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Review: What We Write about When We Write about the Death Penalty: A Review of Recent Books and Literature on Capital Punishment

Reviewed Work(s): America's Experiment with Capital Punishment: Reflections on the past, Present, and Future of the Ultimate Penal Sanction by James R. Acker, Robert M. Bohm and Charles S. Lanier: The Death Penalty in America: Current Controversies by Hugo Bedau: Death in the Dark: Midnight Executions in America by John D. Bessler: Death at Midnight: The Confession of an Executioner by Donald A. Cabana: Just Revenge: Costs and Consequences of the Death Penalty by Mark Constanzo: The Death Penalty: A World-Wide Perspective by Roger Hood: Death Work: A Study of the Modern Execution Process by Robert Johnson: The Death Penalty: For and against by Louis P. Pojman, Louis P. Rojman and Jeffrey Reiman: The Killing State: Capital Punishment in Law, Politics, and Culture by Austin Sarat

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BOOK REVIEW

WHAT WE WRITE ABOUT WHEN WE WRITE ABOUT THE DEATH PENALTY—A REVIEW OF RECENT BOOKS AND LITERATURE ON CAPITAL PUNISHMENT

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AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION (James R. Acker, Robert M. Bohm, and Charles S. Lanier eds., Carolina Academic Press 1998) 586 pp.

THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES (Hugo Bedau ed., Oxford University Press, 1997) 524 pp.

John D. Bessler, DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA (Northeastern University Press 1997) 200 pp.

Donald A. Cabana, DEATH AT MIDNIGHT: THE CONFESSION OF AN EXECUTIONER (Northeastern University Press 1996) 319 pp.

Mark Constanzo, JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY (St. Martin's Press, 1997) 206 pp.

Roger Hood, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE (Oxford University Press, 2d rev. ed. 1996) 307 pp.

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Robert Johnson, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* (Wadsworth Publishing, 2d ed. 1998) 262 pp.

Louis P. Rojman & Jeffrey Reiman, *THE DEATH PENALTY—FOR AND AGAINST* (Rowman & Littlefield Publishers 1998) 175 pp.

THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE (Austin Sarat ed., Oxford University Press, 1999) 263 pp.

I. INTRODUCTION

These new books focusing on capital punishment issues come at a time when if there is not renewed interest in the death penalty, there is at least some surprise, among advocates, academics, and toilers in the criminal justice system, that we find ourselves where we are at the end of the millennium. Capital punishment is here to stay for the foreseeable future; thirty eight states have reenacted capital statutes.¹ The number of those executed since 1976 has passed 500.² Over 3,000 people, mostly men, who are disproportionately from the ranks of the poor and ethnic minorities, await execution on state death rows.³ That there are so many on death row, and that the technicalities of executions—as opposed to technicalities of law or constitutional guarantees of due process—preoccupy the courts at present, is part of the surprise.

Where is the debate over the death penalty? America is the only western country, some would say the only democracy, where capital punishment is still practiced.⁴ Public executions are periodic demonstrations of state authority in China, Nigeria, Iraq and Pakistan.⁵

¹ James R. Acker et al., *Introduction, AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION*, 5, 7 (James R. Acker et al., eds. 1998).

² See e.g. Death Penalty Information Center at <<http://www.essential.org>>.

³ MARK CONSTANZO, *JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY* 79-84 (1997). See also Death Penalty Information Center, *supra* note 2.

⁴ By the millennium, all of Europe will be free of the death penalty. Since 1990 only Russia, Ukraine, and a few other ex-Soviet states still execute murderers. As members of the Council of Europe, these countries will be under pressure to become abolitionist. See Mathew Spicer & Wolfgang Kruger, *The Current Position of Capital Punishment in Europe in 1997*, 21 *THE CRIMINOLOGIST* 197 (1997).

⁵ After some rituals resembling a trial which convicted him of sodomy, the Taliban in Afghanistan engaged in a public execution by burying the transgressor beneath a collapsing brick wall. Amazingly, he lived. *"Executed" Afghan is Alive*, *N.Y. TIMES*, Jan. 17, 1999, at A3, available in 1999 WL 9867290. Presumably neither this, nor the evi-

Some argue that if the United States is to retain capital punishment, the practice of the State killing people under the authority of the law, then our executions also should be public, as they were until well into this century.⁶

Opponents of the death penalty argue that if 'the public'—whoever that is—'really knew'—whatever that means—how capital punishment in America was practiced, they would insist their law makers get rid of it.⁷ Proponents of the death penalty also argue that the public should 'really know' what the death penalty is. Others address the issue laterally—by describing some aspect of what the death penalty means in practice in the United States today.⁸ *Gregg v. Georgia* ushered in the new capital punishment era in 1976,⁹ and the execution of Gary Gilmore by firing squad in January of 1977 announced that the new capital punishment really had arrived.¹⁰ The era of the United States Supreme Court's emphasis in *Gregg* and its companion cases upon the due process protections for defendants ensured by the structure of the new capital statutes, with jurors making explicit findings on statutory aggravating and mitigating factors, shifted empirical academic research to jury decision making.¹¹

dence of mass graves in Kosovo filled with unarmed civilians, see e.g. *Report: Kosovo Victims Civilians*, CHI. TRIB., March 17, 1999, available in 1999 WL 2854320, qualify as the legitimate exercise of state power. See also PHILLIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998).

⁶ JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 4 (1997).

⁷ See e.g. *id.* at 206-11.

⁸ See e.g. CONSTANZO, *supra* note 3.

