BOOK REVIEW

TRYING TO UNDERSTAND AMERICA'S DEATH PENALTY SYSTEM AND WHY WE STILL HAVE IT

THOMAS F. GERAGHTY*


BEYOND REPAIR? AMERICA'S DEATH PENALTY (STEPHEN P. GARVEY ED., LONDON: DUKE UNIVERSITY PRESS 2003). 244 PP.


ILL. GOVERNOR'S COMM’N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT (APRIL 2002).

I. INTRODUCTION

Opponents of the death penalty have a lot of ammunition in their arsenals. This country’s history of the administration of the death penalty is fraught with evidence of racism. Only in rare instances has anyone other than a poor person been executed. There is no evidence that the death penalty deters crime. The United States is the only western country that continues to execute. The United States is one of the only countries in the world that still executes juveniles, only recently having been prevented from executing the mentally ill. The Supreme Court and Congress have placed obstacles in the way of fair adjudication of capital cases that elevate

* Professor of Law, Associate Dean for Clinical Education, Director, Bluhm Legal Clinic, Northwestern University School of Law.
procedure over substance to the extent it is not clear that our court of last resort would step in to save the life of a defendant whose innocence is substantially established. All of this despite the fact that we have come precariously close to executing innocent defendants. All of this despite the fact that other countries with well-established respect for human rights have either eliminated the death penalty or carry it out as punishment for only the most egregious of crimes.

The three books reviewed in this essay take different, and equally effective, approaches to describing these contradictions and to suggesting strategies to abolish the death penalty in the United States. Franklin Zimring, in *The Contradictions of American Capital Punishment*, examines the American death penalty in the context of international and national politics and public policy. He asks why the death penalty persists in the United States in light of the international consensus against it and the many rational and compelling reasons for its abolition in the United States. He argues that an intelligent campaign for abolition can only be charted if the challenges mounted by the opposition are fully understood. The collected essays in *Beyond Repair? America’s Death Penalty*, address in detail specific issues relevant to the death penalty, ranging from the influence of public opinion to the difficulties involved in ensuring that capital juries are capable of understanding and following the jury instructions that should, but in fact may not, control their life and death decisions. Finally, Professor Joan Jacobs Brumberg’s *Kansas Charley: The Story of a 19th Century Boy Murderer*, is a detailed examination of one nineteenth century case involving the execution of a juvenile. Professor Brumberg’s book brings home the importance of the examination of individual cases as a means of understanding the phenomenon of American capital punishment. Her book confirms what many who represent defendants in capital cases know: the more familiar we become with a client, the more we understand the forces and influences which led both to the crime and to the prosecution, the more compelling the case for abolition.

Having attempted to make the point that these three books taken individually and especially together make an unassailable case for abolition, I recognize that I must be wrong about this assertion. The arguments, explicit and implicit, made in these books have been made before. Yet the public is not rising up against the death penalty. Quite to the contrary,

---

support for the death penalty in the United States seems strong and in little immediate danger of waning in the near future. Perhaps the best proof of the strength of support for the death penalty is the fact that no candidate for state-wide or national office could win an election after announcing opposition to the death penalty. Even the most "progressive" politicians I know or read about regard opposition to the death penalty as a veritable kiss of political death.

There is a vast political and emotional disconnect between death penalty opponents and those who embrace the death penalty. This is not a unique observation. But it is reinforced by personal experiences—one ordinary, one unusual. The first experience, that is shared by every lawyer who represents clients in death penalty cases, is facing the equally committed and aggressive positions and actions taken by prosecutors who favor the death penalty. Prosecutors who favor the death penalty do so for as many reasons as those who oppose the death penalty. Just deserts, the political advantage of being perceived tough on crime, and retribution are all part of the mix.

The "unusual experience" was that of representing four defendants in the Illinois clemency hearings held in the Fall of 2002. These hearings preceded Governor Ryan's pardons of four death row inmates and commutation of all then existing death sentences in Illinois to natural life without parole. Prosecutors brought the families of victims to those hearings. Although many of the presentations made by defense lawyers on behalf of their clients were powerful in addressing systemic and case-specific shortcomings of our death penalty system, no objective observer could contend that our (the defense lawyers') presentations were anywhere near as powerful as the pleas of victims' family members. The pain expressed by family members of victims brought tears to the eyes of even the most cynical defense lawyer and further outrage to the hearts of death penalty proponents. Despite the sound logical arguments that can be made against resting life and death decisions on such understandably emotional appeals to passion, it is not possible to ignore their power.

What can be done to create a meaningful dialogue between the emotional/political power of pro-death penalty advocates and the rational arguments made by abolitionists, which point to irrefutable flaws in a system that condemns the innocent, that fails to provide adequate representation to defendants, and that has restricted meaningful appellate and collateral review? As it stands now, the two communities of interest are talking past each other. There is little reason to believe that this will change. Perhaps that is why leading thinkers on the subject, such as Frank Zimring, believe that appealing to the lawyers, judges, and legislators who
control the death penalty system is of secondary importance. They believe that the primary focus should be on mounting an effective public campaign against the death penalty which focuses on an emerging human rights consensus and on the system’s propensity to commit error without a corresponding willingness to correct those errors.

This conclusion, while realistic, is distressing to lawyers like me who would like to see changes made before the end of our careers. It means business as usual, at least in the courtroom, for the foreseeable future. I suggest that there is another alternative, at least for lawyers. Take the information, analyses, and stories presented by the books reviewed in this essay and use them to fashion a more concerted effort to bring to more states what has been accomplished in Illinois—a moratorium followed by a thorough examination of the death penalty process, followed by legislation designed to address systemic defects. This approach is best illustrated by the *Report of the Governor’s Commission on Capital Punishment* (hereinafter referred to as “Ryan Commission’s Report”). In states where suspension of the imposition of the death penalty is not a political possibility, examination of the process could be undertaken and legislative proposals made. State commissions examining capital punishment systems should be drawn from all communities and should include those in favor of and those opposed to the death penalty. Exposing defects and proposing improvements may substantially reduce the number of death penalty prosecutions while ensuring a fairer process for those defendants the state seeks to execute. The books reviewed in this essay and the Ryan

---

4 *See ILL. GOVERNOR’S COMM’N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT (April 2002) [hereinafter RYAN COMMISSION’S REPORT].*

5 For example, after the Ryan Commission’s Report was issued, a bill was presented to the Illinois Legislature that would require confessions in homicide cases to be videotaped. S.B. 15, 93d Gen. Assem., Reg. Sess. (Ill. 2003). This bill has been signed into law. *See* 2003 Ill. Legis. Serv. P.A. 93-517 (West). In addition, legislation has passed the Illinois General Assembly, S.B. 472, 93d Gen. Assem., Reg. Sess. (Ill. 2003), codifying many of the recommendations of the Ryan Commission, including broader discovery provisions, disclosure requirements specific to the testimony of informants, and lineup procedures designed to reduce suggestiveness. *See* John Chase & Ray Long, *Death Penalty Reform Passes; Deal is Reached on Police Perjury*, CHI. TRIB., Nov. 20, 2003. Previously, in response to the crisis in Illinois prompted by the identification of thirteen wrongfully convicted death row inmates, the Illinois Supreme Court enacted rules governing discovery in capital cases, *see* ILL. COMP. STAT. S. CT. RULE 416 (2003), as well as certification requirements for counsel who try capital cases. ILL. COMP. STAT. S. CT. RULE 714 (2003) (creating a “Capital Litigation Trial Bar” and imposing training requirements for admission). After those rules were passed, the Supreme Court of Illinois required all circuit court judges eligible to hear capital cases to attend training sessions covering the law and management of capital cases. ILL. COMP. STAT. S. CT. RULE 43 (2003) (requiring judges who may hear death
Commission's Report suggest the need for such an approach while we wait for further developments, based upon perhaps now unforeseen developments, in the court of public opinion. The Ryan Commission's Report sets the bar high for continuing use of the death penalty, a bar that our justice system may not be able to meet. Moreover, the setting of such standards, even by a non-legislative body, are bound to become a meaningful, although not a controlling, component of the common law of Illinois' capital punishment system. Just as international norms regarding capital punishment are seen as potentially powerful influences in the American debate over the death penalty, norms established by such bodies as the Ryan Commission may be seen as increasingly influential.

