

Review Essay: Deciding Whether the Death Penalty Should Be Abolished¹

Voices of the Death Penalty Debate: A Citizen's Guide to Capital Punishment by Russell G. Murphy (United States of America: Vanderplas Publishing 2010), pp. 315, ISBN: 978-1-60042-108-2, LCCN: 2010928139.

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The death penalty, like abortion, deeply divides the country. To most Americans the answer to the question of whether the death penalty is unavoidable is obvious and beyond debate. It is “one of the most complex, emotional, controversial, and important public policy issues of our time.” (*Murphy. A Citizens Guide, Id.* at 293). American attitudes on the death penalty “have been relatively stable for almost a decade.” (*Id.*). Two out of three Americans support capital punishment. A Gallup poll conducted in 2006 asked respondents how they would decide “between death or life in prison without parole.” (*Id.*). Forty-eight percent of the respondents favored life without parole to capital punishment. (*Id.*) Too often, however, strongly held opinions on this topic are based on emotionally charged slogans rather than a reasoned consideration of the issue’s complexities.

Russell Murphy’s book, *Voices of the Death Penalty Debate*, is a desperately needed book to educate citizens around the world on the difficult public policy issues raised by capital punishment. His new book presents multiple theoretical, ideological, sociological, and personal perspectives on the death penalty debates. Capital punishment

¹ The authors would like to thank Stephanie J. McVay for her expert research assistance and to Chrissy J. Knowles for her editorial suggestions.

continues to be one of the most passionate political disputes of our time even though the number of death penalty sentences has been reduced fifty percent in recent years.

Few Americans are satisfied with the way we carry out death sentences in the criminal justice system. Conservatives, liberals, and progressives all agree that the American way of putting people to death is a disaster, but for different reasons. The simplest indicator of the failure of the death penalty is its exorbitant cost and the lack of empirical evidence about whether it is worth the price. This book sheds new light on the debate over capital punishment that continues around the world.

Contemporary public attitudes toward the death penalty reflect the social theories, moral perspectives, and economic issues discussed in the testimony recounted in this book. These issues in dispute can be classified as “the four r’s;” revenge, restraint, rehabilitation, and reintegration. As with many other social problems, political ideology selectively distorts popular interpretations of death penalty realities. Social conservatives, adopting the ideology of revenge, tend to blame liberal judges for paying too much attention to the rights of defendants. Conservatives place a high value on protecting the public from evil individuals. To conservatives, the death penalty should be swift and certain. Liberals are concerned with the issue of crime control, but equally concerned with the Constitutional rights of those accused of capital crimes and with the possibility that innocent individuals may be executed. Progressives believe that crime is symptomatic of social and economic inequality and believe that crime control must begin with social justice and reintegration of wrongdoers back into society.

The problem with the death penalty debates is that ideology and emotionalism too often prevent a true exchange of ideas and a rational weighing of policy factors.

Lawyers, journalists, and informed members of the public need this book because it dispassionately examines the arguments for and against the death penalty in an innovative format: through witness testimony. The statements of former death row inmates, families of murder victims, defense attorneys, and religious leaders offer the best hope that the death penalty discussion will move beyond superficial sloganeering that too often reflects much heat but sheds little light on the issues.

Russell Murphy's *Voices of the Death Penalty Debate* summarizes statements of witnesses who testified at the New York Assembly Hearings on that state's death penalty between December 2004 and February 2005. The title of this book reflects Murphy's sincere attempt to present the arguments and the witnesses' testimony in a fair and impartial manner. The expert and participant observation witnesses included family members of murder victims, correctional officials, leading law professors and social scientists, academics, criminal defense attorneys, prosecutors, religious leaders, law reformers police officers, exonerated death row inmates, jurists, and celebrities such as Bianca Jagger, ex-wife of Rolling Stone legend, Mick Jagger.

Murphy does not draw conclusions from the data or develop a brief for law reform. Instead, he presents statements in a lively and accessible manner, letting the readers draw their own conclusions. Although the overwhelming majority of witnesses were anti-death penalty, Professor Murphy invites his readers to rethink their position after hearing the best available arguments from all sides of the debate. He is a skilled editor, sensitive in not letting ideology or politics distort or drown out the voices of death penalty witnesses. He has extracted the greatest hits of the hearings and presents them in an interesting format without altering the voices of those with unpopular positions. He

demonstrates the skill of a sociologist in letting the witnesses tell the story of the death penalty in America. For the first time, policymakers and members of the public have access to diverse perspectives from experts on all sides of the death penalty debate. This book promises to have a significant impact on the capital punishment discussion by presenting the most compelling arguments made by academics, religious leaders, and criminal justice system participants accessible to a larger audience. As the author notes, this “deliberately different book” examines the death penalty through the voices of diverse witnesses and scholars. (*Id.* at ix). He does not superimpose his own take on the raw data from the hearing but lets readers make up their own minds.