⁹ See *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹⁰ For a summary of the post-*Gregg* era, see Carol S. Steiker & Jordan M. Steiker, *Siber Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

¹¹ Members of an interdisciplinary research project with headquarters at Northeastern University have extensively analyzed the decisions of hundreds of actual jurors in penalty phase cases in fourteen states. The findings of this research are less than reassuring in that they suggest that penalty phase jurors deciding upon death are frequently confused by the law and its instructions, that they bring to the life/death decision misinformation and misconceptions, and irrational and unsupported fears of the defendant's imminent release. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L. J. 1043 (1995); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1999); William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. J. 1476 (1998). Those studying juror decision making will be glad to see that Rita James Simon's classic *THE JURY AND THE DEFENSE OF INSANITY* has been reissued in 1999 by Transaction Press with a new introduction by the author.

Several of the books reviewed here engage in these arguments: what is capital punishment in America at the end of the twentieth century? Why do we still have it? Who is affected by it, and what does it cost? Who is informed about it, and what role does it play in elections? Where is there an open and honest discussion about it, and who are the participants? The books reviewed here raise other non-trivial questions: For whom are they written? What difference do they make, or can they make? The capital punishment engine seems to have its own driving force and momentum. Perhaps it is enough that these authors tell us some part of the story of where we are now in terms of capital punishment in the United States, and how we got there.

II. PUBLISHING IN THE LEGAL PROFESSION AND THE RELEVANCE OF BOOKS ON THE DEATH PENALTY TO THE APPLICATION OF THE DEATH PENALTY

The legal profession almost exclusively carries on its professional debates in the three hundred and some law reviews, published by law schools, where publication is relatively quick, and the law student editors offer free and almost limitless editorial services, inserting a reference to the latest appellate case, or a legislative amendment, up to a few weeks before publication. These publications are immediately available on line to all members of the academic legal community, students, faculty, and librarians, to every state and federal appellate court, and to tens of thousands of commercial subscribers. In these journals, facts and the technicalities of procedures, and the existence of other legal commentary, can be checked and rechecked to a point of obsessive accuracy up to a few weeks before publication, under the theory that if a court, a judgment, perhaps a judgment of death, is to rely upon the arguments and information in the journal, its pinpoint accuracy must be unassailable.

The journals used to be a form of training for the preparation for publication of briefs, especially briefs to the United States Supreme Court. Briefs in most courts are now not printed, in part because of the delay introduced by printing and the high quality of low cost photocopying. Some courts even accept filings on line. By contrast, the publishers of legal treatises and textbooks price their products high, issue new editions with glacial speed, publish expensive pocket parts and updates, and can make a profit by selling less than a thousand copies a year. Does the existence of a variety of professional publications, such as law reviews and legal treatises, preempt the market for trade books about legal issues such as capital punishment,

at least for a professional audience? Do judges and lawyers read scholarly books, books with empirical research about the death penalty, books with dense philosophical arguments?

The professional culture surrounding law reviews, what they publish, who is being published and where, and what being an editor means for the enhancement of the careers of law students and law teachers alike has recently been the subject of extensive discussion in that professional literature itself.¹² The down side to the much vaunted accuracy of the student cite checking and reference is that what you write is subject to be being preempted by next month's or next year's publication on the same subject, also instantaneously available to every court, law library and law school.

If practicing lawyers and judges rely upon a journal literature and commercial on line research services for information and opinion, then who is the audience for books on a subject such as capital punishment? The production of books is basically an academic exercise. Most of the books reviewed here are published by a university press. The academic presses have been able to step into the gap left as large commercial publishers have become preoccupied with blockbuster books and surviving corporate transformations. Twenty years ago several of the books reviewed here might have comfortably rested in the mid list of a commercial publishing house.¹³ Twenty five years ago a book on a topic of general interest, such as capital punishment, might have sold 10,000 copies. A commercial publisher now considers 20,000 to be the minimum to justify their corporate overheads.¹⁴

¹² The number and role of footnotes is the subject of appropriately excessive, long running professional jokes, as law review articles regularly weight down their subjects with a thousand footnotes. Those running footnotes may offer a more coherent and substantial narrative than the text in larger print. As a publishing phenomenon, however, it is not only the availability of editorial services and the relatively rapid turn around time, but the instant distribution to an audience of tens of thousands which is the attraction for writers. The flip side of instant availability is being immediately out of date, and that hundreds of journals and legal newspapers on line compete for the attention of judges, lawyers, and policy makers. For further discussion see Symposium, *Interpreting Legal Citations*, J. LEGAL STUDIES, forthcoming, 1999. And of course footnotes have always been the forum for fierce ideological fights. SEE ANTHONY GRAFTON, *THE FOOTNOTE: A CURIOUS HISTORY* 7 (1997).

¹³ Concern for a decline in demand for monographs and academic books has prompted discussion and analysis by the Association of American University Presses (AAUP) and others. See Robert Darnton, *The New Age of the Book*, THE NEW YORK REVIEW OF BOOKS, March 18, 1999, at 5.

¹⁴ University presses still publish books that sell less than a thousand copies. Some few university presses, most notably Chicago, Harvard, Princeton, University of California, and Yale have recently published books whose sales on certain titles have risen over five thousand copies—in some cases, well over that number. Ironically, the aca-

Yet many, too many some would say, are writing and publishing books on subjects which range through and across the academic disciplines, subjects such as capital punishment and the death penalty, in part because the principal criterion for granting tenure at universities remains whether or not the candidate has published a book with an academic press. Furthermore, if the changing economics of universities and commercial publishing were not enough, both book publishers and the authors of books live within the revolution introduced by electronic publishing and the immediate availability of immense amounts of information and discussion, much of it virtually free, about topics such as capital punishment which were formerly the province of academic books and professional journals. Books which used to remain on library or office shelves for decades with the security of being kept as repositories of background information are now subject to removal and replacement by data from a web page before the books are even catalogued.¹⁵ Furthermore, capital punishment as a topic appropriately belongs to everyone: to sociologists, criminologists, psychologists, the humanities, the moral philosophers, religious leaders, as well as the public which watches and participates in capital trials, and avidly reads about all aspects of the law in their newspapers.

