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BOOK REVIEW

UNITED STATES OF AMERICA: THE DEATH PENALTY, Amnesty International, London: Amnesty International Publications. 1987. Pp. vi + 245. Softbound. \$6.00.

*Reviewed by Timothy J. Foley**

I.

In an eight week period between June 7 and July 30, 1987, the state of Louisiana electrocuted seven men.¹ Elsewhere in the South, during the same period, four other executions occurred.² Eleven years after the death penalty was reinstated by the United States Supreme Court in *Gregg v. Georgia*³ and its companion cases,⁴ the South appears well on its way to resuming a pace of executions not rivaled since the early 1950s,⁵ with the rest of the nation not far behind.

In 1985, in response to this country's reinstatement of the death penalty, an Amnesty International mission visited Florida, Georgia,

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1. NAACP Legal Defense and Educational Fund, Inc., *DEATH ROW, U.S.A.* (August 1, 1987) (on file at the Santa Clara Law Review office).

2. Two executions occurred in Texas, one in Virginia and one in Mississippi. *Id.*

3. 428 U.S. 153 (1976).

4. *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

5. Extrapolating from the June/July 1987 figures, executions may soon be occurring at a rate of over sixty per year in the South alone. The last calendar year in which the total number of executions in the country was this high was in 1955. AMNESTY INTERNATIONAL, *UNITED STATES OF AMERICA: THE DEATH PENALTY 207* (1987) [hereinafter *AMNESTY REPORT*]. From 1930 to 1939, there were 1,667 executions in the United States. The use of executions began a slow decline in the 1940's, when 1,284 prisoners were executed. The annual nationwide total dipped below 100 for the first time in 1950, below 50 for the first time in 1958. By the late 1960's, the moratorium, broken only in the last few years, had begun. *Id.*

Texas and Louisiana to meet with officials, visit prisons and discuss capital punishment issues with lawyers.⁶ Amnesty International is an independent organization, based in London and composed of members around the world, dedicated to the protection of human rights, the release of prisoners of conscience, and the prohibition of torture and other degrading punishments.⁷ Opposition to the death penalty is one of the organization's fundamental tenets.⁸

United States of America: The Death Penalty (Amnesty Report) published in January, 1987,⁹ is a collection of the conclusions drawn from the 1985 mission supplemented by additional, more recent data. It represents a welcome gathering of information regarding the use of the death penalty in the 1980's in the United States. The moral, legal and economic debates over the means and manner of capital punishment have now passed from the theoretical to the real. The Amnesty volume recognizes this fact, and argues that the "new" post-*Furman v. Georgia*¹⁰ system has failed to provide minimum fairness in the selection of those who die. Ironically, this volume made its appearance only months before the United States Supreme Court conceded, when faced with similar findings, that "[a]pparent disparities" in the capital selection process are "inevitable."¹¹

II.

Some general comments will be helpful prior to the discussion of the contents of the *Amnesty Report*. First, Amnesty's bias is not hidden and must be recognized. The organization "opposes the death penalty unconditionally, believing it to be the ultimate cruel, inhuman and degrading punishment and a violation of the right to life. . . ."¹² Unsurprisingly, this position handicaps much of the analysis. When a debator's premise and conclusion are the same, the logic of the arguments has a surface attractiveness but suffers from

6. AMNESTY REPORT, *supra* note 5, at 7.

7. AMNESTY REPORT, *supra* note 5, at 241-43.

8. Amnesty has become increasingly involved in capital punishment issues since the late 1970's. In 1979, Amnesty published a report on the death penalty around the world. AMNESTY INTERNATIONAL, *THE DEATH PENALTY* (1979). Since 1980, Amnesty has concentrated its anti-death penalty efforts on seven nations: China, Cuba, Iran, Iraq, Nigeria, South Africa and the Soviet Union. In February, 1987, in conjunction with the publication of the report on the death penalty in the United States, the United States became the target of a full-scale Amnesty campaign against the death penalty. N.Y. Times, Feb. 19, 1987, at A17, col.1.

