Book Review

Deciding Whether the Death Penalty Should Be Abolished

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The issue of the death penalty, like abortion, deeply divides this 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.”³ American attitudes on the death penalty “have been relatively stable for almost a decade.”⁴ 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.”⁵ Forty-eight percent of the respondents favored life without parole to capital punishment.⁶ 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: A Citizen’s Guide to Capital Punishment (Voices), is a desperately needed book to educate citizens around the world on the difficult public policy issues raised by capital punishment. The book presents multiple theoretical, ideological, sociological, and personal perspectives on the death penalty debate. Capital punishment continues to be one of the most passionate political disputes of our time, even though the number of death penalty sentences has been reduced by fifty percent in recent years.

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¹ Professor of Sociology and Anthropology, Northeastern University.
⁴ Id. at 293.
⁵ Id.
⁶ Id.
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 Rs”: 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 debate 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 the superficial sloganeering that too often produces much heat but sheds little light on the issues.

Russell Murphy’s *Voices* summarizes statements of witnesses who testified at the New York Assembly Hearings on that state’s death penalty between December 2004 and February 2005 (Hearings). 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 Stones 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 extracts 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. He does not superimpose his own take on the raw data from the hearing but lets readers make up their own minds.

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 background 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.

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 Law School, is not just on the sidelines but was himself an expert witness who testified at the 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; it is deeply personal as well as academic and policy-driven. He notes that the reversal of the death penalty of the murderer of his friend’s sister led him to rethink his own position on capital punishment. Professor Murphy served as an informal advisor to the family of the murder victim, Jill Russell. 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.

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7. MURPHY, supra note 3, at ix.
10. See MURPHY, supra note 3, at ix (describing impetus for writing Voices).
While New York’s death penalty is the focus of this book, its 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. Subsequently, in 1995, New York reinstated capital punishment. The movement to revive New York’s death penalty was spearheaded by Republican Governor George Pataki. In the 2004 case of People v. LaValle, 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 the wake of LaValle, the chairs of key state legislative committees called for a hearing to address the law, policy, and practices of the death penalty. The Hearings “stretched into five days with 146 witnesses testifying in person and 24 persons or groups submitting written statements.”

I. DEATH PENALTY DATA IN A NUTSHELL

Professor Murphy introduces the Hearings by providing the reader with a statistical profile of government executions. Chapter One, Death Penalty Facts and Figures, presents sociological data in addition to basic statistics and the demographics of those sentenced to 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 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 Hearings.

A brief sampling of the data Murphy presents 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 with which capital punishment is used. 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. 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

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12. See id. at 358; see also MURPHY, supra note 3, at ix (discussing LaValle).
13. See MURPHY, supra note 3, at ix.
14. Id.
15. See id. at 1.
modern times were carried out in southern states and the remainder in midwestern states.\textsuperscript{17} The aggregate number of death sentences imposed is dropping dramatically in the states. “[P]ost-sentencing exonerations”—or “the innocence phenomenon”—help explain the decline in overall numbers of executions.\textsuperscript{18} 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 expense. 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.\textsuperscript{19} The states simply cannot afford this punishment. An Urban Institute study finds that a death sentence in Maryland cost $1.9 million more than a sentence of life without parole.\textsuperscript{20} New York “spent $175 million on capital prosecutions from 1995 to 2005 but failed to execute a single killer,”\textsuperscript{21} a frustrating situation for both liberals and conservatives.