Is there then a market for books such as those reviewed here with the general reader: the curious, the mentally agile, the skeptical and verbally acute high school student, the retired person with interests in the world, the person sidelined or temporarily taking time off who is reading, the old or young woman or man, getting a book or two from the lending library every week? Are there thousands of general readers who haven't allowed television to predigest or dictate what they think or feel, people who want to inform themselves about what is, for better or worse, surprisingly or predictably, sadly or inevitably, one of the great moral issues of our time.¹⁶ After all, one of the tenets

demographic publishing houses have become more commercial, pressured to reduce subsidies from their universities, themselves squeezed by budgetary constraints, commitments to payrolls swollen by the expansion of tenured staff in the seventies and eighties and the congressional obliteration of mandatory retirement. Budgetary considerations have caused the formerly reliable audience for university press books—college faculty and university libraries—to cut back on book buying. Telephone interview with Daniel Halpern, Director of The Ecco Press: An Imprint of HarperCollins (April 29, 1999). See also the discussion in Darnton, *supra* note 13.

¹⁵ See e.g. Death Penalty Information Center, *supra* note 2.

¹⁶ The answer to this question would appear to be yes. A recent article reported that the "death of the book" has been exaggerated, noting for example that "the number of items checked out from the Harold Washington Library Center [in Chi-

of the public policy debate is that public opinion supports the death penalty, and that one of the few things voters care about is capital punishment. Perhaps then, the general reader as voter will be influenced by scholarly, or serious books about the death penalty.

The popular thirst for stories about murder keeps alive some of the general public's interest in academic books about capital punishment. Murder mysteries, fantasies of murder, sanitized representations of killings, and dramatizations of capital punishment have long been staples of popular literature and entertainment, and this leads a few to a more serious literature. Capital cases dominate the newspaper headlines and evening news not just because journalists are ghoulish or exploitative, but because people want to know about them. This has been true since the time of Socrates. Before Dickens, the nineteenth century novel had criminal trials, murder, and its punishments as a central subject. However, is this audience going to buy and read books with hundreds of citations to cases where the text is interlarded with statistics, charts, and graphs?

With more than a million-and-a-half of Americans actually in prison,¹⁷ many thousands of them for murder, the question of who is punished and what the punishment for murder should be is a social and political issue in addition to being a legal question. Unlike in other periods of our history, the number of those in prison is a substantial fraction of the population, and a very large segment of certain subgroups, black males between the ages of sixteen and thirty, for example.¹⁸ The death sentence for murder has always provoked special attention because a tiny fraction of all murderers are sentenced to death, and even a smaller proportion are executed. Capital cases are seen as extraordinary, because they are so. Even though the number of executions has increased dramatically, the proportion of all murderers executed remains very small indeed.¹⁹

Data on capital cases exists and has been exhaustively analyzed since the middle of this century.²⁰ Studies of capital punishment and the application of capital statutes have stood as studies of the criminal

cago] has grown to more than 970,000 in 1998 from 670,000 a year" when the library first opened. See Carolyn Alessio, *Not Dead Yet*, CHI. TRIB., May 3, 1999, § 1, at 1.

¹⁷ VIVIEN STERN, *A SIN AGAINST THE FUTURE: IMPRISONMENT IN THE WORLD* 36 (1998).

¹⁸ See The Sentencing Project at <<http://www.sproject.com>>.

¹⁹ COSTANZO, *supra* note 3, at 106.

²⁰ For the most recent quantitative analyses of the application of the death penalty in a single jurisdiction, Philadelphia, Pennsylvania, see David C. Baldus et al, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L.R. 1638 (1998).

justice system as a whole. The death penalty is one end of the continuum of criminal sentences. Capital cases offer a perspective on the State's execution of justice as a whole. That the outcome of a criminal trial is a sentence of death distinguishes that case, but does not remove it from the criminal justice system. Judges, lawyers, police, victims, and defendants play their accustomed roles and take their pre-assigned positions in capital cases. These are special cases, but they are also just criminal cases. Sometimes that is the injustice: that people are sentenced to death so matter of factly, with so little attention paid to the gravity of the punishment. Studies of the death penalty and its imposition have a great deal to say about the criminal justice system as a whole.

What do books about capital punishment have to offer that has not already been made available by these other forms of writing and publishing about the law? Which returns us to the original questions: Who writes the books, who publishes them, and who reads them? Can they make a difference in public policy?

First, books are intended to stay around longer than a month or two. If a book is to be published and remain on the library shelves, and to merit a library spending part of its embattled budget, the book should offer a different and more substantial product than that available in the law reviews, legal newspapers, and law journals.²¹ The anticipated audience must be different from the audience which reads the mystery novels, the newspapers, and the professional legal literature. At the very least, the anticipated audience should be that audience in a different and more serious mood. People who buy a book are presumably thinking of sitting down and reading it, as opposed to the way many of us scroll on screen through the latest opinion or annotation, checking on a ruling, or perhaps picking out tidbits of information from the footnotes. Is there an academic and quasi academic audience for books about the death penalty? If so, is it drawn from the general public as well as from those engaged in graduate and undergraduate programs in the humanities and social sciences, from psychology, women's studies, criminal justice, sociology, philosophy, history, and other fields where the law surfaces and often is the principal subject? Questions of justice engage all of these disciplines in addition to having relevance to the law itself. What do

²¹ "Until recently, monographs used to account for at least half the acquisitions budget of most research libraries. In 1996-1997, however, 78% of the acquisitions budget of the library of the University of Illinois at Chicago went for periodicals, 21% for monographs." Darnton, *supra* note 13, at 5.

these recent publications on the death penalty have to offer? Where do they belong on the long shelf of existing books on capital punishment?