The books and report reviewed in this essay, through their examinations of the phenomenon of American capital punishment, expose flaws in our criminal justice system, not specific to death penalty cases. These flaws suggest that our system of justice may not be the best in the world as is widely proclaimed. The phenomenon of capital punishment, with all of its flaws, gives our justice system a bad name, especially in the international community. Wrongful convictions in death penalty cases occur with unsettling frequency. Is there any reason to believe that the systemic defects (under-funded and poor lawyering, especially in investigation and trial preparation, over-reliance upon confessions in police investigations, reliance upon informants and "jail house snitches," investigative "tunnel vision," and reliance on poor science) identified by the Ryan Commission do not infect the rest of the criminal justice process?6

II. THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT

An underlying thesis of Franklin Zimring's important and provocative new book, The Contradictions of American Capital Punishment, is that in order to identify effective strategies for achieving the abolition of the death penalty in the United States, one must understand the forces that have established and continue to make the death penalty an accepted part of the American mainstream. To help us understand the seemingly unyielding political and philosophical strata upon which the death penalty rests, Professor Zimring contrasts the experience of Western European

penalty cases to attend Capital Litigation Seminars). Perhaps most significantly, the Illinois Supreme Court amended Rule 3.8 of the Illinois Rules of Professional Conduct with a new paragraph (a): "The duty of a public prosecutor or other government lawyers is to seek justice, not merely to convict." ILL. COMP. STAT. S. CT. RPC 3.8(a) (2003).

6 See Ryan Commission's Report, supra note 4 (identifying flaws in the Illinois criminal justice system which produced wrongful convictions in thirteen Illinois death penalty cases). This Report is discussed in more detail infra Part V.
governments, which quietly abolished the death penalty even when there was much popular support for it, to the experience of the U.S., where calls for abolition provoke such strident responses from politicians and the public that there is no way of avoiding an intense, and, perhaps, ultimately futile, public debate. Why did European governments have such an easy time of it when they decided to abolish the death penalty? Why is the opposite true in the United States?

To answer this question, Zimring looks to the phenomena of vigilantism and lynching that occurred mostly in southern states where eighty-nine percent of executions have been carried out since the death penalty was reinstated. This tradition, Zimring argues, explains why, contrary to what we might expect, citizens in states with a long tradition of suspicion of centralized power in government approve of their states' imposition of the ultimate penalty. Zimring later characterizes this "theory of American difference" as a "plausible theory" to explain how vigilante traditions might influence contemporary attitudes, to survey available evidence on the theory presented, and to suggest the further tests that can draw us closer to understanding the link between one of the most troubling chapters of the American past and the controversial and distinctive circumstances of execution in the American present.

Efforts to resolve the conflict between those who favor and those who oppose the death penalty will have to focus on resolving the conflict between those who hold to the notion that government is too weak to protect the individual (descendants of the vigilante tradition) and those who worry that government is too powerful (adherents of the "due process

8 ZIMRING, supra note 1, at 89.
Those parts of the United States where mob killings were repeatedly inflicted as crime control without government sanction are more likely now to view official executions as expressions of the will of the community rather than the power of a distant and alien government. For this reason, modern executions are concentrated in those sections of the United States where the hangman used to administer popular justice without legal sanction. Of equal noteworthiness, those areas of the United States where lynchings were rare a century ago are much less likely now to have a death penalty or to execute. In this important respect, the propensity to execute in the twenty-first century is a direct legacy of a history of lynching and of the vigilante tradition if it is still a part of regional culture.

9 Id. at 118.
10 Id.
mindset”). The debate on the future of the death penalty in the United States, Zimring argues, must focus on converting one mind-set to the other when the debate is relatively “low stakes” to most of the citizenry. Despite the fact that both the ingrained nature of the death penalty in American society and the “low stakes” relevance of the debate to the ordinary citizen, Zimring argues that, “the end game for American capital punishment has already begun but . . . the struggle will be intense.”

In order to help understand the direction in which the struggle for abolition might take us, we need to understand where the struggle has been. During the 1990’s, the number of executions increased almost fivefold and conflict over the death penalty intensified. Despite the increase in executions, those in favor of the death penalty chaffed at the procedural hurdles that were placed in the way of carrying out the death penalty and turned to Congress to obtain legislation that would speed up the process. Those opposed to the death penalty argued that speeding up the process would inevitably limit our justice system’s ability to adequately review the propriety of convictions and sentences. The proponents of the death penalty won this battle. Rules were enacted that were designed to prevent prolonged litigation over the justness of convictions and sentences. The ultimate test of the justness of such rules played out in cases in which last minute (and procedurally defaulted) claims of innocence were presented to the Supreme Court of the United States. After Herrera, the

11 Id. at 122.

The vigilante mindset assumes that the offender can be identified without legal procedures, while the due process mindset assumes there is substantial difficulty in sorting out the guilty from the innocent. Behind that contrast lies another: The criminal offender is an outsider in the vigilante imagination, not a genuine member of the community. No wonder he is so easy to identify.

12 Id. at 130 (“No stable and long-term solution to the death penalty conflict seems likely without reducing the power of one of the two traditions that stand behind the dispute.”).

13 Id. at 133-34.

The dispute over the death penalty is a low-stakes matter when compared with the epic struggle between nondiscrimination and race segregation. . . . [N]obody’s definition of self, no person’s livelihood or basic citizenship is at stake when executions are present or absent in state government, except, of course, the condemned. Capital punishment in the United States is not a way of life.

14 Id. at 141.

15 Id. at 144.

16 Id. at 148 (“The strategy [of death penalty proponents] was to restrict the types of objections that condemned prisoners could raise on appeal and to provide ironclad legal reasons for rejecting any last-minute appeals as the time for execution draws near.”).

question is whether, as we look to the future, the Supreme Court will decide that execution of an innocent defendant is inconsistent with the Constitution. Justice Rehnquist noted that even if such an "assumed right" exists, the "showing for such an assumed right would necessarily be extraordinarily high." Zimring identifies the moral dissonance of the Supreme Court's reluctance to state unequivocally that our Constitution protects against the execution of the innocent as a potential fault line in death penalty proponents' efforts to limit access to the courts. Thus, the strategy of attacking the death penalty based on the possibility that the innocents will be executed effectively raises the conflict between speeding up the process and reducing the number of wrongful convictions and death sentences.

There were ninety-eight exonerations of death row inmates between 1970 and 2001. Can we be satisfied that the appellate process identified all wrongful convictions before executions were carried out? Can we expect that in the future such cases will be identified before executions are carried out? If the answer to both questions is "no," is not this the most powerful argument in favor of overcoming the "vigilante" tradition and abolishing the death penalty? Based upon our knowledge of the phenomenon of wrongful convictions to date, Zimring estimates that it is probable that we have executed five innocent defendants since Gregg v. Georgia. Perhaps more such cases could be identified were prosecutors not so loathe to allow post-execution DNA testing.

