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Reflections on the Killing State: A Cultural Study of the Death Penalty in the Twentieth Century United States

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REFLECTIONS ON *THE KILLING STATE*: A CULTURAL STUDY OF THE DEATH PENALTY IN THE TWENTIETH CENTURY UNITED STATES?

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I dedicate this Article to my parents, Charles Samuel Aarons and Regina Aarons. I thank them for all the sacrifices they have made and for their unyielding love. They were my first teachers and continue to teach me.

A special debt is extended to another Dwight. Years ago, he treated me to the best single discussion on teaching law. In that discussion he also introduced me to analyzing the interaction of law and culture. His scholarship inspires me. Later, I wrote the following to a treasured friend:

> One of the nicest things that Fran [Ansley] did for me was to introduce me to Dwight. . . . She was of the mind that I needed a mentor. She was right. . . . She took it on herself to approach a man that she had met once and asked if he would serve, if nominated. His name was Dwight L. Greene, and he said yes. Dwight lived in Queens, New York and taught at Hofstra Law School. We met in June 1993 in mid-Manhattan. I remember the meeting almost as if it were last week. One of the things that we talked about was Judge Ruth Bader Ginsberg, who the day before had been nominated to the Supreme Court. I remember because he had the *New York Times* and was pointing out the people that she quoted after being introduced to the press. We spent about three hours talking and eating appetizers at what was supposed to be a short, informal meeting to touch base. We hit it off, and I looked forward to accepting his invitation and calling him up and talking about issues both big and small.
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> He reminded me a lot of me. We both went over the names. I think his middle name was Lawrence, and mine is Lanston. We both wore glasses, could have handled gaining a little more weight, and, giving myself the benefit of the doubt, I like to think that we were about even on the receding hairline issue. He also appeared to be a bit absent-minded . . . .
>
> In any event, after we left the restaurant/bar, when we were on the subway going toward downtown Manhattan, . . . [h]e did express a slight bit of concern about arriving home a little bit later than he would have liked, but said that the meeting was worth it.
>
> Fortunately, I was quick to write him a note of thanks for taking the time and effort to meet with me. Unfortunately, the reason that everything is in the past tense is that he was killed July 5, 1993. . . . I still feel a sense of loss, though I only truly knew him for three hours. I am better for having met him. When I feel at my wits end, one of the things I recall is his good-nature, his incisive thoughts on society, law, and being a law teacher.

I. INTRODUCTION

Formulating strategies for the abolition of the death penalty as this world journeys through the Twenty-first century and beyond may seem strange to some. In the abolitionist's view, humans should have long ago realized that state-sanctioned executions are counterproductive because, among many reasons, they can only be administered arbitrarily, and the process by which death sentences are imposed negatively infects and reflects upon that society. Though outlawed in about 111 nations, the worldwide abolition of the death penalty has yet to occur, as it is still regularly employed in about 84 countries.[1] In light of developments in the United States, it is quite possible that abolition, if it occurs at all, is years away.[2]

The Killing State: Capital Punishment in Law, Politics and Culture[3] (hereinafter *The Killing State*) is a book of ten essays from an April 1997 conference at Amherst College, "Capital Punishment in Law and Culture."[4]

It has left me with the somewhat rhetorical questions: "What would Dwight do?" and "What would Dwight say?" I hope that the choices that I have made in such times have been somewhat consistent with his ideas. I hope to err on the side trying to understand others and being a constant, but gentle advocate that so much more is possible if, as a society, we learn how to deal with each other on an individual basis instead of through the modern day cleavages. I shall continue to try to embody such concepts in my life. One day I may arrive.

1. *See* Death Penalty Information Center, *The Death Penalty: An International Perspective*, *at* http://www.deathpenaltyinfo.org/dpicintl.html (last visited Feb. 24, 2003).

2. Predictions of this sort are notoriously imprecise. In 1962, one scholar incorrectly thought that the United States Supreme Court was at least a generation away from addressing the constitutionality of the death penalty. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 242 (1962). Within ten years of this thought, the Court ruled that the death penalty as then administered was unconstitutional, and then four years later, it was deemed a valid form of punishment under rewritten statutes. In 1986, two scholars predicted that the death penalty would be abolished in the United States as soon as 2001 but no later than 2036. FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 148-66 (1986).

Finally, two important actors in the enterprise, at different times, inaccurately estimated the future course of death penalty jurisprudence. In 1971, Justice Brennan believed that the Court would never hold capital punishment unconstitutional. *See* William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 321 (1986). While in 1976, Chief Justice Burger thought that there would never be another execution in the United States. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 259 (1979).

3. THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE (Austin Sarat ed. 1999) [hereinafter THE KILLING STATE].

4. *Id.* at Acknowledgments. That both a mechanism and a market for conference-generated anthologies exist says as much about the academic publishing market, as it does of the academy's role in society. During the Twentieth Century, scholars have envisioned different and somewhat contradictory functions of the university. For part of that discussion, see ALAN

That conference explored how state-authorized killings affect law, politics, and culture. After reading the book jacket and the introductory essay, *Capital Punishment as Legal, Political, and Cultural Fact: An Introduction*, one might think that the book addresses the impact that capital punishment has on modern law and society. The book's general editor, and the apparent driving force behind it, is Austin Sarat, the William Nelson Cromwell Professor of Jurisprudence & Political Science at Amherst College and a leader in the Law and Society Association.[5] Sarat essentially promises a wide exploration of the death penalty. In the Introductory essay, he writes:

> What will the persistence of capital punishment mean for our law, politics, and culture? Will it contribute to or undermine democracy and the rule of law? Will it nurture a culture of respect and responsibility or of resentment and recrimination? It is to these questions that the essays collected in this volume are addressed.[6]

Thus, a reader might rightfully expect a modern cultural study of the death

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BLOOM, THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY'S STUDENTS 47-48, 337-47 (1987) (criticizing college students and the way in which they are taught in liberal arts); LYNNE V. CHENEY, TELLING THE TRUTH: WHY OUR CULTURE AND OUR COUNTRY HAVE STOPPED MAKING SENSE AND WHAT WE CAN DO ABOUT IT 192-206 (1995) (questioning the apparent prevalence of postmodern and skeptical thinking and arguing that there should be a return to an objective truth); DAVID DAMROSCH, WE SCHOLARS: CHANGING THE CULTURE OF THE UNIVERSITY 186 (1995) (advocating a more collaborative approach among scholars in their scholarship and teaching); JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 1-9 (1916) (touting the role of formal education in developing both the individual and society); JAMES J. DUDERSTADT, A UNIVERSITY FOR THE 21ST CENTURY 21-24, 38-41, 44-52, 261-89 (2000) (personal reflections by a former large public research university president on issues challenges facing higher education and need for universities to embrace inevitable changes in society and in their role); JULIUS GETMAN, IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION, at Preface (1992) (personal reflections considering some of problems facing higher education); J. WADE GILLEY, THINKING ABOUT AMERICAN HIGHER EDUCATION: THE 1990S AND BEYOND 13-15 (1991) (identifying critical issues that contemporary higher education systems will have to address); GEORGE MARSDEN, THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF (1994) (reviewing the history of the influence of religion on intellectual life at universities traditionally viewed as the nation's trend setters); CARY NELSON, MANIFESTO OF A TENURED RADICAL (1997) (discussing problems facing higher education and proposing reforms that would make institutions more connected with progressive political ideals); Symposium, *What's the University For?*, 2 HEDGEHOG REV. 5 (2000) (exploring the university's place and purpose in the Twenty-first Century United States).

5. Judith Resnick, *On the Margin: Humanities and Law*, 10 YALE J.L. & HUMAN. 413, 413 n.35 (1998).

6. THE KILLING STATE, *supra* note 3, at 4.

penalty,[7] with particular attention paid to how capital punishment affects politics and law. This is an ambitious goal: to connect a body of law to its deeper meaning and its impact on a society. Establishing a connection between some social problems and capital punishment would seem to require substantial research, yet would be an invaluable enterprise. It is not hard to imagine how useful such work would be, especially in light of several recent multiple killings.[8] If persuasively written and adequately documented, such scholarship could provide support for revising both penal laws and the criminal litigation process to more directly prevent criminal violence. Further, if criminal violence is substantially reduced, it would be easier to foresee the death penalty abolished.