III. RECENT BOOKS ON CAPITAL PUNISHMENT

The Death Penalty in America: Current Controversies,²² edited by Hugo Bedau, is a source book, continuing in the tradition of the author's 1964 classic, *The Death Penalty in America: An Anthology*.²³ Hugo Bedau is a distinguished scholar and a tireless and long standing advocate for abolition of the death penalty in America. In the 1950s and 1960s Bedau and his colleagues traveled across the country, to individual states to chronicle the recorded history of the death penalty in every individual state.²⁴

This book includes basic statistical information on crime, homicide, and the death penalty and its application, such as tables indicating the historical facts regarding the number of persons sentenced to death, the number of commutations, and changes in public opinion over the decades since 1936. The book also reprints a variety of articles on capital punishment published in the 1980s and 1990s. The breadth and range of relevant information and commentary presented here makes this volume indispensable for the teaching of an undergraduate course on criminal justice or the death penalty. Law students, as well as graduate students in criminology and sociology, will benefit from this basic information and from the updated, extensive bibliography. This book isn't written for lawyers in particular, but the story of capital punishment in the latter half of this century is a story of litigation, more litigation, and still more litigation. It's a story that can't be told without addressing the role of the courts. The history of capital punishment in the second half of the century is emblematic of how our society has moved towards defining itself in the theater of courts. This book allows us to understand the drama and conflict between legislatures and the courts in a broad social and political context, and that is welcome.

America's Experiment with Capital Punishment,²⁵ is edited by two professors of criminal justice, James R. Acker and Robert M.

²² THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES, (Hugo A. Bedau ed. 1997).

²³ THE DEATH PENALTY IN AMERICA: AN ANTHOLOGY (Hugo A. Bedau ed. 1964).

²⁴ See e.g. Hugo A. Bedau, *Death Sentences in New Jersey, 1907-1960*, 19 RUTGERS L.R. 1 (1960).

²⁵ AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION, *supra* note 1.

Bohm, and a doctoral fellow in criminal justice, Charles S. Lanier. The compilation brings together new essays by death penalty experts, including some of the most distinguished advocates against the death penalty. The book is an important contribution because it condenses into one volume essays and bibliography from scholars and advocates such as David Baldus and George Woodworth, Stephen Bright, Deborah Denno, and Craig Haney, as well as the editors themselves who have contributed importantly to the policy debate and academic literature. A graduate seminar in sociology or criminal justice, not to mention a law school seminar, which devotes any amount of time to the death penalty will find this set of essays indispensable. The contributors to this book have summarized large chunks of the history of the death penalty in the second half of the century. A remarkable part of that history has been the growth and sophistication of the applied social science methodology. This collection addresses that development. Its contributors have been the ones making that history.

The Death Penalty—For and Against,²⁶ by Louis P. Rojman and Jeffrey Reiman, is part of a specially commissioned series titled “Point/Counterpoint” containing debates between prominent philosophers on the moral issues of our times. The philosophical basis of these essays brings breadth to the discussion not found in the more academic work of advocates who are arguing a complicated position based upon the state of the law at a particular point in time. These essays confront the moral issue head on: is capital punishment just, and does it have a place in a just society? For those who teach in this area, Louis P. Rojman’s “For the Death Penalty,” is an especially welcome contribution.²⁷ This essay sets out in a coherent and orderly manner the arguments for capital punishment, and sets out in turn the objections and response to these arguments. The essay discusses in turn the utilitarian tradition, deterrence, the theory of just desert, and other arguments. The footnotes are rich with sources. Although the book lacks a bibliography, a detailed index is there for the scholar and teacher. Many proponents rely upon simple vengeance and un-systematic descriptions of the horrors of murder. This essay goes beyond that and addresses the philosophical foundations for the theory behind the State taking life as a punishment.

In response, Jeffrey Reiman’s “Why the Death Penalty Should Be Abolished,” similarly keeps the debate on a philosophical level,

²⁶ LOUIS P. ROJMAN & JEFFREY REIMAN, *THE DEATH PENALTY—FOR AND AGAINST* (1998).

²⁷ Louis P. Rojman, *For the Death Penalty*, in ROJMAN & REIMAN, *supra* note 26, at 1.

referring frequently to Kant, Nietzsche, as well as Richard Rorty, Michael Davis, John P. Conrad, and many others.²⁸ Both authors then reply to each other's arguments. Not only are the essays well written, but they are relatively short. The book tidily summarizes the moral and philosophical positions for and against capital punishment. What is new is putting these arguments together seamlessly in one volume. The debate is set forward cleanly as a series of arguments and replies. This book may not have been written for lawyers, sociologists, psychologists or law students, but these essays should be welcome in these curricula. Teachers and students of philosophy, and all aspects of criminal justice, in addition to readers who appreciate an elegantly written essay, will find much to admire here, and benefit from the clarity and breadth of thinking.

