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CRIMINOLOGY

TWO DIFFERENT WORLDS: CRIMINOLOGISTS, JUSTICES AND RACIAL DISCRIMINATION IN THE IMPOSITION OF CAPITAL PUNISHMENT IN RAPE CASES

DENNIS D. DORIN*

*[W]e have people here who come at these things from very different angles. Some of the social scientists here, for example, are people who have already done advanced work and publication in fields that other social scientists and lawyers don't really know the first thing about. There are people here who, as lawyers, are aware of the issues presently being litigated that the social scientists don't know the first thing about. The result is that almost any discussion we have of any topic is going to be miles ahead of some people and miles behind some.***

ANTHONY AMSTERDAM

INTRODUCTION

On June 29, 1977, the United States Supreme Court struck down the death penalty for the rape of an adult woman as "cruel and unusual punishment"¹ violative of the eighth and fourteenth amendments. *Coker v. Georgia* thus seemed the denouement to a campaign of litigation to bar the capital sanction from rape prosecutions. In the mid-1960s, the NAACP Legal Defense Fund (LDF) concluded that the time was ripe to attack through the courts one of the most pernicious forms of racial discrimination—the selective employment by Southern states of capital

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** NAACP, LEGAL DEFENSE FUND AND CENTER FOR STUDIES IN CRIMINOLOGY AND LAW, DEATH PENALTY CONFERENCE 13 (1977).

¹ *Coker v. Georgia*, 433 U.S. 584 (1977).

punishment in rape cases where blacks were convicted of raping whites.² *Coker* was thus the last of a series of cases, beginning with *Maxwell v. Stephens*,³ in which the LDF had pressed the argument that capital rape sentencing was racially discriminatory.

Yet, with one exception the *Coker* justices never even mentioned the issue of racial discrimination in their opinions. Justice White writing for the four-justice plurality chose to rely solely upon the contention that the death sentence was a disproportionate punishment for a rape in which the adult victim had not been deprived of her life.⁴ In reaching this conclusion, Justice White maintained that previous cases required him to "seek guidance in history and from the objective evidence of the country's present judgment concerning the acceptability of death as a penalty" for such a crime.⁵ He then presented a historical sketch of the use of the capital sanction which, he claimed, encompassed "the last 50 years . . ."⁶ But nowhere did Justice White even hint at the presence of racial discrimination in the imposition of the death sentence in rape cases. For all his opinion revealed, such a possibility was not even important enough to be considered by historians.

Justice Brennan voted with the Court, but on separate grounds. Without the slightest mention of possible racial discrimination in the use of the death penalty in rape cases, he alluded to his dissent in the previous case of *Gregg v. Georgia*,⁷ in which he had argued that the death penalty was per se unconstitutional as an affront to human dignity.

Justice Marshall was the only member of the *Coker* Court to assert that the imposition of capital punishment was racially discriminatory. A former General Counsel for the Legal Defense Fund, Justice Marshall invoked his concurrence in *Furman v. Georgia*,⁸ in which he had presented what he considered to be substantial evidence showing that racial discrimination played a major role in the execution of blacks and other minorities at rates highly disproportionate to their percentage of the population.⁹

Such a general lack of treatment of the racial issue might well have

² Michael Meltsner has recounted this campaign in M. MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973) [hereinafter cited as *CRUEL AND UNUSUAL*].

³ 229 F. Supp. 605 (E.D. Ark. 1964), 398 F.2d 138 (8th Cir. 1968), *app'd sub nom.*, *Maxwell v. Bishop*, 398 U.S. 262 (1970).

⁴ 433 U.S. at 584.

⁵ *Id.* at 593.

⁶ *Id.*

⁷ 428 U.S. 153, 227 (1976).

⁸ 408 U.S. 238 (1972).

⁹ 433 U.S. at 600. *See Furman v. Georgia*, 408 U.S. 238, 314 (1972) (Marshall, J., concurring).

come as a shock to a large number of the criminologists and sociologists who had studied the infliction of the death penalty in rape cases. A string of studies transversing decades had raised grave doubts as to whether persons were executed for rape on a "color-blind" basis.¹⁰ Even such a staunch proponent of capital punishment as Ernest van den Haag was to concede a year after *Coker* that the charges of racially discriminatory application of capital punishment were "most often justified when the penalty was inflicted for rape."¹¹

Most importantly, what Bedau and Pierce described as "one of the most definitive pieces of research ever done on capital punishment"¹² had concluded that the main variable in the execution of rapists was whether they were blacks with white victims. Wolfgang's and Riedel's "Rape, Racial Discrimination and the Death Penalty," the latest phase of studies produced by Wolfgang-led teams since the mid-1960s, had scrutinized 35 variables which might have explained capital sentencing in 1,265 rape cases in 11 Southern and border states from 1945 to 1965.¹³ Wolfgang and Riedel had found that seven times more blacks than whites were sentenced to death in these cases. The odds that such an occurrence could have happened by chance were 1 in a 1,000. Moreover, Wolfgang and Riedel discovered that blacks who raped whites received the death penalty in 36 percent of the cases, while the comparable percentage for blacks who raped blacks or whites who raped whites was only 2 percent. Their main conclusion, which was to go largely unchallenged by other social scientists and statisticians, was that the patterns discerned could only be explained as the products of racial discrimination.¹⁴

But why had the Court's opinions in *Coker* largely ignored such data? Surely the relevant studies had been brought forcefully to the justices' attention. Indeed, these studies had been continually thrust

¹⁰ See, e.g., the studies summarized in Wolfgang & Riedel, *Rape, Racial Discrimination and the Death Penalty*, in CAPITAL PUNISHMENT IN THE UNITED STATES 99, 105-107 (H. Bedau & C. Pierce eds. 1976) [hereinafter cited as CAPITAL PUNISHMENT].

¹¹ van den Haag, *The Collapse of the Case Against Capital Punishment*, 30 NAT'L REV. 404 (March 31, 1978). The same concession is made by two other proponents of capital punishment, Lehtinen and Carrington—the latter with a specific acceptance of the validity of Wolfgang's "careful and comprehensive study." See F. CARRINGTON, NEITHER CRUEL NOR UNUSUAL 210 (1978); Lehtinen, *The Value of Life: An Argument For the Death Penalty*, 23 CRIME & DELINQUENCY 237, 246-47 (1977).

¹² CAPITAL PUNISHMENT, *supra* note 10, at xvii.

¹³ Wolfgang & Riedel, *Rape, Racial Discrimination, and the Death Penalty*, in CAPITAL PUNISHMENT, *supra* note 10, at 109-14.

¹⁴ *Id.* at 118-19.

Speaking of his rape study, Wolfgang has asserted that "no statistical witness was ever offered to contradict this evidence. Nor was any statistician, social scientist, or criminologist ever offered by opposing advocates to contradict or reinterpret my research data." See *id.* at 244.

before the Court in all of the major capital punishment cases from *Maxwell* through *Coker*.¹⁵

The petitioner's brief in *Coker* was thus following a well-worn route when it noted that "the overwhelming majority of defendants executed for the crime of rape in this country in the past thirty years have been black." Since 1930, it continued, "when reliable statistics began to be kept by the federal government, 48 whites, 405 blacks, and 2 members of other minorities [had] been put to death for this crime." There was historical evidence that, in Georgia, as in the other Southern and border states, "the death penalty was specifically devised as a punishment for the rape of white women by black men . . ."¹⁶ One of the "most frequent and insistent criticisms" of these states' ostensibly color-blind post-Civil War rape statutes was that they were "administered discriminatorily so that blacks were disproportionately executed for rape . . ." Explicitly citing Wolfgang's and Riedel's national study, as well as their delineation of the same patterns in an intensive analysis of Georgia, the brief maintained that recent statistical studies had "proved the fact of discrimination conclusively . . ."¹⁷

There was thus no way for the Court to be oblivious to the Wolfgang analyses. If it failed to mention them, although they seemed to be an obvious source of data and findings, there had to be other reasons. In two introspective pieces, Wolfgang has suggested some possible explanations.¹⁸ In doing so, he has lucidly presented the perspective of a sociologist-criminologist intimately engaged in the central cases.

But there are two worlds involved. It is thus essential also to look as objectively as possible at the orientations of the one inhabited by law-

¹⁵ See *Gregg v. Georgia*, 428 U.S. 153 (1976), *Furman v. Georgia*, 408 U.S. 238 (1972), *McGautha v. California*, 402 U.S. 183 (1972), and *Maxwell v. Bishop*, 398 U.S. 262 (1970).

¹⁶ Brief for Petitioner at 53, *Coker v. Georgia*, 433 U.S. 584 (1977).

¹⁷ *Id.* at 54-56. The brief traced "this history of the punishment for rape in Georgia since the days of slavery. . . . Prior to the Civil War," it noted, "rape committed by a white man was never regarded as sufficiently serious to warrant a penalty greater than 20 years imprisonment." But a rape committed by a slave or a free person of color upon a white woman was punishable by death." One year after the abolition of slavery, however, a facially color-blind statute was enacted, by giving juries discretion to sentence any man convicted of rape to either death or not more than twenty years imprisonment. . . . Despite the ostensible neutrality of the statute," the brief concluded, alluding to Wolfgang's and Riedel's work, "the post-Civil War racial sentencing pattern varies little from the antebellum pattern. . . ." *Id.* at 54.

By the time *Coker* was decided, there was no dearth of law review articles bringing the Wolfgang rape studies to the judiciary's attention in ways that emphasized their relevance to the constitutionality of the death penalty for rape. See, e.g., Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970) and White, *Disproportionality and the Death Penalty: Death as a Punishment for Rape*, 38 U. PITT. L. REV. 15 (1976).

¹⁸ See Wolfgang, *The Social Scientist in Court*, 65 J. CRIM. L. & C. 239 (1974) [hereinafter cited as *Social Scientist*]; Wolfgang, *The Death Penalty: Social Philosophy and Social Science Research*, 14 CRIM. L. BULL. 18 (1978) [hereinafter cited as *Death Penalty*].

yers, judges, and justices. Such an exploration may well broaden our understanding of the interplay of criminology and constitutional law in these life-and-death cases. What follows, therefore, is a series of speculations relating to why the *Coker* Court failed to legitimate, or even discuss, what might have been the most persuasive sociological studies ever done relating to racial discrimination in the imposition of the death penalty.

Social scientists find it difficult enough to explain why events do occur; accounting for their non-occurrence is even more hazardous. Nevertheless, such an exercise should prove heuristic. It may assist sociologists and criminologists and lawyers and judges in better understanding, and perhaps even overcoming, breakdowns in communication between their respective subcultures.