Unfortunately, *The Killing State* fails to tie its theorizing to either history, relevant academic literature, or societal problems. The book does not establish that a society's culture, law, and politics are invariably contaminated by pursuing and having executions. Though classified as an assessment of the cultural impact of capital punishment, the essays in *The Killing State* do not consider the cultural expressions of groups that are most heavily impacted by the death penalty or those segments of this country that most frequently use the sanction. Consequently, *The Killing State* presents an incomplete picture of the cultural and social impact of capital punishment in the United States.

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7. For a cultural study of the death penalty covering nearly the first century of the United States, see LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE 1776-1865 (1989). A more recent book considers the history of capital punishment in the United States and that history's impact on modern capital punishment practices. *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002).

8. Some of the more widely covered incidents include sniper killings in Maryland, Virginia, and Washington D.C., see *Descent into Evil*, NEWSWEEK, Nov. 4, 2002, at 20; killings at Appalachian Law School in Virginia, see Francis X. Clines, *3 Slain at Law School; Student is Held*, N.Y. TIMES, Jan. 17, 2002, at A18; the September 11, 2001 attacks on New York City and Washington, D.C., see Tim Golden, *A Day of Terror: The Operation—Terrorism Carefully Synchronized and Devastatingly Effective*, N.Y. TIMES, Sept. 12, 2001, at A13; a shooting at a Fort Worth, Texas church, see *Funerals Held for 4 of Church Gunman's Victims*, HOUSTON CHRON., Sept. 19, 1999, at A1; shootings in Atlanta by a stock trader, see Craig Schneider & Sophia Lezin Jones, *Rampage leaves mental scars: The city and survivors of Mark Barton's deadly spree are struggling to find ways to heal*, ATL. J. & CONST., Aug. 2, 1999, at 1A; a mass killing by two students at their high school in Littleton, Colorado, see Mike Williams, *'Make sense of it? We can't: Colorado town grapples with its grief.*, ATL. J. & CONST., Apr. 21, 1999, at 1A; killings in Springfield, Oregon by a high school freshman, see Timothy Egan, *Oregon Freshman Goes to Court as Number of Deaths Rises to 4*, N.Y. TIMES, May 23, 1998, at A1; a shooting at an Arkansas middle school by two of its students, see John Schwartz, *2 Boys Charged with Murder: Ark. Ambush Suspects Are Friends, 11 and 13*, WASH. POST, Mar. 26, 1998, at A1; a killing spree in Pearl, Mississippi, see Thomas B. Edsall, *Mississippi Boy Held in School Killing Spree*, WASH. POST, Oct. 2, 1997, at A3; and a shooting at a Paducah, Kentucky high school, see Stephen Braun, *Answers to Killings Elusive, Town Finds*, L.A. TIMES, Dec. 3, 1997, at A1.

Thus, despite its contention otherwise, the book is not a cultural study of the death penalty. It is therefore unlikely to play as meaningful a role in bringing about the abolition of the death penalty because it will not force many to reconsider their views on capital punishment. In other words, it is highly unlikely that the book will prompt its readers to consider how the death penalty operates and its effect on the culture, law, and politics of the United States. Those who do reflect on capital punishment's impact on culture, law, and politics may do so more because *The Killing State* did not fulfill its asserted aim rather than because of the book's actual content.

Part II of this Article summarizes and comments on each essay in the book. Part III discusses Robert Cover and the book's adoption of his metaphor of legal interpretation as violence. According to the metaphor, a person relies on his or her understanding of the world when engaging in legal interpretation. The interpreter commits violence, however, when he or she imposes his or her reading of the law on others. *The Killing State* does not include any of Cover's essays, but his presence is felt throughout the book. Part IV explores the apparent premises of the essayists in *The Killing State*. Part V reviews aspects of the death penalty's impact on interpretation of the federal constitution and habeas corpus law. Part VI looks at whether *The Killing State* is truly a cultural exploration of the death penalty by considering subcultures within the United States and some of the goals of law and society scholarship. Part VII considers Tennessee in particular and whether it has become culturally, politically, or legally deficient by resuming executions in 2000. Finally, Part VIII are my reflections on death penalty legal scholarship and the role it may play in moving toward the abolition of the death penalty.

II. *THE KILLING STATE*: A DETAILED SUMMARY

According to the book's introductory essay, "it now appears that the killing state will be a regular part of the landscape of American politics for a long time to come."[9] The essayists in the book "are united in their belief that scholarship on the death penalty has to go beyond treating it as simply a terrain of moral argument and policy contest."[10] Accordingly,

> [t]he contributors to this volume address the powerful symbolic politics of the death penalty, the way capital punishment pushes to, and beyond, the limits of law's capacity to do justice justly, and the place of the politics of state killing in contemporary 'culture wars.' . . . . It is the contention of the essays contained in this volume that we can learn a lot about the kind of society we live in by examining the way that society punishes, including whether it uses death as punishment.[11]

9. THE KILLING STATE, *supra* note 3, at 3.
10. *Id.* at 4.
11. *Id.* (footnote omitted).

To carry forth its assertion that discussions of capital punishment should not be limited to discussions on the law, the essayists in *The Killing State* come from various disciplines, which they draw upon in their essays.

The book's first section, "The Politics of State Killing," looks at the relationship between state killings and democracy. This section, comprised of four essays, evidences a broad interpretation of "politics," as they are generally not concerned with the science of government. In the first essay, *After the Terror : Morality, Equality, Fraternity*, Anne Norton, a political scientist at the University of Pennsylvania, details how the oppressed classes in England, France, and their former colonies used violence to throw off the shackles of monarchy and colonialism.[12] Norton's essay notes that today the power dynamics are reversed. That is, instead of the citizenry rebelling against an unjust government and using executions to bring about political and possibly social equality, now the death penalty—though invoked in the name of the government ("The State v." or "The People v.")—is most often directed against a community's outcasts. Notwithstanding the authority switch, she says "we moderns, we liberals, we constitutionalists are subjects of (and subject to) a history in which capital punishment serves not the powerful but the dominated, not the state, but the subject. . . . In this history, capital punishment figures not as the exhaustion of law but as its inauguration."[13] The essay starts promisingly, detailing the regicides of Louis Capet in France and Charles Stuart in England, and the leveling power of those revolutions. However, it fades in trying to connect the modern death penalty with the writings of thinkers, like psychoanalyst and philosopher Franz Fanon,[14] Jacques Derrida, Friedrich Nietzsche, Sigmund Freud, Michel Foucalt, and Louis Althusser. According to Norton, Fanon suggested that killers—whether as individuals or the government—are responsible for their actions.

Norton equivocates on abolishing the death penalty. In support of it, she notes that the punishment of death signifies to the nation and its citizens the gravity of the crime. She further opines that capital punishment can be viewed as a form of domination to which everyone, including the powerful, can be subjected.[15] In apparent opposition to the death penalty, Norton suggests that despite its potential leveling power, having the death penalty and not using it would be a magnanimous exercise of the sovereign's prerogative. Accordingly she concludes her essay with this quote from Nietzsche: "It is not unthinkable that a society might attain such a consciousness of power that it could allow itself the noblest luxury possible to it, letting those who harm

12. *Id.* at 27.

13. *Id.*

14. Norton relies most heavily on portions of FRANZ FANON, WRETCHED OF THE EARTH (1963) (Constance Farrington trans., 1968), in which Fanon wrote of the violence that is supposedly necessary to bring about liberation from colonialism and the onset of democracy.

15. THE KILLING STATE, *supra* note 3, at 36-37.

it go unpunished."[16]

Norton essentially tries to connect the formation of modern democracies with the writings of later philosophers. Curiously, she largely eschews political philosophers. What her essay actually suggests is that those in control of the government—whether a monarch or those in revolt—use the state's authority for their own benefit. So long as this occurs, then Nietzsche's aphorism will remain only an aspiration. However, Nietzsche's maxim is an overstatement. Few actually argue that capital offenders should "go unpunished." Capital punishment abolitionists, for instance, maintain that criminals should not be executed, though they should otherwise remain subject to confinement. Thus, the capital abolitionist position is nobler than that of death penalty supporters because they argue that the state should choose not to impose the ultimate punishment on the properly convicted.