In response to the phenomenon of wrongful convictions, leaders of the legal community, including Justice O'Connor, have called for minimum standards for defense counsel and the resources necessary to mount an

---

We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. Id. at 417. Justice Rehnquist implied that a satisfactory "state avenue" would be executive clemency. Id.

18 In her concurring opinion, Justice O'Connor, joined by Justice Kennedy, stated: "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution." Id. at 420 (O'Connor, J., concurring). Justices O'Connor and Kennedy had little trouble denying habeas relief in Collins because the petitioner had, in their view, utterly failed to make a persuasive showing of innocence. Id. at 426 (O'Connor, J., concurring).

19 Id. at 417.

20 ZIMR_ng, supra note 1, at 161.

21 428 U.S. 153 (1976); ZIMR_ng, supra note 1, at 168.

22 ZIMR_ng, supra note 1, at 170.
adequate defense. Zimring concludes that this reform would "revolutionize capital trial and appellate practice in almost every state in the United States that has experienced more than a few executions," and that "the flood of better defense counsel might finish the job" of achieving abolition. The fact that Justice O'Connor appears to have championed the movement for state-of-the-art defense in capital cases is a hopeful sign. Zimring notes that in an address to a group of women lawyers in Minnesota, a state that does not have the death penalty, Justice O'Connor said, "[y]ou must breathe a sigh of relief every day."

What are the prospects for the future and the continuing "tug of war" between the "due process" and "vigilante" traditions? Zimring suggests that "morally centered objections" and "morally committed activism" are necessary in addition to whatever legal challenges lawyers for condemned prisoners are able to advance. These objections should take into account the international community's abhorrence of the death penalty, the fault lines Zimring identifies in Supreme Court jurisprudence (particularly Justice Blackmun's dissent in *Callins v. Collins*), Justice O'Connor's outspokenness on executing the innocent, the need for increased resources for the defense, as well as the decision in *Atkins v. Virginia*. All of this could crumble, however, if the composition of the Court, instead of maintaining its present balance, becomes more conservative as vacancies are filled.

Outside the legal arena, "a strategy of discourse and protest that is the opposite of the gentle politics of abolition in . . . Europe" is needed. The focus of abolitionists should be a more aggressive campaign by human

23 Id. at 171.
24 Id.
25 Id. at 172.

Further, providing good trial and appellate lawyers to all capital defendants in high-execution states will slow down the process, virtually end procedural defaults, and put tremendous stress on the trial resources of high-death penalty prosecutors' offices. So if the direct impact of upgrading minimum standards for counsel in capital cases does not lock the death penalty process, then the indirect impact of a flood of better defense counsel might finish the job.

26 Id. at 178.
27 Id. at 180.
29 536 U.S. 304 (2002) (holding that the execution of the mentally retarded is unconstitutional).
30 ZIMRING, supra note 1, at 195.
rights activists possessing "ethical credibility" in order to "destabilize the mainstream support for the death penalty."\textsuperscript{31}

What are the prospects for abolition? According to Zimring,

a process of social engagement with capital punishment that is without precedent in American history has already begun. The end game in the effort to purge the United States of the death penalty has already been launched. The length and intensity of the struggle necessary to end the death penalty are not yet known, but the ultimate outcome seems inevitable in any but the most pessimistic view of the American future.\textsuperscript{32}

III. BEYOND REPAIR? AMERICA'S DEATH PENALTY

*Beyond Repair? America's Death Penalty*, contains essays by leading legal scholars, journalists, and anti-death penalty lawyers. Samuel Gross and Phoebe Ellsworth examine public opinion about the death penalty.\textsuperscript{33} The essays conclude that, while public support for the death penalty is still strong, a "new script"\textsuperscript{34} is being offered in opposition to business as usual. This conclusion is based upon the growing awareness that the death penalty is imposed almost entirely upon the poor, that defense services are inadequate, and that the criminal justice system makes mistakes.\textsuperscript{35} Gross and Ellsworth note, however, that the new script has not entirely replaced the old one. The public's cry for retribution still resounds.\textsuperscript{36} Politicians who know that retribution does not sit well with many of their voters cite deterrence as a rationale.\textsuperscript{37} Support for the death penalty declines, however, when the reality of life imprisonment without parole is offered as an alternative.\textsuperscript{38} But on balance, public support for the death penalty remains strong despite the defects in the system exposed by anti-death penalty advocates and lawyers. Given that abolition seems unlikely, is there another option? Gross and Ellsworth examine the "moratorium" which allows the quality of the system to be evaluated while executions are placed

\textsuperscript{31} Id. at 199-200.

\textsuperscript{32} Id. at 205.


\textsuperscript{34} Id. at 27.

\textsuperscript{35} Id. at 28-29.

\textsuperscript{36} Id. at 33 ("Retribution remains the major reason that people give for supporting capital punishment.").

\textsuperscript{37} Id.

\textsuperscript{38} Id. at 35.
In Illinois, a moratorium has produced a thorough examination of the criminal justice system. The review of the system produced a report which prompted the creation of a legislative package of reforms that was recently passed by the legislature in Springfield. The "moratorium movement" that Gross and Ellsworth suggest is reminiscent of past criminal justice reform movements, particularly those in the 1920s which focused on defects in state criminal justice systems.

Professor Larry Yackle, in his essay, describes the rich and important history of federal habeas corpus. That history convincingly demonstrates the need for a limited and effective system for federal review of state court convictions. The evolution of habeas corpus jurisprudence was the result of the need recognized by, among others, Justice Holmes, to protect criminal defendants from glaring constitutional deprivations in state courts. The Warren era brought about the application of basic constitutional protections to state court criminal proceedings and, consequently, increasing political and judicial resistance to the notion that federal courts should intervene in the state court criminal adjudications. Judicial resistance took the form of the creation of procedural hurdles. Congress responded with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). All this occurred, despite the fact that case after case demonstrated the flaws in state court adjudications. Yackle appropriately identifies the Strickland case, which set forth the federal standard for assessing effective assistance of counsel claims, as a major impediment to determining whether a defendant received a fair trial.

The prejudice prong of Strickland sets an impossibly high standard for vindication of the right to effective assistance of counsel. This standard is particularly inappropriate, Yackle argues, when the resources made

---

39 Id. at 47 ("A moratorium is an acceptable position because the current system seems to fall short of justice. A serious investigation is necessary to discover the source of these shortcomings and to devise remedies.").
40 Id. at 53 ("The moratorium on executions in Illinois further focused public attention on problems in administering the death penalty and publicized the possibility of a moratorium as a new position on the death penalty.").
41 See supra note 5.
47 Yackle, supra note 43, at 70 ("When counsel's behavior is bad enough to fail the 'performance' component of the test, the Court has rarely been willing to find 'actual prejudice.'").
available by the states for the provision of counsel are so woefully inadequate.\textsuperscript{48} Yackle exposes the flaws in procedural hurdles imposed by the Supreme Court and by Congress. The "new rule" jurisprudence governing retroactivity claims announced in \textit{Teague v. Lane}\textsuperscript{49} comes under special criticism\textsuperscript{50} as do the limits, imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),\textsuperscript{51} upon federal courts in adjudicating the habeas claims of state court prisoners, litigation over filing deadlines, procedural default, limitations on hearings in federal court, and curbs on successive claims. These restrictions dangerously limit our justice system's ability to provide full and fair review.\textsuperscript{52}

Journalists have played a special and effective role in exposing defects in America's capital punishment system. No reporters have been more skilled, dogged, and effective than Chicago Tribune reporters Steve Mills and Ken Armstrong, whose chapter describes the near execution and eventual exoneration of Anthony Porter, and the effect of almost executing an innocent man had on Illinois Governor George Ryan, the architect of the moratorium in Illinois.\textsuperscript{53} This chapter focuses on the question of whether we have executed innocent defendants, concluding that, "the question of

---

\textsuperscript{48} Id.