The question of whether there is racial discrimination in the imposition of capital punishment is of profound importance. It requires the society's and its judicial system's most rational, accurate, and fair consideration. Given this imperative, what may have been the obstacles to discourse between the "two worlds" in the capital rape cases? Were there powerful justifications for the Supreme Court's not legitimating Wolfgang's findings? And if there were, did they absolve Justice White from even mentioning the existence of the racial discrimination issue? This inquiry might provide at least tentative answers to these and other troubling questions concerning the court's vast discretion to use or ignore social science data.

I. SPECULATIONS

A. JUDICIAL FRAILTIES

Sociologists, criminologists, and other social scientists commonly assert that many judges have such deficient social science backgrounds that they cannot even begin to fathom pertinent methodologies and findings. It is thus not surprising that, while quoting a federal district judge in *Maxwell* to the effect that statistics are " 'elusive things at best, and it is a truism that almost anything can be proved by them,' " Wolfgang retorts that these "are common assertions made by persons who are not social scientists trained in statistics."¹⁹

Hard evidence on the extent of judicial ignorance in this area is lacking. Even if social scientists could agree upon a standard examination of the requisites for an understanding of their studies, they could not likely procure a scientifically selected sample of jurists willing to take it. Nor have social scientists serving as witnesses in litigation been polled

¹⁹ Wolfgang, *Social Scientist*, *supra* note 18, at 244.

in an attempt to determine their impressions of the levels of comprehension of their respective judges and justices.

Nevertheless, sociologists, criminologists, and other social scientists have disseminated a number of anecdotes purporting to demonstrate jurists' failures to comprehend social science,²⁰ sometimes even in areas where the latter have shown a propensity to legitimate behavioral argumentation, such as in employment discrimination cases.²¹ Even if such stories are exaggerations, there is at least strong indirect evidence that a lack of sophistication in social science theory and methodology on the part of the judiciary could well be an important contributor to breakdowns in communication between "the two worlds."

Judges and justices are largely products of a traditional education not oriented toward science or mathematics, which is more suited to a pre-computer age. Law schools generally do not have courses in the logic of hypothesis testing and statistical analysis. The chances may thus be poor that a jurist will possess a sophisticated grasp of the complexities and nuances of testing a hypothesis, and they may be only slightly better than his clerk has received the necessary preparation.

The ramifications of such a situation may well be far-reaching.

²⁰ A story told by political scientist John White, a participant in the United States Supreme Court's major reapportionment cases of the mid-1960s, is not atypical. White relates that, at one point in the proceedings, participating lawyers and political scientists decided to provide each Justice with an elementary primer so that he could better follow their statistical presentations. Within a few days, according to White, they found themselves being thanked by the Chief Justice. Addressing them from the bench, Warren expressed his appreciation, but noted that neither he nor his brethren had been able to decipher the primer's computations. Anecdote related to Professor John White's undergraduate class in State and Local politics, Arizona State University, Tempe, Arizona, 1963-1964 academic year.

Donald Horowitz suggests another way by which we might attempt to gauge the social science proficiency of federal district judges, through case studies of their policy-making in representative cases. Viewed from this perspective, he tends to be pessimistic. *See* D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977).

²¹ Consider, for example, the account of a social scientist who has served as an expert witness in such cases before one of the nation's leading federal district judges. His jurist, he contended, did not demonstrate the "technical expertise" to follow the social science argumentation. This individual concluded, however, this judge "did not have to understand all of the arguments to get things done. He knew what he wanted to find, and it was rumored that his clerks wrote his opinions."

Yet, it should be noted that this same observer cited Judge Sam C. Pointer, Jr. of the Northern District of Alabama as a "statistical expert" in full command of such cases. And a similarly positive impression of Judge James B. McMillan of the Western District of North Carolina has been conveyed by sociologist Raymond Michalowski, who has testified as an expert witness in Judge McMillan's court in well over twenty employment discrimination cases. Michalowski has concluded that, while Judge McMillan is highly skeptical and suspicious of testimony proffered by social scientists, he still evidences a firm grasp of it both in his courtroom statements and questions and in his opinions. Interview with a political scientist who is a frequent expert witness in Alabama federal courts at the University of North Carolina at Charlotte (May 23, 1980); Telephone interview with Raymond Michalowski (June 4, 1981).

The sociologist or criminologist may find himself faced with a serious dilemma. If he keeps his studies simple enough to be comprehended by what are many times individuals with possibly less understanding of social science than his own undergraduates, he may sacrifice so much methodological potency as to make them invalid.²² Hence, there are profound problems involved in social scientists' and lawyers' attempts to "sell" what may be described as "advanced" works to the judiciary, even when it welcomes the opportunity for such an education.

Judges, however, may well be less than enthusiastic about taking courtroom courses from social scientists.²³ *Moorer v. State of South Caro-*

²² Consider, for example, the bewilderment of most members of the federal judiciary confronted with this very important methodological statement from Wolfgang's and Riedel's analysis of racial discrimination in the imposition of the death penalty for rape in Georgia:

The general problem is to set up a function of the following form:

$$Z = a_1 x_1 + a_2 x_2 + a_3 x_3 \dots a_k x_k \quad (1)$$

when x equals measured variables, and a equals corresponding coefficients.

The discriminant function analysis computes coefficients for equation (1). The resulting Z values are used in an analysis of variance such that the ratio of the variance between sentence-type groups to the variance within sentence groups is at a maximum See Wolfgang & Riedel, *Rape, Racial Discrimination and the Death Penalty*, in CAPITAL PUNISHMENT, *supra* note 10, at 115.

Indeed, Judge J. Skelly Wright, long considered one of the more progressive members of the U.S. Circuit Courts of Appeals, expressed his bewilderment and outrage at the introduction of less complex statistical analyses than these in *Hobson v. Hansen*, 327 F. Supp. 844, 859 (D.D.C. 1971):

[t]he unfortunate if inevitable tendency [of this argumentation] has been to lose sight of the disadvantaged young students on whose behalf this suit was first brought in an overgrown garden of numbers and charges and jargon like 'Standard deviation of the variable,' 'statistical significance,' and 'Pearson product moment correlations.'

See generally Rist & Anson, *Social Science and the Judicial Process in Education Cases*, 6 J. L. & EDUC. 2 (1977).

²³ This reluctance may well stem, at least in part, from the relatively high average age of judges and justices. Rosen, for example, approvingly quotes Justice Holmes to the effect that judges "commonly are elderly, and are more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties." See Rosen, *Social Science and Judicial Policy Making*, in USING SOCIAL RESEARCH IN PUBLIC POLICY MAKING 109, 116 (C. Weiss ed. 1977) [hereinafter cited as USING SOCIAL RESEARCH].

Holmes himself seemed an excellent example of this phenomenon. Alpheus T. Mason relates that Holmes' great friend, Justice Louis Brandeis, frequently implored him to familiarize himself with what would presently be called the social sciences. To acquaint himself with economic analysis, for example, Brandeis suggested that Holmes devote a summer to studying the facts of the textile industry.

Holmes expressed his repugnance for Brandeis' suggestion in a letter to Sir Frederick Pollock:

I hate facts. I always say the chief end of man is to form general propositions—adding no general proposition is worth a damn. Of course a general proposition is simply a string for the facts and I have little doubt that it would be good for my immortal soul to plunge into them, good also for the performance of my duties, but I shrink from the bore—or rather I hate to give up the chance to read this and that, that a gentleman should have read before he dies

A. MASON, *BRANDEIS: A FREE MAN'S LIFE* 577 (1946).

lina,²⁴ one of the early cases in which the LDF sought to have the death penalty invalidated, provides an extreme example. In *Moorer*, a federal district judge in South Carolina went far beyond a refusal to consider the Wolfgang studies relating to that state; he ordered all of Wolfgang's South Carolina materials impounded, stipulating that they were not to be employed at all in the attempt to save the defendant. Indeed, only an intervention by the United States Court of Appeals for the Fourth Circuit liberated the data.²⁵

The vast proportion of modern federal judges would surely react less extremely. But the lack of a social science background of many of them at least suggests strongly that they might well find themselves insecure in the presence of such studies, and conclude that the better part of valor would be to disregard them and rest their decisions on other bases. At least David Riesman, an urbane traveller within both "worlds", has so argued. Riesman has contended that law students, lawyers, judges, and justices tend to feel that they have sufficient native intelligence, reasoning acumen, and common sense to resolve major legal and social problems while "playing it by ear."²⁶ Hence their conscious or subconscious conclusion that any social science finding not readily discernible to them as laymen is not worth considering.²⁷

Finally, the press of work at all levels of the federal court system cannot be discounted. Judges and justices are busy people. They face a workload of cases unheard of a few decades ago. If they are to retool in the social sciences, they must be shown that the advantages will be immediate and far-reaching. Yet, a glance at some of the courts' more

²⁴ 368 F. 2d 458 (4th Cir. 1966).

²⁵ This sorry episode is recounted by Michael Meltsner. See M. MELTSNER, *supra* note 2, at 88.

²⁶ "Lawyers and law professors," Riesman has written, "are very apt to be scornful of the findings of social science":

This is an offshoot of a professional self-image of omniscience . . . It is also a reflection of the lawyer's wish to maintain a pattern of practice . . . in which he can play by ear . . . Science threatens this—just as the coming of automation and the enormous demands for planning threaten the similar 'play it by ear' tendencies of old-fashioned business executives.

D. RIESMAN, *ABUNDANCE FOR WHAT?* 433 (1964).

²⁷ But some judges do evidence a grasp of social science inquiry. See then Judge Harry Blackmun's explanation of a null hypothesis in *Maxwell v. Bishop*, 398 F.2d 138, 142 (8th Cir. 1968).

Daniel Patrick Moynihan, at least, sees grounds for optimism:

Courts will learn to adapt to the changed conditions of evidence which social science imposes on contemporary argument. . . . Indeed, lawyers with no more than a good undergraduate grounding in social-science methodology could have quite an impact in this area simply by establishing standards of cross-examination which are infrequently attained today.

Moynihan, *Social Science and the Courts*, 54 PUB. INTEREST 12, 30 (1979).

dramatic employments of social science might convince them that the course is not worth taking.

B. THE THIN ICE SYNDROME

Brown v. Board of Education,²⁸ decided in 1954, no doubt constitutes the Supreme Court's most well known employment of psychological and sociological studies in a case with profound implications. What did the Court obtain for its attempt to utilize the insights of modern social science? First, it was pilloried by a profusion of legal commentators in law reviews, books, and other media. Second, and many years later, it was informed by the very social science that it had trusted that some, if not all, of the findings underwriting its opinion were primitive and invalid.²⁹

As Wolfgang has so correctly observed, it is of the very essence of sociological inquiry for past studies to be continually subjected to new modes of proof and to be cast aside when discredited. It may not be easy, in terms of reputation and ego, for a sociologist or criminologist to concede that his study has been invalidated. But, for a judge or justice who has built a whole constitutional edifice on such a rejected analysis, the result can be catastrophic.³⁰

To build one's decision and opinion on social science, therefore, may well make one more vulnerable than is necessary. It can involve the giving up of future options. It can entail something that judges and justices, as most policymakers, are loathe to do—surrender power.