On another level, Norton's essay seems incomplete. She uses the Regicide and Reign of Terror as examples and relies mostly on Fanon's writings seeking to end European colonial rule. To be sure, these three periods included the violent overthrow of government. One wonders, however, if she would have been able to dispel the apparent contradictions in the present capital punishment practices of Europe and former European colonies. For instance, the European Union and its member nations have abolished the death penalty, but most of former European colonies are retentionist countries.[17] Thus, it may be that the history of the "founding of the modern, liberal, constitutional order,"[18] which she suggests haunts all modern democracies, in reality, is not that influential.

In the next essay, Hugo Adam Bedau, a philosophy professor at Tufts University and one of the leading and most prolific abolitionist writers, challenges the death penalty at its core. In *Abolishing the Death Penalty Even for the Worst Murderers,* he argues that the worst kind of murderer—which he defines as a serial, multiple, or recidivist killer—should, at most, be sentenced to life imprisonment and should not receive a death sentence.[19] Bedau contends that substantive due process, liberty, autonomy, and privacy are each a basis for prohibiting capital punishment. Bedau advocates what he calls a "'substantive due process' argument."[20] According to Bedau, "[s]ociety, acting through the authority of its government, must not enact and enforce policies that impose more restrictive—invasive, harmful, violent—interference with human liberty, privacy, and autonomy than are absolutely necessary as the means to achieve legitimate and important social

16. *Id.* at 37.

17. *See* ROGER HOOD, THE DEATH PENALTY IN WORLDWIDE PERSPECTIVE Appendix (1996).

18. THE KILLING STATE, *supra* note 3, at 27.

19. *Id.* at 41-42.

20. *Id.* at 47.

objectives."[21] The death penalty is excessive punishment, Bedau says, because abolitionist states have controlled criminal homicides and incapacitated their most violent offenders, at least as effectively as neighboring death penalty jurisdictions.[22]

Congratulations to Bedau for advancing the abolitionist argument where the claim is conceivably the weakest. If he convinces readers that incapacitating and not executing the serial, multiple, or recidivist killer is the most appropriate punishment, then it is likely that in most instances the death penalty will be deemed excessive punishment. Retribution is the governing rationale behind capital punishment, and Bedau attempts to temper retributivist sentiment by focusing on the criminal's worth and by limiting the state's treatment of him.[23] Bedau's claim is an old argument fashioned to survive the ultimate acid test. With reasoning similar to that of Justice Marshall in *Furman v. Georgia*,[24] Bedau states that "the role of a system of punishment in a modern civilized society really is only as a means to the legitimate end of a society without criminal violence."[25] Though he does not claim that they are all legitimate ends of punishment, Bedau maintains that revenge, retribution, and desert can adequately be addressed by life imprisonment.[26]

Bedau's essay, unfortunately, will likely convince only the already converted. Studies have shown that support for capital punishment is not based on perceptions of general social utility. Rather, even after being informed that a death sentence will only end the life of the murderer and not serve any other purpose, most capital punishment advocates still typically maintain that the death penalty is necessary to avenge the death of the victim. That is, they maintain that an execution—and not incapacitation—is the only fit punishment for a killer.[27]

Bedau constructs his argument in the abstract. Until adequate data on the nature of murderers and the causes of such killings is available, this method may be the required approach when arguing against the death penalty. When discussing the death penalty, supporters of capital punishment are more apt to focus on the facts of the crime and not on any of its antecedent causes. Those facts often make it difficult not to shout, "Execute him!" Consider, for example, the exchange between Justices Blackmun and Scalia in *Callins v.*

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21. *Id.*

22. *Id.* at 49.

23. *Id.* at 51-52.

24. *See* Furman v. Georgia, 408 U.S. 238, 342-60 (1972) (Marshall, J., concurring) (exploring the rationales traditionally advanced for maintaining the death penalty).

25. *Id.* at 51.

26. THE KILLING STATE, *supra* note 3, at 47-49.

27. *See, e.g.*, Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 437-38 (1999).

Collins.[28] In response to Justice Blackmun's soliloquy against the death penalty and his conclusion that the death penalty could not be administered in a manner consistent with the Constitution, Justice Scalia noted that Justice Blackmun chose to write in "one of the less brutal of the murders that regularly come before us."[29] Scalia mentioned that another appeal before the Court, in which Blackmun had not chosen to condemn the death penalty, involved an "11-year-old girl raped by four men and then killed by stuffing her panties down her throat," and he stated, "[h]ow enviable a quiet death by lethal injection compared with that!"[30] It is noteworthy that Scalia focuses on the brutality of the killing as a measure for the type of punishment that the state may impose. Typically, the *lex talionis* variant of retribution (commonly called an "eye for an eye") holds that the state may kill a murderer as punishment for the killing an innocent person. Supporters of capital punishment, however, do not insist that the murderer be executed in the same manner as the victim was killed.[31] More importantly, federal constitutional law requires that any sentence comport with human dignity.[32]

A Juridical Frankenstein, or Death in the Hands of the State[33] by Julie M. Taylor, an anthropologist at Rice University, looks at the cultural implications of police killings in Argentina. Taylor recounts how the Argentine police, particularly from 1976 to 1983, developed into an independent force that perpetrated violence on its citizens. According to her, Argentina became a "delinquent state" as its military and civilian leaders silenced their critics, often through secret killings.[34] She states that the killing of government critics

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28. 510 U.S. 1141, 1141-58 (1994).

29. *Id.* at 1142 (Scalia, J., concurring).

30. *Id.* at 1143. In a later response, Blackmun explained that the facts of the second case, *McCollum v. North Carolina*, further suggested to him that the death penalty system did not adequately determine which defendants deserved death. Blackmun noted that of the four defendants charged with the crime, only McCollum, who was mentally retarded, was sentenced to death, despite there being no evidence that he took the lead in committing the crime. *See* McCollum v. North Carolina, 512 U.S. 1254, 1255 (1994) (Blackmun, J., dissenting).

31. *See, e.g.*, STEPHEN NATHANSON, AN EYE FOR AN EYE? THE MORALITY OF PUNISHING BY DEATH 74-75 (1987); ERNEST VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 193 (1975).

32. The punishment cannot be "excessive." The test of "excessiveness" has two components. "First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime." Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion) (citations omitted).

33. THE KILLING STATE, *supra* note 3, at 60.

34. *Id.* at 69. Taylor outlines how Isabel Perón authorized the armed forces to take over police functions. The authorization was done purportedly to deal with subversive guerrilla elements that were fomenting insurrection. *Id.* Not only were these devices unnecessary as the guerrillas had been defeated, they were used by the military systematically to abduct, detain, and torture native Argentineans. *Id.* Some of these victims were "physically eliminated." *Id.* at 69-70. Taylor later likens the more recent practices of the Argentine police force to the military's

was done "not to eliminate physically the person who has been killed, but to control those that remain alive, mainly through fear, but also at times, through the shattering of social ties and the removal of leadership."[35] Taylor's assessment reads like an utilitarian critique of capital punishment. She highlights the corrosive impact that state-sanctioned, arbitrary punishment can have on the state, its law enforcement officers, its legal system, and its citizens. Though discussions of criminals, violence, and crime usually do not focus on police officers, Taylor's essay reminds those who may have forgotten that law enforcement authorities have the capacity to violate the law.[36]

The concluding essay in the politics section is *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*[37] by Jonathan Simon and Christina Spaulding. They describe how since *Gregg v. Georgia*,[38] state laws have increased their aggravating circumstances, and they assess the implications of this increase. Simon, a law professor at the University of Miami, and Spaulding, a public defender in Florida, take an important, technical aspect of capital punishment, describe its development, and suggest what these developments may say about our society.

Aggravating circumstances were introduced into United States death penalty jurisprudence in 1976 as a way to ensure that only the most deserving defendants were sentenced to death.[39] In 1971, the United States Supreme Court stated that there was no appreciable way to "identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority . . . ."[40] Notwithstanding the apparent impossibility of describing when the death penalty should be imposed, the Court held that it did not violate Due Process Clause of the Fourteenth Amendment to permit the jury to impose a death sentence without any governing legal standards.[41] However, the following year, the Court decided—partly because juries were being given unrestricted

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conduct during the military dictatorship. *Id.* at 70-75.

35. *Id.* at 76.

36. *See, e.g.*, Security and Law Enforcement Employees, Dist. Council 82 v. Carey, 737 F.2d 187 (2d Cir. 1984). In *Carey*, the Second Circuit, before addressing the due process protections afforded to prison guards suspected of trafficking contraband into the penal institution, asked: "who are to guard the guards?" *Id.* at 192.