9. See AMNESTY REPORT, *supra* note 5.

10. 408 U.S. 238 (1972).

11. *McCleskey v. Kemp*, 107 S. Ct. 1756, 1777 (1987).

12. AMNESTY REPORT, *supra* note 5, at 3.

the weaknesses of a self-rationalizing approach.

The volume apparently has two purposes: it is both a report on the death penalty in America and a manifesto for the abolitionist movement. The duality of purpose and the occasional inconsistency between these two objectives leads to some problems. The arguments of death penalty advocates, for example, are used mainly as springboards for more persuasive counter-arguments and are rarely presented as viable positions.¹³ Nonetheless, the Amnesty approach, by refusing to disguise its bias, invites critical review, displaying a confidence in the logic of and basis for its conclusions.

Any single volume review of the death penalty in America must, of necessity, be limited to selective issues, and this one is no exception.¹⁴ The *Amnesty Report* leapfrogs through a variety of topics, coming to rest in some unusual areas. However, given the slimness of the volume, it provides a good overview of a very broad topic. The volume would benefit, however, from a more structured and coherent organization. After the introductory chapters, the topics seem almost randomly selected and ordered.

The volume begins with a summary of recent historical background: the roots of the abolitionist movement, the convergence of forces that produced *Furman*¹⁵ and the subsequent reinstatement of the death penalty.¹⁶ The background material is supplemented with a seven page synopsis of the basic procedural law of capital punishment.¹⁷ As a mere seven page summary of an extremely complex area, this chapter is admirable. In addition, the breadth of the *Amnesty Report* is apparent from the discussions concerning the involvement of mental health professionals in the capital punishment process and the international standards relating to the death penalty.¹⁸

The primary value of the *Amnesty Report* is in its focus upon the recent application of the death penalty. With almost 100 execu-

13. Note the discussion in chapter 13 regarding the *General Arguments for and Against the Death Penalty*. AMNESTY REPORT, *supra* note 5, at 162-77. This section amounts to little more than a checklist of the central arguments in the debate over the death penalty. Its scope is very limited and the conclusions predictable. Compare H. BEDAU, *THE DEATH PENALTY IN AMERICA* (3d ed. 1982); E. VAN DEN HAAG AND J. CONRAD, *THE DEATH PENALTY: A DEBATE* (1983).

14. See generally H. BEDAU, *supra* note 13; J. GORECKI, *CAPITAL PUNISHMENT* (1983); T. SELLIN, *THE PENALTY OF DEATH* (1980).

15. 408 U.S. 238 (1972).

16. See AMNESTY REPORT, *supra* note 5, at 9-18.

17. See AMNESTY REPORT, *supra* note 5, at 19-26.

18. See AMNESTY REPORT, *supra* note 5, at 139, 178 (chapters 10 and 14 respectively). Unfortunately, both these areas are discussed in a far too cursory fashion. Less brevity would have resulted in a more informative presentation.

tions in the past ten years, the use of capital punishment has returned as a reality in the United States. The debate over the role of the death penalty in our system is no longer merely theoretical. Amnesty's contribution is to this new debate, rooted in the reality of modern capital punishment.

Three areas discussed in the *Amnesty Report* are particularly sobering in light of the re-emergence of the death penalty. First, the report sets forth the studies that have shown invidious racism in the choice of the death-deserving defendant, despite the efforts of the courts to eliminate this factor. Second, the report indicates that the use of the death penalty on those that our society traditionally considers as less culpable — juveniles and the mentally ill — seems destined to continue. Third, the case studies delineated by Amnesty indicate that capital punishment continues to be applied in an arbitrary and capricious manner.