Consider, for example the vicissitudes of Justice Marshall and his use of social science to argue that there is no evidence that capital punishment is a better deterrent to murder than life imprisonment. Justice Marshall delved deeply into the famous work of Thorsten Sellin and other such sources to make this argument in his concurrence in *Furman v. Georgia*.³¹ But, by *Gregg v. Georgia*,³² a mere four years later, he found

²⁸ 347 U.S. 483 (1954).

²⁹ For a summation of some of the negative response to the Court's employment of such studies in *Brown*, see Rosen, *Social Science and Judicial Policy Making*, in USING SOCIAL RESEARCH, *supra* note 23, at 113.

The latest chapter in this story centers upon James Coleman's repudiation of the 1966 report that bears his name. The Coleman Report is by far the most well-known social science justification for the pro-busing policies of a number of federal courts and agencies. See Fiske, *Social Scientists as Policy-Shapers*, The New York Times, January 8, 1980, at C1.

³⁰ U.S. Circuit Court of Appeals Judge William Doyle has contended, for example, that basing constitutional doctrines upon social science, with its ever-changing theories, methodologies, and findings, would be particularly hazardous. Doyle maintains that judges would pose a great "danger to our 200-year experience in constitutional democracy" if they were to rest their interpretations upon such sources "rather than . . . the bedrock of a coherent . . . principle." See Doyle, *Can Social Science Data Be Used in Judicial Decisionmaking?*, 6 J. LAW & EDUC. 13, 18 (1977).

³¹ 408 U.S. 238, 348-54 (1972) (Marshall, J., concurring).

himself confronted with a new and unforeseen challenge—Isaac Ehrlich's econometric arguments that the death penalty did, in fact, provide more effective deterrence. Undaunted, Marshall counterattacked in his *Gregg* dissent, lecturing Ehrlich, his brethren, the legal profession, and the public at large on the proper use of regression analysis.³² Relying upon a barrage of rebuttals to Ehrlich by social scientists, the Justice now found himself in the very thick of statistical argumentation. That hazardous venture barely completed, he was then confronted by the National Academy of Sciences-sponsored *Deterrence and Incapacitation* and its determination that neither the analyses relied upon by Ehrlich nor him were sufficiently valid.³⁴ Marshall had bet quite a lot on social science. He might well have come up losing, his constitutional arguments resting upon a patently shaky social science foundation.³⁵

It is thus not surprising that a number of judges and justices forego a heavy reliance upon sociological or criminological documentation. Whether or not they comprehend it, they sense that employing it may well put them out on thin ice with Marshall. It is consequently easy to understand the considerations moving Justice John Harlan to write a majority opinion in one of the capital punishment cases in which he speaks disparagingly of "the infant science of criminology."³⁶

³² 428 U.S. 153 (1976).

³³ *Id.* at 233-36 (Marshall, J., dissenting).

³⁴ NAT'L RESEARCH COUNCIL, PANEL ON RESEARCH DETERRENT AND INCAPACITATIVE EFFECTS 8-9 (A. Blumstein, J. Cohen & D. Nagin eds. 1978). Blumstein has contended that the Sellin-type and Ehrlich evidence relating to deterrence and capital punishment was "extremely well gone over" by his panel. His panel, he has noted, found that "both data sets are flawed." "Basically," Blumstein has related, "we concluded that we remained uninformed about any effect of capital punishment—that there are fundamental flaws in the evidence that's presented." See NAACP LEGAL DEFENSE FUND AND CENTER FOR STUDIES IN CRIMINOLOGY AND CRIMINAL LAW, DEATH PENALTY CONFERENCE 137 (1977) [hereinafter cited as DEATH PENALTY CONFERENCE].

This result has led Blumstein to write recently that "unfortunately the available research cannot yet provide useful information for policy decision. . . ." Blumstein, *The Positive Values of Negative Research*, 3 CRIMINOLOGIST 17 (1978).

³⁵ Moynihan credits Stewart with the proper response to this situation—to accept all the existing research as inconclusive. See Moynihan, *Social Science and the Courts*, *supra* note 27, at 17-18.

³⁶ *McGautha v. California*, 402 U.S. 183, 221 (1971).

Michael Finkelstein has also noted that the judiciary's reliance upon social science findings can lead to a lessening of its options, and, hence, power:

The acceptance of mathematical methods undoubtedly implies a certain yielding by judges of their freedom of decision . . . This consequence . . . may be a source of judicial reluctance to entrust decisions to them and may tempt the Court to continue the familiar practice of casting legal rules in broad discretionary terms to ensure that legal principles will not embarrass with results that run against the grain of judicial intuition.

Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338, 375-76 (1966).

C. BETWEEN THE STOOLS

The skepticism and suspicion many members of the federal judiciary already have toward the introduction of evidence from the social sciences are too frequently exacerbated by the legal gaffes of criminologists and sociologists serving as witnesses. In the great majority of cases the latter are blameless. It is the responsibility of their working colleagues in the legal profession to steer them away from such pitfalls.

Episodes like Wolfgang's testimony in the *Maxwell* federal habeas corpus proceedings are not uncommon. Wolfgang has described his frustration and chagrin on being cross-examined as to whether his study of discrimination in Arkansas rape cases included Garland County, the situs of the *Maxwell* trial. He had to reply in the negative, carefully explaining that his scientifically selected random sample of counties did not encompass Garland. Regardless of his attempt to convey the requisites of proper social science inquiry to the federal judiciary in this case, however, it seemed that Garland's omission counted heavily against him.³⁷

Wolfgang has conveyed this episode as an example of the lack of methodological sophistication one can find in judges. But it could just as well be illustrative of the ways in which extant doctrines can be brought to bear—when judges believe they are carefully abiding by *stare decisis*—to mangle sociological and criminological findings.

The Legal Defense Fund took an enormous gamble in sponsoring, implementing, and attempting to introduce into evidence Wolfgang's famous studies. It had to assume that its chances were good for bringing about a sweeping innovation in the ways in which a great majority of federal judges approached such litigation. It had to convince them to make an abrupt departure from their treatments of the vast majority of blacks' rights cases—to find entire states, not merely their subdivisions, guilty of racial discrimination. When the judiciary was unwilling to take this far-reaching step, Wolfgang was left wide open for an inquiry into Garland County's omission.

The precedents that seemed the closest to the issues in *Maxwell* involved the systematic exclusion of minorities from grand and petit juries. In them the Supreme Court's focus had always been upon the county in which the defendant was being tried.³⁸ The great preponderance of school and other kinds of desegregation cases that seemed less apposite still scrutinized particular districts, cities, or counties. It thus seemed perfectly proper to the *Maxwell* judges to ask Wolfgang about

³⁷ See Wolfgang, *Social Scientist*, *supra* note 18, at 244.

³⁸ See De Cani, *Statistical Evidence in Jury Discrimination Cases*, 65 J. CRIM. L. & C. 234 (1974).

Garland County. When he could not provide data for it, it was easy for them to sweep his testimony to the periphery. Indeed, for it not to be, the federal bench would have had to have set off on what it then regarded as a new and possibly hazardous course. Statewide patterns could nullify sentences in localities for which evidence was wholly lacking. The judges would have had to abandon the cautious, trial-and-error, incremental approach that had long characterized their *modus operandi* in a field as uncertain and explosive as racial discrimination.

The federal judiciary had other troubling questions. The consent defense was potentially the rape defendant's most powerful weapon. How did Wolfgang account for the fact, obvious to just about any trial judge or lawyer, that hardly any attorney would employ it in an allegedly black rapist-white victim prosecution? Wolfgang's subsequent articles stated that he "controlled" for this variable, but how was never explicitly explained.³⁹

It could be argued that a defense attorney's conclusion that such a tactic would not persuade, or might even alienate, a typical jury might reflect his own racism; or that it might reflect his accurate comprehension of the discrimination that could be expected from such juries. Such assertions were provocative, the stuff out of which hypotheses were made. The point was, however, that Wolfgang did not really have the data to test them. Indeed, he would have needed a particularly sophisticated study to do so. How, for example, would he have been able to plumb the minds of defense counsel or jurors to apprehend their reactions to consent defenses? Through interviews? Through statistical

³⁹ This line of inquiry appeared in one *Maxwell* case after another. Federal District Court Judge Gordon E. Young noted in *Maxwell v. Stephens*, 229 F. Supp. 205, 216 (E.D. Ark. 1964) that the consent defense was a substantial obstacle to conviction in many rape cases. Yet, he concluded that Wolfgang had not adequately accounted for it and that his statistical analysis thus represented "a rather naive attempt to ascertain why a rape conviction was sought in one case and not in another." *Id.*

Possibly conveying more than he intended, Federal District Court Judge J. Smith Henley asserted that the issue of consent "from a factual standpoint [was] much less likely to be present in cases in which white women [had] been attacked by Negro men," and that the "disproportion between death sentences imposed on Negro men convicted in interracial cases and . . . [those] imposed in [others might] well [have been] referable in large measure to the fact that in the former . . . the trial jurors [thus had] a firmer and more abiding conviction of the truth of the charges. . . ." *Maxell v. Bishop*, 257 F. Supp. 710 (D. Ark. 1966) (emphasis added).

Then Judge Blackmun noted in *Maxwell v. Bishop*, 398 F.2d 138, 147 (8th Cir. 1968) that it was indisputable from the *Maxwell* record that there was "no question, and no hint of one, as to the victim's lack of consent."

Yet, Wolfgang's various articles were not very enlightening as to how he "controlled" for this. *See, e.g.*, Wolfgang & Riedel, *Rape, Race and the Death Penalty in Georgia*, 45 AM. J. ORTHOPSYCHIATRY 658 (1975); Wolfgang & Riedel, *Rape, Racial Discrimination and the Death Penalty in CAPITAL PUNISHMENT*, *supra* note 10, at 108-09; Wolfgang, *Social Scientist*, *supra* note 18; Wolfgang, *Death Penalty*, *supra* note 18.

analyses controlling for every other conceivable variable, so that one had to conclude that the only reason the black defendant did not use such an approach was because he rightly expected it to fail due to racial discrimination?

The judges had raised a legitimate question. Consent was frequently at the heart of successful rape case defenses. But, a consent defense was hardly ever employed in black-on-white cases. How had Wolfgang accounted for it? Such a consideration may have been paramount for the jurists; it seemed to be swept under the rug, ignored, or skimmed over by the social scientists.

D. THE PASSIVE VIRTUES

There is yet another way in which the judiciary and sociologists and criminologists live in different worlds: Doctrines are perpetually changing, often in ways that exclude social science analyses.