In this country, law enforcement officials are routinely investigated for the lawfulness of their conduct. Prosecutions arising out of these investigations, however, are more rare. More closely connected to capital punishment is the under enforcement of ethical standards and other rules that govern prosecutorial and judicial conduct in capital cases. *See* Penny J. White, *Errors and Ethics: Dilemmas in Death*, 29 HOFSTRA L. REV. 1265, 1280-86 (2001).

37. THE KILLING STATE, *supra* note 3, at 81.

38. 428 U.S. 153 (1976).

39. *See* cases cited *infra* note 43.

40. McGautha v. California, 402 U.S. 183, 204 (1971).

41. *Id.* at 196.

and unguided authority to impose a sentence of life or death—that the death penalty was being randomly and arbitrarily administered throughout the United States in violation of the Eighth Amendment.[42] In 1976, under newly redrawn statutes, the Court parted from its decision in *Furman* and once again upheld the imposition of the death penalty.[43] The redrawn statutes, in the Court's opinion, suitably directed and limited the discretion of the sentencing authority.[44] Thus, the sentencing authority would be directed to the specific circumstances of the crime and the defendant's background when considering what sentence to impose. Properly used, aggravating circumstances would have made it unlikely that sentencers would invariably conclude that every murder deserved the death sentence or that every murderer should be executed. In short, aggravating circumstances were part of the processes that ensured that the death penalty operated in a meaningful, rational manner and that it was not inflicted arbitrarily or capriciously.[45] According to Simon and Spaulding, aggravating circumstances were not only gatekeepers for prosecutors in determining the cases in which a death sentence could be sought but were also viewed as tour guides for juries on whether the penalty was appropriate in that case. Aggravating circumstances were also seen as salient factors for judges assessing the systematic imposition of death sentences. That is, when reviewing capital cases, appellate judges could look at the aggravating and mitigating circumstances to determine whether the death penalty was being imposed in a rational and consistent manner.[46]

Over time, the role of aggravating circumstances has changed, and there has been a proliferation of aggravating circumstances. *Lowenfield v. Phelps*,[47] is representative of some of the changes. In *Lowenfield*, the Court held that an aggravating circumstance could be identical to an element of capital murder of which the defendant had been convicted, so long as the statutory definition of capital murder did not include all homicides.[48] *Lowenfield* essentially allows a capital defendant to be sentenced to death upon being found guilty of the capital crime. This is because before any evidence is admitted in a capital sentencing proceeding, the jury, by finding the defendant guilty of the capital homicide charge, has already found beyond a reasonable

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42. *See* Furman v. Georgia, 408 U.S. 238 (1972).

43. *See* Jurek v. Texas, 428 U.S. 262, 276-77 (1976); Gregg v. Georgia, 428 U.S. 153, 207 (1976); Proffitt v. Florida, 428 U.S. 242, 259-60 (1976).

44. Those statutes typically contained a list of aggravating circumstances and a non-exhaustive list of mitigating circumstances. At least one aggravating circumstance had to exist and it had to outweigh the mitigating circumstances before a death sentence could be imposed. *See Gregg*, 428 U.S. at 196-97; *Proffitt*, 428 U.S. at 248-50; *Jurek*, 428 U.S. at 273-74.

45. *See Gregg*, 428 U.S. at 196-206; *Proffitt*, 428 U.S. at 250-53; *Jurek*, 428 U.S. at 268-76.

46. *See Gregg*, 428 U.S. at 204-06; *Proffitt*, 428 U.S. at 252-53, 258-59; *Jurek*, 428 U.S. at 270-73.

47. 484 U.S. 231 (1988).

48. *Id.* at 241.

doubt the existence of at least one of the aggravating circumstances. Thus, Simon and Spaulding correctly note that aggravating circumstances may open "the door to the inner house of death but, after *Lowenfield* they do not proscribe what goes on inside."[49]

The legal developments are more extensive than Simon and Spaulding describe. Since 1983, the United States Supreme Court has all but muted the conversation among state prosecutors, juries, appellate courts, and the legislature on the appropriateness of particular aggravating circumstances. For instance, in *Zant v. Stephens*,[50] the Court held that the Constitution does not require that sentencers be instructed as to what weight to give any of the sentencing phase evidence on aggravating or mitigating circumstances.[51] In *Blystone v. Pennsylvania*,[52] the Court upheld a Pennsylvania statute *requiring* the imposition of the death penalty if aggravating circumstances were found to exist but no mitigating circumstances were present,[53] and in *Boyde v. California*,[54] the Court approved a jury instruction that *mandated* imposition of the death penalty if the jury concluded that the aggravating circumstances outweighed the mitigating circumstances.[55]

Statutes like those approved in *Lowenfield*, *Blystone*, and *Boyde* increase the likelihood of the defendant being sentenced to death.[56] These legal developments mean that after securing a conviction, prosecutors do not have to spend considerable effort in proving the existence of the aggravating circumstances or in establishing how their existence makes the crime more worthy of death. Consequently, aggravating circumstances can be viewed as

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49. THE KILLING STATE, *supra* note 3, at 87.

50. 462 U.S. 862 (1983).

51. *Id.* at 880.

52. 494 U.S. 299 (1990).

53. *Id.* at 305.

54. 494 U.S. 370 (1990).

55. *Id.* at 377.

56. All three cases raise special problems when the jury is the sentencing authority. *Lowenfield* is problematic because it may be more difficult for the *jury* to meaningfully distinguishing between cases in which the death sentence should be imposed and those in which it should not.

Under laws like those approved of in *Blystone* and *Boyde*, the jury may not give careful attention to the mitigating circumstances. This is because the jury's duty of assessing the mitigating circumstances is more explicit when it is instructed that, in deciding what sentence to impose, it is to weigh the aggravating circumstances against the mitigating circumstances. However, under *Blystone* and *Boyde* the risk is greater that the jury will not fully appreciate that the defendant's production of *any* mitigating circumstance evidence will dissipate its otherwise mandatory obligation to impose a death sentence. Further, the jury is also deprived of its ability to exercise mercy, which has been one if its prerogatives at least since *Gregg*. *See Gregg*, 428 U.S. at 203. Finally, shifting to the defendant the burden of establishing that a death sentence should not be imposed is inconsistent with the capital sentencing processes approved of in the 1976 cases and in *Lockett v. Ohio*, 438 U.S. 586 (1978).

costless expressions of legislative judgment.[57] Further, instead of helping to ensure that the death penalty is imposed in a rational manner, according to Simon and Spaulding, aggravating circumstances now "seem to have their real audience and their real currency as elements of a populist politics of vengeance and solidarity based on pain and outrage. They now circulate as tokens of our esteem doled out by our representatives to placate or reward special interest groups."[58] Simon and Spaulding's essay shows that if fear of violence is the primary motivation for criminal punishment, then there are few limits to defining crimes or imposing punishment on those who instill fear.[59]

The three essays in *The Killing State*'s middle section, "Capital Punishment and Legal Values," more directly address capital punishment jurisprudence. This section begins with Peter Fitzpatrick's *"Always More to Do": Capital Punishment and the (De)Composition of Law*.[60] Fitzpatrick, a law professor at Queen Mary and Westfield College, argues that "law cannot accommodate either the general decision to have capital punishment or the particular decision to kill someone."[61] By exploring the theoretical meaning of law and the difference between law and justice, Fitzpatrick looks for ways in which more can be done to examine the full impact of the death penalty on a society. To establish that law is incomplete and duplicitous, Fitzpatrick recounts descriptions of crowds at executions and examines the discourse in United States Supreme Court opinions.[62] Instead of recounting how several people at an execution objected to the event, however, Fitzpatrick ignores that he is relying on different observers' descriptions of different execution crowds in England and in Germany.[63] This also makes it easier for Fitzpatrick to come to the conclusion that he does.[64] While he acknowledges the subjectivity of descriptions, Fitzpatrick nonetheless contends that the accounts indicate that executions did not instill in the crowd the proper reverence for

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57. *See, e.g.*, *id.* at 318-19 (Brennan, J., dissenting).

58. THE KILLING STATE, *supra* note 3, at 100.

59. *Cf.* Joan W. Howarth, *Representing Black Male Innocence*, 1 J. GENDER RACE & JUST. 97 (1997) (using cultural studies analysis to consider whether the social construction of gang membership of a black man was used as a substitute for evidence of guilt in a criminal trial).

