S. Ct. 1127, 1129 (1994) (mem.) (Blackmun, J., dissenting), *denying cert. to* 998 F.2d 269 (5th Cir. 1993).

34. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451-54 (1994).