A number of the Supreme Court's precepts and principles have so combined, for example, to make virtually obsolete Wolfgang's rape evidence. Yet, at a time when it might still have been current, the federal courts sidestepped it repeatedly through explicit or implicit invocations of what the late Alexander Bickel called the "passive virtues" doctrine.⁴⁰

In brief, this precept admonishes judges and justices to avoid all unnecessary controversies. Perhaps best delineated by Justice Brandeis in his famous *Ashwander v. Tennessee Valley Authority* opinion,⁴¹ it advises the judiciary not to create precedents if there are already enough to do the job. The courts are not to look for trouble. Their capital is severely limited. They constitute, in Alexander Hamilton's words, "the least dangerous branch."⁴² They must rely upon "the political branches" to implement their opinions and decisions. As courts of law, rather than broad-gauge policy-makers, they should consequently decide cases on the most narrow grounds possible.

Thus, a court seeking not to confront the disturbing implications of Wolfgang's study could easily invoke principles it was allegedly obligated to follow in accordance with its commitment to the "passive virtues." The Legal Defense Fund thus pressed its first major assault on capital punishment per se before the Justices in *Maxwell*, hoping that it would be the occasion for their legitimation of Wolfgang's findings. Ultimately, the result was a per curiam opinion stating that *Maxwell* was being reversed under *Witherspoon v. Illinois*⁴³—a precedent that had

⁴⁰ A. BICKEL, THE LEAST DANGEROUS BRANCH 111-98 (1962).

⁴¹ 297 U.S. 288 (1936).

⁴² Hamilton, *Federalist No. 78*, in THE FEDERALIST PAPERS 465 (C. Rossiter, ed. 1961).

⁴³ 391 U.S. 510 (1968).

nothing to do with racial discrimination.

The onslaught was sidestepped again a year later in *McGautha v. California*,⁴⁴ where the Court, in an opinion by Justice Harlan, upheld California's system of standardless jury sentencing in capital cases without even mentioning the racial discrimination argument. Dissenting opinions by Justices Douglas and Brennan barely suggested the possibility of discriminatory sentencing. In all, the Justices used 127 pages, yet never once alluded to the Wolfgang evidence that LDF attorney Anthony Amsterdam had maneuvered before them.

In a far more positive moment for the abolitionist movement, the California Supreme Court, in the pathbreaking 1972 *People v. Anderson*,⁴⁵ declared the death penalty in violation of the state constitution. Yet, nowhere in this highly significant case, one that a number of close observers believe contributed significantly to the momentum leading to the United States Supreme Court's *Furman v. Georgia*⁴⁶ holding, had the California court even so much as suggested racial discrimination might have been involved in capital sentencing.

Did *Furman* finally legitimate Wolfgang's rape studies? Criminologists and sociologists who believe that it did illustrate the breakdown in communication between the "two worlds." For nothing could be more chimerical. Indeed, a close reading of the opinions in *Furman* suggests strongly that a majority of the Court actually invalidated the use of Wolfgang's analyses.

The Court's only official *Furman* opinion was a less-than-one-page per curiam opinion stating flatly that Georgia's mode of imposing and carrying out the death penalty violated the eighth and fourteenth amendments. What followed were five separate opinions by the members of the majority and four by the dissenters. Only three majority justices explicitly mentioned the racial discrimination argument. And, of these, just two, Justices Douglas and Marshall, accepted it.

Yet, even one of these, Douglas, seemed to go out of his way not to mention the Wolfgang rape studies. He chose instead to base his showing of racial discrimination upon such less developed works as those by Koeninger⁴⁷ and Hartung,⁴⁸ as well as a string of impressionistic and

⁴⁴ 402 U.S. 183 (1971).

⁴⁵ 100 Cal. Rptr. 152; 493 P.2d 880 (1972).

⁴⁶ 408 U.S. 238 (1972). *Furman* has been generally interpreted to hold that capital punishment, as then inflicted by Georgia and a great many other states, violated the eighth and fourteenth amendments, because it was capriciously and arbitrarily imposed on a small number of possible defendants due to virtually standardless sentencing practices.

⁴⁷ Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELINQUENCY 132 (1969).

⁴⁸ Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8, 14-17 (1952).

conclusory statements from the 1967 Presidential Crime Commission,⁴⁹ Warden Lewis Lawes of Sing Sing⁵⁰ and Ramsey Clark.⁵¹ Justice Douglas did invoke Wolfgang eventually, but when he did, it was in regard to Wolfgang's earlier study with Kelly and Nolde of which Pennsylvania death row inmates were able to avoid execution—one that did not come close to the comprehensiveness and unequivocal conclusions of the Southern rape analyses.⁵²

No one relied more upon social science in his opinion than Justice Marshall. Yet, although he cited congressional hearings and a dozen or so other sources (including Wolfgang, Kelly, and Nolde), only once did he allude to the rape study, doing so in a most oblique and cryptic manner. The medium was a footnote to Justice Marshall's conclusion that racial discrimination was one of the causes of the higher execution rate among Negroes.⁵³ Included in the large number of sources invoked by it was a series of pages in a book by Wolfgang and Cohen, *Crime and Race: Conceptions and Misconceptions*.⁵⁴

Wolfgang and Cohen did employ the rape project, but only to the very limited extent of citing a few of its initial and relatively primitive findings relating to a single state, Arkansas. The N encompassed only 34 black and 21 white defendants. When the cases resulting in death sentences were isolated, it dropped to 14. Using these few data, Wolfgang and Cohen concluded that

of the 19 defendants in rape cases involving a black defendant and a white victim, nine—or 47 per cent—were sentenced to death. By contrast, of the 36 cases involving white offenders and white victims or black offenders and black victims, only five—or 14 per cent—received the death sentence.⁵⁵

Why was this mere fragment of the study, one whose source was listed clearly by Wolfgang and Cohen as "Preliminary Analysis of Rape and Capital Punishment in the State of Arkansas, 1945-1965,"⁵⁶ the only allusion made to it by Justice Marshall? And why did he refer to it in such a circuitous way, when several highly developed Wolfgang-team analyses were at his fingertips as a prominent part of the evidence?

Perhaps a clue is suggested by the opinion of the last member of the

⁴⁹ PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967).

⁵⁰ L. LAWES, LIFE AND DEATH IN SING SING 155-60 (1928).

⁵¹ R. CLARK, CRIME IN AMERICA 335 (1970).

⁵² Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L.C. & P.S. 301 (1962).

⁵³ 408 U.S. 364-65 (Marshall, J., concurring).

⁵⁴ M. WOLFGANG & B. COHEN, CRIME AND RACE: CONCEPTIONS AND MISCONCEPTIONS (1970).

⁵⁵ *Id.* at 81.

⁵⁶ *Id.* at 87.

Furman majority to mention explicitly the racial discrimination argument, Justice Potter Stewart. Justice Stewart concluded that Georgia's death sentences were "cruel and unusual in the same way that being struck by lightning [was] cruel and unusual." They fell upon a "capriciously selected random handful"⁵⁷—a conclusion that seemed directly to fly in the face of Wolfgang's findings of clearly discernible racially discriminatory patterns. But Stewart was not content to reject implicitly the Wolfgang position. Relying instead upon a *Stanford Law Review* study of California's penalty jury in first-degree murder cases, he declared that racial discrimination had not been proven and could best be "put . . . to one side."⁵⁸

But this article had examined only one non-Southern state from 1958 to 1966. Its raw statistics relating to the proportions of death sentences for black defendants with white victims and white defendants with white victims were not remotely like those that the Wolfgang teams had accumulated for the Southern and border states in the rape cases. Wolfgang had served as one of the consultants to the *Stanford Law Review*⁵⁹ project, and, rather than claiming that it had eclipsed his work, the review advised specifically that its findings be compared to those of Wolfgang's "important recent study of capital sentencing patterns in 11 Southern states from 1945 to 1965"⁶⁰

Stewart simply ignored these considerations. But why did he not feel intellectually obligated to consider them? Perhaps he thought them irrelevant. If, for some reason, Wolfgang's study were obsolete, then the *Stanford Law Review's* would be the only one worth considering. But none of the other four members of the Court's official majority had declared the former to be outdated. Justices Douglas, Brennan, and White had not directed themselves to Wolfgang's study at all, with only Justice Marshall lamely invoking it.

All four of the dissenters, however, had joined footnote 12 of Chief Justice Burger's opinion, delivering two powerful blows against the rape studies. First, they contended, the racial discrimination issue was not even before the Court. In yet another invocation of the "passive virtues," they argued that whether sentencing had been racially discriminatory was only relevant to an attack upon capital punishment under the Equal Protection Clause. Thus it involved issues "totally distinct from the Eighth Amendment question to which [the Court's] grant of

⁵⁷ 408 U.S. at 309-10 (Stewart, J., concurring).

⁵⁸ *Id.* at 310. The article relied upon was Note, *A Study of the California Penalty Jury in First-Degree Murder Cases: Standardless Sentencing*, 21 STAN. L. REV. 1297 (1969).

⁵⁹ *Id.* at 1306.

⁶⁰ *Id.* at 1421.

certiorari was limited in these cases."⁶¹

Second, even if the Court reached the merits of such an issue, the evidence provided by the defendants had to establish far more than that the death penalty was applied in a discriminatory fashion "in the distant past." The defendants' statistics covered periods "when Negroes were systematically excluded from jury service and when racial segregation was the official policy of many States. Data of more recent vintage [were] essential."⁶²

Hence, a conclusion on Stewart's part that the Wolfgang works were obsolete would actually be a majority position embraced as well by Justices Burger, Blackmun, Powell, and Rehnquist. And the same would of course apply to Justice Stewart's decision to invoke the "passive virtues" to argue that the racial discrimination question should not even be afforded the *Furman* Court's consideration.

That these were the steps Justice Stewart had taken was revealed by the reasons he gave for why, in addition to the *Stanford Law Review's* findings, racial discrimination had not been proven and could best be "put . . . to one side." He simply referred the reader to footnote 12 of the Chief Justice's dissenting opinion. In such a circuitous manner, without even conceding that racially discriminatory sentencing was before it, a majority of the Justices dismissed Wolfgang's study as obsolete.⁶³

Consequently, the way was clear for the majority of the Court in *Gregg v. Georgia*⁶⁴ to refuse, without a single mention of the Wolfgang works, to declare capital punishment unconstitutional per se and to approve a system for its imposition modeled on Georgia's. The Justices produced a plurality opinion by Justices Stewart, Powell, and Stevens; another by Justice White and joined by Justices Burger and Rehnquist; a "statement" of Justices Burger and Rehnquist; a separate concurrence by Justice Blackmun; and separate dissents by Justices Brennan and Marshall. Of these, only Justice Marshall's even entertained the notion that past patterns of racial discrimination in the imposition of capital punishment were relevant when assessing its present constitutionality. And Justice Marshall never once explicitly reiterated this conclusion. The reader of his opinion was informed indirectly of the relevance of past patterns of discrimination through a statement that Justice Marshall still embraced the views expounded in his *Furman* concurrence relating to the "basic issue presented to the Court in these cases."⁶⁵

⁶¹ 408 U.S. at 390.