*Death at Midnight: The Confession of an Executioner*²⁹ by Donald A. Cabana offers a strong first person narrative on what capital punishment means and is now in America. The author was a warden at Parchman, the Mississippi State Penitentiary, when the gas chamber was brought back into use in the 1980s. Even though Mississippi paid an official executioner a fee of \$500, the warden discovered his hand was on the lever as well. The author explains:

One does not, I conceded, run a maximum security prison for a living without encountering difficult decisions every day. I certainly knew better than most, that those who run prisons must rule with their heads not their hearts. Such an outlook sounds cold and cruel, but I entertained memories of everything from simple fist fights to riots, hostage takings, and brutal murders. . . . Nothing, however, could prepare me for what I saw and felt when I supervised my first execution.³⁰

The author's story of how a college internship in Massachusetts turned into a career in prison administration, mostly in the South, is a tale worthy of being heard. Capital punishment, this book reminds us, is not just courts, legislators, and prosecutors, but also the many, many others who carry out the law's commands down the line. The complex political reality, both small and large scale, of capital punishment and corrections in America today is a part of this man's life story. Perhaps there are some realities which can only be understood

²⁸ Jeffrey Reiman, *Why the Death Penalty Should Be Abolished in America*, in ROJMAN & REIMAN, *supra* note 26, at 67.

²⁹ DONALD A. CABANA, *DEATH AT MIDNIGHT: THE CONFESSION OF AN EXECUTIONER* (1996).

³⁰ *Id.* at 17.

through the eyes of a particular human being at a specific point in time. There is sentiment here, draped over the frame of an individual's life and career, but there is no sentimentality in this account.

The Killing State: Capital Punishment in Law, Politics, and Culture,³¹ edited by Austin Sarat, is a variegated set of essays by distinguished academics across disciplines. This collection has a literary, postmodern, cultural studies bent, beginning with Anne Norton's consideration of the politicized employment of public executions in the French Revolution. Noteworthy are strong contributions by experienced litigators and well-known advocates, Anthony G. Amsterdam, Franklin E. Zimring, and the editor, Austin Sarat, himself. The breadth of subjects, and the depth of treatment recommend this book to graduate students across the social sciences and humanities. The volume is a reminder that capital punishment, as a subject, does not only belong to the lawyers, or the courts, but also belongs in the center of the serious study of the power of the State, and the social order across time and place.

Death in the Dark—Midnight Executions in America,³² by John D. Bessler, is an extended and subtle argument for opening the execution process up to public scrutiny. Its author is an adjunct professor at the University of Minnesota Law School and an attorney who has represented death row defendants. The book is addressed to lawyers, law students, and the legally sophisticated, but the discussion is easily accessible to a general public now familiar with legal technicalities from cases such as O.J. Simpson's. The book contains extensive notes, citations to statutes and other legal sources, and an index. Thus it is a useful work for those teaching and learning within a variety of disciplines.

The book examines the traditions of secrecy surrounding executions, in the American states and England. An original and welcome contribution is a detailed historical essay on Minnesota's so called 'midnight execution law,' an 1889 statute which required executions to be conducted in private and which limited the number of spectators. The debate over this statute, which reached the United States Supreme Court,³³ is an occasion to chronicle the contemporaneous abolitionist movement in Minnesota, with reference to analogous developments in other states.

³¹ THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE (Austin Sarat ed., 1999).

³² BESSLER, *supra* note 6.

³³ See *Holden v. Minnesota*, 137 U.S. 483 (1890)

Bessler does not advocate half measures. The book is an extended argument for returning to the tradition of public executions by allowing the televising of executions. Bessler argues that if America is to keep capital punishment, citizens should be able to see what the sentence means. He argues that jurors and judges should be required to witness executions. These are not frivolous arguments, and they are made in the context of an examination of the long history of public executions and of the relatively recent tradition of hiding the details of executions from the public and the press. Raising these questions forces the reader to confront whether executions should be on pay-per-view television, should they be interspersed with images of war on the news, and bracketed by the suspenseful and highly stylized glorification of murder which are the staple of our public entertainment. The crimes for which real murderers are executed, if reported as 'news,' may seem trivial in comparison to the multiple and willful murders of fantasy committed in our name as entertainment every night into the wee hours.

In making this argument Bessler discusses a series of fascinating cases involving the proposed televising of executions. First Amendment issues, as well as questions of privacy, are discussed against a legal, social and historical background. The fact that there have been more than a few cases calling for the televising and broadcasting of executions, and that several got as far as they did in the federal appellate system, indicates that the society is at least willing to consider these arguments.³⁴ The debate poses the deterrence question with a different twist. Bessler's point is: if the State is going to execute murderers as the agent for the people in a democracy, then let everyone see what is going on, instead of conducting the executions in secret. Bessler's rhetoric is not sensationalist. The historical accounts of public executions takes on a different dimension in the context of the recent litigation over methods of execution and the (to date unsuccessful) attempts to televise executions. Bessler points out that we allow television to show public executions when they occur in China or Romania. Why not broadcast the same footage for executions in our own country?

The debate forces the reader to consider the deterrence issue from a fresh perspective. The history of public executions in the United States (the last public execution took place in Kentucky in 1936) will be shocking to some.³⁵ However, wherever executions are

³⁴ See *e.g.* *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977).

³⁵ BESSLER, *supra* note 6, at 32.

public, thousands of people want to see them. It may be a fascination with death, rather than an interest in justice or retribution, which fuels the public's desire to hear the condemned's last words and the menu for the final meal. The discussion also raises serious questions involving State imposed limits on the First Amendment, the public and the media's right of access to prisons, as well as unusual questions of privacy. This book is for the lawyers and for the historians, and for those who seek a reflection of our cultural identity in litigation.

