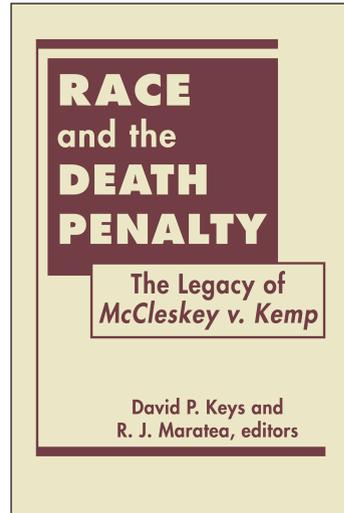


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Race and the
Death Penalty:
The Legacy of
“McCleskey v. Kemp”

edited by
David P. Keys
and R. J. Maratea

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1

Racial Bias and Capital Punishment

Richard C. Dieter

ON JANUARY 17, 1977, GARY GILMORE WAS PUT TO DEATH BY firing squad in Utah. Although many people protested the return to executions in the United States after a ten-year moratorium, Gilmore wanted no part of the dissent, dismissing his lawyers and begging the state to carry out his execution (*New York Times* 1977). The death penalty was back, and there did not seem to be any way to stop it. Despite glaring inequities in its application, the Supreme Court declared the death penalty constitutional, and a large majority of the states had passed new statutes to underscore their support.

Although the first five executions after the reinstatement of the death penalty involved white defendants, the nagging issue of racial discrimination simmered as a potential indictment of the system. When the death penalty was struck down in *Furman v. Georgia* in 1972, the problem of racial bias was on the minds of many of the justices. Justice William Douglas warned that the “Arbitrariness [of the death penalty] is pregnant with discrimination” (*Furman v. Georgia* 1972). Justice Thurgood Marshall, who had represented capital defendants in the South, cited racial bias as a primary reason to strike the death penalty down: “It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment” (*Furman v. Georgia* 1972).

But for other justices, the proof of racial discrimination in the death penalty was still lacking. Justice Potter Stewart led the way in deciding *Furman* on the less sensitive ground of arbitrariness. “My concurring Brothers have demonstrated,” he wrote, “that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed” (*Furman v. Georgia* 1972).

Thus it fell to a humble professor at the University of Iowa College of Law to provide the court and the nation with the proof that some still required. David Baldus returned to the battleground state of Georgia—home of the court’s most important death penalty decisions of the century—and planned one of the most comprehensive studies ever conducted on the issue of race and the death penalty. He and his fellow researchers, George Woodworth and Charles Pulaski, compiled data on nearly 2,500 homicides, taking into account 230 variables, and examined the data with a series of rigorous statistical tests. Their conclusion was clear and statistically compelling: Race was a stronger predictor of who would be sentenced to death in Georgia than many of the aggravating factors commonly used to procure the death penalty, such as the murder of a police officer, or murder with kidnapping (Baldus, Pulaski, and Woodworth 1992).

As is now well-known, the case bearing this evidence, *McCleskey v. Kemp*, went all the way to the Supreme Court, where the death penalty in Georgia was upheld by a 5–4 vote. Justice Lewis Powell, the author of the decision, later revealed to his biographer that it was the one decision in which he would change his vote (Jeffries 1994). But the decision stands and continues to define the court’s position on this critical issue. The majority sensed the implications of David Baldus’s findings—not only could this information upset the death penalty nationwide, but it could also affect the criminal justice system in other ways. Justice William Brennan referred to the court’s hesitancy to embrace this new reality as “a fear of too much justice” (*McCleskey v. Kemp* 1987a).

Warren McCleskey was executed in 1991, ushering in a period of steadily rising executions lasting throughout the decade. On two occasions, the US House of Representatives sought to remedy what the court had done by passing a version of the Racial Justice Act that would have allowed consideration of statistical studies in death penalty appeals as evidence of discrimination, but the Senate would not go along (O. John-

son 2007). Undeterred, David Baldus continued his research in state after state, amassing an even more convincing body of work demonstrating a fundamental flaw in our system of capital punishment: Those who kill white victims have far greater odds of receiving the death penalty than those who kill black victims. This consistent finding, replicated by many researchers in a broad spectrum of states, lends even more credibility to Baldus's original research.

Today, the death penalty is winding down. Death sentences have decreased by almost 65% since 2000, and executions are down by over half. Seven states in the past seven years have abandoned capital punishment altogether. More states are likely to take that step in the near future as the problems of the death penalty prove it to be unworkable within our constitutional standards. In particular, the alarming prevalence of witness misidentification, prosecutorial misconduct, and DNA evidence yielding wrongful and overturned convictions, along with the prohibitive costs associated with capital punishment, are collectively functioning as an impetus for change. The research of David Baldus and many other scholars has demonstrated that the system failed to meet any reasonable standards, and this will likely lead to its final demise. The country and our system of justice owe David Baldus a debt of gratitude for this immense contribution to our collective knowledge of capital punishment in providing an important catalyst for modern death penalty research.

The essays in this volume are indeed inspired by Baldus's research and insights on the relationship between race and capital punishment. In Part 1, David Keys, R. J. Maratea, Tony Poveda, and Ross Kleinstuber explore the missed opportunity that *McCleskey v. Kemp* presented. Until that case is revisited, racial bias in the death penalty will likely remain cemented within the system.

In Part 2, some of the country's leading criminal justice researchers, including Gennaro Vito, George Higgins, Jacqueline Ghislaine Lee, Ray Paternoster, Michael Rocque, Jamie Flexon, and John Galliher, build on the work of David Baldus through their own research and analysis of capital punishment. These essays reveal that the problem of racial and economic disparity in sentencing is deeply rooted in US history and is not likely to be overcome by mere "tinkering" with the death penalty.

Finally, in Part 3, Robert Bohm and Franklin Zimring peer into the death penalty's symbolism and future to find other symptoms of decay that may eventually lead to the end of capital punishment. Each essay adds to the fundamental debate about the death penalty that David Baldus so aptly brought to the public's attention.