⁶² *Id.*

⁶³ *Id.* at 310.

⁶⁴ 428 U.S. 153 (1976).

⁶⁵ 428 U.S. at 231.

It was in no way unprecedented, therefore, for Justice White to sidestep Wolfgang's works in his *Coker* opinion. By means of a primitive proportionality argument,⁶⁶ he simply delivered the coup de grace to the Court's ever officially evaluating them. The death penalty for the rape of an adult woman would be struck down without an examination of whether it had been inflicted discriminatorily.⁶⁷

Why then did none of the Justices invoke Wolfgang's most up-to-date and powerful studies in any of these cases? Any of the reasons thus far suggested by this article might have explanatory power. Two points must be made for present purposes. First, one or more of the Court's members genuinely might have been responding to a conception of the "passive virtues," a disinclination to confront new issues when cases could be satisfactorily decided without them. Second, as *Maxwell*, *McGautha*, *Furman*, *Gregg*, and *Coker* so clearly demonstrated, if the Court or individual Justices chose to sidestep the unsettling implications of Wolfgang's conclusions, they had abundant doctrinal means to do so.

E. OBSOLESCENCE

It would seem especially painful to sociologists and criminologists that the very cases that were putting the Wolfgang rape evidence "on hold" were also helping to make it obsolete. At least at the lower levels, *Maxwell* signaled that the federal courts would continue to direct their attention to possible discriminatory practices in the local jurisdiction in which the defendant was being tried. They would not be responsive to alleged findings of discriminatory patterns throughout a state as a whole.⁶⁸ The result, for probably all of Wolfgang's rural and suburban

⁶⁶ One commentator aptly described the plurality's approach as "simplistic." Note, *The Death Penalty for Rape—Cruel and Unusual Punishment?*, 38 LA. L. REV. 868, 871 (1978).

⁶⁷ 433 U.S. at 584.

White's opinion was very similar to one written seven years earlier, *Ralph v. Warden, Maryland Penitentiary*, 438 F.2d 786 (4th Cir. 1970). That court concluded that the death penalty was "so disproportionate to the crime of rape when the victim's life [was] neither taken nor endangered that [its imposition violated] the Eighth Amendment." *Id.* at 793. It is significant, in light of Bickel's "passive virtues," that this holding of the Fourth Circuit—a jurisdiction that encompassed the Wolfgang-studied states of Maryland, North Carolina, South Carolina, Virginia and West Virginia—made no mention whatsoever of the possibility of racial discrimination in the employment of the death sentence in such cases.

⁶⁸ Meltsner has insightfully recounted the impact of this decision upon Wolfgang's statistical analysis in *Maxwell*, one that could be expected to manifest itself in similarly devastating forms in the great majority of such cases:

There had been only three death sentences in Garland County in the last thirty years, a number by far too small to permit statistical analysis. The Fund had argued that it was absurd to round up the jurors who sat on Maxwell's case in 1962—assuming they could be found—and ask them if they had sentenced Maxwell to death because he was black [E]ven a team of psychoanalysts could not discover whether Garland County juries, or Maxwell's particular jury, sentenced to death because of race.

M. MELTSNER, *CRUEL AND UNUSUAL*, *supra* note 2, at 104-05.

counties, if not also for his urban ones, was too few cases to permit a valid analysis for a small area.

This disaster in terms of the unit of study was accompanied by an even greater one concerning the current relevance of the data. As we have seen, Burger's footnote 12 in *Furman* seemed to exclude any evidence from the period when "[n]egroes were systematically excluded from jury service and . . . racial segregation was the official policy in many states."⁶⁹

Such a stricture, one that Justice Stewart also apparently embraced, would eliminate from consideration the great majority of Wolfgang's rape case data. That this was in fact the Court's intention seemed even more certain after *Coker*. *Coker* showed that, for almost all of the justices, possible patterns of racial discrimination before *Furman* (1972) and *Gregg* (1976) were irrelevant. *Furman* and *Gregg* invalidated a substantial number of state capital punishment statutes. The ones taking their place would apparently be viewed by the Burger Court as constituting a "clean slate." Wolfgang's chronicle of death sentencing in rape cases from 1945 to 1965 was thus obsolete.

The Court would claim that it was exploring the "history" of the death penalty for rape in *Coker*. Indeed, as we have seen, the doctrine which governed Justice White required him to do so. But his plurality and the members of the minority—in short, a large majority—could determine, for their purposes, when history actually began and with a few strokes of the pen, Wolfgang's study became prehistory. Legislation still unconstitutional under *Furman* and *Gregg* and other such cases could be invalidated by them. Statutes that did not obviously run afoul of them (and the vast proportion of them were new, having been enacted to comply with them) would be evaluated from the date of their passage. Thus, whatever racially discriminatory patterns Wolfgang and others might have discerned became academic.

F. THE FOOT-IN-THE-DOOR SPECTRE

Perhaps the Justices were haunted by the ghosts of past and future capital cases when they contemplated the Wolfgang findings. A ruling legitimating them based on such findings would have stated, in effect,

⁶⁹ 408 U.S. at 390. This argument has been employed against the Wolfgang rape studies by such proponents of capital punishment as Frank Carrington. Carrington, as noted previously, has conceded that Wolfgang's and Riedel's study was "careful and comprehensive." He also did not "question its conclusion that during the twenty years [examined,] in Southern states, there was discrimination in rape cases." But, he concluded, this research, covering largely periods when blacks were systematically excluded from grand and petit juries, did not "provide support for a conclusion that racial discrimination continues . . ." E. CARRINGTON, *NEITHER CRUEL NOR UNUSUAL*, *supra* note 11, at 210-11.

that hundreds of blacks in rape cases went to their deaths as victims of racially discriminatory sentencing. It would have suggested strongly that perhaps thousands more had suffered the same fate through murder sentences.⁷⁰

Equally or more devastating, a specific endorsement of this kind of study would have opened the floodgates to a similar attack upon the entire criminal process, from arrest to final petition for a habeas corpus writ or attempt to secure executive clemency. Once the Court legitimated such weapons, they would be turned loose upon the whole system. The result would likely be a "legal revolution" making the Warren years look like a retrenchment. The entire prosecutorial process would be vulnerable to social science assault through the employment of analogous, or even more refined, methodologies.⁷¹ These implications might have seemed too radical, even for the Court's most liberal members. Wolfgang's methodology might have been viewed as a Pandora's Box containing the most revolutionary hypotheses or lines of speculation.

G. PAYING THE PIPER: AN IMAGE PROBLEM?

Could the federal courts have been especially skeptical of Wolfgang's findings because the LDF had financed his study? Could they have been influenced by the fact that Wolfgang was an abolitionist before the rape project? Might they have considered that, by the time *Coker* was heard, most of the research claiming to have discovered racially discriminatory patterns in capital sentencing was by social scientists who were also committed abolitionists?⁷²

⁷⁰ Students of racial discrimination and the death penalty have long suggested this hypothesis. See, e.g., M. MELTSNER, CRUEL AND UNUSUAL, *supra* note 2, at 97, 106. In an obvious understatement, Wolfgang noted that in *Maxwell*, "[W]e had trouble with the Supreme Court recognizing that the trial process in Arkansas should be condemned over a twenty-year period." NAACP DEATH PENALTY CONFERENCE, *supra* note 34, at 69.

⁷¹ The possibility that a legitimation by the federal courts of Wolfgang's rape studies would subject the entire prosecutorial process to a similar challenge has long been recognized by Wolfgang & Riedel, *Rape, Racial Discrimination and the Death Penalty*, in CAPITAL PUNISHMENT, *supra* note 10, at 119 and NAACP, DEATH PENALTY CONFERENCE, *supra* note 34, at 56.

It has also been relied upon by their opponents. See, e.g., the comment by Bryant Huff, a Gwinnett County, Georgia prosecutor that such a decision would "make it impossible to send anybody to jail"—a view that, he contended, the United States Supreme Court shared with him. Grieder, *The Return of the Death Penalty*, *The Washington Post*, Nov. 8, 1976, at B-5.

⁷² Abolitionist reportage of such research has not always helped its image. In an article entitled "SPLC Sponsored Execution Study," for example, the Southern Poverty Law Center announced grandiosely that William Bowers' examination of whether there was a correlation between the race of murder defendants and their victims and the application of the death penalty would "prove or disprove" the theory "that prosecutors and juries tend to reserve the death penalty for blacks who kill whites . . ." *SPLC Sponsors Execution Study*, 5 *POV. L. REP. (CCH)* 3 (1977).

It is likely that a large number of federal judges and justices agree with Daniel Patrick Moynihan's contention that "social science is rarely dispassionate, and social scientists are frequently caught up in the politics which their work necessarily involves."⁷³ Moreover, such jurists might also concur in Christopher Jencks' statement that, in such disciplines, "He who pays the piper writes the questions. . . ."⁷⁴

This basic skepticism, one no doubt greatly strengthened by the spectacle of defense and prosecution teams of "house" psychiatrists in perpetual pitched battles in cases involving insanity defenses,⁷⁵ might well be exacerbated by the occasional charges by judges such as J. Skelly Wright that the social scientists testifying before them have "fudged" their analyses: "[T]he studies by both sets of experts are tainted by a vice well known in the statistical trade—data shopping and scanning to reach a preconceived result, and the court had to reject parts of both reports as unreliable because they were biased."⁷⁶

Wolfgang has maintained that he certainly would have disseminated his findings just as completely if no discrimination had been discovered.⁷⁷ Everything in his highly distinguished career gives credence to this contention. Nor has anyone ever challenged his or his colleagues' intellectual integrity in the conduct of these analyses. Nevertheless, researchers in this area are painfully aware that their work may literally have life-and-death implications. It is conducted by social scientists who, in general, are already strong proponents or opponents of the death penalty. Many times it is funded by interest groups intimately interested in the outcome. It tends to be done in the heat of battle and frequently in a rush, so that its fruits will be available for the next fateful court testing.

In such a context, it would not be surprising if a large number, if not most, members of the federal judiciary tended to view the findings of social science as comparable to those of opposing psychiatrists in insanity defense cases. Such concerns might well have hindered the courts' consideration, much less legitimation, of Wolfgang's rape studies.

⁷³ Moynihan, *Social Science and the Courts*, *supra* note 27, at 19.

⁷⁴ Quoted in Fiske, *Social Scientists as Policy-Shapers*, *supra* note 29, at C4.

⁷⁵ This phenomenon has not escaped the condemnation of presidential counselor Edwin Meese:

A good portion (of criminal trials) is taken up with hot-and-cold running psychiatrists for both sides telling all the things wrong with the accused . . . The way psychiatrists are now pushed and tugged and, in effect, compromised with their medical standards in order to provide testimony for one side or the other—this is a disgrace to their profession.