The cases involve a surprising array of public decision makers, as well as the predictable presence of wardens, governors, media personnel, and others, offering an example of how America now engages in moral discourse through the often shrill public discussion of legal proceedings. Two examples discussed in detail by Bessler stand out. In 1990, a lawsuit seeking to televise the execution of Robert Alton Harris involved KQED, San Francisco's largest public television station, and the ACLU.³⁶ It was not the first, nor will it be the last lawsuit seeking to broadcast executions on television. Because California had the largest death row population, and its Supreme Court, before Chief Justice Rose Bird and her colleagues were removed, had set aside many state-imposed death sentences, that lawsuit became a lightning rod for a national debate over the purpose of capital punishment. Similarly in 1993 the ACLU's lawsuit over whether the gas chamber in California was an inhumane method of execution went to an eight-day trial in which medical and other experts presented bizarre testimony about the workings of lethal gas.³⁷ The court eventually held that lethal gas was an inhumane method of execution, and the Ninth Circuit agreed. The execution of Robert Harris, who incidentally had no objection to the filming of *his* execution, had already taken place in the gas chamber by the time the final opinion was handed down. There was a videotape made of the execution. These cases are a multifaceted example of politics as theater, with a real life literally at stake.

Just Revenge—Costs and Consequences of the Death Penalty,³⁸ by Mark Constanzo, is part of a series on contemporary social issues. In this work, Constanzo makes no pretense of being anything other than an advocate against capital punishment. The work is directed to the general reader, the student, and the teacher of communications, sociology, political science, and public policy at the undergraduate

³⁶ *Id.* at 5, 12-17.

³⁷ *Id.* at 17-21.

³⁸ CONSTANZO, *supra* note 3.

level. The chapter containing information on the cost of the death penalty, and the differing amounts that the states are willing to spend for different aspects of capital defense, makes accessible a relevant, and fugitive, body of information. The discussion of the lawsuits concerning the death penalty, the description of some of the jury research and public opinion polls, and the general debate over the humanity of various methods of execution, are all good introductory material for college students and others acquainting themselves with the parameters of the debate.

Death Work: A Study of the Modern Execution Process,³⁹ is by Robert Johnson. The publisher includes a reference to its website offering supplements and the opportunity to e-mail the author. Robert Johnson is a Professor in the School of Public Affairs at American University in Washington, D.C., and he says at the outset that he regards America's system of capital punishment as State imposed torture. The book is valuable in its presentation of first person reports of conditions on death row and the process leading to an actual execution. He describes the atmosphere on death row prior to an execution and being a witness to an execution with great immediacy. The literature cited is not the usual academic or social science literature, and the book is valuable for its humanistic and human rights perspective. It is not for the weak-minded or the queasy. This argument is not put forward through polite talk, or abstractions.

The Death Penalty: A World-Wide Perspective,⁴⁰ by Roger Hood, brings an international human rights perspective to the discussion. The book is a revised and updated version of a report presented to the United Nations Committee on Crime Prevention and Control in 1988. Roger Hood is a Fellow at All Souls and the director of the Centre for Criminological Research at Oxford University. He was a consultant to the Secretary-General's Report on the United Nations Survey titled *Capital Punishment and Implementation of the Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty*, which was presented to the Economic and Social Council of the United Nations in 1995.⁴¹ The appendices and bibli-

³⁹ ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* (2d ed. 1998).

⁴⁰ ROGER HOOD, *THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE* (2d rev. ed. 1996).

⁴¹ *Capital Punishment and Implementation of the Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty: Report of the Secretary General*, U.N. Doc. E/1995/78, (1995) [hereinafter *Report of the Secretary General*]. See also *Extrajudicial*,

ography contained within this work, on the status of capital punishment world-wide, are valuable for scholars and human rights activists. These materials allow for the consideration of international data beyond what is reported haphazardly in the daily newspapers.

The world-wide trend for abolition continues, at least among European states. However, those countries that still do execute, count for many. The number executed worldwide in 1994 was higher than any year since 1981.⁴² Iran executed 1500 in 1989, and 139 in 1994, and China averages about 1,000 executions per year.⁴³ Many observers regard the official estimates as far below the actual number executed, and the survey reports that several countries did not respond to requests for information. Despite the deficiencies of the quantitative information, it is nonetheless helpful to have some systematic comparative data on the incidence and application of the death penalty throughout the world. The debate on practices in the United States can benefit from these perspectives.⁴⁴ The book reads like a UN Report, but its worldwide perspective brings another dimension and greater depth to the arguments surrounding the return of executions to America.

IV. RECENT DEVELOPMENTS AND THE PUBLIC DEBATE: THE DEATH PENALTY IN PRACTICE IN ILLINOIS

What the death penalty is in practice can be illustrated by recent events in Illinois. The Illinois courts have removed twelve men from the Illinois death row, after finding that they had been wrongfully convicted on the basis of corrupted or improper evidence.⁴⁵ These cases were not reversed for 'ordinary' trial errors. The causes of reversal included judges taking bribes, prosecutors who knowingly put lying witnesses on the stand, and police and prosecutors who withheld evidence from the defense that another person committed the murder.⁴⁶ The most extraordinary development is that a criminal

Summary or Arbitrary Executions: Report of the Special Rapporteur, U.N.Doc. e/cn.4/1998/68/add.3, (1998).

⁴² HOOD, *supra* note 40, at 72.

⁴³ *See id.* at 74 tbl. 3.

⁴⁴ *See e.g. Report of the Secretary General*, *supra* note 41

⁴⁵ Ken Armstrong & Ted Lighty, *Death Row conviction thrown out: 11th reversal in 12 Years will free Chicago man*, CHI. TRIB., Feb. 20, 1999, § 1, at 1, available in 1999 WL 2845495; Steve Mills & Ken Armstrong, *Yet another Death Row inmate cleared*, CHI. TRIB., May 18, 1999, § 1, at 1.