60. THE KILLING STATE, *supra* note 3, at 117. Fitzpatrick borrows from a capital defense attorney and Roger Hood in naming his essay. The defense attorney explained that more could always be done to prevent a client from being executed, and Hood suggested that a novice to the death penalty might think that from a philosophical and policy perspective "there appears to be nothing new to be said" about it. *Id.* at 117 n.3 (quoting ROGER HOOD, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE 6 (1996)).

61. *Id.* at 118.

62. *Id.* at 124.

63. *Id.* at 125.

64. To him, these discrepancies do not matter because the crowd seldom agreed that the execution was legitimate and often questioned whether the sovereign was the true murderer.

the law or the punishment.[65] In actuality, Fitzpatrick's accounts may show that at different executions, some protested the execution or used the public gathering as an occasion for broadcasting their views.[66] Fitzpatrick's point may have been more persuasive had he used different reports from several executions, which detailed the widespread irreverence or solemnity of the events.

Perhaps due to unfamiliarity with the United States' legal system and heavy reliance on a secondary source,[67] Fitzpatrick also misattributes to the United States Supreme Court cases actually decided by the Eleventh Circuit Court of Appeals.[68] His essay suggests as well that he may not understand the limited scope of equal protection.[69] As to his legal point, despite our inability

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65. *Id.* at 125-28.

66. *Id.*

67. *See* PETER HODGKINSON ET AL., CAPITAL PUNISHMENT IN THE UNITED STATES OF AMERICA: A REVIEW OF THE ISSUES 12 (1996).

68. THE KILLING STATE, *supra* note 3, at 130-31. Fitzpatrick cites *Smith v. Kemp*, 715 F.2d 1459 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983) and *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983), in his discussion of United States Supreme Court discourse. The Supreme Court declined to review both decisions.

This mistake brings to mind Robert Bork's comment on statements falsely attributed to him regarding *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), after he was nominated for the United States Supreme Court. He wrote, "Not only didn't I decide the case, I have never written about it or even discussed it. I can only suppose that Planned Parenthood was applying the familiar rule that equity regards as done that which ought to have been done. In their view, if I didn't make that ruling, I should have." ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 289 (1990).

Bork is not the first high court nominee asked to explain opinions that he neither participated in nor wrote. For example, during his confirmation hearings to become Chief Justice of the United States, Associate Justice Abe Fortas was questioned about several cases that were decided before he became a member of the Court. *See Nominations of Abe Fortas and Homer Thornberry: Hearings Before the Senate Comm. on the Judiciary*, 90th Cong., 189-209 (1968) (included questions regarding *Baker v. Carr*, 369 U.S. 186 (1962), *Reynolds v. Sims*, 377 U.S. 533 (1964), *Mallory v. United States*, 354 U.S. 449 (1957), *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965)).

69. THE KILLING STATE, *supra* note 3, at 131. Fitzpatrick writes as though the Equal Protection Clause is unbounded. It is not. *See generally* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (stating that the equality principle is devoid of content; equality has content only when there is a referent).

In discussing *McCleskey v. Kemp*, 481 U.S. 279 (1987), Fitzpatrick states that if statistical evidence were admitted in capital cases neither black defendants nor poor defendants could be executed. Fitzpatrick's analysis fails to acknowledge the necessity of a causal connection between race or poverty and imposition of the death penalty. His reasoning also does not take into account that the Equal Protection Clause only protects similarly situated groups from improper governmental action, that the level of judicial scrutiny depends on the classification of the category, and that racial classifications are subject to strict scrutiny and poverty classifications are not.

to truly experience or know death while we are alive, it is not foolish to expect that the state have, at least, a rational, legal basis for its decisions to execute its citizens. The inaccuracies in Fitzpatrick's work undermines the persuasiveness of his effort. He is partly right, though, in concluding "that decisions about capital punishment 'ultimately rest upon the subjective moral evaluations of prosecutors, juries, and judges' that any issue 'concerning the death penalty is ultimately a matter for moral and political judgment.'"[70] What he does not acknowledge is that even if the decisions whether to have capital punishment and whether to impose it are moral ones, that moral battle has been waged on a legal playing field for more than a generation.[71] Fitzpatrick's essay would have been more rewarding if he had explained the moral prohibition against capital punishment and how the law could be made more responsive to and consistent with that prohibition.

The next two essays are highlights of the book. In *The Executioner's Dissonant Song: On Capital Punishment and American Legal Values*,[72] Franklin E. Zimring, a law professor at the University of California, Berkeley, discusses the implications of capital punishment for the United States' law and legal practice. Zimring believes that an inherent conflict exists between a system of regular executions and the asserted principles of the United States' legal culture.[73] According to Zimring, conflict in capital cases occurs on three levels: the denial of human dignity inherent in executing a person; the undermining of integrity of the legal process in capital cases through efforts to reduce delays between executions; and the corrosive impact that circumventing due process in capital cases has on the criminal litigation system.[74] Zimring's primary focus is on the latter two areas, which actually coalesce into the question of whether executions should ever become routine

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70. THE KILLING STATE, *supra* note 3, at 132 (quoting ROGER HOOD, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE 157-58, 162 (1996)).

71. Perhaps reflecting frustration with efforts of abolitionists to forestall an execution through use of the courts, one Justice has written, "The heavily outnumbered opponents of capital punishment have successfully opened yet another front in their guerilla war to make this unquestionably constitutional sentence a practical impossibility." Simmons v. South Carolina, 512 U.S. 154, 185 (1994) (Scalia, J., dissenting).

Around the same time, during the oral argument of a different capital case, the same Justice suggested that lawyers representing capital defendants should "[t]ry harder" to avoid last minute stay requests. *See* Transcript of Oral Argument at * 7, McFarland v. Scott, No. 93-6497, 1994 WL 665012 (U.S. Mar. 29, 1994); *see also* Linda Greenhouse, *Court Confronting Results of Limiting Death Row Appeals*, N.Y. TIMES, Mar. 30, 1994, at A1 (quoting Justice Scalia as telling the director of a capital defense organization: "I just want you to know that I am not happy with the performance of the Texas Resource Center in the cases that come before me. Try harder").

72. THE KILLING STATE, *supra* note 3, at 137.

73. *Id.* at 138.

74. *Id.* at 137.

events.[75] For that to happen, Zimring says, the period between sentence and execution will have to be reduced and courts would have to restructure or ignore capital defendants' rights.[76] Restructuring or ignoring capital defendants' rights will inevitably allow courts to compromise the rights of defendants in noncapital cases.[77] According to Zimring, "[t]he death penalty in the United States can only be principled if it is not efficient; it can only be expeditious if it is morally and procedurally arbitrary."[78] Zimring's observations are borne out by the experience of states that have resumed regular executions since 1976—especially Texas.[79] None of these states has a capital case processing system that routinely and vigorously respects capital defendants' rights. In fact, since 1976, few jurisdictions have, for more than a short time, adopted a capital punishment case processing system that is both efficient and fair.[80]

Anthony Amsterdam's *Selling a Quick Fix for Boot Hill: The Myth of Justice Delayed in Death Cases*[81] deals with the United States Supreme Court's increasing tendency since 1982 to vacate stays of execution imposed by the lower federal courts. In most instances, the defendant is executed within hours of the lifting of the stay.[82] Amsterdam, a law professor at New York University, exposes the illogic of the practice, explaining that it

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75. *Id.* at 140-47.

76. *Id.* at 144-45.

77. *Id.* at 146-47.

78. *Id.* at 147. Elsewhere, I have written on the issues involved in delay in capital cases. *See generally* Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147 (1998); Dwight Aarons, *Getting Out of This Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases*, 89 J. CRIM. L. & CRIMINOLOGY 1 (1998).

79. *See* Brent E. Newton, *A Case Study in Systemic Unfairness: The Texas Death Penalty, 1973-1994*, 1 TEX. F. ON C.L. & C.R. 1, 2 (1994); *see also* AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: DEATH PENALTY IN TEXAS: LETHAL INJUSTICE 3 (1998) (stating that "Texas executes more people than any other jurisdiction in the Western World").

80. Federal law may soon bring about formal documentation of the inequalities of the modern capital punishment system. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), to achieve an accelerated schedule for the filing and consideration of post-conviction petitions by state capital defendants, states must be certified as providing (1) mechanisms for the appointment and compensation of defense counsel, (2) payment of reasonable litigation expenses, and (3) standards for assessing the competency of defense counsel. *See* 28 U.S.C. § 2261(b) (2000).