Meese, *End Pleas of Insanity*, *The Charlotte Observer*, Apr. 16, 1981, at 13A.

⁷⁶ *Hobson v. Hanson*, 327 F. Supp. 844, 859 (D.D.C. 1971).

⁷⁷ Wolfgang, *Social Scientist*, *supra* note 18, at 243-46.

H. TRAILBLAZING

Why might the Court have relied heavily upon sociological and psychological analyses in *Brown v. Board of Education*,⁷⁸ while not mentioning them in the great majority of subsequent desegregation cases? Why did it seem in step with modern criminology's conception of when the prosecutorial process began in *Miranda v. Arizona*⁷⁹ to abandon that perspective for a far more rigidly legalistic one in *Kirby v. Illinois*⁸⁰ and *Gerstein v. Pugh*?⁸¹ And why did this same pattern seemingly manifest itself in *In re Gault* and its successors?⁸²

One possible answer is reminiscent of Charles Miller's comments about when the justices seem to rely upon historical and sociological, in contrast to purely doctrinal, arguments. Miller contends that findings from these disciplines are far more in demand when a majority of justices is about to trailblaze in a new direction and the number of persuasive precedents is accordingly low. A break with past cases somehow has to be justified.⁸³ What Justice Benjamin Cardozo referred to as the method of logic, philosophy, or analogy will not carry the freight. The Court thus turns to Cardozo's methods of history or evolution, custom or tradition, or, perhaps most commonly in recent years, sociology or social engineering.⁸⁴

Hence, to the extent that the Burger Court wants to "cool down" the law in the wake of its reformist predecessor, it will generally be un-receptive to social science analyses attempting to test hypotheses relating

⁷⁸ 347 U.S. 483 (1954); C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 19 (1969).

⁷⁹ 384 U.S. 436 (1966).

⁸⁰ 406 U.S. 682 (1972).

⁸¹ 420 U.S. 103 (1975). See M. Spicker & H.E. Pepinsky, *The Role of Criminology in Formulating Constitutional Doctrine* (Nov. 8, 1979) (paper presented at 1979 Annual Meeting of American Society of Criminology, Philadelphia, Pa.).

⁸² See V. Streib, *Application of Delinquency Theory by the Supreme Court*, (Nov. 8, 1979) (paper presented at the 1979 Annual Meeting of the American Society of Criminology, Philadelphia, Pa.). The citation for *In re Gault* is 387 U.S. 1 (1967). *Contra*, *Fare v. Michael C.*, 442 U.S. 707 (1979); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *In re Winship*, 397 U.S. 358 (1970).

⁸³ C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY*, *supra* note 78, at 200.

⁸⁴ See B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51-141 (1921).

Riesman has argued along these lines that, at its lowest level, "social science provides new gimmicks to be used in advocacy. . . . I believe this to be the function of the 'Brandeis brief,'" he argues, "an allegedly impartial but actually polemical use of documentation . . . to overwhelm or provide new generalizations for judges" D. RIESMAN, *ABUNDANCE FOR WHAT?* *supra* note 26, at 446.

Wolfgang has also noted insightfully that "the social scientist who becomes involved in testifying in this area must be prepared for arguments and decisions that are political or that reside in legal vicissitudes outside the framework of social science inquiry and evidence." Wolfgang, *Social Scientist*, *supra* note 18, at 244.

to racial discrimination in the imposition of the death penalty.⁸⁵ Some sociological studies do tend to support the status quo, but a substantial

⁸⁵ But consider the response to such studies of an appellate court with seemingly very different intentions. The Massachusetts Supreme Court's recent holding in *District Attorney for the Suffolk District v. James Watson*, 411 N.E.2d 1274 (1962), struck down the state's capital punishment statute as violative of the Massachusetts Constitution Art. 26, the cruel and unusual punishment clause. Chief Justice Hennessey's majority opinion held, *inter alia*, that such an infliction of the death penalty would be racially discriminatory.

As evidence, Chief Justice Hennessey employed a quote about America's use of the capital sanction in general from the President's Commission on Law Enforcement and the Administration of Justice. He simply alluded to C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (1974).

His main empirical support, however, came from statistics disseminated by Bowers and Pierce in 1979. See W. Bowers & G. Pierce, *Preliminary Tabulations Reflecting Arbitrariness and Discrimination under Post-Furman Capital Statutes* (Aug. 1, 1979) (Center for Applied Social Research, Northeastern University). Chief Justice Hennessey thus noted that, from the time of the passage of the Florida, Georgia, Texas, and Ohio post-*Furman* capital statutes, through 1977, the following patterns had emerged:

In Florida, of 286 blacks who had killed whites, forty-eight (16.8%) were sentenced to death; of 111 whites who killed blacks, none were sentenced to death. In Georgia, of 258 blacks who killed whites, thirty-seven (14.3%) were sentenced to death; of seventy-one whites who killed blacks, two (2.8%) were sentenced to death. In Texas, of 344 blacks who killed whites, twenty-seven (7.8%) were sentenced to death; of 143 whites who killed blacks, none were sentenced to death . . . [In Ohio,] of 173 persons who killed white persons, thirty-seven of them (21.4%) were sentenced to death. Of forty-seven whites who killed blacks, none were sentenced to death.

Id. at 1285. He then concluded that these figures, in and of themselves, demonstrated that racial discrimination in capital sentencing had continued into the post-*Furman* years. *Id.* at 1286.

But how did statistics for Florida, Georgia, Texas, and Ohio show that the infliction of the death penalty in Massachusetts would be racially discriminatory? For one thing, Chief Justice Hennessey contended that the Ohio figures indicated that such discrimination was not confined to the South. For another, he could cite two cases—*Commonwealth v. Soares*, 387 N.E.2d 499 (Mass.), *cert. denied*, 444 U.S. 881 (1979) and *Commonwealth v. Franklin*, 385 N.E.2d 227 (Mass. 1978)—which, he maintained, led his court to take notice of the fact that racial prejudice existed “in some persons” in his state. There was thus no reason to assume, he concluded, that the patterns observed in Florida, Georgia, Texas, and Ohio would not appear in Massachusetts. *Id.* at 1286.

Was Chief Justice Hennessey's analysis comparable to that employed by federal courts confronted with such studies? The respective burdens of proof would seem radically different. The federal judiciary had never legitimated a showing of racial discrimination premised on nothing more than a comparison and contrast of the races of death-sentenced offenders and their victims.

The LDF had commissioned Wolfgang's study because it needed a good deal more than sentencing disparities in capital rape cases. It had to be able to demonstrate that the impacts upon such patterns of all other plausible variables were relatively insignificant. [For a recent Fifth Circuit Court of Appeals holding indicating that the federal courts have in no way lowered this standard under the eighth amendment or the Due Process or Equal Protection Clauses of the fourteenth amendment, see *Spenkelink v. Wainwright*, 578 F.2d 582, 612-16 (5th Cir. 1978).] Hence, it was only after Wolfgang found them to be negligible that he concluded that the infliction of the death sentence in rape cases was racially discriminatory.

But Chief Justice Hennessey ignored the question of whether other factors might have had a significant impact, even though he was examining an area, murder, where the potential for their influence may well have been far greater. (For a vivid exposition of the argument that there are far more obstacles to controlling for non-racial variables in homicide sentencing

majority would seem to do the opposite. Whether this characteristic stems from the ideologies of the persons who decide to pursue careers in the social sciences, or the research topics or methodologies they choose, many of their findings tend to be socially and politically unsettling.

Such a thrust cannot be expected to be welcomed warmly by justices in the Burger mold. Indeed, the Chief Justice himself, invoking the Court's allegedly highly limited capabilities to evaluate such research, has more or less told investigators of the Wolfgang stripe to take their works elsewhere. The executive and legislative branches, he has concluded, are far better equipped to give such analyses a proper hearing.⁸⁶

It is thus possible that the Court is attuned to the ramifications of studies like Wolfgang's. Indeed, their possible consequences may have constituted the main reason it failed to cite, much less legitimate, them.

II. IMPLICATIONS

This article has attempted to sketch the different modes of thought of criminologists and sociologists, on the one hand, and the federal judiciary, on the other, relating to the issue of possible racial discrimination in capital rape sentencing. In doing so, it has shown how a social science work of major importance can be lost in the hazardous seas between them. What might be some of the lessons of this episode? They can at least be suggested through a consideration of two factors. First, we might consider whether Wolfgang-like studies have outlived their usefulness as evidence in death penalty litigation. Second, we might determine whether our analysis suggests ways in which social scientists and judges and justices might improve communication between their respective "worlds."

than in that relating to rape, *see* NAACP, DEATH PENALTY CONFERENCE, at 71 (remarks of Stephen Schulhofer). *See also* note 88 *infra*.

There were still other major ways in which the *Watson* Court legitimated statistical arguments falling far below federal judicial criteria. Its data were not even for Massachusetts. In contrast, federal jurists in *Maxwell* tended to be hostile to statistics from jurisdictions outside of Garland County.

Of course, Chief Justice Hennessey attempted to link these data to *Watson* through the *Soares* and *Franklin* cases. But neither of these involved racially discriminatory sentencing, and it is highly doubtful that the Burger Court, for example, would have ever endorsed such a linkage. *Soares* held that a trial judge's permitting a prosecutor to employ his preemptory challenges so as to exclude 12 of the 13 eligible black jurors from the panel in a black defendant's murder trial was reversible error—even though there was no showing of an explicit intent on the prosecutor's part to racially discriminate. [Mass. Adv. Sh. 593 (1979).] The pages cited for *Franklin* merely contained black defendants' uncontradicted evidence that they had been the victims of vicious and violent criminal harassment and racially discriminatory law enforcement as a result of disturbances in an East Boston housing project where members of their race constituted a small minority.

⁸⁶ *See* *Furman v. Georgia*, 408 U.S. at 404-05 (Burger, C.J., dissenting).

A. THE WOLFGANG-LIKE RACIAL DISCRIMINATION STUDY: A
VANISHING SPECIES?

The most cursory glance at modern sociology and criminology shows that studies analogous to Wolfgang's are being produced in great profusion.⁸⁷ Nor are lawyers seeking to overturn the death penalty ignoring them,⁸⁸ despite the fact that they may have achieved their most persuasive form in the rape cases. Perhaps it could be argued that the

⁸⁷ The Bowers and Pierce work employed in *District Attorney for the Suffolk District v. Watson*, *supra* note 85, is an important example of these numerous endeavors. See *Death Rows: Color Them Mostly Black*, The Charlotte Observer, March 6, 1978, at A1.