In making the death penalty testimony accessible to a wider audience, Murphy’s major objective is citizen education. He explains the constitutional issues in ways that can be understood by laypersons. Professor Murphy’s book would make 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 black.\textsuperscript{22} Perhaps the best predictor of death-penalty eligibility is gender: men constitute more than ninety-eight percent of the death row population.\textsuperscript{23} This empirical data will be 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 practice.”\textsuperscript{24} The European Union is, in effect, a “death penalty-free zone of 800 million people.”\textsuperscript{25} Death-penalty zones around the world are

\begin{footnotes}
\item[17] See \textsc{Murphy}, supra note 3, at 1.
\item[18] \textit{Id.}
\item[19] See \textit{id.} at 2-3.
\item[20] \textit{Id.} at 2.
\item[21] \textsc{Murphy}, supra note 3, at 3.
\item[22] \textit{See id.} at 2.
\item[23] \textit{See id.}
\item[24] \textit{Id.} at 3.
\item[25] \textsc{Murphy}, supra note 3, at 3; \textit{see also} EU GUIDELINES ON THE DEATH PENALTY: REVISED AND UPDATED VERSION 2, http://www.eurunion.org/DPGuidelines-10-08.pdf (last visited Aug. 28, 2010)
\end{footnotes}
disproportionately located in the most authoritarian and regressive countries in central Africa, the Middle East, and Asia.\footnote{26} 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 Two, Professor Murphy does an excellent job of summarizing the Supreme Court’s constitutional jurisprudence. Journalists and legislators will appreciate Murphy’s accessible, tightly written discussion of the constitutional principles regarding the death penalty. He notes that the United States 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.’”\footnote{27} Defense attorneys generally challenge death penalty statutes or procedures under the Eighth Amendment of the United States Constitution, which forbids cruel and unusual punishment. Journalists, legislators, and other non-lawyers will appreciate the way that Murphy demystifies the leading United States 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 \textit{Furman v. Georgia}.\footnote{28} In \textit{Furman}, the United States Supreme Court struck down a death penalty conviction, holding by a five-to-four margin that Georgia’s death penalty was standardless and thus violated the United States Constitution’s prohibition against cruel and unusual punishment. This was a bellwether decision that reshaped the path of death 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.

\textit{See EU GUIDELINES ON THE DEATH PENALTY: REVISED AND UPDATED VERSION, supra, at 2.}

26. \textit{See Murphy, supra note 3, at 3.}

27. \textit{Id. at 7 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).}

because existing statutes were no longer valid.” Murphy notes that “a majority of American states imposed the death penalty” prior to Furman. 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 of 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. Murphy discusses the relationship between race and death penalty law, and notes that 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. After the Court struck down Texas’s system for imposing capital punishment in a companion case to Furman, the Texas Legislature enacted a statute narrowing the circumstances for capital punishment. Alabama enacted a statute delimiting the aggravated offenses for which the death penalty could be imposed in that state.

A basic understanding of federalism is necessary to comprehend the constitutional structure of the death penalty. New York overturned the death penalty in People v. LaValle 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.

The death penalty cases discussed in this chapter trigger powerful emotional

30. See MURPHY, supra note 3, at 7.
32. See MURPHY, supra note 3, at 7.
34. Id. (citing TEX. PENAL CODE ANN. § 19.03 (West 1974)).
37. See MURPHY, supra note 3, at 6.
reactions because of the brutality of the underlying capital offenses. For example, in *Jurek v. Texas*, the United States Supreme Court upheld a death penalty imposed on a defendant for the killing of a ten-year-old girl “by choking and strangling her with his hands, and by drowning her in water by throwing her into a river in the course of committing and attempting to commit kidnapping... and forcible rape.” 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’s procedure and affirmed the death sentence.

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 of *Gregg v. Georgia*, in which the United States 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. 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 Three 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, 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.