Russell Murphy has carefully edited the excerpted testimony to place it in sociological and historical context as a contemporary debate. In the introductory chapters, Murphy provides readers with the social and legal context necessary to understand the excerpted testimony. He offers a treasure trove of empirical studies, government statistics, and constitutional principles while also covering the classic arguments for and against the death penalty.

Russell Murphy’s dispassionate presentation of the data is impressive given that he has strong personal views on the topic. Murphy, a well-known criminal law professor at Suffolk University, is not just on the sidelines but was himself an expert witness who testified at the New York Death Penalty Hearings. His interest in the death penalty is not that of a legal monk cloistered in the ivory tower but that of a knowledgeable insider. His interest in the death penalty is deeply personal as well as academic and policy-driven.² He notes that the reversal of the death penalty of the murderer of his friend’s sister led

² See Russell G. Murphy, *People v. Cahill*, 68 ALB. L. REV. 1029 (2005).

him to rethink his own position on capital punishment.³ Professor Murphy served as an informal advisor to the “family of Jill Russell Cahill, who was brutally murdered by her husband in up-state New York.” (*Id.* at ix). The genesis of this book is a commitment to provide others with the raw materials to rethink their own positions, armed with the best available data and perspectives.

While New York’s death penalty is the focus of his book, the implications are national and even international. The United States is out of step with other democratic nations in its long-standing support of the death penalty. New York was the first state to use the electric chair in 1890. Nevertheless, in 1965, New York largely eliminated the death penalty for most offenses. Then, in 1995, New York reinstated capital punishment. The movement to revive New York’s death penalty was spearheaded by Republican Governor George Pataki. In 2004, the New York Court of Appeals, New York’s highest court, struck down portions of the jury instructions from the 1995 death penalty statute in *People v. La Valle*.⁴ (*Id.* at ix). In the wake of *La Valle*, the chairs of key state legislative committees called for a hearing to address the law, policy, and practices of the death penalty. (*Id.*). New York’s Death Penalty Hearings “stretched into five days with 146 witnesses testifying in person and 24 persons or groups submitting written statements.” (*Id.* at ix).

I. Death Penalty Data in a Nutshell

Professor Murphy introduces the New York Death Penalty Hearings by providing the reader with a statistical profile of government executions. Chapter 1 on Death Penalty Facts and Figures presents sociological data in addition to basic statistics and the

³ See *People v. Cahill*, 809 N.E.2d 561 (N.Y. 2003).

⁴ 817 N.E.2d 341 (N.Y. 2004)

demographics of the death penalty. This basic information on the death penalty is clearly written and will be useful to lay audiences as well as lawyers and policymakers. It provides the equivalent of an International Almanac on every important death penalty statistic. Murphy not only covers the number of executions country by country but also highlights data on race and gender. This systematic data provides context for the reader to evaluate testimony by witnesses at the Death Penalty Hearings.

A brief sampling of the data presented by Murphy reveals how useful this information will be to policymakers and classroom teachers. The first question asked in a classroom discussion of the death penalty is the frequency of capital punishment. In Murphy's book, we learn that thirty-five states and the U.S. federal government sanction the use of the death sentence for egregious crimes (*Id.* at 1). Murphy's demographic and historical data on the incidence of executions confirms that individual regions of the United States have radically different perspectives on the death penalty.

Professor Murphy teaches in New England, where there has not been an execution for many decades. Eighty-seven percent of U.S. executions in modern times were carried out in Southern states and the remainder in Midwestern states. (*Id.*) The aggregate number of death sentences imposed is dropping dramatically in the states. "Post-sentencing exonerations—the innocence phenomenon" helps explain the decline in overall numbers of executions. (*Id.*) While state executions are decreasing, federal death sentences are on the increase.