In his *Furman* concurrence, Justice William O. Douglas lamented the undercurrent of racism in the history of capital punishment in this country, noting that standardless sentencing discretion was "pregnant with discrimination."¹⁹ Amnesty returns to this area, finding that the fifteen years since *Furman* have brought us no closer to a race-neutral system.²⁰

In the early 1980's, Professor David Baldus conducted and supervised a detailed analysis of racial factors in death sentencing in Georgia (the Baldus Study). Applying 230 control factors to over 2000 homicide cases, the Baldus Study statistically verified that individuals who kill whites are much more likely to receive a death sentence than those who kill blacks. In the mid-range of aggravated cases, for example, the study found that an offender in a white-victim murder was twenty percent more likely to receive a death sentence than a similarly situated black-victim defendant.²¹ Earlier, during the late 1970's, a study conducted by William Bowers and Glenn Pierce using data from four states²² found that black-defendant/white-victim homicide was five to forty times more likely to receive the death sentence than a white-defendant/black-victim homi-

19. 408 U.S. at 257.

20. Much of the information used in Amnesty's discussion of the racial factors was gathered from the data presented in the *McCleskey* federal habeas litigation. See AMNESTY REPORT, *supra* note 5, at 54-64; *McCleskey*, 107 S. Ct. at 1763-64; *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985).

21. See AMNESTY REPORT, *supra* note 5, at 57-59. The Baldus Study also found evidence that black defendants were more likely to receive death sentences than white defendants, although the statistical verification of this finding was slim. *Id.* at 59.

22. Florida, Georgia, Texas and Ohio. AMNESTY REPORT, *supra* note 5, at 59.

cide.²³ These studies reveal, at the very least, the disturbing fact that the race of the victim, as much or more than any other factor, affects the sentencing determination. Worse, the studies indicate that the undercurrent of racism that has haunted the entire history of capital punishment in this nation is still strong.²⁴

The second area that should give one pause is the continuing selection of juveniles and mentally ill individuals for the death sentence. As of August 1, 1987, thirty-five inmates who were under eighteen at the time of their offense were under sentence of death in the United States.²⁵ This total, of course, does not include Charles Rumbaugh, Jay Pinkerton and James Terry Roach, all of whom were age seventeen when arrested and who were executed in 1985-86 in Texas and South Carolina.²⁶ Further, the selection of children for the death penalty is not limited to the South: Paula Cooper, a sixteen-year old at the time of her offense, was given the death sentence in Indiana; Joseph Aulisio, fifteen, was condemned in Pennsylvania; Wayne Thompson, fifteen, was sentenced to death in Oklahoma.²⁷ *Thompson v. Oklahoma*, involving a challenge to the constitutionality of the death sentence on juveniles, is currently pending before the United States Supreme Court.²⁸

Putting aside the legal question of the constitutionality of condemning minors, ethical questions remain. Certainly, juveniles can commit heinous murders, but it is almost universally accepted that a child is less morally culpable for his or her acts than an adult.²⁹ If capital punishment is to be used as society's ultimate sanction, its use must turn not upon the heinousness of the act alone but on the moral

23. See AMNESTY REPORT, *supra* note 5, at 55-56. See Bowers and Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 595 (1980).

24. Justice Brennan, dissenting in *McCleskey*, reviewed some of Georgia's disturbing history, including the statutory delineations between crimes committed by blacks and whites. For example, the 1861 Georgia Penal Code contained a three tiered system of sentencing for rape: rape of a black woman was punished by fine or imprisonment, rape of a white woman by a white man was punished by a prison term of two to twenty years; and rape of a white woman by a black man was punished by death. 107 S. Ct. at 1786.

25. *Death Row*, *supra* note 1.

26. See AMNESTY REPORT, *supra* note 5, at 203, 205.

27. AMNESTY REPORT, *supra* note 5, at 75.

28. 724 P.2d 780 (Okla. 1986), *cert granted*, 107 S. Ct. 1284 (1987).

29. As Amnesty has documented, numerous international covenants condemn the use of the death penalty on the underaged; and the practice of sentencing juveniles to death, even in death penalty retentionist nations, has all but died out, except in the United States. See AMNESTY REPORT, *supra* note 5, at 73, 178; Hartman, "Unusual" Punishment: *The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655 (1983).

culpability of the defendant. Consequently, its use on children is disturbing.