⁸⁸ See NAACP, DEATH PENALTY CONFERENCE, *supra* note 34, at 72-73 (remarks of Morris Dees). Many of these studies are being introduced into evidence despite such serious pitfalls as the following:

First, federal courts still indicate a strong tendency to discount statewide statistics. In *Spenkelink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), for example, the Court conceded that *Furman* required it to consider Spenkelink's allegation that Florida, as a whole, discriminated against murderers with white victims in its capital sentencing. But, it maintained that it need do nothing more than determine whether the state followed "a properly drawn statute [under *Furman*] in imposing the death penalty . . ." 578 F.2d at 613. If Florida met this criterion, the cruel and unusual punishment issue of racial discrimination evaporated.

Nor would the court devote considerable time and energy to such data, absent a showing of an explicit intent or purpose on the part of the state to racially discriminate. Invoking *Washington v. Davis*, 426 U.S. 229 (1976) and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977), the Fifth Circuit sounded very much like the federal courts in the early stages of *Maxwell*: "If a petitioner can show some specific act or acts evidencing intentional or purposeful racial discrimination against him, . . . either because of his own race or [that] of his victim, the federal district court should intervene and review substantively the sentencing decision." 578 F.2d at 614.

Second, how are such studies to include the controls for all other plausible non-racial variables that the federal judiciary seems to be demanding? See 578 F.2d at 612-16. This quandary has been sketched vividly by Stephen Schulhofer:

Marvin [Wolfgang] and Tony [Amsterdam] studied Arkansas over a twenty-year period, and they were looking only at rape cases. When they got down to the bottom line in cases in which the defense of consent was not raised, or the victim and offender did not know each other, and so on, there were simply too few cases in the cell. Their study was convincing to me, but the Court felt that there were too few cases in the cell to convincingly make the point that racial discrimination was involved necessarily. That was after twenty years. I don't think we can wait for twenty years to bring the case again; and we have now—instead of rape cases where the general context is relatively coherent—we have homicide situations involving burglary, robbery, rape, or straight-out killing unassociated with any other crime. The potential number of variables is very much greater. The danger I see is that in this sort of after-the-fact statistical analysis, "N" is going to have to be very large before you're at the point where you have enough cases in all the cells to be able to say which variables are significant.

NAACP, DEATH PENALTY CONFERENCE, *supra* note 34, at 71.

Additionally, the federal courts may be conducting themselves as good social scientists in demanding that all plausible non-racial variables be shown to be insignificant. As we have seen, the Massachusetts Supreme Court has determined that racial discrimination was behind the marked disparities between the number of blacks who killed whites and the reverse on Florida's Death Row. See note 85 *supra*.

Yet, the Fifth Circuit, faced with comparable data in *Spenkelink*, noted that there was at least one plausible non-racial variable for which Spenkelink had not controlled. The state had contended that Florida murders involving black victims tended not to be the kinds for

time, energy, and intelligence devoted to them could better be employed in other dimensions of the abolitionist campaign. It is obvious that, from the perspective of social science, these analyses have contributed substantially to our understanding of the role of racial discrimination in capital sentencing. But can they be expected to "strike pay dirt" in court?

Based on the considerations explored above, it would seem that the chances of the LDF's, ACLU's, or the Southern Poverty Law Center's winning major federal cases on a successful formal showing of racial discrimination in the infliction of the death penalty for murder are extremely low, regardless of the inherent validity of their studies. Indeed, it would not be surprising, given the past record and the inclinations of the Burger Court, if many members of the federal judiciary employed all sorts of techniques whereby they would not only fail to legitimate such analyses, but sidestep them entirely.⁸⁹

Yet, despite the odds, it is most unlikely that the abolitionists will abandon them. There is always the possibility, no matter how small, of the sudden and dramatic breakthrough.⁹⁰ Attempts will also be made to keep them in the forefront of the public's consciousness. The profoundly disturbing questions they raise about the justice and constitutionality of contemporary death sentencing will not be allowed to evaporate.⁹¹

And there is yet another reason why attorneys will continue to press

which the death sentence was appropriate, involving primarily "family . . . , lovers' . . . , liquor . . . , and barroom quarrels." 578 F.2d at 612.

Could the Fifth Circuit have acted appropriately in demanding that Spengelink account for it? A recent study by Lewis, Mannle, Allen, and Vetter suggests strongly, at the very least, that such an inquiry could be insightful and suggestive. Conducting the first post-*Furman* profile of the inmates on Florida's Death Row, this team made what it considered to be an "especially surprising finding"—"about two-thirds of the victims were total strangers to the offender."

Although earlier studies have indicated that in three-fourths of all homicides, the victim and his slayer know each other (e.g., relative, friend, lover), . . . [these inmates] . . . most often killed a person whom they had not previously met.

Moreover, Lewis, *et al.* also found that most often "these killings occurred during the course of some other felony (e.g., burglary, robbery, rape)" In short, such murderers might well have been the very ones most properly being selected for the capital sanction under the aggravating and mitigating circumstances criteria of Florida's post-*Furman* statute. Lewis, Mannle, Allen, & Vetter, *Post-Furman Profile of Florida's Condemned—A Question of Discrimination in Terms of the Race of the Victim and a Comment on Spengelink v. Wainwright*, 9 STETSON L. REV. 1, 22 (1979).

⁸⁹ On the positive side for the abolitionists, however, *Lockett v. Ohio*, 438 U.S. 586 (1978), may lead to a loss of specificity in sentencing statutes which could make charges of racial discrimination more facially plausible.

⁹⁰ See the discussion of *Watson*, note 85 *supra*.

⁹¹ Michael Meltsner, for example, has invoked a powerful moral and ethical justification for them: "[W]hen human life is at stake constitutional doubts never die." See L. STEVENS,

such studies—their hunch that maybe, behind-the-scenes, works like Wolfgang's do influence the judges' and Justices' decisions although they are not formally endorsed in the opinions.⁹² Could it be that, either consciously or subconsciously, judges and justices do find them persuasive? Such a hypothesis would be extremely difficult to test. Nevertheless, previously confidential data from the late Justice Tom C. Clark's private papers⁹³ suggest that such an influence could well be at

DEATH PENALTY: THE CASE OF LIFE VERSUS DEATH IN THE UNITED STATES 12 (1978) [hereinafter cited as LIFE VERSUS DEATH].

From a more pragmatic perspective, a major part of the abolitionist movement's publicity campaign involves its keeping the racial discrimination issue a highly salient one for all relevant governmental institutions. This strategy entails a conscious attempt to influence the societal context in which judges and justices approach capital cases.

Anthony Amsterdam has argued, for example, that the issues of racial, economic, and sexual discrimination "are important not only because of their potential legal force, but because they permit us to raise doubts in the minds of judges, [legislators,] and the general public, about the fairness of the administration of the death penalty and its conformity to the supposed penological goals of capital punishment." NAACP, DEATH PENALTY CONFERENCE, *supra* note 34, at 47.

This strategy is obviously facilitated by the media's ready and widespread dissemination of such allegations. See, as two of many examples, Braden, *It Just Works Out That Way*, The Washington Post, June 4, 1979, at A-27 and Wicker, *Death Trap—Florida's Executions Mock Justice*, The Charlotte Observer, June 25, 1979, at 8A, arguing in the wake of the Spenslink execution that capital sentencing is racially and economically discriminatory. The Associated Press, among other media, also gave extensive coverage to Hugo Bedau's recent testimony before the Senate Judiciary Committee in opposition to Chairman Strom Thurmond's bill to "reinstitute the death penalty for certain crimes" The story paraphrased Bedau as maintaining that, despite *Furman*, "almost all of the 700 people now on death row are blacks, many of them convicted of killing white people." *Hearings Open On Death Penalty Proposals*, The Charlotte Observer, April 28, 1981, at 2A.

Arguments based on racial discrimination, even ultimately unsuccessful ones, also play a substantial role in abolitionist attempts to "buy time" to keep individual Death Row inmates alive and create a "logjam" in the implementation of many, if not all, executions. See NAACP, DEATH PENALTY CONFERENCE, *supra* note 34, at 37. This issue, for example, may well have saved the lives of Maxwell and inmates similarly situated long enough for their cases to be won under *Witherspoon*.

⁹² Kenneth Murchison has intimated that the *Coker* decision might well have been affected by the justices' unexpressed recognition of an obvious history of racial discrimination in the imposition of capital punishment in rape cases. Indeed, Murchison finds it "reasonable to hypothesize that the Court was influenced by the likelihood of discrimination against black defendants" in a large number of its landmark criminal justice cases. Murchison, *Toward a Perspective On the Death Penalty Cases*, 27 EMORY L. J. 544-45 (1978).

In a similar vein, one commentator wondered "to what extent unspoken factors also influenced the [*Coker*] plurality's decision. . . . Several groups were pressuring the Court to forbid the death penalty for rape," she observed. "The NAACP Legal Defense Fund, [for example,] had worked for years to end the use of the penalty in rape cases because it alleged that historically the penalty was used selectively against black men who raped white women." Note, *The Death Penalty For Rape*, *supra* note 66, at 870.

See also Anthony Amsterdam's comments, note 91 *supra*; NAACP, DEATH PENALTY CONFERENCE, *supra* note 34, at 72-73 (remarks of Morris Dees).

⁹³ Memorandum to the Conference from Mr. Justice Goldberg *re*. Capital Punishment (*re*, *Rudolph v. Alabama*, Oct. Term 1963, Misc. 308) (unpublished papers of Justice Tom C.

work in the justices' decision of cases.

Michael Meltsner has argued that no case was more important in launching the Legal Defense Fund's campaign against capital punishment than *Rudolph v. Alabama*.⁹⁴ In *Rudolph*, the Supreme Court, by means of a per curiam opinion, simply denied *certiorari*. Its action threatened Rudolph's very existence. To almost the entire legal profession, however, the case would have scarcely been worth noticing had Justice Goldberg, joined by Justices Douglas and Brennan, not dissented.

In his dissenting opinion Justice Goldberg raised for the first time the question of whether capital punishment for rape was per se violative of the eighth and fourteenth amendments. The LDF, which was cognizant of the disproportionate number of black men who had been executed in Southern and border states, had been called to the struggle by Justices Goldberg, Douglas, and Brennan. Goldberg's opinion did not mention racial discrimination as a possible factor in such cases, a dramatic omission that the LDF interpreted as a signal that this issue was still too controversial to be considered. Nevertheless, the LDF, inspired by an invitation of at least a third of the Court to begin the assault against the death sentence in rape cases, was soon sponsoring the research that was to culminate in Wolfgang's famous studies.⁹⁵

Had the possibility of racially discriminatory sentencing actually been a significant factor for Justice Goldberg when drafting the initial version of the *Rudolph* dissenting opinion? An early stage of Justice Goldberg's dissent in the Clark files contains a footnote that disappeared from the final published version. Justice Goldberg argued that a persuasive argument could be made "against the constitutionality of death as a punishment for sexual crimes not endangering human life." Then followed the ill-fated footnote:

This would also eliminate the well-recognized disparity in the imposition of the death penalty for sexual crimes committed by whites and nonwhites. See, e.g., National Prison Statistics, April 1952, which indicates that between 1937 and 1951, 233 Negroes and 26 whites were executed for rape in the United States.⁹⁶

Why this disappeared from the final opinion is an interesting ques-

Clark, University of Texas Law School Library, Austin, TX) [hereinafter cited as Memorandum to the Conference].