\textsuperscript{49} 489 U.S. 288 (1989).

\textsuperscript{50} Yackle, \textit{supra} note 43, at 77-78.

The \textit{Teague} doctrine has been criticized in academic circles. It is implausible to propose that federal courts create entirely "new rules" of constitutional criminal procedure whenever they apply settled procedural rules to the circumstances of particular cases. Certainly, it is implausible to conceive that federal courts forge "new" rules of procedure whenever they reach a judgment regarding constitutional claim that differs from a previous state court judgment that may have been erroneous but was still "reasonable."

\textsuperscript{51} Pub. L. No. 104-132, 110 Stat. 1214 (1996); \textit{see also} Yackle, \textit{supra} note 43, at 77-78.

\textsuperscript{52} Yackle, \textit{supra} note 43, at 93.

If Americans cannot agree that capital punishment is an unworthy social policy in itself, we should at least agree that judicial proceedings in death penalty cases must be rigorous and scrupulously fair. Otherwise, defendants may be convicted and sentenced to die in violation of their constitutional rights. And, in some instances, the innocent may nonetheless be executed. Sadly, we have not committed ourselves to exacting procedural arrangements in capital cases. Instead, the Supreme Court and Congress have compromised the one procedural mechanism that might catch mistakes before it is too late: the federal courts' authority to examine prisoners' constitutional claims in federal habeas corpus proceedings.

\textsuperscript{53} Ken Armstrong & Steve Mills, "

\textit{Until I Can Be Sure,}" \textit{How the Threat of Executing the Innocent has Transformed the Death Penalty Debate, in BEYOND REPAIR? AMERICA'S DEATH PENALTY, supra} note 2, at 94.
whether an innocent person has been executed remains largely unanswered.

Mills and Armstrong went to Texas and to Florida to see if such a case could be found. Although they found cases in which the evidence against the executed defendant was highly suspect, they were unable to develop conclusive proof of innocence. Mills and Armstrong note the potential of post-execution DNA comparisons to establish that innocent defendants have, in fact, been executed. They wonder why some prosecutors have opposed such inquiries. The chapter then identifies the factors leading to wrongful convictions based upon examination of the 285 cases in which the death penalty was imposed after it was reinstated in Illinois in 1977. Flaws identified included incompetent legal counsel, the use of jailhouse informants, and unreliable scientific evidence such as hair comparisons. Mills and Armstrong’s examination of the Texas death penalty system revealed that in one-third of cases in which executions had taken place, defendants were represented by an attorney who had before or after trial been disbarred, suspended, or otherwise sanctioned. Unlike Illinois, where appellate review of wrongful convictions has resulted in some success, in Texas, the appellate process, according to Mills and Armstrong, “has frequently proved tolerant of flawed convictions and reluctant to acknowledge holes in the prosecution’s case.”

Although the “innocence” story has, in recent years, eclipsed the “race” issue in attacks on American capital punishment, Sheri Lynn Johnson, in her chapter Race and Capital Punishment, notes that exonerated death row inmates are overwhelmingly African American. Johnson describes the troubling history of disproportionate execution of blacks and the Supreme Court’s unwillingness to acknowledge the controlling fact of racial disparities in executions absent a showing of discriminatory purpose. Studies conducted after McCleskey continue to demonstrate

---

54 Id. at 105.
55 Id. at 117-18. (“Our work had the feel of an archeological dig. We were dusting off artifacts that had been buried along with [the executed defendant]. In the end, we were able to identify a host of weaknesses in the prosecution’s case, but we did not unearth irrefutable proof of innocence.”)
56 Id. at 118.
57 Id. at 105.
58 Id. at 105-07.
59 Id. at 111.
60 Id. at 112.
62 Id. at 166 (citing McCleskey v. Kemp, 481 U.S. 279 (1987)).
significant "race-of-victim" effects. In addition, predictions of future dangerousness, errors in identification, and jury misconduct claims often have racial content. Prosecutors and defense lawyers often inject conscious or unconscious negative racial stereotypes into their strategies and comments during trial. These stereotypes work their way into the sentencing process, especially those involving propensity to violence, making it more likely that a person of color will be sentenced to death than a white defendant. Johnson speculates that this is the result of jurors dehumanizing non-white defendants. Johnson notes that restrictions on voir dire effectively prevent defense lawyers from determining whether white jurors can, in fact, be fair to non-white defendants. Because racial stereotypes are so ingrained in our culture and in our justice system, Johnson laments that, "absent major revamping of the legal controls on the behavior of all of the actors in capital cases, it is sad but safe to predict that racial discrimination in capital sentencing is not going to disappear any time soon."

Understanding how jurors make decisions in capital cases is key to determining whether life and death decisions are being made rationally, intelligently, and in accordance with the law. The results of the Capital Jury Project, a National Science Foundation-funded multi-state research project, are described in the chapter, Lessons from the Capital Jury Project. The authors, John H. Blume, Theodore Eisenberg, and Steven P. Garvey, academics and practitioners who have extensive scholarly and practice credentials, conclude that the system's fairness is compromised by unqualified jurors serving in capital cases and that these jurors do not understand the legal principles designed to control their discretion. These conclusions are based on interviews of jurors who have served in capital cases. Many jurors interviewed (fourteen percent) who served in capital cases were "unqualified" because they believed that the death penalty was the only acceptable punishment in cases on which they served as jurors.

---

64 Johnson, supra note 61, at 131.
65 Id. at 132-33.
66 Id. at 136-37.
67 Id. at 141.
68 Id. at 142.
69 Id. at 143.
70 John H. Blume et al., Lessons from the Capital Jury Project, in BEYOND REPAIR? AMERICA'S DEATH PENALTY, supra note 2, at 144.
71 Id. at 145.
72 Id.
73 Id. at 150.
Jurors were confused over the question of how aggravating and mitigating factors should be weighed, over the burden of proof at sentencing, and over consideration of non-statutory mitigating factors at sentencing.\textsuperscript{74}

These findings raise the question of whether our legal system’s assumption that jurors will rest their decisions on the facts and the law of particular cases is correct. If this assumption is incorrect, the dangers inherent in our capital trial and sentencing schemes are readily apparent. How do jurors actually decide between life and death? The authors identify the seriousness of the crime, the remorse of the defendant, and the future dangerousness of the defendant as key factors.\textsuperscript{75} Included in the future dangerousness analysis conducted by jurors is the question of whether a defendant sentenced to life will actually serve a life sentence.\textsuperscript{76} The jurors’ race and religion are also factors in juror decision making. Interestingly, however, the factors of race and religion, while significant in the jurors’ first vote, do not seem to play a role in the jurors’ final vote.\textsuperscript{77} Rather, the size of the first vote majority seems to be the controlling predictor of the final sentencing decision.\textsuperscript{78} The lessons learned from talking to jurors are clear. The selection process must be upgraded to ensure that jurors selected are able and committed to following the law. Confusing jury instructions at the sentencing phase means that jurors are unable to follow the law. Finally, because many jurors state that they would not vote for death if they knew that life without parole was a reality, jurors should be instructed that natural life sentences do not leave open the possibility of parole.\textsuperscript{79}

Another defect in the phenomenon of American punishment is the extent to which it is inconsistent with international norms. In the chapter, \textit{International Law and the Abolition of the Death Penalty}, William A. Schabas chronicles the status of the death penalty in international law.