Another hypothesis for the decline is the fiscal crisis of the states. Death penalty adjudication is marked by delay and it is expensive. A National Bureau of Economic Research study cited in this chapter concludes that the cost of all U.S. capital trials in the

period between 1982 and 1997 was \$1.6 billion (*Id.* at 3). The states simply cannot afford this punishment. An Urban Institute study finds that a death sentence in one state cost \$1.9 million more than a sentence of life without parole. (*Id.* at 2). New York “spent \$175 million on capital prosecutions from 1995 to 2005 but failed to execute a single killer,” a frustrating situation for both liberals and conservatives. (*Id.* at 3).

Citizen education is Russell Murphy’s major objective in making the death penalty testimony accessible to a wider audience. He explains the constitutional issues in ways that can be understood by laypersons. Professor Murphy’s book would make for excellent supplementary reading in sociology and criminology courses in Social Problems, Race Relations, and Class, Crime and the Criminal Justice System. Just by way of example, sociology and criminal justice students will be interested to learn of the strong correlation between race and ethnicity and executions. Murphy cites California data showing that killers of whites are more than three times more likely to be executed than if the victim is a black. (*Id.* at 2). Perhaps the best predictor of the death penalty is gender. Men constitute more than 98% of the death row population. (*Id.*). This empirical data is the fodder for lively class discussions.

Professor Murphy presents international data on death penalty trends. By 2009, 139 countries around the world prohibited the death penalty either “in law or in practice.” (*Id.* at 3). The European Union is, in effect, a “death-penalty zone of 800 million people.” (*Id.* at 3).⁵ Death-penalty zones around the world are disproportionately the

⁵ “At the October 1997 Council of Europe Summit, Heads of Government, including all EU member states, called for universal abolition of the death penalty. Moreover, new member states of the Council of Europe have committed themselves to moratoria and to ratify the 6th Protocol of the European Convention on Human Rights (ECHR) committing them to permanent abolition. The 13th Protocol of the ECHR, which has been signed by all EU member states and entered into force on 1 July 2003, commits the member states concerned to permanent abolition of the death penalty in all circumstances. EUROPEAN UNION, EU

most authoritarian and regressive countries in central Asia, the Middle East, and Asia. (*Id.* at 3). Even though Murphy makes no comment on this global data, the reader is left with the impression that the United States' policy is on all fours with the most regressive and backward looking countries in the world.

II. The Constitutional Matrix for Death Penalty Trials

In Chapter 2, Professor Murphy does an excellent job of summarizing the Supreme Courts' constitutional jurisprudence. Journalists and legislators will appreciate Murphy's accessible discussion of the constitutional principles in a few pages. He notes that the U.S. Supreme Court's constitutional calculus is based upon a general legal standard rather than a bright-line rule. A state's method of carrying out the death penalty must meet "contemporary 'evolving standards' of decency." (*Id.*). Defense attorneys generally challenge death penalty statutes or procedures under the Eighth Amendment's "cruel and unusual punishments" clause of the U.S. Constitution. Journalists, legislators, and other non-lawyers will appreciate the way that he has demystified the leading U.S. Supreme Court cases and explains the distinctions between federal and state grounds for challenging the death penalty.

Professor Murphy traces the path of constitutional law decisions on the death penalty beginning with *Furman v. Georgia*.⁶ In *Furman*, the U.S. Supreme Court struck down a death penalty conviction, holding by a 5-4 margin that Georgia's death penalty was standardless and thus violated the U.S. Constitution's prohibition against cruel and unusual punishment. This was a bellwether decision that reshaped the path of death

GUIDELINES ON THE DEATH PENALTY: REVISED AND UPDATED VERSION,
<http://www.eurunion.org/DPGuidelines-10-08.pdf> (last visited Aug. 28, 2010).

⁶ 408 U.S. 238 (1972).

penalty law. The Death Penalty Information Center highlighted the significance of this case in shaping death penalty law:

Thus, on June 29, 1972, the Supreme Court effectively voided 40 death penalty statutes, thereby commuting the sentences of 629 death row inmates around the country and suspending the death penalty because existing statutes were no longer valid.⁷

“A majority of American states imposed the death penalty” prior to the *Furman* case. (*Id.* at 7). *Furman* mandated that the states reexamine their procedures to eliminate the problem of arbitrary and capricious death sentencing. After *Furman*, a number of states redrafted their death penalty statutes to address the Eighth Amendment issues identified by the Court.

