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# Life in the Balance: Procedural Safeguards in Capital Cases

The Honorable Harold Baer Jr.

# BOOK REVIEWS

LIFE IN THE BALANCE: PROCEDURAL SAFEGUARDS IN CAPITAL CASES By Welsh S. White. Forward by Hugo Adam Bedau. Ann Arbor: The University of Michigan Press, 1984. Pp. 289. $19.95.

Reviewed by the Honorable Harold Baer, Jr.*

The author of *Life in the Balance* is a professor of law at the University of Pittsburgh School of Law. He graduated from Harvard and received his LL.B. from the University of Pennsylvania. For a moment in time, Mr. White was an Assistant District Attorney for Philadelphia. In this slim volume, he is consistent in taking up the cudgels on behalf of the defense. Although primarily directed to lawyers, this book may be comprehensible to others with an interest in and knowledge of the status of capital punishment in the United States. It is a scholarly, valid and detailed analysis of certain concerns touching our system of capital punishment. The book consists of an introduction, a series of eleven essays and two brief updates; one entitled "Witherspoon Revisited" and the other "Disproportionality and the Death Penalty." I found the text and the notes at the conclusion of each chapter complete and detailed, if a little tedious.

The introduction is worth studying. In it we are treated to a roadmap of capital punishment landmarks, along with some of the author's pithier insights. The roadmap discloses that before 1972, juries had absolute discretion to determine what sentence, *i.e.*, death or life imprisonment, was to be meted out in a capital case,[1] and how *Furman v. Georgia*[2] held such a system unconstitutional as violative of the eighth amendment. One justice in *Furman* wrote that such a process was "[c]ruel and unusual in the same way that being struck by lightning is cruel and unusual

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1. *See* Witherspoon v. Illinois, 391 U.S. 510 (1968).
2. 408 U.S. 238 (1972).

. . . . [Those sentenced] are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."[3] Thereafter, the court decided in *Gregg v. Georgia*,[4] that, if implemented along numerous procedural and substantive guidelines, the death penalty was not unconstitutional. Add to this some very recent state court decisions suggestive of still another direction, one advocated by the author, and the fabric of the volume is close to complete. The author sets his stage, or one of them, with the following analysis:

> "*Witherspoon* is a fascinating but perplexing decision. Its constitutional underpinnings have always been unclear, lower courts have had enormous difficulty in administering it, and commentators have criticized it as going either too far or not far enough. The Court holds that a death sentence cannot be carried out if it is imposed by a jury from which veniremen were excluded for cause simply because they expressed general objections or conscientious or religious scruples against the death penalty. At the same time, the Court indicates that *Witherspoon's* holding will not apply if the only veniremen excluded for cause are those who make it unmistakably clear that they will automatically vote against the imposition of capital punishment, regardless of the evidence presented at trial. The line that separates these two groups of veniremen is not very clear. A prospective juror may be absolutely opposed to capital punishment but still feel that there *might* be some case in which she would at least want to consider the evidence before deciding whether to vote against the death penalty. In this type of situation, the distinction between opposing the death penalty and automatically voting against it may be too subtle for ordinary minds to grasp. Whether a particular individual fits into one category as opposed to another may indicate more about her approach to language than it does her real feelings about capital punishment. No wonder the courts have so much difficulty in administering the test. Making the distinctions required by *Witherspoon* is difficult

3. 408 U.S. at 309-10 (Stewart, J., concurring).
4. 428 U.S. 153, 187 (1976).

> enough under the best of circumstances. Making them on the basis of answers given in the voir dire is almost impossible."[5]

Sprinkled throughout are facts that provide some background for what is to come:

> As of June 20, 1983, there were 1,202 inmates on death row; 632, or 51.83 percent, of these inmates were white. Given the differing crime rates of whites and nonwhites, these figures are not inconsistent with a conclusion that the death penalty is being even-handedly applied.[6]
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> . . . .
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> Professor Hans Zeisel found that a person arrested for a felony-murder of a white victim was more than thirty times as likely to be sentenced to death as a person arrested for the felony-murder of a black victim. In addition, a black defendant arrested for the felony-murder of a white victim was almost twice as likely to be sentenced to death as a white defendant arrested for the felony-murder of a white victim.[7]

The essay on death-qualified juries and the problems they present was by far the most compelling. Having recently tried a criminal case in which the insanity defense was the critical issue and where psychiatric evidence was introduced on both sides, the essay on this defense in capital cases was also enlightening.