\textsuperscript{74} \textit{Id.} at 153-59.

[Large numbers of jurors . . . tend to believe that mitigating factors must be proven beyond a reasonable doubt and to the satisfaction of each and every juror. Unless the important differences between the guilt-or-innocence and penalty phases of the trial and between aggravating and mitigating factors are emphasized to them in no uncertain terms, far too many jurors will rely instead upon the popular and erroneous beliefs they bring with them to court.]

\textit{Id.} at 159.

\textsuperscript{75} \textit{Id.} at 163-66.

\textsuperscript{76} \textit{Id.} at 165-68.

\textsuperscript{77} \textit{Id.} at 173.

\textsuperscript{78} \textit{Id.} at 173-74.

\textsuperscript{79} \textit{Id.} at 176. The Supreme Court has ruled that this instruction must be given at the defendant’s request if the State argues that the defendant’s future dangerousness is a reason for executing him. \textit{See} Simmons \textit{v}. South Carolina, 512 U.S. 154 (1994). \textit{See also} Shafer \textit{v}. South Carolina, 532 U.S. 36 (2001) (holding that a jury should have been instructed that parole was unavailable to a defendant who was given a life sentence).
Schabas begins his discussion with the United Nation's Universal Declaration of Human Rights, which does not specifically address the issue of capital punishment, although it provides a framework for considering the legal effect of an evolving international consensus against capital punishment. This consensus has become so strong that "[m]ost developed countries now refuse to extradite fugitives to the United States without assurances that capital punishment will not be imposed." In addition, several international treaties, including the International Covenant on Civil and Political Rights, limits the death penalty to only the most serious crimes, and the U.N. Convention on the Rights of the Child prohibits imposition of the death penalty upon persons under eighteen years of age.

Regional human rights systems have come close to abolition, Schabas argues, by imposing limitations upon its use and by making available anti-death penalty protocols. However, the key to a universal international condemnation of the death penalty will be the evolving understanding of whether the death penalty is inconsistent with the prohibition of cruel, inhumane, and degrading treatment or punishment prohibited by the Universal Declaration of Human Rights. Schabas concludes that "the argument that capital punishment is contrary to the prohibition of cruel, inhuman, and degrading . . . punishment is a judicial time bomb, ticking away inexorably as international abolition gains momentum." However, Schabas also recognizes that "the United States seems to have a studied indifference [to international norms] possibly the consequence of its long isolationist traditions but more likely attributable to the arrogance associated with its status as the last remaining superpower." Are there strategies or interests which will make the United States responsive to evolving international norms? Schabas suggests refusal of other countries to extradite prisoners to the United States and the United States' "growing status as an international pariah" could play a role.

---

81 Id. at 182.
83 Schabas, supra note 80, at 184-85.
84 Id. at 187.
85 Id. at 210.
86 Id. at 211.
In the final chapter of the book, Franklin Zimring previews the analysis and arguments made in his later book, *The Contradictions of American Capital Punishment*, reviewed above. Of most relevance to practitioners is his very clear challenge to the judicial system: "Trying to administer the death penalty on a recurrent basis creates an unprecedented tension between the willingness of a legal system to investigate allegations of illegality and the prompt administration of the prescribed punishment for crimes." Zimring also notes that the "resentment of judicial review is exacerbated by the genuine dilemmas of federalism in the enforcement of constitutional standards in state death cases." Streamlining the death penalty, the consequence of judicial and congressional hostility to prolonged appeals, will increase the likelihood that innocent defendants will be executed. The conflict between speed, efficiency, and reliability conflict in the context of the phenomenon of wrongful convictions. Zimring predicts that the public will rightly condemn a system that condones, by virtue of the architecture of the system, execution of the innocent:

These inherent conflicts are a fault line under the superficial stability of citizen support for the death penalty in the United States. The execution system can never live up to the public's standards for a death penalty worthy of support. It will be either too cumbersome and halfhearted when appeals are allowed or arbitrary and unjust when they are restricted. The death penalty in the United States is destabilized by the inherent limits of mass criminal justice. The only clear path out of the impasse is an end to executions.

It is interesting to note that Zimring's final observation in *Beyond Repair? America's Death Penalty* is much more optimistic than the overall tone of his book, *The Contradictions of American Capital Punishment* in which he identifies the wrongful conviction phenomenon as a standard bearer for abolition but also notes that a significant effort to influence public opinion will also be necessary.

**IV. KANSAS CHARLEY: THE STORY OF A 19TH CENTURY BOY MURDERER**

The first two books reviewed in this essay, *The Contradictions of American Capital Punishment* and *Beyond Repair? America's Death Penalty*...
Penalty,\textsuperscript{92} contribute to our understanding of the phenomenon of capital punishment in the United States through their examination of trends, statistics, legal doctrine, and public policy. There is another equally powerful way to understand America’s death penalty. That is through an examination of individual cases which tell the stories of the characters involved—the defendant, the victims and the victims’ families, the defense lawyer, the prosecutor, and the judge. Another “character” or influence in these cases is, of course, the court of public opinion.

Joan Jacobs Brumberg has managed to put all of these perspectives together in her book, \textit{Kansas Charley: The Story of a 19th Century Boy Murderer}.\textsuperscript{93} Professor Brumberg, a social historian at Cornell University, tells the story of a boy who committed a double murder at age sixteen and was executed in 1892 at the age of eighteen in Cheyenne, Wyoming.\textsuperscript{94} The story is the product of Professor Brumberg’s remarkable investigation of a variety of documentary sources including social service archives, newspaper accounts, a transcript of the defendant’s trial, and personal papers of some of the characters involved. The details and the theme of the story should resonate with all who have been engaged in the debate over capital punishment or in the prosecution or defense of capital cases: an egregious and sensational crime committed by a child who was no angel, an economically and socially deprived defendant, a defendant with undiagnosed and misunderstood psychological problems, a history of parental neglect, and physical abuse by adults charged with the responsibility for the care of the defendant. Add to the mix outraged family members of the victims, defense counsel overmatched by the prosecution, a trial judge and a governor susceptible to political pressures (from death penalty advocates and death penalty opponents) when deciding whether to impose and to carry out the sentence. Finally, the genesis and continuing tradition in the United States of executing juveniles is described in the context of a real case.

The story begins in New York City in November 1874, where Charley was born to immigrant German parents. Charley’s mother died when he was four, leaving his father to care for him and his brother and sister. A year later, Charley’s father, who had turned to alcohol when unemployment and the loss of his wife made him despondent, committed suicide by drinking insecticide. Charley and his three siblings were admitted to the

\textsuperscript{92} \textit{Beyond Repair? America’s Death Penalty}, \textit{supra} note 2.

\textsuperscript{93} \textit{Brumberg}, \textit{supra} note 3.