The subtext for the Court’s decision in *Furman* was the history of segregation in the South. Many death penalty sentences are handed down in so-called red states with conservative values and histories of racial conflict. The Court was concerned with race and social class as significant independent variables that predicted when the death sentence would be imposed. (*Id.* at 7). Murphy discusses the relationship between race and death penalty law and how the Court has categorically invalidated the death penalty for juvenile killers, the developmentally disabled (but not for capital defendants who are severely mentally ill), and non-killer felony-murder accomplices. (*Id.* at 8-9). After the Court struck down Texas’ system for imposing capital punishment in a companion case to *Furman*, the Texas Legislature enacted a statute narrowing the circumstances for capital punishment.⁸ Alabama enacted a statute in 1975 delimiting the aggravated

⁷Death Penalty Information Center, *Introduction to the Death Penalty*, <http://www.deathpenaltyinfo.org/part-i-history-death-penalty> (last visited August 29, 2010).

offenses for which the death penalty could be imposed in that state.⁹ A basic understanding of federalism is necessary to comprehend the constitutional structure of the death penalty. New York's death penalty was overturned in *People v. LaValle*,¹⁰ on state constitutional grounds rather than under federal law. The New York Court of Appeals ruled that a "deadlock" jury instruction that "told the jurors that a failure of the jury to unanimously decide on a death sentence would result in the judge sentencing the defendant to 25 years to life in prison" was a violation of the state's due process clause. (*Id.* at 6).

The death penalty cases discussed in this chapter trigger great emotional reactions because of the brutality of the underlying capital offenses. For example, in *Jurek v. Texas*,¹¹ the U.S. Supreme Court upheld a death penalty imposed on a defendant "for the killing of a 10-year-old girl by choking, strangling, and drowning her in the course of kidnapping and forcible rape."¹² At a separate sentencing hearing, the Texas jury then considered the two relevant statutory questions regarding aggravating and mitigating circumstances. The *Jurek* Court upheld Texas' procedure and affirmed the death sentence.

⁸ "The new Texas Penal Code limits capital homicides to intentional and knowing murders committed in five situations: murder of a peace officer or fireman; murder committed in the course of kidnapping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim is a prison employee." *Jurek v. Texas*, 242 U.S. 262, 268 (1976) (citing Tex. Penal Code § 19.03 (1974)).

⁹ See Ala. Rev. Code, § 13-11-2 and Ala Rev. Code § 13-11-6.

¹⁰ 817 N.E.2d 341 (N.Y. 2004)

¹¹ 242 U.S. 262 (1976).

¹² *Id.* at 265.

Busy journalists and policymakers will appreciate Murphy's sure-footed and concise summaries of constitutional precedents shaping the path of death penalty law and policy. The current state of death penalty law begins with the 1976 decision in *Gregg v. Georgia*, where the U.S. Supreme Court "reserved to itself an independent authority to inquire whether execution of a particular defendant or class of criminals is consistent with the concept of 'human dignity'" under the Eighth Amendment. (*Id.* at 7-8). In the wake of *Gregg*, a number of states changed their capital sentencing laws and procedures to address the Supreme Court's concerns.

III. Capital Punishment: The Question of Justification

Chapter 3 examines death penalty justifications from a variety of perspectives. This chapter is appropriate for courses in rhetoric, argumentation and debate, political science, American studies, and general core curriculum courses, as well as traditional social science courses. Murphy's approach of choosing to let the proponents of diverse perspectives speak for themselves works well and will stimulate classroom discussion. The expert testimony provides the strongest arguments that can be made for and against the death penalty. The traditional justifications for the death penalty --"retribution, deterrence, incapacitation, and rehabilitation" —are all clearly presented. (*Id.* at 11).

The retributivist asks: "Does this person deserve to die?" (*Id.*) Nevertheless, the death penalty debates often center on the question of deterrence. As Murphy sardonically notes, the death penalty is 100% effective if the measure is specific deterrence since the criminal is permanently and irrevocably removed from society. (*Id.* at 12). The question that is unknown and perhaps unknowable is whether the death penalty correlates with general deterrence. Does the imposition of a death sentence send

a deterrent message to other potential murderers? Murphy draws upon the testimony of leading academics, religious leaders, and family members of murder victims to address the argument over whether capital punishment deters potential criminals from committing capital offenses. Much of the testimony beginning in Chapter 3 addresses this question on an anecdotal basis. It is impossible to do justice to this book without summarizing the arguments that witnesses made in the hearings.