The execution of the mentally ill and the mentally retarded also conflicts with the premise, central to the purported viability of capital punishment, that the death sentence should be reserved for the most culpable. The *Amnesty Report* traces the cases of five condemned men who suffered from a severely debilitating mental illness and yet received death sentences. These included the cases of Morris Mason, a paranoid schizophrenic with an IQ of sixty six, executed by Virginia in 1985, and David Funchess, an honored Vietnam veteran who suffered severe post-traumatic stress disorder, executed by Florida in 1986.³⁰

Third, Amnesty recites in its case-by-case descriptions the most glaring examples of the lottery that the death penalty has become. John Young, for example, executed in 1985, was represented at trial by counsel who admitted to a complete failure to investigate mitigating evidence, who failed to put on any penalty phase trial, and who was disbarred and convicted of drug charges after the trial. When Young's federal habeas counsel amassed this evidence, and offered it in combination with significant, previously unconsidered mitigation, the federal courts refused to grant a new trial.³¹

Other cases are equally troubling. Doyle Skillern was executed in 1986 only a short time before his accomplice — the triggerman — was eligible for parole.³² Robert Wayne Williams, executed in 1983, had a trial lawyer who spent a total of eight hours preparing his case.³³ Morris Mason, the paranoid schizophrenic, was denied the assistance of a defense psychiatrist in evaluating his sanity at his trial. Ironically, three months before his execution and, as the courts held, too late to save him, the United States Supreme Court declared, in another case,³⁴ that such a denial was a violation of fundamental rights.³⁵

Faced with these case examples, the continued condemnation of juveniles and the mentally ill, and the statistical evidence of racial motivation in sentencing, it is difficult to resist the conclusion that

30. How *Ford v. Wainwright* will affect this type of case is as yet unclear. *Ford* held that: (1) the execution of the presently insane violates the eighth amendment and (2) states must construct adequate and reliable procedures for determination of competence for execution. 477 U.S. 399 (1986).

31. See AMNESTY REPORT, *supra* note 5, at 46-47.

32. See AMNESTY REPORT, *supra* note 5, at 52.

33. See AMNESTY REPORT, *supra* note 5, at 44.

34. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

35. See AMNESTY REPORT, *supra* note 5, at 82-83.

the system is not operating as it should. As Amnesty states: "There must be serious doubts about the fairness and effectiveness of the criminal justice system when race, place, social class or chance consistently play a larger part in determining a death sentence than the facts of the crime or the character and circumstances of the defendant."³⁶

III.

In 1972, the United States Supreme Court overturned Georgia's death penalty statute, and effectively invalidated all existing capital sentencing statutes.³⁷ No majority opinion delineated the common rationale for this holding,³⁸ but *Furman* came to mean that the death penalty cannot "be imposed under sentencing procedures that creat[e] a substantial risk that it would be inflicted in an arbitrary and capricious manner."³⁹ As Justice White, arguably the swing vote in *Furman*, phrased it, the state must have a "meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not."⁴⁰

This theme has consistently appeared in the Court's illumination of the "constitutional responsibility to tailor and apply [the] law in a manner that avoids the arbitrary and capricious infliction of the death penalty."⁴¹ Simply put, the ultimate penalty of death must be "imposed fairly and with reasonable consistency, or not at all."⁴²

The *Amnesty Report* presents significant evidence that this objective has not been met. Nor is Amnesty alone: other sources have indicated that death sentences in the modern era are no less capricious than they were prior to *Furman*.⁴³ In *McCleskey v. Kemp*,⁴⁴ decided in April, 1987, three months after the *Amnesty Report* was issued, the United States Supreme Court rejected the claim that sta-

36. See AMNESTY REPORT, *supra* note 5, at 53.

37. *Furman v. Georgia*, 408 U.S. 238 (1972).

38. The five justice majority wrote five concurring opinions. *Id.*

39. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

40. *Furman*, 408 U.S. at 313.

41. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

42. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

43. See, e.g., Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980's*, 14 N.Y.U. REV. L. & SOC. CHANGE 797 (1986); Hubbard, *Reasonable Levels of Arbitrariness in Sentencing Patterns: A Tragic Perspective on Capital Punishment*, 18 U.C. DAVIS L. REV. 1113 (1985); Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim Based Discrimination*, 18 LAW & SOC'Y REV. 437 (1984); Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908 (1982).

44. 107 S. Ct. 1756 (1987).

tistical evidence of invidious discrimination entitled Warren McCleskey, a black man who had been convicted of killing a white police officer, to a death sentence reversal. In supporting this decision, Justice Powell, writing for a slim five justice majority, stated that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system."⁴⁵

In the early eighties, *McCleskey* became the lead case in the latest wave of statistical challenges to capital punishment. Marshalling the Baldus Study and other evidence, McCleskey's counsel demonstrated significant disparities in sentencing based upon the race of the victim and, to a lesser extent, the race of the defendant. McCleskey claimed that these disparities represented a violation of equal protection and offended the central eighth amendment reliability requirements of capital sentencing.⁴⁶

The Eleventh Circuit, sitting en banc, rejected McCleskey's claims in 1985 by a nine to three margin. Judge Clark, one of the three dissenters, commented: "To allow this system to stand is to concede that in a certain number of cases, the consideration of race will be a factor in the decision whether to impose the death penalty."⁴⁷

The Supreme Court majority, in affirming the circuit court, seems to concede precisely this point. Rejecting the eighth amendment claim, Justice Powell notes that a "permissible range of discretion" in capital sentencing is not only necessary for the particularized consideration of the individual defendant, but is intrinsic to a system that is rooted in jury participation and prosecutorial discretion.⁴⁸ The system, in essence, "has its weaknesses" and its "imperfections,"⁴⁹ but for five justices, the evidence brought by McCleskey failed to demonstrate a "constitutionally significant" risk of discrimination.⁵⁰

Two observations aid in understanding the *McCleskey* Court's

45. *Id.* at 1777.

46. *Id.* at 1770.

47. *McCleskey*, 753 F.2d 877, 927 (11th Cir. 1985) (Clark, J., dissenting). See AMNESTY REPORT, *supra* note 5, at 61 (discussion of circuit dissents). Judge Clark's comment is mistakenly attributed by Amnesty to Judge Hatchett.

48. *McCleskey*, 107 S. Ct. at 1774.

49. *Id.* at 1788.

50. *Id.* One commentator reacted to the *McCleskey* holding with the following: "It is not difficult to summarize the Court's decision in this case. It recognizes the racial discrimination inherent in the Georgia capital punishment system, but does not consider any remedial action necessary or appropriate. This opinion is a national tragedy." Bernstein, *Supreme Court Review*, TRIAL, Sept. 1987, at 100.

apparent acceptance of systemic racial motivation in capital sentencing.

First, the *McCleskey* opinion is another example of the schizophrenic nature of modern capital punishment jurisprudence. By simultaneously embracing the requirements of uniformity and individuality, the Court finds itself attempting to reconcile two inconsistent goals.⁵¹ The Court has struck down automatic death sentencing statutes on the grounds that they deny individualized consideration of the defendant⁵² while demanding adherence to the consistency and reliability necessary to avoid arbitrary infliction of capital sentencing.⁵³ The *McCleskey* majority perpetuates the assumption that these two goals are reconcilable: Justice Powell writes in terms of a minimum requirement of discretion within a rational, narrowing process of selection.⁵⁴ Indeed, the "balance" between "a high degree of uniformity" and "the necessity for the exercise of discretion" is "essential" to "the Anglo-American criminal-justice system."⁵⁵ The opinion, however, fails to recognize *McCleskey's* claim that the disparities transcend any legitimate individualization because they are based on impermissible racial factors.