\textsuperscript{94} A leading physician of the time opined that “masturbation was common among the insane, a finding that many took to mean that it was causative in what came to be known as ‘masturbatory induced insanity.’” \textit{Id.}
New York Orphan Asylum where they were well fed, clothed, and subjected to rigorous discipline, including regular beatings for disciplinary violations. Charley's brothers and his sisters did relatively well there and were placed with families. One of Charley's brothers was sent westward on an "orphan train." Charley, however, suffered from chronic bed-wetting. In order to address this problem and to head off masturbation, a constant Victorian concern, a physician at the New York Orphan Society decided that Charley should be circumcised at age twelve. Not only did he not look like boys his age, his chronic bed wetting continued, causing him continuing embarrassment.

Charley Miller's first placement out of the asylum was unsuccessful because of this problem as was his second placement in Minnesota where his foster father finally abandoned him at a train station with no money or ticket back to New York. Charley was forced to go it alone until he was reunited with his brother in Kansas with the help of the New York Orphan Society. At age fourteen, he ran away from his Kansas placement, complaining that his host family did not clothe him. He hoped to join his older sister in Rochester, New York. Along the way, he became enamored with life on the road, adopting the nickname "Kansas Charley" in order to impress his fellow vagabonds and in imitation of the dime novels he liked to read. When he was reunited with his sister in Rochester, New York, where she had come to live with a prosperous family, he roamed the streets in search of adventure and fancy clothes. After spending eight months with his sister, he headed west to become a cowboy. This trip involved detours to New York and to Philadelphia. It was during this time that Charley apparently began to routinely commit petty crimes, winding up in a correctional facility in Philadelphia. After his release, he appeared to be proud that he had "served time." Heading westward on freight trains, he was gang raped by older vagabonds. To protect himself, he bought a .38 caliber pistol.

Charley met the two young men he shot to death in a Nebraska train yard and he traveled westward with them. The victims, from Missouri, were heading west with the support and permission of their parents to begin new lives in Wyoming. During the trip, Charley shot and killed the two young men. He took money and personal items from the victims and then left the train at the next stop looking for food. The bodies were discovered by railroad workers.

Two weeks after the shooting, Charley traveled to Kansas, where he told his brother that he had committed the crime which was now receiving national attention in the newspapers. In Kansas, Charley turned himself in and made a statement admitting guilt to a local sheriff and a newspaper
editor. The confession, which contained the story of Charley's life, was printed in newspapers around the country. As he returned to Wyoming in custody, the debate was raging about how to deal with what Charley had done. Should he stand trial and face the death penalty? Or should he be treated as a child who had been deprived of love, family, food, and guidance by caring adults? The victims' parents weighed in on this debate, characterizing Charley as a "depraved, deliberate killer rather than a deprived, remorseful orphan."

Court proceedings in Cheyenne began shortly after Charley was returned there from Kansas. A lawyer was appointed to represent him. The lawyer was paid $100 for his services. He had never tried a capital case. His experience at the bar was limited. Prior to representing Charley, he focused more on business opportunities than on legal practice. Pitted against Charley's lawyer was an experienced and aggressive prosecutor with important political and social connections to Wyoming's ruling elite. The prosecutor put on his case with skill and attention to detail. Charley's lawyer appeared to have no theory of defense. Despite the fact that the bodies were surrounded by empty bottles, there was no effort on the part of the defense to portray the crime as alcohol-related and no effort to call into question the character of the victims in order to suggest a motive for the killing. Rather, the defense lawyer attempted to undermine the credibility of Charley's confession by pointing out that Charley was left alone for a long period of time with the sheriff and newspaper editor who took the statement. The defense contended that the account of what Charley said was intended to be good newspaper copy instead of a reliable account of the conversation. Since Charley's motive for the killing was key to the jury's decision on both guilt-innocence and sentencing, the direct and cross-examination of the sheriff and the newspaper editor were crucial. No accurate transcription of the original confession was made. The witnesses relied upon their memories and their notes of the conversation. The

---

95 Id. at 100.
96 Later, Charley's lawyer would make valiant, if somewhat misguided, attempts to save Charley's life.
97 Brumberg observes:
A more skilled attorney might have tried to suggest that [the victims] were roughnecks, or that Ross, the more adventurous of the two, led Waldo into risky activities that he would never have undertaken on his own. But [the defense lawyer] did neither. Whatever his reasons, the decision to ignore the influence of alcohol empowered the prosecution. By failing to suggest that the victims were impudent young law breakers stoked by the liquor they had been drinking all day, [the defense lawyer] allowed the prosecution to hold the moral high ground.

Id. at 117.
prosecution's witnesses testified that Charley told them he killed for money. The defense was not able to shake them.

Charley was called to the stand. He was asked about his background, a compelling story of deprivation. But he told the story with little emotion, and his lawyer did not draw out the details of what must have been horrendous experiences for a child. Likewise, his account of the crime provided the jury with little information upon which to base an understanding of the crime. Charley's relationship with the two victims was not explored except for the fact that he was angry at the victims because they ignored him after he had given them food. Charley was either unwilling or unable to articulate a sympathetic motive for the killings, perhaps in part because his lawyer did not dig deeply enough into the circumstances prior to the time of the killing. The prosecution took ample advantage of Charley's failure to provide a reason for his actions. The next day's newspapers "made it clear that he had won few hearts." Brumberg attributes this to his defense lawyer, who flubbed an important opportunity to show that his unrefined client had some sense of morality and duty . . . [the defense lawyer] never developed the idea that when [Charley] turned himself in to the authorities it was a brave act of moral conscience, a marker of responsibility, and not a desire for notoriety, as some people proposed.

Having failed to provide a rational explanation for his client's behavior, the defense lawyer raised the issue of insanity. Recalling Charley to the stand after a night's recess, Charley was asked about his habit of masturbating. It was established that he masturbated three to four times per day. This information was brought out in order to establish that Charley had been rendered insane by this "unclean" practice. Five expert witnesses were called in an effort to establish a connection between masturbation and the murders. None were convincing. Finally, Charley was asked about the gang rape in the boxcar. Charley testified that he had been assaulted, but was not able to convey the horror of the incident.

98 Brumberg writes:

Was [Charley] afraid that the boys from St. Joe would call him a filthy street waif or say something else that was mean? Or was there something in their attitude or behavior that frightened him by bringing up memories of the time he had been attacked in the boxcar by older men? Today, the idea that Miller may have experienced "homosexual panic" as the result of his prior sexual abuse would have been part of the arsenal of a savvy defense lawyer.

Id. at 132.

99 Id. at 139.

100 Id. at 140.

101 The author suggests that this tactic was not planned. However, the defense was able to produce five "expert" witnesses in relatively short order, suggesting that such a defense may have been contemplated from the beginning.
Charley displayed little emotion when the jury's verdict finding him guilty of first degree murder was read in court. His apparent impassivity was another nail in his coffin.

The post-verdict proceedings in the case included an appeal to the Supreme Court of Wyoming and a petition for clemency directed to the Governor. His death sentence was stayed as Charley's lawyer prepared the appeal. As the appeals and clemency proceedings progressed, the Governor, as well as women's groups such as the Women's Christian Temperance Union, became central figures in the debate over whether the juvenile condemned to death would live or die. The Episcopal Bishop of Wyoming also entered the debate, urging the Governor to commute Charley's sentence as did the president of the Union Pacific Railroad. The prominent Rochester businessman who provided a home for Charley's sister weighed in with a petition signed by other prominent New York citizens opposing execution. This petition cited provisions of New York law which prohibited execution of juveniles.