IV. The Death Penalty: Pro

Emile Durkheim (1857-1917) was a French sociologist whose *De La Division Du Travail Social (The Division of Labor in Society)* advanced a functional theory of the evolution of modern legal systems.¹³ Durkheim's perspective was that crimes not only affected the individual but also contravened the collective conscious or societal norms.¹⁴ The degree of social solidarity is Durkheim's key for understanding not only societal organization but also individual deviance such as criminal behavior and suicide. For Durkheim, a society's division of labor shaped the nature of other social institutions, including the law. As society becomes more complex and differentiated, he believed that

¹³ Durkheim "argued that the division of labor produced anomie: In effect, when competition places isolated and estranged individuals, in opposition, it can only separate them more." During the transition to an industrial society, rapid social change creates anomic breakdowns. In the developed industrial societies, the division of labor will evolve into a new source of "organic" social cohesion. Durkheim argued that in an industrial society criminal remedies are expanded to increase restitution in place of repressive penalties. . . Michael L. Rustad, *Private Enforcement of Cybercrime on the Electronic Frontier*, 11 S. CAL. INTERDISC. L.J. 63, 69 (2001). Many anthropologists generally reject Durkheim's view, noting that preliterate societies often place their primary emphasis on maintaining social solidarity through some form of restitution rather than on punishment. For a classical review of this debate see, A. Stanley Diamond, *Primitive Law, Past and Present* (1972) (arguing that in early societies repressive law as restricted to a small number of offenses while restitution, private vengeance and feuding are more common).

¹⁴ "Durkheim theorized that "disruptions presumably reduce the individuals' sense of belongingness, resulting in anomie at a personal level." He blamed anomie on the disintegration of social norms that occurs due to changes in social institutions caused by transformation of the economic base." *Id.*

the law evolves from repressive to primarily restitutive.¹⁵ Even the most ardent supporters of the death penalty would be surprised that capital punishment was prescribed for so many offenses in ancient society. “The Torah, composed of the first five books of the Hebrew Scriptures (Old Testament)...contains numerous laws which make up the Mosaic code.”¹⁶ The Holiness Code in the Torah, for example, stated that “all persons guilty of adultery [were] to be killed” and “a person who takes the Lord’s name in vain is to be killed.”¹⁷

In today’s death penalty debates, even the most militant supporters tend to favor very narrow circumstances for the imposition of this ultimate sanction. Murphy cites the testimony of Professor Robert Blecker of New York Law School, a strong advocate of capital punishment, who contends that society needs a narrowly tailored death penalty as a deterrent, basing his argument on a moral theory of justice predicated upon retributive justice. (*Id.* at 13). Blecker’s commitment to the death penalty is balanced by his concern that the states not take a life without a compelling justification. His testimony points to the need to implement additional measures to protect the rights of the accused. Murphy summarizes and excerpts testimony from the perspective of law enforcement on the death penalty law-in-action. (*Id.* at 65). These individuals tend to believe that capital punishment has is a significant deterrent.

¹⁵ ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (New York: The Free Press, 1984) (translated by Lewis Coser) (originally published in 1893); See also Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism* 42 AM. U. L. REV. 1393, 1463 (1993), (“Emile Durkheim’s observation that as society becomes more complex, it shifts from punitive to restitutive law.”).

¹⁶ The Mosaic Code and Its Applicability Today, http://www.religioustolerance.org/hom_bibh2.htm (last visited Aug. 29, 2010).

¹⁷*Id.*

In support of the death penalty as retribution, Murphy provides the testimony of a mother whose daughter was killed in a robbery of a Wendy's restaurant. (*Id.* at 15-16). This mother, who was originally anti-death penalty, expressed the anger and bitterness of some survivors when she said: "If my son commits (a capital crime), kill him. I don't care." Such testimony by family members of murder victims brings retribution arguments down from the abstract legal heavens and statistical disputes to questions of the legitimacy of revenge.

V. The Death Penalty as a Deterrent: Con

Schools of theology and religion, and departments of liberal arts colleges, are another possible market for this book. Witness the overwhelming opposition to the death penalty by religious leaders and organizations. An Auxiliary Bishop of the Catholic Church in New York testified against the death penalty reasoning "[v]engeance through execution does not heal wounds." (*Id.* at 20).