Despite states' arguments in federal court that they have adequate capital case processing systems, no federal court has found that a state has satisfied those requirements. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 3.3a, at 123-29 (4th ed. 2001) (collecting cases as of July 2001).

81. THE KILLING STATE, *supra* note 3, at 148.

82. In the most prominent instance, the Court prohibited the entry of any further stays of California's execution of Robert Alton Harris. *See* Vasquez v. Harris, 503 U.S. 1000, 1000 (1992).

denigrates the work of the district court and court of appeals judges and shows how some of the Court's language in its orders portrays an incomplete picture of both the capital litigation process and the role of capital defense attorneys.[83] The apparent exasperation evident in Amsterdam's essay seems to be both because death comes to the condemned through a state-sanctioned execution, and because death occurs through a drastic change in judicial procedures. According to Zimring, the change undermines the judicial review process.[84] Zimring and Amsterdam's contributions are laudable because they are both clearly written and they marshal law and history to convey their message. Amsterdam's extensive documentation of his contentions adds to the persuasiveness of his argument.[85]

The final section, "The Death Penalty and the Culture of Responsibility," consists of three essays, which in contrast to the rest of the book, more directly explore capital punishment's influence on culture. These essays require careful reading and probably could have been made more understandable by clearer writing. While implicitly defining "culture" broadly, including the unwritten norms and expectations within a society, the essays discuss only the tangible products of a society.

The section begins with William E. Connolly's *The Will, Capital Punishment, and Cultural Wars*.[86] Connolly, a political science professor at John Hopkins University, discusses the prominence of free will in theories of criminal responsibility. Connolly first briefly recounts the roles that free will, responsibility, and punishment have played historically, as described in the work of criminal law theorists.[87] He notes that most theoretical discussions of these terms ignore the uncertainty and instability that is within them.[88] According to Connolly, the United States' cultural construct—as reflected in social science research, judicial opinions, news reports, election campaigns, jury selection processes, and jury deliberations reports—allows people to ignore essentially malleable concepts like free will, responsibility, and proportionality of punishment.[89] These cultural components make what is

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83. *Id.* at 154-57.

84. The Court's vacatur of stays of executions affects a district judge's decision to grant a stay in a subsequent case. One student has researched the impact of the Court's rulings on lower federal courts' consideration of stays of execution in state capital cases. Nicole Veilleux, Note, *Staying Death Penalty Executions: An Empirical Analysis of Changing Judicial Attitudes*, 84 GEO. L.J. 2543 (1996). Veilleux surveyed nearly five hundred published stay decisions of the United States Supreme Court and all federal courts within the Fifth and Eleventh Circuits from 1981 to 1995. She determined that the Supreme Court's reinterpretation of federal habeas law and renewed federalism concerns were the reasons for an increased refusal by the federal courts to grant stays of execution. *Id.* at 2571.

85. *See* THE KILLING STATE, *supra* note 3, at 165-183.

86. *Id.* at 187.

87. *Id.* at 187-193.

88. *Id.*

89. *Id.* at 195-96.

difficult and fuzzy seem easy and sharply focused. For instance, the state, in seeking to inflict the ultimate punishment on the defendant, argues that he freely chose to commit the crime and thus deserves punishment. The defense, perhaps with the help of social workers, questions the true cause of the crime and highlights society's responsibility toward the defendant. Consequently,

> [i]n such a predetermined context of legal argument, the prosecutor appears to be a clear thinker with coherent categories while the social worker emerges as a fuzzy idealist trying to force two opposing conceptions of the world into one story line. The first agent appears to embody the clarity of 'our culture' while the second struggles to twist that clarity to save the life of a defendant.[90]

According to Connolly, increased globalization, with its accompanying disintegration of the nation-state, has led to increased interest in the exercise of official punitive authority.[91] In a world in which once fundamental truths are now under constant attack and re-definition, capital punishment's value extends beyond the criminal law.[92] The death penalty has become a barometer of cultural values.

> It mobilizes political divisions between one set of partisans, who seek to return to a fictive world in which the responsible individual, retributive punishment, the market economy, the sovereign state, and the nation coalesced, and another set, who seek to respond in more generous ways to new experiences of the cultural contingency of identity, the pluralization of culture, the problematical character of traditional conceptions of agency and responsibility, and the role of the state in a new world order.[93]

A consequence of using the death penalty as such a barometer is that those opposed to capital punishment are not only stigmatized, but they are also marginalized. As Connolly puts it, "[p]ublic objections by liberals miss the point unless we are able to challenge the line of associations between morality, simplicity, revenge and death. Until we do, the agents of cultural war will succeed in using our opposition to associate us with moral softness toward murderers . . . ."[94] In other words, traditional critiques of capital punishment have become insufficient.

Connolly proposes that abolitionists instead first focus on explaining to those who only marginally support capital punishment of the artificial construct behind the sanction and how that artificiality is maintained despite

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90. *Id.* at 197.
91. *Id.* at 198.
92. *Id.*
93. *Id.* at 200.
94. *Id.* at 201.

its negative impact on a nation's culture.[95] Abolitionists also have to "expose cultural sources of the intense social resentment in circulation today, and we need to probe more carefully the politics by which it so readily becomes shifted onto a selective set of targets."[96] Finally, abolitionists have "to join political movements that speak to those economic, educational, and social circumstances that encourage so many to resent their place in a democratic culture."[97] If identifying a trend is the first step toward reversing it, then Connolly has rendered a valuable service. However, he only fleetingly suggests ways to implement his ideas.[98]

Discussions on contentious subjects, such as the death penalty, are probably most effective when they are personal. Thus, to explain the artificial construct behind capital punishment, abolitionists should use everyday examples to which their listeners can readily relate.[99] For example, in talking about free will or proportionality of punishment one could use a mundane commercial transaction that goes awry—such as the misdelivery of the morning newspaper—as the starting point, and explore the impact of free will (such as the individual decisions of everyone involved in producing the newspaper) or proportionality of punishment (that is, adjusting the monthly bill to account for the misdelivery) on that event. From there one could segue into how contingencies affected the commercial transaction and then to how the capital litigation process and often public discussion of it do not adequately account for life's vagaries.

Beyond Intention: A Critique of the "Normal" Criminal Agency, Responsibility, and Punishment in American Death Penalty Jurisprudence by Jennifer L. Culbert, a visiting assistant professor of Justice Studies at Arizona State University, comments on the elusiveness of formal legal prerequisites

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95. *Id.* at 204.

96. *Id.*

97. *Id.*

98. The whole of Connolly's suggestion is:

> I suppose that Nietzsche can help on the first front [of teaching each other how to translate existential dimensions of resentment] while thinkers like Arendt and Foucault might help on the second [of joining political movements that address economic, educational and social circumstances that encourage many to resent their present situation in a democratic culture]. The problem, for starters, is that few of us are now prepared to show how each front is entangled in the other and not too many are prepared to listen even if we made progress in the diagnosis. But it remains important to keep trying.

Id. at 205 n.21. I partially agree with Connolly that familiar critiques of capital punishment are insufficient. In Part VIII, I offer a few suggestions on how abolitionist lawyers can create a legal climate accepting of abolition. In reality, the abolitionist movement has insufficiently courted every constituency that may oppose the death penalty.

99. The law school so-called Socratic method of classroom discussion and reasoning by analogy are often useful measures for such discussions. Though that method values speculation of discussants over the documentation of their claims. *See* Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 45-50 (1998).

for imposing a death sentence.[100] She contends that the decision to impose a death sentence hinges more on moral norms than on legal ones.[101] The problem with moral norms guiding the legal contours of the death penalty, according to her, is that judges are allowed to determine which conduct is morally blameworthy or punishable.[102] Judges, as arbiters of the law, use the "normal person"—an imaginary character—and impose liability on those who violate the norms of this person.[103] Culbert notes that the fictive "normal person" is an autonomous, rational, and self-determining individual who can be held responsible for his or her voluntary acts.[104] However, a criminal defendant's "acts" are often not discrete, self-evident facts, but are products of legal interpretation. Culbert uses *Tison v. Arizona*[105] to make her point.