In the midst of this outpouring of sentiment against imposition of the death penalty, Charley escaped from prison not once, but twice. He became older. He appeared, because of his actions and age, to be more sophisticated than the unfortunate waif who was portrayed at trial. His conviction was affirmed and an execution date was set. The case went to the Governor. He visited Charley in jail as part of his decision-making process. Eventually, the Governor's decision seemed to rest on the question of whether Charley's trial had been fair and whether there was any doubt of his guilt. The Governor was also concerned about the prospect of increased vigilantism, a phenomenon that was to be feared in the frontier West of the late nineteenth century, should he grant the petition for commutation. He denied the petition.

Charley sent out invitations to his execution. He talked to reporters in greater detail about the travails of his life. As to a motive for the killings, Charley denied that he killed for money, claiming that he was drunk at the time he killed his companions. However, he appeared to display little understanding of or contrition for the murders. When asked by friends why he committed the murders he said, "I don't know. When I saw what I had done it all seemed like a dream to me. I have tried to give reasons to myself and to [you] and to other friends, but I can't tell."102 Charley was hanged in the courtyard of the Cheyenne courthouse on April 22, 1892.

102 Id. at 228.
According to Brumberg, Charley's life and execution confirm that the United States has an "ugly history of executing poor children." These pressures are still with us. Harsh treatment of juveniles (particular transfer of juveniles from juvenile to criminal court) characterized the period of 1980-1995. The Supreme Court has been presented with cases involving the execution of children and the mentally retarded. Unless things change, we will continue to execute juveniles. Have we made any progress since 1892?

Professor Brumberg's book suggests that we have not. We are still executing juveniles. We still do not provide adequate counsel and resources for the defense of capital cases. Political influences still infect the death process. There is a divide in the United States between those states which routinely execute and those which do not. What should death penalty advocates take away from this book?

Professor Brumberg's detailed reconstruction of a single case epitomized the efforts of death penalty lawyers to tell the stories of their clients' lives and the stories about how the criminal justice system has fallen short. It is through the history of Charley's life that we understand the political, social, and economic inequities that produced Charley, and which explain his prosecution and execution.

103 Id. at 240.
104 See Thompson v. Oklahoma, 487 U.S. 815 (1988) (holding that the Eighth Amendment prohibits execution of a fifteen year old); Stanford v. Kentucky, 492 U.S. 361 (1989) (holding that the Eighth Amendment does not prohibit execution of a seventeen year old); see also Patterson v. Texas, 536 U.S. 984 (2002) (Stevens, Ginsburg, and Breyer, JJ., dissenting from denial of certiorari). Justice Stevens noted:

Petitioner was convicted of capital murder and sentenced to death for a crime he committed when he was 17 years old. In his dissenting opinion in Stanford v. Kentucky, 492 U.S. 361, 382, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), Justice BRENNAN, writing for four Members of the Court, explained why the Eighth Amendment prohibits the taking of the life of a person as punishment for a crime committed when below the age of 18. I joined that opinion and remain convinced that it correctly interpreted the law. Since that opinion was written, the issue has been the subject of further debate and discussion both in this country and in other civilized nations. Given the apparent consensus that exists among the States and in the international community against the execution of a capital sentence imposed on a juvenile offender, I think it would be appropriate for the Court to revisit the issue at the earliest opportunity. I would therefore grant a stay of this execution to give the Court an opportunity to confront the question at its next scheduled conference in September. Accordingly, I respectfully dissent from the denial of a stay.

Id.

V. THE GOVERNOR’S COMMISSION ON THE DEATH PENALTY

I have represented relatively few clients in death penalty cases. But in just the cases randomly assigned to me on appeal by the Supreme Court of Illinois, I was confronted with the following: a case in which, prior to my client’s plea of guilty and sentence of death, unknown to all in the courtroom, my client was taking psychotropic medication;\(^{106}\) a case in which we eventually obtained relief in a state court post-conviction petition because the trial court judge attempted to extort a bribe from my client’s family in order to avoid a death sentence;\(^{107}\) a case in which, despite the fact that my client claimed that he was tortured by police, his former attorney did not file a motion to suppress and presented no evidence in mitigation;\(^{108}\) a case in which our Supreme Court held that my client should be permitted to present modus operandi evidence regarding police torture of suspects and that he was not adequately represented at sentencing.\(^{109}\) Our Legal Clinic is currently in the process of amending a post-conviction petition in which it appears that evidence of the prosecution’s relationship with an informant/jail house snitch was withheld from the defense. This case has also been remanded to the trial court to allow presentation of evidence regarding systemic police torture of suspects.\(^{110}\)

While these cases and others like them were percolating through Illinois’ justice system, Illinois discovered that it had wrongfully convicted thirteen defendants sentenced to death.\(^{111}\) The near execution of Anthony Porter,\(^{112}\) later proved to be innocent, prompted Governor Ryan to impose a

---


\(^{107}\) See People v. Titone, 747 N.E.2d 357 (Ill. 2001); see also United States v. Maloney, 71 F.3d 645 (7th Cir. 1995).


\(^{109}\) See People v. King, 735 N.E.2d 569 (Ill. 2000).

\(^{110}\) See People v. Kitchen, 727 N.E.2d 189 (Ill. 1999).


moratorium on carrying out death sentences in Illinois in January 2000.\textsuperscript{113} After announcing the moratorium, Governor Ryan, in March of 2000, convened a commission, composed of prosecutors, defense lawyers, judges, and non-lawyer members of the community, to "determine what reforms, if any, would ensure that the Illinois capital punishment system is fair, just, and accurate."\textsuperscript{114} The Ryan Commission issued its report in April 2002 after reviewing Illinois cases in which the death penalty had been imposed. The work of the Ryan Commission focused on an intensive examination of the thirteen wrongful convictions, a review of all 250 cases in which the death penalty had been imposed in Illinois since 1977, research on the impact of the death penalty on victims, a review of death penalty laws in other jurisdictions, the views of experts on the death penalty, and the efforts of other jurisdictions to address problems in their death penalty systems.\textsuperscript{115} Common themes in the cases of the thirteen wrongfully convicted were thin evidence,\textsuperscript{116} the use of in-custody informants,\textsuperscript{117} and faulty eye-witness identifications.\textsuperscript{118} The Ryan Commission noted that more than half of the 250 cases in which the death penalty had been imposed in Illinois were reversed for trial related and sentencing errors.\textsuperscript{119}

The Commission examined all aspects of the death penalty process, beginning with police and pre-trial investigations, finding unanimously that the phenomenon of "tunnel vision," or "confirmatory bias" often interfered with thorough and unbiased inquiries.\textsuperscript{120} Police and prosecutors should also be required to list exculpatory evidence uncovered during an investigation and to maintain those records.\textsuperscript{121} The Commission also recommended that legislation authorize the appointment of a public defender for indigent defendants who are subject to police investigation.\textsuperscript{122} Interrogations should

\textsuperscript{114} RYAN COMMISSION'S REPORT, supra note 4, at 1.
\textsuperscript{115} Id. at 2-3.
\textsuperscript{116} The report concludes:

All 13 cases were characterized by relatively little solid evidence connecting the defendants to the crimes. In some cases, the evidence was so minimal that there was some question not only as to why the prosecutor sought the death penalty, but why the prosecution was even pursued against the individual defendant.

\textsuperscript{117} Id. at 7.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 8.
\textsuperscript{120} Id. at 9.
\textsuperscript{121} Id. at 10.
\textsuperscript{122} Id. at 22.
be video-taped. This recommendation specifically noted that, "video-taping should not include merely the statement made by the suspect after interrogation, but the entire interrogation process." Other recommendations of the Commission included careful recording of witness statements and management of lineups to avoid suggestiveness. The detailed examination of identification procedures undertaken by the Commission underscored its concern about the past and future of the reliability of identifications absent a wholesale overhaul of the ways in which lineups are currently conducted. The Commission also focused on the need to improve the state's forensic evidence analysis and collection systems, recommending that the state's ability to collect and analyze DNA evidence be augmented and that an independent, state-funded forensic laboratory be created.

