The Concept of "Equalizing Downward" in Capital Punishment Cases

Daniel C. Durham

Arizona State University

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The United States Supreme Court decision in *McCleskey v. Kemp* (481 U.S. 279, 1987) ruled that general patterns of discrimination do not prove that racial discrimination occurred in a particular case. The McCleskey case involved a black male who was convicted and sentenced to death for the murder of a white police officer in the state of Georgia. A study conducted for the defense concluded that all individuals convicted of murdering whites in Georgia were more likely to be sentenced to death than if the victim had been black (Baldus, Woodworth & Pulaski, 1990). Replication of this study in other areas of the United States reflects the same general racial bias with approximately eighty percent of death row inmates who were executed having murdered a white individual (Baldus et al., 1990). An additional aspect of discrimination in capital punishment cases involves the judicial process that is still entrenched in a legal system that routinely excludes minorities from jury service (Fukurai, Butler& Krooth, 1993). Accordingly, the prevailing issue with discrimination in capital punishment trials is not that the Court has not tried to set a standard for equal protection, but rather that it is somewhat impossible to prove that discrimination in the application of a death sentence was intentional and purposeful. As such, it is slightly ironic that during a period in American history that promotes increased protection for civil rights, discrimination against both black suspects and black victims of crime has risen steadily (Stunts, 2011).

Equalization in the Execution Process

In the wake of the trials of the Scottsboro Boys in Alabama during 1931 which involved the rampant discrimination of nine black males unjustly accused of rape, the Martinsville Seven were a group of seven young black men charged with the rape of a white woman in Martinsville, Virginia during 1949. Similar to the trial of the Scottsboro Boys, trials of the Martinsville Seven

were heard by all-white and all-male juries (Rise, 1995). In quick succession, all six juries convicted the each of the Martinsville Seven on a capital crime of rape and recommended the death penalty. In attempts to delay or overturn the death sentences, Samuel W. Tucker becomes involved with the Martinsville Seven as an attorney for National Association for the Advancement of Colored People (NAACP). In the process of planning a defensive strategy for the appeal process, Tucker identified that the state of Virginia had executed forty-five black men over the course of approximately fifty years for raping white women. However, no white males had been executed for the crime of rape (Rise, 1995). Such was the stage for the argument by Tucker that, "If you can't equalize upward, we must equalize downward" (Rise, 1995). In simple terms, Tucker was making a statement regarding the unequal application of the death penalty, as well as other areas in society, based on the race of a defendant. On a more complicated level Tucker, an intense advocated for the cause of equal rights was arguing that actions must be taken to make administration of capital punishment equal for all races through fairness in the death sentencing process. Regardless, Tucker's argument was rejected by the state and federal courts during the throughout the appeal process. During the same period as the trial of the Martinsville Seven, mandatory capital punishment sentencing was in the process of changing to discretionary sentencing (Bohm, 2011). While this change was perceived to be a positive step in the evolution of capital punishment, the fact is that some southern states only abandoned mandatory sentencing to allow an all-white jury to consider race when deciding whether to impose a death sentence (Bohm, 2011). However, it would be some twenty years later before the U.S. Supreme Court decision in *Furman v. Georgia* (408 U.S. 238, 1972) would develop a system of super due processes to impose additional safeguards with the intent of protecting the rights of death-eligible criminal defendants (Sarat, 2001).

The Challenge of "Equalizing Downward"