This chapter is replete with powerful personal stories of the death penalty. Contrary to popular expectation, the vast majority of family members of murder victims opposed the reinstating of the death penalty in New York. (*Id.* at 17). Kate Lowenstein, daughter of the late Allard Lowenstein, a Member of Congress and a social activist who was murdered by a mentally ill ex-student, was typical of the survivors' testimony:

In our grief, the state tells us that this (the execution of the murderer) will help you, but it is the murdered life we want back and in the end, nothing changes that an execution leaves us silent. The murdered are still murdered, now another family is in agony and a system has gone forward that is contrary to everything we want justice to be, a system that values white life over black, rich over poor, the powerful over the vulnerable, the conviction of the innocent. All of these things my father taught me to fight against. (*Id.* at 18).

Some family members argue that a combination of factors including poverty, mental illness, weak family structure, and racial discrimination produce America's high rate of capital crimes and that we must increase efforts to eradicate the underlying causes rather than focus on the individual circumstances. Our task as citizens is to acknowledge these factors and work out ways to reduce the radius of the risk of horrific crimes

Ethyl and Julius Rosenberg's son, Robert Meeropol, testified at length about how the execution of his parents affected his life. He noted that he was in favor of the death penalty as a child but changed his mind. For a long time, he believed his parents had been murdered. (*Id.* at 35). Bianca Jagger testified on behalf of Amnesty International. Ms. Jagger described the horrific experience of witnessing a Texas execution of a person she believed to be innocent. (*Id.* at 44-48).

Murphy examines the witness's perspective on deterrence, which is the chief alternative to retribution. (*Id.* at 55). Deterrence would be a compelling justification for the death penalty if empirical evidence demonstrated that it made a difference. New York Law professor, Robert Blecker represents the pro-capital punishment perspective, arguing "the case for deterrence as strongly as he justified retribution for capital punishment." (*Id.* at 55). Blecker maintained that the death penalty has a greater deterrent effect than life without parole. (*Id.* at 56). But Murphy juxtaposes Blecker's testimony against academics who state that there is little or no evidence that executions have a deterrent effect on potential criminals. (*Id.* at 57).

Some of the most thoughtful testimony came from ordinary citizens. Patricia Perry, a New York voter and citizen made the argument that the death penalty "teaches our children that some murder is okay." (*Id.* at 76). Murphy also excerpts from the

fascinating testimony of a former death row inmate who states that those awaiting execution do not believe that the death penalty has a deterrent effect. (*Id.* at 77).

This format of presenting different theoretical, ideological, and personal perspectives is why this book is ideally suited for courses featuring contemporary debates.

VI. Capital Punishment & the Fiscal Crisis of the State

Chapter 4 focuses on the exorbitant cost of the death penalty apparatus and raises larger public policy issues about whether capital punishment is cost-justified. The New York State Assembly sought answers to questions such as whether a death penalty could be reformed to be administered more fairly and consistently and to make the penalty less economically burdensome. (*Id.* at 109). This chapter provides clear and convincing evidence that the death penalty is far more expensive than life without parole. (*Id.* at 110). California's death penalty apparatus costs \$90 million per year, considering the appeals process. Given that California executes only one person roughly every two years, the financial burden appears to be clearly excessive. (*Id.* at 115).

Murphy is careful to present both sides of the fiscal cost debate, citing testimony by Professor Blecker that "death penalty costs are not excessive." (*Id.* at 117). Blecker's law and economics oriented perspective is that if we executed more prisoners, it would lead to cost savings and free up more space in our correctional institutions. (*Id.* at 118). This argument is reminiscent of the argument that smoking saves money because smoking results in premature death reducing the cost of caring for the aged.¹⁸ Executions in America will never be self-financing as they might be in a country like China without constitutional protections for death penalty defendants.

¹⁸ See generally, W. KIP VISCUSI, *SMOKE-FILLED ROOMS: A POSTMORTEM OF THE TOBACCO DEAL* (Chicago: University of Chicago Press, 2002).

Many desirable government initiatives cannot be undertaken because of massive state expenditures for a small number of death row inmates. The best available data from New York estimates a \$24 million price tag for each death sentence. Ironically, despite the enormous amount of resources invested in these cases, in the end, not a single convicted New York criminal was executed. (*Id.* at 121). The testimony of Kate Lowenstein brings common sense to the criminal law: “The death penalty puts all the focus on a few murderers. It pours millions of dollars into killing one person.” (*Id.* at 127). This chapter examines the cost issue from diverse perspectives, including the testimony of judges, legal academics, and researchers.