⁴⁶ In addition to the twelve reversals of the 'wrongly convicted,' a recent series of articles in the *Chicago Tribune* presented data on over three hundred Illinois cases in which prosecutors abused the rights of defendants, in some but not all cases resulting

prosecution, the first of its kind in the history of the entire country, is now being brought against police and prosecutors on behalf of one group of those wrongfully convicted.⁴⁷

On November 13-15, 1998 at Northwestern University School of Law, 1500 people attended the first national Conference on Wrongful Convictions and the Death Penalty.⁴⁸ The Conference assembled in one place twenty-seven men and two women (sixteen African Americans and nine whites) who had been sentenced to death and later been found to have been wrongly convicted of capital crimes and wrongly sentenced to death.⁴⁹ The Conference also brought together academics, advocates, investigators, journalists and the many others who had worked for years to bring to light these wrongful convictions, often in the face of cynicism and bureaucratic stonewalling.

Many of those who were later found to be innocent were convicted on the basis of false confessions, on the basis of perjured testimony, in trials where they were inadequately represented, usually by publicly paid defense counsel. The idea that an innocent person

in a reversal of the conviction or a reprimand to the attorney. See Maurice Possley & Ken Armstrong, *The verdict dishonor*, CHI. TRIB., January 10, 1999, § 1, at 1, available in 1999 WL 2833492; Maurice Possley & Ken Armstrong, *The flip side of a fair trial*, CHI. TRIB., Jan. 11, 1999, § 1, at 1, available in 1999 WL 2833677; Maurice Possley & Ken Armstrong *Prosecution on trial in DuPage*, CHI. TRIB., Jan. 12, 1999, § 1, at 1, available in 1999 WL 2833918; Ken Armstrong & Maurice Possley, *Reversal of fortune*, CHI. TRIB., Jan. 13, 1999, § 1, at 1, available in 1999 WL 2834238; Ken Armstrong & Maurice Possley, *Break rules, be promoted*, CHI. TRIB., Jan. 14, 1999, § 1, at 1, available in 1999 WL 2834609. These articles are also available at the *Chicago Tribune's* website, <<http://chicagotribune.com>>.

⁴⁷ See Pam Belluck, *Officials Face Trial In an Alleged Plot to Thwart Justice*, N.Y. TIMES, March 9, 1999, at 1; Maurice Possley & Ken Armstrong, *Prosecution on trial in DuPage*, CHI. TRIB., Jan. 12, 1999, § 1, at 1, available in 1999 WL 2833918, and continuing reports, see e.g. Maurice Possley, *Cruz again denies giving police a vision statement*, CHI. TRIB., April 21 1999, § 2, at 3, available in 1999 WL 2865597.

⁴⁸ Those present at the Northwestern Conference included Randall Dale Adams, incarcerated for over a decade, whose case was brought to the attention of the public through the film "A Thin Blue Line." National and international coverage of the conference was extensive, including full-length programs on ABC's Nightline and programs in Sweden, South Africa, and Switzerland. Tapes of panel presentations and a list of participants are available from Professor Lawrence Marshall, Northwestern University School of Law, 357 E. Chicago Ave. Chicago 60611 and from TEACH'EM, 160 East Illinois St. Suite 300, Chicago, IL. 60611, ph. 1-800-225-3775, email: Teach'em@bonus-books.com.

⁴⁹ These 29 men and women are less than half of the 75 people nationally who have been exonerated after having been sentenced to death. Many of them were imprisoned for decades on death row. See e.g. Rick Bragg, *Man Imprisoned for 30 Years is Rid of Bars but Not Fears*, N.Y. TIMES, Nov. 23, 1998, at 1; Michael L. Radelet et al., *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 906 (1996).

would confess to a crime, especially a crime such as murder, and especially when that crime carries the possibility of the death sentence, is counter-intuitive and extremely difficult for the public, as well as jurors, judges, journalists, and others to understand. Surely, the commonsense view is, if someone confessed to a crime, they must be guilty. Yet persuasive scientific evidence exists documenting instances of people confessing to crimes they did not commit.⁵⁰ Issues concerning the sentencing of innocent people to death have reached the point where one Illinois Supreme Court justice has said that he will no longer vote to uphold death sentences.⁵¹ Furthermore, the Illinois Supreme Court has appointed a special committee to study the trial and sentencing process in capital cases within the State of Illinois.⁵²

The experience in Illinois shows us what the new death penalty is in a large northern industrial state.⁵³ The Illinois capital statute is a typical post-*Furman* statute with all of the constitutional protections established by the United States Supreme Court in *Gregg* and the dozens of other constitutional cases on capital punishment decided since 1976. The death penalty can be imposed by a jury, or by a judge without a jury, only after a bifurcated, two stage trial. The Illi-

⁵⁰ At the Northwestern Conference on the Wrongfully Convicted, several former death row inmates who were totally innocent of the offense described how they confessed to a murder committed by some one else. The mentally disabled and those whom the police have identified for other reasons are especially vulnerable to abuse in this circumstance. For an analysis and documentation of false confessions in capital cases, see Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivation of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997).

⁵¹ Justice Moses Harrison wrote:

My colleagues are decent and good people. Just as the execution of an innocent person is inevitable, it is inevitable that one day the majority will no longer be able to deny that the Illinois death penalty scheme, as presently administered, is profoundly unjust. When that day comes, as it must, my colleagues will see what they have allowed to happen, and they will fell ashamed.

People v. Bull, 705 N.E.2d 824, 848 (Ill. 1998) (Harrison, J., concurring in part and dissenting in part).