⁹⁴ 375 U.S. 889 (1963).

⁹⁵ M. MELTSNER, CRUEL AND UNUSUAL, *supra* note 2, at 29-30. Stevens had characterized the impact of the Goldberg dissent in the following manner: "Justice Goldberg's words appeared like a flash in the dark, illuminating views held by an important segment of the Court, views many opponents of capital punishment were surprised to discover," L. STEVENS, LIFE VERSUS DEATH, *supra* note 91, at 92.

⁹⁶ Memorandum to the Conference, *supra* note 93, at 18.

tion. Perhaps Justice Brennan had something to do with it, or maybe Justice Goldberg reconsidered it. The reason or reasons explaining its omission, though, are largely immaterial. What is important is that it was initially a part of the opinion—at least a partial influence upon Justice Goldberg that he did not acknowledge in his published version.⁹⁷

B. PRESCRIPTIONS

Wolfgang has delineated lessons which his rape study experience might provide for social scientists participating in similar litigation.⁹⁸ Most of his excellent insights need not be reiterated here. This article, however, has examined in more detail the considerations that might have motivated the federal judiciary in these cases. In doing so, it may have conveyed to criminal justicians a greater appreciation of the judicial subculture.

It is easy for sociologists and criminologists to blame most of the breakdowns in communication between them and federal jurists on the latter's alleged ignorance of the basics of social science inquiry. But, as noted previously, there is no extant precise measurement of the degree to which judges and justices cannot fathom behavioral methodologies and findings. While the federal judiciary's lack of scientific proficiency may have played a role, there were also powerful justifications for the courts' refusal to legitimate the Wolfgang rape studies. Social scientists involved in such activities should strive to convey their approaches and conclusions in language that can be understood by individuals with much more limited theoretical and methodological backgrounds.⁹⁹

They would be wise, however, to take account of far more. The "thin ice syndrome"¹⁰⁰ not only is, but should be, a profound concern of jurists who find themselves in a policy-making role. Scientifically brilliant studies that nevertheless fall "between the stools"¹⁰¹ may not be

⁹⁷ Justice Goldberg has since maintained that three factors influenced his 1963 *Rudolph* memorandum: "[t]he finality of death, its failure as a deterrent, and the arbitrary fashion in which the death penalty was being imposed." In a footnote to this explanation, he observed that there "was disturbing evidence that the imposition of the death penalty had been arbitrary, haphazard, capricious and discriminatory. For example, the impact of the death penalty had been demonstrably greatest among disadvantaged minorities." See Goldberg, *The Death Penalty for Rape*, 5 HASTINGS CONST. L.Q. 1,5 (1978).

⁹⁸ See generally, the two Wolfgang accounts alluded to in this article, Wolfgang, *Social Scientist*, *supra* note 18; Wolfgang, *Death Penalty*, *supra* note 18.

⁹⁹ Consider, for example, the admonition of Judge J. Skelly Wright, in *Hobson v. Hansen*, 327 F. Supp. 844, 859 (D.D.C. 1971). Having hired their respective experts, he concluded, "the lawyers in this case had a basic responsibility . . . to put the hard core statistical demonstrations into language which serious and concerned laymen could, with effort, understand." See Rist & Anson, *supra* note 22, at 2.

¹⁰⁰ See text accompanying notes 28-36 *supra*.

¹⁰¹ See text accompanying notes 37-39 *supra*.

welcomed by judges and justices believing it their duty to operate within the parameters of governing doctrines. Members of the judiciary who may be condemned by social scientists as "ducking the issues" or "coping out" may be responding to what they consider one of the most noble of all imperatives, "the passive virtues."¹⁰² Social scientists on the cutting edges of their discipline must be resilient enough to respond to doctrinal changes that would make their findings legally obsolete.¹⁰³ They should be aware that the "foot-in-the-door spectre" and the "paying the piper problem" may be working against them,¹⁰⁴ but that the hunch that jurists may be responding positively to their studies behind-the-scenes may have some foundation.¹⁰⁵

Wolfgang has suggested that such social scientists work closely with skilled legal practitioners from the inception, to the presentation in court, of their studies. This advice is splendid, but perhaps they should go even further. Their chances for the successful employment of their scholarship in similar cases might be enhanced by a greater appreciation of the judges' and justices' subculture. This understanding might be obtained through observation, experience, reading, or formal courses. Regardless of how it is acquired, however, sociologists and criminologists would seem to have much to gain by devoting far more attention and energy to understanding their judicial audience.

Additional education might also go far within the other world. The fact remains that the federal judiciary does tend to lack a preparation in the social sciences. The federal courts are already being assailed regularly for their alleged deficiencies in comprehending the implications of their policy-making.¹⁰⁶ It seems inconceivable that they can overcome this criticism and continue to function as viable institutions without appreciable social science expertise. Judges and justices, at a minimum, should have an acquaintance with statistical inference. At least an exposure to the implications of the scientific method would seem a requisite, given the nature of the courts' present and future dockets. Maybe law clerks and younger jurists will bring more of these proficiencies into the profession in the coming years. Nevertheless, the need is obvious right now for members of the federal judiciary to become familiar with social science methodology through courses, perhaps sponsored by groups such as the Federal Judicial Conference, that would at least introduce them to the basics of modern social science.

Perhaps the two worlds could work together more effectively to illu-

¹⁰² See text accompanying notes 40-67 *supra*.

¹⁰³ See text accompanying notes 68-69 *supra*.

¹⁰⁴ See text accompanying notes 70-71 *supra*.

¹⁰⁵ See text accompanying notes 92-97 *supra*.

¹⁰⁶ See D. HOROWITZ, *supra* note 20, at 255-98.

minate serious policy problems if the Supreme Court sets a better example in its treatment of social scientists' data and findings. Eugene Rostow has noted eloquently that the Court is a continuing seminar into the ideals and realities of our constitutional system. The justices cannot escape being important teachers.¹⁰⁷ Thus, when they trivialize or treat frivolously the contributions of social science, they invite the lower federal judiciary—indeed the entire society—to do the same.

It may not be correct to fault Justice White for his refusal to legitimate the Wolfgang rape studies in *Coker v. Georgia*. Indeed, a major part of this article has demonstrated that the Court could well have discerned forceful reasons why such an endorsement would be highly inappropriate. It might also be defensible that the *Coker* plurality considered studies of possible racial discrimination before *Furman* obsolete. It could, as a policy-maker, attempt to start with a clean state, examining whether present capital punishment statutes are discriminatory.

What is censurable in the White opinion is the way in which it sidestepped the issue dramatized by Wolfgang's inquiries. White actually contended that he was examining the history of the use of capital rape statutes during the last fifty years. In doing so, he put himself within the time frame of Wolfgang's analyses. Whether or not Wolfgang's work was valid, Justice White was confronted with a situation in which such legislation had been employed almost exclusively by Southern states to bring about the execution of close to ten times as many blacks as whites. It would thus seem that any reasonable "history" of the use of this sanction would have had to have at least acknowledged that a prominent issue was whether it had been inflicted in a racially discriminatory fashion. But Justice White failed to even identify it as a source of contention.¹⁰⁸

¹⁰⁷ Rostow has observed that the Supreme Court is, "among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar." E. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* 167-68 (1962).

¹⁰⁸ As Charles Miller has so eloquently argued,

[t]he political authority of the Court often endows it with a certain intellectual authority. By writing history into its opinions the Court contributes to the public's view of the American past as much as, and sometimes even more than, professional historians and other historical writers do. When the Supreme Court has a chance to tell us what American history is, history becomes more than a tool of decision. It affirms or denies the significance of past events for the activities of the present . . . With the increased scope and power granted the Court by the use of history goes the increased responsibility in the handling of historical materials.

MILLER, *THE SUPREME COURT AND THE USES OF HISTORY*, *supra* note 78, at 25.

But, what Wolfgang noted so aptly about the trial process applied directly and obviously to Justice White's opinion in *Coker*: "[I]n Court . . . there is selectivity unlike that which exists in science. If history were written with such selectivity, if psychology, sociology and other kinds of research were performed in an adversary style, science would rush too quickly to conclusions or be aborted in its efforts." Wolfgang, *Social Scientist*, *supra* note 18, at 246.

Indeed, perhaps the eight justices in *Coker* who utterly ignored the existence of the racial

Such a performance could hardly impress social scientists with the Court's sincerity in seeking information from them on an issue of such life-and-death implications.¹⁰⁹ Justice White's opinion thus seemed far more of a white-wash than a quest for illumination. The societal stakes in this and so many other policy areas would suggest strongly the need for the judicial world to produce something far more intellectually defensible.

This discussion has suggested ways in which the breakdown in communication between the "two worlds" might be ameliorated. In doing so, we are aware that such prescriptions will not bring about the millennium. Yet, they surely transcend a mere conclusion that the fate of Wolfgang's rape studies demonstrates the human predicament, or, to paraphrase Friedrich Nietzsche, that humankind is all too human. There may be grounds for optimism. Donald Horowitz tells us that federal judges have a strong tendency to be generalists.¹¹⁰ Acquiring a general orientation toward social science might well be something that they would find to be not only useful, but appealing. Social scientists seem pulled powerfully in the opposite direction. An attempt to acquire a broad appreciation of judicial policy-making might provide at least a partial curative to too narrow a specialization. In the long term, it may well prove more helpful to them than answers to a question that they frequently pose to colleagues in the legal profession: "What data do those judges want from us now?"

discrimination issue might well consider Alfred Kelly's observation that the "truth of history does not flow from its usefulness."

In this respect, does *Coker* suggest that the Burger Court deserves the following Kelly indictment as much as, or even more than, its predecessor?"

[T]he present use of history by the Court is a Marxist-type perversion of the relation between truth and utility. It assumes that history can be written to serve [certain important] interests. The whole process calls to mind the manipulation of scientific truth by the Soviet government in the Lysenko controversy. The Court's purposes may be more laudable and the politics involved less spectacular, but the assumptions about the nature of reality are the same.

Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 157.

¹⁰⁹ For another highly questionable judicial response to social science data, see U.S. Circuit Court of Appeals Judge William Doyle's attempt to resurrect Blackstonian jurisprudence in his contention that such information is alien to the federal judiciary's constitutional law decisions in the desegregation field. See Doyle, *supra* note 30, at 18.

¹¹⁰ See D. HOROWITZ, *supra* note 20, at 28-31.