Tison involved the prosecution of two sons for an unplanned killing committed by their father after they helped him escape from prison.[106] *Tison* held that the sons could be sentenced to death because they participated in the prison escape, even though they did not participate in the killing, intend that the victims be killed, or inflict the fatal blows.[107] For Culbert, the Court did not want to acknowledge that some criminal conduct is an accumulation of small gestures and not pre-planned events.[108] Nor did the Court want to admit that normal persons might be unwitting perpetrators of heinous crimes. Thus, Culbert writes, "a defendant may be sentenced to death because he acts without anticipating or desiring the consequences of his actions and yet otherwise is completely 'normal.' . . . Only through such subterfuge and equivocation can the Court account for the fact that people participate in violent crimes with no intention of doing harm without resorting to psychological or medical accounts of human behavior."[109] Culbert notes that criminal law doctrine typically does not rely on psychology and psychiatry to understand human behavior. In fact, relying on these disciples is usually viewed as a threat to criminal jurisprudence because mental health experts instead of juries may determine the defendant's criminal responsibility, and the medical understanding of the "normal person" may displace the legal one.[110] By ignoring the psychological basis for human behavior, Culbert notes, death penalty law has become loosened from its sociological moorings.

Culbert's insights apply to all of criminal law. Like most of the law, criminal law has a tendency to be self-defined and to ignore important

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100. *Id.* at 206.
101. *Id.*
102. *Id.* at 207.
103. *Id.*
104. *Id.* at 211.
105. 481 U.S. 137 (1987).
106. *Id.* at 139-41.
107. *Id.* at 158.
108. THE KILLING STATE, *supra* note 3, at 212-16.
109. *Id.* at 213.
110. *Id.* at 214.

historical, scientific, and empirical developments.[111] In fact, those intimately familiar with all facets of the criminal law apparatus—either by study or by work experience—are generally not invited to participate in formulating penal policy.[112] Consequently, scientific, empirical, and, on occasion, even anecdotal information usually does not inform either criminal law or capital punishment doctrine. The disconnect among research, criminal law doctrine,[113] and public policy is most exaggerated when penological issues are presented to the public in, for instance, media reports.

The final essay,[114] *The Cultural Life of Capital Punishment: Responsibility and Representation in* Dead Man Walking[115] *and* Last

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111. Richard Posner has argued that since the last half of the Twentieth Century this phenomena has changed. Now, the legal system and legal thought are more willing to embrace other disciplines and ways of thinking and dealing with what are ostensibly legal problems. *See* Richard A. Posner, *The Decline of Law as an Autonomous Discipline, 1962-1987*, 100 HARV. L. REV. 761, 767 (1987).

112. *See* Samuel H. Pillsbury, *Why Are We Ignored? The Peculiar Place of Experts in the Current Debate About Crime and Justice*, 31 CRIM. L. BULL. 305 (1995). Of the many reasons for the exclusion are that politicians tend to "emphasize selfish, shorter-term, and emotional concerns in making policy decisions," *id.* at 315, whereas penological and legal experts tend to favor "far-sighted, broad-minded, and rationalistic" approaches. *Id.* at 317; *see also* Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFFALO CRIM. L. REV. 23, 32 (1997) (exploring the impact of psychological factors, race, and politics in formulating criminal law doctrine); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511 (2001) (exploring the criminal law making process and proposing methods that might rein in its breath). One barrier is fading as some jurisdictions no longer automatically exclude lawyers from jury service. *See generally* Michael P. Sullivan, Annotation, *Jury: Who is Lawyer or Attorney Disqualified or Exempt from Service, or Subject to Challenge for Cause*, 57 A.L.R. 4th 1260, 1261 (1987) (analyzing state and federal cases where the courts have addressed whether an attorney or lawyer is disqualified or exempt from jury service).

113. The law of insanity is the paradigmatic example. In this nation's history, four major tests, or a variation thereof, have been used to determine if a defendant lacked criminal responsibility for a crime. Each test was only adopted after great dissatisfaction with existing law. Moreover, even though courts and legislatures thought the tests they adopted were innovative, these tests for insanity were often based on outdated research. For a brief description of these developments, see Finger v. State, 27 P.3d 66, 71-75 (Nev. 2001); Graham v. State, 547 S.W.2d 531, 538-44 (Tenn. 1977).

114. THE KILLING STATE, *supra* note 3, at 226.

115. In the movie *Dead Man Walking*, Matthew Poncelet and Carl Vitello, while under the influence of drugs and alcohol, go into the woods. They happen upon a teenage couple kissing in a parked car. Poncelet and Vitello sneak up on the couple and tell them they are security guards. The couple follow their orders and get out of the car. The boyfriend is bound and forced to watch Poncelet and Vitello repeatedly rape his girlfriend. Eventually, the boyfriend is shot twice in the back of the head, and the girlfriend is stabbed numerous times in the upper body and then shot twice in the back of the head. *See* DEAD MAN WALKING (Poly Gram Filmed Entm't 1995).

Dance,[116] is by Austin Sarat, the book's editor. It considers how condemned inmates and the public are portrayed in two movies. After highlighting some possible psychological and social roles that concepts of punishment and responsibility play within the criminal law, Sarat notes that executions—the implementation of the ultimate sentence—are conducted in semi-private settings.[117] Consequently, what we know of executions "comes in the most highly mediated way as a rumor, a report . . . . Or it comes in images and representations made available in popular culture."[118]

In light of the disjunction between punishment, responsibility, and the public's lack of direct connection to executions, Sarat proposes "to make a particular intervention in scholarship about the death penalty, to turn away from abstract, philosophical questions about the morality or legality of state killing and narrow policy-relevant research toward an analysis of the cultural life of capital punishment."[119] While noting that the movies chosen are not representative of the genre, Sarat selects films produced by major movie studios in the United States in 1996: *Dead Man Walking*[120] and *Last Dance*. He points out how both films repeatedly emphasize that the condemned main characters—Cindy Liggitt in *Last Dance* and Matthew Poncelet in *Dead Man Walking*—accept full responsibility for their crimes before they are executed.[121] Such an acceptance allows the audience to conclude that the executions are appropriate. Sarat also notes: "The language of responsibility directs attention away from the legal and political issues surrounding capital punishment just as it refuses to accept structure, accident, or conspiracy as

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116. In *Last Dance*, Cindy Liggitt kills two people with a crowbar during a burglary of their home. Twelve years later, during a review of her case in the last few weeks before her scheduled execution, an attorney hired by the clemency board becomes convinced that she should not die. The attorney first persuades her to fight for her life, and he then tries to obtain a stay of her execution. *See* LAST DANCE (Touchstone Pictures 1995).

117. THE KILLING STATE, *supra* note 3, at 229.

118. *Id.*

119. *Id.* (footnotes omitted).

120. Several commentators have considered the presentation of capital punishment issues in *Dead Man Walking*. *See* David R. Dow, *Fictional Documentaries and Truthful Fictions: The Death Penalty in Recent American Film*, 17 CONST. COMMENT 511, 513 (2000) (pointing out that compared to documentaries, big budget films present more accurate representations of death penalty issues, including portrayals of guilty defendants); Roberta M. Harding, *Celluloid Death: Cinematic Depictions of Capital Punishment*, 30 U.S.F. L. REV. 1167, 1168 (1996) (stating that *Dead Man Walking* is a superior example of handling of capital punishment issues); Christopher J. Meade, Note, *Reading Death Sentences: The Narrative Construction of Capital Punishment*, 71 N.Y.U. L. REV. 732, 760-61 (1996) (arguing that to address capital issues more persuasively films should include guilty defendants, such as *Dead Man Walking*'s Matthew Poncelet); Carole Shapiro, *Do or Die: Does* Dead Man Walking *Run?*, 30 U.S.F. L. REV. 1143 (1996) (comparing the movie's representations with the book on which it was based and with actual capital defendants).