Second, the majority avoids the most difficult part of the question before the Court: the level at which the sentencing disparities become constitutionally intolerable. The opinion admits the imperfections of our criminal justice system, but ignores the difference between mere imperfection and systemic racial bias. Instead, Justice Powell simply concedes that human beings, and systems constructed by human beings, cannot be perfect. Disparities and inconsistencies exist. The inquiry is then at what level do the disparities exceed the permissible vagaries of human endeavor. *McCleskey* makes no attempt to define where this line exists, but finds that the evidence of discrimination presented fails to bring the Georgia system over the line into constitutionally impermissible territory. Thus, the Court finds that the system is acceptable.

Here, of course, Amnesty disagrees. Amnesty concludes that "no means of limiting the death penalty can prevent its being imposed

51. An insightful discussion of the tension between these goals is contained in *State v. Ramseur*, 106 N.J. 123, 348-59, 524 A.2d 188, 303-08 (N.J. 1987) (Handler, J., dissenting).

52. *Woodson*, 428 U.S. at 303-05; *Roberts*, 428 U.S. at 334-36 (1976); *Sumner v. Shuman*, 107 S. Ct. 2716, 2724-26 (1987).

53. *Gregg*, 428 U.S. at 188-89; *Godfrey*, 446 U.S. at 428; *Eddings*, 455 U.S. at 110-15; *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

54. 107 S. Ct. at 1772-73.

55. *Id.* at 1777 n.35.

arbitrarily or unfairly."⁵⁶ This statement is roughly equivalent to Justice Powell's conclusion that disparities will inevitably exist in a system that uses juries, judges and prosecutors.⁵⁷ Yet, the inferences drawn from this conclusion are precise opposites: Amnesty calls for abolition, the Court opts for acceptance. The recognition of a level of capriciousness, then, merely serves to bolster either position's reasoning. Simply, if capital punishment is a legitimate use of state power, a level of imperfection in its implementation is, as in all human endeavors, a quality to be minimized but not reason to surrender. And, if capital punishment is an illegitimate use of state power, any level of arbitrary and discriminatory application is further evidence of its unacceptability.

In the final passage of the *McCleskey* majority, however, we find Justice Powell ironically echoing some of Amnesty's plea for the people to re-involve themselves in the dialogue.

[M]cCleskey's arguments are best presented to the legislative bodies. It is not the responsibility - or indeed even the right - of this Court to determine the appropriateness of punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are 'constituted to respond to the will and consequently the moral values of the people.'⁵⁸

These comments represent more than judicial restraint in passing responsibility to the Legislature in a difficult case. For the Court, and Justice Powell in particular, the remarks represent a certain weary recognition that the Court's nearly twenty year struggle with capital punishment - from *McGautha v. California*⁵⁹ to *Furman*⁶⁰ to *Gregg*⁶¹ to *McCleskey*⁶² - has not resulted in a fair, responsible and reliable system, but in one that, beneath its spruced up surface, produces the tragic and capricious results documented in the *Amnesty Report*.

Thus, both the *Amnesty Report* and the Court reach the conclusion that, if, as the problems in the current system suggest, something needs to be done about the death penalty in this country, it is ultimately up to the people and their legislatures to act. The Court, out of a weary recognition of its perceived limitations, and Amnesty,

56. See AMNESTY REPORT, *supra* note 5, at 189.

57. *McCleskey*, 107 S. Ct. at 1775-77.

58. *Id.* at 1781 (quoting *Furman*, 408 U.S. at 383 (Burger, C.J., dissenting)).

59. 402 U.S. 183 (1971).

60. 408 U.S. 238 (1972).

61. 428 U.S. 153 (1976).

62. 107 S. Ct. 1756 (1976).

out of a positive allegiance to moral principle, have called upon the citizenry to address the realities of the system and confront the disparities that it perpetuates.

McCleskey represents at least a temporary acceptance by the judiciary, that the capriciousness and discrimination in death penalty sentencing, chronicled by the *Amnesty Report* are an acceptable "imperfection" of our system. Whether these "imperfections" are acceptable to the legislatures or the people remains an open question.