Like the rest of Murphy’s book, this chapter is fair, reasoned, and balanced. Still, it is hard to avoid concluding that capital cases are not only costly but pose an “unacceptable risk... (of an) arbitrary and unreliable sentence.” (*Id.* at 151). The Death Penalty Information Center assembled data on New York’s expenditures on the death penalty that further supports this conclusion:

At one time the Capital Defender Office had more than 70 staffers and an annual budget of \$14 million. Now it has a \$1.3 million budget and six people on staff. The remaining staffers now have the responsibility of reviewing some 3,000 boxes of information about its cases and finding a way to properly preserve privileged materials. Since the office was established, 10,000 murders have occurred in New York. Prosecutors considered bringing the death penalty in 877 capital-eligible cases, and district attorneys filed notice of intent to seek the death penalty in 58 cases. Juries in only seven cases ultimately returned death sentences. No one was executed.¹⁹

VII. Social Context: Race, Mental Illness & Executions

¹⁹ Death Penalty Information Center, *Closing of the Capital Defender Office Will Save the State Millions as New York’s Death Penalty Ends*, <http://deathpenaltyinfo.org/legislative-activity-new-york> (last visited Aug. 29, 2010).

Like John Rawls' veil of ignorance, too much legal scholarship examines the law devoid of social context.²⁰ As a young law professor, Roscoe Pound castigated the law professors of his day for their dry as dust, overly abstract, approach to teaching law and scholarship. The legal academics of his day desiccated the common law by removing social context. A growing literature establishes the importance of gender and race in the context of torts litigation.²¹ Racial-context cases like lead paint poisoning and negligent sterilization cases “demonstrate the multiple ways in which race is constructed and racial meanings are produced in tort litigation.”²²

The death penalty debates are too often acontextual, ahistorical, and disconnected from the societal factors impacting the American criminal justice system.²³ Murphy, however, does not neglect this sociological dimension. He argues that capital punishment is “inextricably bound up with the history of race relations in the United States.” (*Id.* at 153). Murphy highlights the scholarship of University of Iowa law professor David

²⁰See generally, John Rawls, *Justice as Fairness: A Restatement* (2001).

²¹ Doctrinally limited civil recourse theorists completely ignore how race, class, gender, and power differentials impact tort law rights and remedies. For a sampling of this rich literature see e.g., Martha Chamallas & Linda K. Kerber, *Women, Mothers and the Law of Fright: A History*, 88 MICH. L. REV. 601 (1990); Martha Chamallas, *Civil Rights in Ordinary Torts Cases: Race, Gender and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435 (2005); Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 1 (2007); See generally, MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (New, York: New York University Press, 2010) (tracing role of race and gender in the history of American tort rights and remedies from the nineteenth century to the present); See also Frank McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761 (1996); Angela P. Harris, Foreword: *The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990), and Camille A. Nelson, *Considering Tortious Racism*, 9 DEPAUL J. HEALTH CARE J. 905 (2005).

²² MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (New, York: New York University Press, 2010) at 29.

²³ Jennifer Wiggins describes the “acontextual approach” in American tort scholarship and legal education. See Jennifer B. Wiggins, *Praxis and Prisms: Towards a Feminist Revision of Torts*, 13 AM. U.J. GENDER SOC. POL'Y & L. 139, 143 (2005).

Baldus who assembled extensive empirical data that became the focus on the Supreme Court's analysis in *McCleskey v. Kemp*. (*Id.* at 55). The Baldus team's research demonstrates that juries imposed death sentences based upon race. Eight out of ten death row cases involved a Caucasian victim. (*Id.* at 156). Murphy also includes expert testimony demonstrating that Latino criminal and defendants are disproportionately given death sentences. (*Id.* at 171-74). This literature suggests that as with the research on tort law, race makes a difference but, Murphy again presents extensive testimony from Professor Blecker, who questions the issue of racial disparity. (*Id.* at 185-87). The section on racial impacts concludes with reform proposals for lessening the influence of race in death penalty cases. (*Id.* at 190-192).

Chapter 5 also addresses the troubling issue of mental illness and the death penalty. The U.S. Supreme Court struck down the death penalty for the mentally retarded but has been unreceptive to extending that standard of decency to defendants with severe mental illness. The bulk of the testimony in this book "compels invalidation of capital punishment in cases involving the severally mentally ill." (*Id.* at 191). Ted Kaczynski, the infamous Unabomber, is an example of a capital defendant whose "illness has rendered him unable to understand he's ill." (*Id.* at 199). The New York Death Penalty hearings provide compelling evidence why the Court should impose a constitutional ban on the state killing of a person who is severely mentally ill. (*Id.* at 209).