The retributivist asks: “Does this person deserve to die?” Nevertheless, the death penalty debate often centers on the question of deterrence. As Murphy sardonically notes, if the measure is specific deterrence, the death penalty is 100% effective because the criminal is permanently removed from society. The question that is unknown and perhaps unanswerable is whether

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39. *Id.* at 265.
41. *See Murphy, supra* note 3, at 7-8.
42. *See supra* note 31 and accompanying text.
43. *Murphy, supra* note 3, at 11 (noting four major justifications of death penalty).
44. *Id.* (quoting Professor Robert Blecker’s testimony) (characterizing retributivist focus in death penalty debate).
45. *See id.* at 12 (commenting on efficacy of death penalty as specific deterrent).
the death penalty correlates with general deterrence. Does the imposition of a death sentence deter other potential murderers? Murphy draws upon the testimony of leading academics, religious leaders, and family members of murder victims to address this controversial issue. Much of the testimony in Chapter Three addresses this question on an anecdotal basis. It is impossible to do justice to this book without summarizing the witnesses’ own arguments.

IV. THE DEATH PENALTY: PRO

Émile 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. Durkheim’s perspective was that crimes not only affected the individual but also contravened the collective consciousness or societal norms. Durkheim’s key for understanding societal organization and individual deviance, such as criminal behavior and suicide, is the degree of social solidarity. For Durkheim, a society’s division of labor shaped the nature of other social institutions, including the law. He believed that as society became more complex and differentiated, law evolved from repressive to primarily restitutive. 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 is composed of the first five books of the Hebrew Scriptures (Old Testament). It contains numerous laws which make up the Mosaic code.”

The Holiness Code in the Torah, for example, states that people who are guilty

46. See ÉMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (W.D. Halls trans., The Free Press 1984) (1893); see also Michael L. Rustad, *Private Enforcement of Cybercrime on the Electronic Frontier*, 11 S. CAL. INTERDISC. L.J. 63, 69 (2001). As Rustad notes, 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, anomie breakdowns occur. In the developed industrial society, the division of labor would evolve into a new source of social cohesion.” Rustad, supra, at 69 (quoting DURKHEIM, supra, at 275). Durkheim argued that in an industrial society, criminal remedies are expanded to increase restitution in place of repressive penalties. 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. See generally A.S. DIAMOND, PRIMITIVE LAW PAST AND PRESENT (Routledge 2004) (1971) (arguing restitution, private vengeance, feuding more common in early societies than repressive law).

47. See Rustad, supra note 46, at 69. As Rustad notes, “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. (quoting Mark Abrahamson, *Sudden Wealth, Gratification, and Attainment: Durkheim’s Anomie of Affluence Reconsidered*, 45 AM. SOC. REV. 49, 49 (1980)).


of adultery or take the Lord’s name in vain will be killed.\footnote{50}{See id.; see also Leviticus 20:10 (discussing consequences of adultery); Leviticus 24:16 (King James) (providing punishment for “he that blasphemeth the name of the Lord”).}

In today’s death penalty debate, 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, basing his argument on a moral theory of justice predicated upon retributive justice.\footnote{51}{See Murphy, supra note 3, at 13 (noting Professor’s Blecker’s stance on death penalty).} 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.\footnote{52}{See id. at 65 (discussing law enforcement perspectives on capital punishment).} These individuals tend to believe that capital punishment is effective as a deterrent.\footnote{53}{See id. at 65-67 (presenting testimony of law enforcement officer).}

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.\footnote{54}{See 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 commit[s] a [capital] crime, kill him. I don’t care.”\footnote{55}{Murphy, supra, note 3, at 16.} 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 of New York testified against the death penalty, reasoning that “[v]engeance through execution does not heal the wounds.”\footnote{56}{See Murphy, supra note 3, at 20 (quoting bishop’s testimony).}

This chapter is replete with powerful personal stories of the impact of the death penalty. Contrary to popular expectation, the vast majority of family members of murder victims opposed reinstituting the death penalty in New York.\footnote{57}{See id. at 17 (detailing testimony of murder victims’ family members).} Kate Lowenstein, daughter of the late Allard Lowenstein, a member of Congress and a social activist who was murdered by a mentally ill former student, was typical of the survivors’ testimony:

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50. See id.; see also Leviticus 20:10 (discussing consequences of adultery); Leviticus 24:16 (King James) (providing punishment for “he that blasphemeth the name of the Lord”).
51. See Murphy, supra note 3, at 13 (noting Professor’s Blecker’s stance on death penalty).
52. See id. at 65 (discussing law enforcement perspectives on capital punishment).
53. See id. at 65-67 (presenting testimony of law enforcement officer).
54. See id. at 15-16.
55. Murphy, supra note 3, at 16.
56. See id. at 20 (quoting bishop’s testimony).
57. See id. at 17 (detailing testimony of murder victims’ family members).
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 and 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.58

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. Ethel 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, due to his belief that his parents had been murdered, but changed his mind over time.59 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.60

Murphy examines the witnesses’ perspective on deterrence, which is the chief alternative to retribution.61 Deterrence would be a compelling justification for the death penalty if empirical evidence demonstrated that it had a measurable impact. New York Law School Professor Robert Blecker represents the pro-capital punishment perspective, arguing “the case for deterrence as strongly as he justified retribution as a basis for capital punishment.”62 Blecker maintained that the death penalty has a greater deterrent effect than life without parole.63 But Murphy juxtaposes Blecker’s testimony against that of academics who state that there is little or no evidence that executions have a deterrent effect on potential criminals.64

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.”65 Murphy also

58. Id. at 18.
59. See MURPHY, supra note 3, at 35 (presenting testimony of Robert Meeropol).
60. See id. at 44-48 (recounting Bianca Jagger’s testimony).
61. See id. at 55 (discussing deterrence as alternative to retribution).
62. Id. (describing Professor Blecker’s views).
63. See MURPHY, supra note 3, at 56.
64. See id. at 57-65 (noting contrasting views among academics regarding deterrent effects of capital punishment).
65. Id. at 76 (quoting Patricia Perry).
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. By presenting different theoretical, ideological, and personal perspectives, Murphy makes this book ideally suited for courses featuring contemporary debates.

VI. CAPITAL PUNISHMENT AND THE FISCAL CRISIS OF THE STATE

Chapter Four 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 the death penalty could be reformed to be administered more fairly, consistently and inexpensively. This chapter provides clear and convincing evidence that the death penalty is far more expensive than life without parole. 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.

Murphy is careful to present both sides of the fiscal cost debate, citing testimony by Professor Blecker that “death penalty costs are not excessive.” Blecker’s law-and-economics-oriented perspective is that if we executed more prisoners, it would lead to cost savings. This perspective is reminiscent of the argument that smoking saves money because smoking results in premature death, reducing the cost of caring for the aged. Executions in America will never be self-financing as they might be in a country like China that lacks constitutional protections for death penalty defendants.

Many desirable government initiatives cannot be undertaken because of massive state expenditures for a miniscule 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 resources invested in these cases, in the end, not a single convicted New York criminal was executed. The testimony of Kate Lowenstein brings common sense to the criminal law: “[T]he death penalty puts all the focus on a few murderers. It pours millions of dollars into killing one person.” This chapter examines the cost issue from diverse perspectives, including the testimony of judges, legal academics, and

66. See id. at 77.
67. See MURPHY, supra note 3, at 109-10 (highlighting questions posed by Assembly).
68. See id. at 110.
69. See id. at 115 (presenting statewide statistics offered by Richard Dieter of Death Penalty Information Center).
70. See id. at 117.
71. See MURPHY, supra note 3, at 118 (discussing Professor Blecker’s perspective).
73. See MURPHY, supra note 3, at 121 (discussing cost estimates of capital punishment).
74. See id. at 127 (alteration in original) (quoting Kate Lowenstein’s testimony).
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researchers.