⁵² See Ken Armstrong, *High Court Orders Death Penalty Study*, CHI. TRIB., April 7, 1999, available in 1999 WL 2861102.

⁵³ For a detailed summary and analysis of the challenges to the application of the Illinois capital punishment scheme since 1977, see Leigh B. Bienen, *The Quality of Justice in Capital Cases: Illinois as a Case Study*, DUKE J. L. & CONTEMP. PROBS., forthcoming, 1999.

nois death penalty scheme allows for the imposition of the death penalty only for first degree murder, and only after deliberation on statutory aggravating and mitigating factors. There has never been proportionality review in Illinois.⁵⁴ As of March, 1999, Illinois has 162 people on death row and has executed twelve since reenactment.⁵⁵ According to the Illinois Department of Corrections, more than 255 death sentences have been imposed since 1977.⁵⁶ The Illinois Supreme Court has set aside more than ninety-four death sentences, and issued more than 327 opinions in death penalty cases.⁵⁷

An immense amount of time and resources at the trial and appellate level have been spent on capital cases in Illinois. Constitutional challenges to the application of the capital statute have been brought repeatedly before the Illinois federal courts and the Illinois Supreme Court since 1977.⁵⁸ Yet the United States Supreme Court has never reviewed the constitutionality of the Illinois capital punishment scheme, and it is unlikely it will do so in the near future. More than twenty years after the first constitutional challenge to the reenacted capital statute reached the Illinois Supreme Court, the structure and substance of the state's capital punishment system remains basically unchanged. Even when four of seven sitting justices of the Illinois Supreme Court simultaneously believed that the statute was unconstitutional, neither the statute nor its application were found to violate federal or state constitutional principles.⁵⁹ As is

⁵⁴ In contrast, the New Jersey Supreme Court engaged in extensive analysis of the application of the capital case processing system in New Jersey, as it implemented a system for conducting proportionality review, the review of the application of the death penalty across the state capital system as a whole. See *State v. Marshall*, 586 A.2d 85 (N.J. 1991) (Marshall I) and *State v. Marshall*, 613 A. 2d 1059 (N.J. 1992) (Marshall II), discussed in Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts after Gregg: Only "The Appearance of Justice"?*, 87 J. CRIM. L. & CRIMINOLOGY 130, 183-212 (1996).

⁵⁵ The most recent execution in Illinois was on March 17, 1999 of Andrew Kokoraleis. See Christi Parsons & Cornelia Grumman, *Kokoraleis' Execution carried out: Ryan denies clemency in mutilation-murder*, CHI. TRIB., March 17, 1999, §1, at 1, available in 1999 WL 2854082.

⁵⁶ See Brief and Appendix Amicus Curiae of the Coalition Concerned about the Execution of the Innocent on Behalf of Ronald Kliner at 12, *People v. Kliner*, 705 N.E.2d 850 (Ill. 1999) (No. 81314) [Locke E. Bowman, Jean Maclearn Snyder, MacArthur Justice Center, University of Chicago Law School, on file with the author].

⁵⁷ *Id.*

⁵⁸ See e.g. Bienen, *supra* note 53.

⁵⁹ "A majority of four of the present [seven] justices have said and continue to adhere to the view that they believe the statute is unconstitutional because it allows prosecutors too much discretion in choosing whether to seek the death penalty, and this may result in arbitrary application of the statute." *People v. Silagy*, 461 N.E. 2d

typical elsewhere, the number of statutory aggravating factors has increased from seven at reenactment in 1977, to seventeen in 1999, as special categories of victims and circumstances, such as drive-by shootings, have been added as statutory aggravating factors.⁶⁰

The current situation in Illinois makes one wonder whether even those who initially supported capital punishment and voted for reenactment now believe it is an effective instrument of justice. Indeed support for capital punishment in Illinois is lower than it has been for years, and this drop in support is attributed in part to the recent reports of innocent people being sentenced to death.⁶¹ The fact that there is serious consideration of a moratorium in the Illinois legislature is noteworthy. The recent events may indeed change people's minds and the public policy. If so, the work of the scholars and academics reviewed here, work which has taken years to complete, work which provides a principled and scientific basis for some of the arguments against the death penalty, can be introduced into the debate, and perhaps make a difference in part because it is in print and published by a respected academic press. The books reviewed here may play a decisive role, introducing new facts and energy into the old debate over the morality and justice of capital punishment in the United States at the turn of the century.

415, 433 (Ill. 1984) (Simon, J., concurring in part and dissenting in part). This series of opinions is discussed in Bienen, *supra* note 53.

⁶⁰ See e.g. an amendment in 1994 adding statutory aggravating factors. P.A. 88-678, L. 1994, incorporated as 720 ILL. COMP. STAT. 5/9-(b)(15-17) (West 1998).

⁶¹ A recent Chicago Tribune survey of 790 Illinois voters shows a majority favors the death penalty, but they also support a moratorium on executions. More than half of the state's voters want to impose a moratorium on executions until the death sentences of all 162 inmates on death row are thoroughly reviewed. The latest survey shows 63% of the state's voters support the death penalty. Five years ago in August of 1994 a similarly based Chicago Tribune poll showed 76% of voters favored the death penalty. Support for the death penalty was strongest among downstate residents, among white voters and among men. It was weakest in Chicago, among African-Americans and women. Nationally the support for the death penalty has fallen to 71% from 80% in 1994. Of the 162 people on death row as of the week of March 21, 1999, 105 are African American, 49 are white, and eight are Hispanic. Rick Pearson, *Moratorium on Executions Gains Favor—Poll finds Support for Death Penalty has Slipped*, CHI. TRIB., March 28, 1999, at 1.