Conceptually, equal justice under the law is a critical component of the criminal justice system. As such, all laws are intended to be equal and administered by all components of the criminal justice system in a fair and just manner without regard to the age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion or disability of a defendant (Kull, 1994). However, in reality, justice is not blind given that it requires human beings to decide the fate of a criminal defendant. This consideration would also be consistent with the thoughts of Justice John Harlan who stated that the ability to render an accurate decision of life and death is "beyond present human ability" (Baldus et al., 1990). Accordingly, perhaps the best that can be achieved is to develop a process that can temper the inherent bias associated with the capital punishment process. Although the arbitrary nature of imposing a death sentence appears to have declined since the Court decision in *Furman v. Georgia* (408 U.S. 238, 1972) changed the procedures used in capital cases, the actual reason for the decline may not be the result of procedural changes, but, rather the increased scrutiny by the Court (Baldus et al., 1990). According to Bohn (2011), the death penalty continues to be administered in an arbitrary manner given issues associated with: the varied manner in which different jurisdictions apply the death penalty; a general inability of many jury members to fully understand the death penalty sentencing process; the difficulty in determining a defendant's actual intent; and, not surprisingly, the continuing refinement of death penalty sentencing laws by the Court. However, actual imposition of the death penalty has less to do with fairness of laws and procedures as it does: the arbitrary nature of judicial assignments; the state where the crime was committed; and plea-bargaining to a non-capital offense (Grisham, 2010). Simply put, as long as fallible humans administer the capital punishment process, the arbitrary nature of the death penalty will continue.

Over the past forty years, the Supreme Court has attempted to ensure that substantive and procedural capital punishment laws provide for a fair and logical conclusion in the application of a death sentence (Cooke, 2006). However, the best intentions of the Court aside, arbitrariness and discrimination in capital sentencing are inevitable (Baldus et al., 1990). Nevertheless, many Americans are under the misguided belief that decisions by the Court ensure the fair imposition of the death penalty through strict adherence to logic and reasoning that is void of emotional perceptions. There is little argument that a decision that is reached through the application of logic and reasoning is more certain than a decision influenced by emotional perceptions. However, considering that a death penalty jury is exposed to emotional perceptions and subjective facts, attempts by the Court to ensure that substantive and procedural capital punishment laws provide for a logical conclusion may never be satisfied (Cooke, 2006). Accordingly, arbitrariness and discrimination in capital sentencing are inevitable (Baldus et al., 1990). For this reason, the goal of equalizing downward in the application of the death penalty is just not a realistically attainable goal, despite the concept of equal justice under the law.

Achieving the Goal of "Equalizing Downward"

Since deciding that mandatory death laws in capital punishment cases were unconstitutional, the Court has imposed numerous constraints to discretionary sentencing in an attempt to prevent arbitrary use of the death penalty. The basic implementation of these constraints has led to the development of a super due process for use in capital punishment cases in an attempt to ensure the proper administration of death sentences (Zimring, 2003). The intent of this super due process is to provide: strict guidelines to ensure that aggravating and mitigating evidence is considered in a death sentence; and an automatic appeal process to include a proportionality review (Bohn, 2011). Additionally, current capital punishment laws generally

require a two-stage (bifurcated) trial procedure. In this bifurcated trial process, the jury: first determines guilt or innocence; and then deliberates to decide whether the sentence will be imprisonment or death after considering the aggravating or mitigating circumstances of the crime (Oshinsky, 2010). The significance of a separate decision process is that in the sentencing phase a jury can receive additional information to determine the appropriateness of a death sentence. However, even with this stringent, albeit somewhat convoluted, process the administration of capital punishment laws is plagued by recurring errors, inaccurate judgments and questionable decisions (Bedau & Cassell, 2004).

The finality associated with sentencing an individual to death is uniquely different from other trial processes. For this reason, the Court has attempted to ensure that substantive and procedural capital punishment laws provide for the fair and impartial implementation of the death penalty. However, this process continues to be rooted in the legal philosophy of determining guilt beyond a reasonable doubt. Accordingly, if the goal of equalizing downward in regards to the administration of a death sentence is to be achieved, there must be a more explicit standard of certainty that would result in a standard of guilt where no significant or real doubts remain (King, 2006). While the reality of absolute certainty may be an unattainable goal, use of a less than certain standard would provide a jury with the ability to deliberate without having to consider that the evidence seemingly suggests that the accused individual committed the crime (King, 2006). There is little doubt that the use of a less than certain standard in capital punishment cases would result in fewer convictions. More notably, providing jurors with a different standard of guilt would provide for a more level playing field with regard to achieving the goal of equalizing downward in the application of the death penalty. At the very least, the potential of convicting an innocent person to death would be significantly reduced (King, 2006).

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