Central to the Commission's recommendations was that the number of death penalty cases prosecuted be reduced by reducing the number of death-eligible crimes and through prosecutors' consideration of state-wide standards for selection of death cases. Other recommendations included steps to be taken to educate trial court judges, the training and certification of lawyers who try death penalty cases, expanded and better supervised discovery procedures, procedures for trial judges to follow in ensuring that juries understand the weaknesses inherent in eye-witness identifications, informant testimony, and the weight to be given to

123 Id. at 24. This recommendation was partially implemented by the Cook County State's Attorney who announced in October 1998 that he would video-tape all "confessions" in homicide cases. He rejected the suggestion that the entire interrogation should be videotaped, stating "[n]o matter when we start videotaping, there will be individuals who say something happened before the videotaping." McRoberts & Judy Peres, Homicide Suspects May Go to Videotape; Confessions on Camera Planned in Aftermath of Ryan Harris Case, Chi. Trib., Oct. 2, 1998, at A1. Subsequently, the Illinois legislature, as part of a death penalty reform package, sent legislation to the Governor requiring that defendants' statements sought to be introduced in death penalty cases "must be electronically recorded and the recording must be substantially accurate and not intentionally altered." S.B. 15, 93d Gen. Assem., Reg. Sess. (Ill. 2003). This bill has been signed into law. See 2003 Ill. Legis. Serv. P.A. 93-517 (West). For further discussion see supra note 5.

125 Id. at 32-40.
126 Id. at 52.
127 Id. at 65-75.
128 Id. at 81-82.
129 Id. at 94.
130 Id. at 105-11.
131 Id. at 117.
132 Id. at 129.
133 Id. at 131.
The sentencing phase of death penalty proceedings should be enhanced by expanded discovery rules explicitly covering the sentencing process, explicit recognition of a history of extreme emotional or physical abuse as a mitigating factor, and by requiring the jury to be advised of alternative sentences that may be imposed. The Commission rejected the proposal that a "residual doubt" instruction be required. The Commission also recommended that the jury instructions governing the weighing of aggravating and mitigation evidence be simplified to make them more understandable.

The Commission's concern about the reliability of eyewitness, informant, and accomplice testimony was highlighted by its recommendation that sentencing juries be instructed that such evidence cannot be the sole basis for a decision to impose the death penalty. This recommendation arguably fills the void created by the Commission's recommendation that no residual doubt instruction be required. Another concession to the concerns implicit in proposals to give a residual doubt instruction was the recommendation that the trial court judge state whether he or she concurs in the decision of a jury which imposes a death sentence. If the judge does not concur, the defendant shall be sentenced to natural life in prison.

The Commission recommended expansion rather than contraction of appellate and post-conviction remedies with the objective of allowing defendants to raise meritorious claims and defenses while at the same time speeding up the post-conviction process. There should be a liberal right to amend petitions based on newly discovered evidence creating a substantial basis for believing the defendant is innocent.

Noting that the bill embodying significant reforms had passed the Illinois General Assembly and the Illinois Senate by overwhelming margins, the Chicago Tribune congratulated state legislators for banning the execution of the mentally retarded, for broadening the availability of DNA testing, for focusing on the need to ensure the reliability of confessions.

134 Id. at 133.
135 Id. at 138.
136 Id. at 141.
137 Id. at 144.
138 Id. at 147-48.
139 Id. at 151-52.
140 Id. at 158.
141 Id. at 152.
142 Id. at 165-70.
143 Id. at 171.
through video-taping, and for setting up a study commission to determine whether death penalty sentences were being sought with racial and geographical balance. However, the Tribune vigorously criticized the legislature for not enacting a thorough “fix” of the system: “[l]ike being a little bit pregnant, the state can’t afford to be a little bit wrong when it comes to executing a human being.” The Tribune editorial listed what was missing from the legislative package: a provision that would have limited Illinois’s twenty-one eligibility factors; an independently managed state crime lab; a process for reviewing state prosecutors’ decisions to seek the death penalty (the editorial noted that, “statistics show that a defendant is ten times more likely to face a death sentence in DuPage County than he is in Cook County,” and that a “defendant in Illinois is four times more likely to receive a death sentence for killing a white person than for killing a minority person”) and a system for examining the factors that produce wrongful convictions. Finally, the Chicago Tribune noted:

It is not time to rest, though. As tempting as it might be to see how these new fixes work before considering additional reforms, we still don’t have the luxury of time. And if there are some in the legislature who still worry that support for these measures makes them too soft on crime, they should remember this: Sending the wrong person to prison—or to death—doesn’t fight crime. It allows killers to roam free.

VI. CONCLUSION

The works reviewed in this essay prompts us to reflect on a range of issues associated with the death penalty. The work reminds us of how many different fora and settings there are in which the morality, the justness, and the desirability and utility of the death penalty are debated. Professor Zimring provides us with a public policy perspective based upon analyses of history, statistics, and developments in death penalty jurisprudence. Professor Garvey has collected a series of essays that describe the phenomenon of the death penalty in the context of public opinion and the concrete challenges faced by defendants and lawyers in court. Professor Brumberg tells the story of one case that demonstrates persuasively that history continues to repeat itself. The Ryan Commission Report, and the legislation that it spawned, represent an effort to prevent history from repeating itself by taking a close look at the mechanics of

145 A Powerful Vote for Justice, CHI. TRIB., June 1, 2003, at C8.
146 Id.
147 Id.
148 Id.
death to see whether the machinery can consistently produce justice. Each of these perspectives and approaches contained in the material reviewed here are essential to deepening our understanding of why America continues to hold on to the death penalty. Each of these perspectives tell us much about what steps we must take in order to best protect defendants subject to death in a system that will continue to execute for the foreseeable future.

What the books do not do, and what they are not designed to do, is to address the deeply held and sometimes strident beliefs of death penalty proponents. One reviewer of Professor Zimring's book wrote:

[Zimring] mocks victim recognition as a new opiate of the people, an illusion foisted on the suffering by a cynical and brutal system. According to Mr. Zimring, the "relief" that the family and friends of a murder victim experience when the murderer is executed simply means "that the additional pain and uncertainty inflicted by the death penalty process"--not the murderer--"has come to an end." It seems not to have dawned on him that this "relief" might have a rational, moral component, that what the victims actually find is a reaffirmation of the fundamental value of innocent life and their loved one's life in particular. Mr. Zimring doesn't grasp the core appeal of capital punishment to many thoughtful, decent people. "The issue," as Scott Turow recently wrote, "is not revenge or retribution, exactly, so much as moral order."¹⁴⁹

Later, the author of this review notes that there is enough "grist for the mill" to lay a solid foundation for opposition to the death penalty as administered in Texas and Florida without resorting to the racially charged vigilante label.¹⁵⁰

Herein lies the problem. Both sides must recognize the integrity of responsible proponents of anti-death penalty and pro-death penalty stands, but there is no process in place, other than an adversarial one, in which exchange of information and ideas can occur. If the short-term prospects for abolition are bleak, we need to start talking to an inclusive community of lawyers, judges, scholars, and citizens in order to achieve consensus that we cannot tolerate the defective system that now exists.

¹⁵⁰ Id.