Like the rest of Murphy’s book, this chapter is fair, reasoned, and balanced. However, its findings strongly suggest that capital cases are not only costly but pose an “unacceptable risk . . . [of an] arbitrary and unreliable sentence.”75 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 staff 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.76

VII. SOCIAL CONTEXT: RACE, MENTAL ILLNESS, AND EXECUTIONS

Like John Rawls’s veil of ignorance, too much legal scholarship examines the law devoid of social context.77 As a young law professor, Roscoe Pound castigated the legal academics of his day for their dry as dust and overly abstract approach to teaching law. The legal scholars 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.78 Racial-context cases like lead paint poisoning and negligent sterilization lawsuits “demonstrate the multiple ways in which race is constructed and racial meanings are produced in tort litigation.”79

75. See id. at 151 (alteration in original) (quoting People v. LaValle, 817 N.E.2d 341, 359 (N.Y. 2004)).
79. CHAMALLAS & WRIGGINS, supra note 78, at 29.
The death penalty debate is too often acontextual, ahistorical, and disconnected from the societal factors impacting the American criminal justice system. Murphy, however, does not neglect this sociological dimension, arguing that capital punishment is “inextricably bound up with the history of race relations in the United States.” Murphy highlights the scholarship of University of Iowa College of Law Professor David Baldus, who assembled extensive empirical data that became the focus of the Supreme Court’s analysis in McCleskey v. Kemp. 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. Murphy also includes expert testimony demonstrating that Latino criminal defendants are sentenced to death disproportionately. This literature suggests, as does the research on tort law, that race makes a difference, but on this issue again Murphy presents extensive testimony from Professor Blecker, who questions the issue of racial disparities. The section on racial impacts concludes with reform proposals for lessening the influence of race in death penalty cases.

Chapter Five also addresses the troubling issue of mental illness and the death penalty. The United States 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 illnesses. The bulk of the testimony in this book “compel[s] invalidation of capital punishment in cases involving the severely mentally ill.” Ted Kaczynski, the infamous Unabomber, is an example of a capital defendant whose “illness has rendered him unable to understand he’s ill.” The Hearings provide compelling evidence why the Court should impose a constitutional ban on the state killing of a person who is severely mentally ill.

VIII. EXECUTING THE INNOCENT

Chapter Six grapples with the innocence issue. The New York State Assembly’s concern was ensuring that the law includes sufficient safeguards so that innocent persons are not put to death. The testimony of Barry Scheck, who

81. See MURPHY, supra note 3, at 153.
82. See id. at 154-55 (discussing McCleskey v. Kemp, 481 U.S. 279 (1987)).
83. See id. at 156 (quoting Professor Baldus’s testimony).
84. See id. at 171-74.
85. See MURPHY, supra note 3, at 181-82 (presenting Professor Blecker’s testimony regarding race and capital punishment).
86. See id. at 190-91.
87. See id. at 191.
88. Id. at 199 (quoting Dr. Xavier Amador’s testimony).
89. See MURPHY, supra note 3, at 209 (noting existing case law supports constitutional ban on capital punishment of mentally ill persons).
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 fourteen death row inmates. Scheck and his team confirm that capital sentencing does not sufficiently safeguard innocent defendants. The criminal law, and particularly the law of death penalty sentencing, needs to routinely incorporate DNA identification technology 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. Attorney and well-known author Scott Turow reframes the debate 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 of those who are undeserving by light of any sense of proportionate punishment. My inalterable conclusion is that the answer to that question is no.

In Illinois, where 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 Seven is that the death penalty practice of the United States is out of step with nearly every other democratic nation and the international human rights community. The United States, one of the top executing countries, lags only behind “China (470), Iran (317), Saudi Arabia (143), and Pakistan (135).” Murphy places this comparative data in context by noting that executions around the world are declining.

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

X. CONCLUSION

*Voices* 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 to reshape capital punishment discussions.

The 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 eleven-to-seven to reject legislation that would have restored capital punishment as a criminal penalty in New York.”96 Helene 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.97

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 undergraduate criminal justice courses or graduate courses on the death penalty. Journalists, legislators, and informed members of the public will find

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96. See id. at 293.
this book to be a dispassionate source book for understanding the death penalty policy’s justifications and implications.