The major concept advanced in the essay devoted to "Death-Qualified Juries" is that such juries as presently constituted are not impartial, but rather are prosecution-prone. The author, essentially relying on the language in *Witherspoon*, tells us how jury selection conducted prior to the taking of evidence on the guilt phase (as averse to the punishment phase) of the trial, provides the prosecutor with the opportunity to challenge for cause those veniremen who during the voir dire respond that they would automatically refuse to impose the death penalty on anyone. The author is critical of this approach, and finds support for his concern in a variety of studies. One study, providing

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5. W. WHITE, LIFE IN THE BALANCE 4 (footnotes omitted).
6. *Id.* at 6 (footnote omitted).
7. *Id.* at 6-7 (footnotes omitted).

the only humor in this depressing essay, advances what is called the "banana ice cream" theory. Specifically, studies have shown that one's attitude towards the death penalty is a "tip off" to other strongly felt views—it is not an isolated phenomenon, as one's preference for banana ice cream might be. The author urges that once this qualification is permitted, the prosecution is a good part of the way home. We thus gain insight into the concerns such a jury would be likely to overlook and how, as a consequence, they will likely lean towards conviction.

There are now thirty-five jurisdictions that authorize capital punishment. All but one provide for death-qualified juries in accordance with *Witherspoon.*

In the author's words: "The burden of this essay is that applying the criteria articulated in *Ballew*[8] necessitates a finding that the form of death-qualification presently employed in capital cases constitutes a violation of a defendant's rights under the Sixth and Fourteenth Amendments."[9] Interestingly, he posits his conclusion in large measure on *Ballew v. Georgia,*[10] where the Court held that the trial of a misdemeanor before a jury of only five persons was a denial of the defendant's constitutional rights guaranteed by the sixth and fourteenth amendments to the Constitution. The fact is, the cases are quite different and, as the author suggests, his conclusion (that *Ballew* supports a change) "is somewhat speculative." Not open to speculation is that on a detailed reading of this and related essays one comes away believing with the author that the issue of death-qualified juries in capital cases "is ripe for reconsideration." In the update, the author suggests that the courts are slowly coming to the conclusions he advances (with respect to death qualified juries) and doing it on the basis of material reminiscent of a Brandies brief.

Another especially interesting essay is entitled "The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases." It illustrates the dilemma facing an individual charged with a capital offense who chooses to raise the insanity defense. Again, the recurring refrain of "unfair" is prominent.

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8. 435 U.S. 223 (1978).
9. W. WHITE, LIFE IN THE BALANCE 127.
10. 435 U.S. 223 (1978).

Why, the author asks, should a defendant be forced to waive his fifth amendment rights when seeking a psychiatric examination for himself? Why must he submit to an examination by the prosecutor? The author makes peace with himself on this issue, at least to a limited extent, by urging that a tape be made of the interview if a lawyer for the defendant is not present. One might wonder which jurisdiction the writer has explored, since in New York at least, the examination by the prosecution permits a tape to be taken and an attorney to be present. Without minimizing the real problems in this dilemma, let me suggest that there may be larger ones, *e.g.*, on which side should the burden of proof reside.

There is much more in this volume. Although practically of more use to lawyers and judges where the death penalty is already on the books, it is a discussion on a scholarly level of several problems that confront our criminal justice system in general.

These essays provide an overview of the state of the law today on a topic of interest to all of us. On a more provincial level, no New York State resident—a jurisdiction where as yet there is no death penalty—will likely come away from a reading of this work without a firm commitment to keep it that way.