VIII. Executing the Innocent

Chapter 6 grapples with the innocence issue. The State Assembly was concerned with ensuring that the law includes sufficient safeguards so that innocent persons are not

put to death. The testimony of Barry Scheck, who uses post-conviction DNA testing to prove innocence, is particularly compelling. Professor Scheck's Innocence Project at Cardozo Law School resulted in the exoneration of 153 persons, including 14 death row inmates. (*Id.* at 211). Scheck and his team confirm that capital sentencing does not have sufficient safeguards to protect the innocent. The criminal law, and particularly the law of death penalty sentencing, needs to incorporate DNA identification technology routinely to prevent the state from putting innocent persons to death. The history of the death penalty in practice has been one of "unreliable eyewitness identification and coerced confessions." (*Id.* at 277). Scott Turow reframes the debate in the innocence chapter with his thoughtful testimony on the difficulties of developing a fair system of capital punishment:

(I) realized that I had been asking myself the wrong question about capital punishment. The proper inquiry...is not whether there are occasional cases, like (serial killer John Wayne) Gacy's, for which death seems the just punishment. The right question...is whether a capital system can ever be devised that reaches only those right cases, without also sweeping in the wrong cases, the cases of the innocent, or those who are undeserving by right of any sense of proportional punishment. My unalterable conclusion is that the answer to question is no. (*Id.* at 277).

In Illinois, where attorney and well known novelist Scott Turow practices, Governor Ryan suspended the death penalty because of concerns about executing the innocent.

IX. Death Penalty in a Global Perspective

The theme of Chapter 7 is that the United States is out of step with the practices of nearly every other democratic nation in its death penalty practices and with the international human rights community. The U.S., one of the top executing countries, lags only behind "China (470), Iran (317), Saudi Arabia (143), and Pakistan (135)." (*Id.* at 4).

Murphy places this comparative data in context by noting that executions around the world are declining.

Many of the witnesses pointed to the irony of the United States having death penalty practices similar to that of nations whose human rights policies we strongly criticize. (*Id.* at 87). As in every other chapter, Professor Murphy includes the voice of pro-death penalty advocates. (*Id.* at 288-89). Nevertheless, the overwhelming weight of testimony is that the United States' death penalty policies are contrary to worldwide developments. The book's conclusion is a postscript that describes how the State Assembly rejected the death penalty. Even though the law may be settled in New York, the death penalty issue continues around the country and around the globe.

Conclusion:

Voices of the Death Penalty Debate is an important book that sheds much light on an extremely controversial topic. Its presentation of diverse voices testifying about the death penalty promises to impact public opinion throughout the United States and the world. Russell Murphy's book will appeal to undergraduates as well as graduate and law students and has the potential of reshaping capital punishment discussions.

The New York hearings have already had an impact on policymakers. After the conclusion of the hearings in the spring of 2005, the "Codes Committee of the New York General Assembly voted 11-7 to reject legislation that would have restored capital punishment as a criminal penalty in New York." (*Id.* at 293). Helen Weinstein, the chair of the Judiciary Committee of the New York Assembly, who was once a strong supporter of the death penalty, changed her mind about New York's death penalty after thoughtfully considering the testimony from these hearings:

Although she supported capital punishment earlier, Assemblywoman Helene E. Weinstein spoke about the evolution in her thinking and her particular concerns about the risk of executing the innocent: "It was an evolutionary process. But clearly the advent of DNA evidence and the dramatic number of individuals who have been exonerated and freed from death row in states around the country was something that was building in my mind.... I'm not sure there's anything as dramatic or as important as the death penalty in terms of my vote. I have certainly looked at legislative proposals I supported or opposed and become convinced there's room for a change of position. Times and evidence have changed. That is the wonderful thing about a mind: You can change when you hear evidence and make an intelligent choice," said Weinstein.²⁴

The audience for this book is broader than legal academics or law students. This book should be in every community library as well as used in a variety of university, college, and even advanced high school courses. It is ideally suited for an undergraduate criminal justice course or graduate courses on the death penalty. Journalists, legislators, and informed members of the public will find this book to be a dispassionate source book for understanding the death penalty policy's justifications and implications.

²⁴ Death Penalty Information Center, *New Voices: Hearings in New York Help Shift Stance of Judiciary Committee's Leader*, <http://www.deathpenaltyinfo.org/node/1377> (last visited Aug. 28, 2010).