121. THE KILLING STATE, *supra* note 3, at 232.

justifications for actions."[122]

Both films place the audience in the position of neutral observers—jurors, if you will—who are to deliberate on whether the defendant deserves to be executed. Like capital sentencing jurors, the audience is not to consider whether death *should* be a permissible penal sanction, only whether it *will* be imposed on this defendant. Again, similar to capital jurors, whose understanding of the crime and the defendant are supposed to depend on the work of the lawyers and their courtroom presentations, the movie audience's perception of the defendant and the crime is subject to the director's presentation and persuasion. According to Sarat, both films give the impression that viewers have seen the crimes as they occurred and that they see what actually happens during an execution.[123] This perspective allows the films to "domesticate the death penalty and allow us to believe that we can know what the state does in our name, that we can measure the effects of capital punishment and in that act precisely fix the balance of pains necessary to make the punishment fit the crime."[124] In this regard the movies mediate between "conservative cultural politics"[125] and popular culture. Sarat further observes that both movies emphasize that the main characters' situations are the products of their own choices.[126] This cinematic device allows the film-makers to ignore the social factors that contribute to crime, while presenting both the capital crime for which the defendant is to be executed and the execution itself as discrete events.[127] In short, according to Sarat, both movies make the death penalty palatable and socially acceptable.[128]

Sarat does not quite succeed in dealing with the "culture of capital punishment" in his essay. While he acknowledges that cultural messages are in "both 'high' and 'popular' culture iconography, in novels, televisions, and

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122. *Id.* at 239.

123. *Id.* at 239.

124. *Id.* at 246.

125. Though this term is never defined, Sarat is apparently referring to those who generally advocate for a particular type of social and fiscal conservatism in law and society. *See generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991).

126. THE KILLING STATE, *supra* note 3, at 240.

127. Abolitionists generally express uncertainty that the defendant committed the crime. This uncertainty, in turn, leads to arguments on whether innocents have been executed. Indeed, at some point during their prosecution and appeals, the overwhelming majority of capital defendants claim that they did not commit the capital offense. That claim may be made at the initial arraignment or plea, during trial, or, most likely, post-conviction. In light of this nearly inevitable claim and virtually unfettered prosecutorial discretion on how to construct and litigate cases, some abolitionists essentially contend that we will never truly "know" the full circumstances of particular crimes. *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988), which held that "residual doubt" regarding the defendant's guilt is not a constitutionally compelled mitigating factor, frustrates this notion because it invites the capital sentencer to believe that guilt has been conclusively established and to focus only on the sentence that it should impose.

128. THE KILLING STATE, *supra* note 3, at 248.

film,"[129] Sarat limits his consideration to mass cultural commodities—movies, television programs, books, and positive law, such as court decisions and statutes.[130] This decision likely has a distorting influence on the "culture" that is presented. The upper social classes produce these items, and these commodities probably reflect upper social class norms. Similarly, these "cultural" barometers are not as apt to represent the perspectives of persons of color or more vanguard approaches, due to the lag time between the creation of these commodities and the circumstances that prompted their creation.[131]

In contrast, Professor Kenneth Nunn, in his law review article, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*,[132] does a more convincing job than Sarat of assessing both the influence of societal views and cultural works on a criminal trial and the influence of criminal trials on society. According to Nunn, it is a myth to believe that a criminal trial pits two evenly matched adversaries, prosecution and defense, in a battle to persuade the jury.[133] In reality, the prosecution has a distinct advantage because popular culture—through the medium of

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129. *Id.* at 230 (footnote omitted).

130. No doubt some aspects of the United States' legal culture can be ascertained by mining movies, television programs and advertisements, newspapers, books, and songs. *See* Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527, 547-563; Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1587 (1989). These sources might provide insights on the norms and ideals valued and promoted within the United States. *See generally* TIMOTHY E. SCHEURER, BORN IN THE U.S.A.: THE MYTH OF AMERICA IN POPULAR MUSIC FROM COLONIAL TIMES TO THE PRESENT (1991) (analyzing various myths present in songs popular in different periods of United States history).

Care should be taken, however, not to infer too generally from these artifacts. Some of the materials are produced for entertainment or satire and have slight educational or historical value. Accordingly, the chance that one may have sacrificed accuracy for dramatic or satirical impact, should be kept in mind when using that material to discover the values of culture. The essayists in *The Killing State* do not examine many cultural products. In fact, the essays in the "Responsibility" section of the book, (section III) which most directly deals with cultural representations, consider only a few movies, books, and songs, and make no suggestion that the material reviewed is representative of what is produced in the United States.

131. Consider, for instance, the "perp walk," in which an arrestee is paraded in front of news reporters. This practice is portrayed as a usual part of police life in the television program *NYPD Blue*, which premiered in September 1993. *NYPD Blue* (ABC 1993). The practice has been going on in New York City at least since the 1940s. *See* Blaine Harden, *Parading of Suspects is Evolving Tradition*, N.Y. TIMES, Feb. 27, 1999, at B1. No court has held an officer liable for performing a perp walk. *See* Lauro v. Charles, 219 F.3d 202, 203 (2d Cir. 2000) (holding that staged perp walk violated the suspect's Fourth Amendment rights but granting the police officer qualified immunity for participating in the activity because the unlawfulness of perp walk was not clearly established by 1994).

132. 32 AM. CRIM. L. REV. 743 (1995).

133. *Id.* at 745.

television—portrays life in the United States as much more violent than it really is and portrays criminals "as one-dimensional demons to be feared and destroyed."[134] Nunn thus places his argument within the larger framework of culture and cultural products, and he substantiates his claims.

As a whole, *The Killing State* tries to discuss the death penalty outside the bounds of the law. This is not surprising because for abolitionists—which, based on the general thrusts of each essay, seems to be the leaning of the book's contributors—the law itself does not yet prohibit a state from executing its own citizens. Consequently, a book on the death penalty that considered only legal issues would be, in the mind of abolitionists, painfully incomplete. While *The Killing State* does address more than the law of the death penalty it misses its chance to be more persuasive as work of scholarship. This is partly because it does not define and document its claims. The following section addresses the book's theme.

III. THE METAPHOR OF VIOLENCE

A repeated theme throughout *The Killing State*, first advanced in the introductory essay, is the "uneasy linkage between law and violence."[135] The book, however, is not concerned with what is known as the "brutalization effect" of capital punishment.[136] The brutalization effect theory is that with each execution members of a society do not feel safer; instead they accept violence as a way of addressing societal problems.[137] Instead, *The Killing State* views law as being entwined with violence. According to Sarat:

> Law it seems cannot work its lethal will and ally itself with the killing state while remaining aloof and unstained by the deeds themselves. As pervasive and threatening as this alliance is, it is, nonetheless, difficult to understand that relationship, or to know precisely what one is talking about when one speaks about it. This difficulty arises because law is violent in many ways—in the ways it uses language and in its representational practices, in

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134. *Id.* at 770.

135. THE KILLING STATE, *supra* note 3, at 6.

136. *See generally* William J. Bowers & Glenn L. Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 26 CRIME & DELINQ. 453 (1980) (finding a "brutalizing effect" resulting from executions).

137. Justice Brandeis once noted the potential impact of the government's conduct on society:

> [O]ur Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)

> the silencing of perspectives and the denial of experience, and in its objectifying epistemology. It arises from the fact that linguistic, representational violence of the law is inseparable from its literal, physical violence. . . . Violence, as both a linguistic and physical phenomenon, as fact and metaphor, is integral to the constitution of modern law.[138]

Sarat thus seems to argue that despite its efforts to remain neutral, the law, in authorizing capital punishment, will itself inevitably become violent. Sarat's observation, however, is not limited to the law of capital punishment but would seem to apply any time competing choices are present in the law. The rejected choice or perspective is "silenced," and the experiences of those who advocated that perspective are implicitly devalued.

Sarat would have been on firmer ground asserting that modern constitutional law, as a linguistic enterprise, is integral to the legal support of the death penalty.[139] That is, in this country, contemporary debates on the death penalty usually include a reference to the constitutionality of the punishment and to principles of morality. The language of the law of capital punishment, however, is frequently neither clear nor decisive. For instance, the present federal constitutional framework for capital punishment was ushered in when the United States Supreme Court, in a less than ringing endorsement, declared that the death penalty does not "invariably violate the Constitution."[140] That understanding of the document is subject to reinterpretation both as the Court's personnel changes[141] and sometimes when the Justices themselves recant their prior views.[142] More generally, characterizing the interpretation and application of law as "violence" is either an inapt metaphor or is an expectation of something—uniformity and perfection—that the law, in general, and the death penalty, in particular, have never been able to deliver.[143] So long as law remains a human endeavor, it is

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138. THE KILLING STATE, *supra* note 3, at 6 (internal quotation marks and footnotes omitted).

139. *See, e.g.*, Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590, 2597-2600 (1996) (recognizing the limits of legal language).

140. Gregg v. Georgia, 428 U.S. 153, 169 (1976) (Stewart, J.) (plurality opinion).

141. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 829-30 (1991) (suggesting that decisions "decided by the narrowest of margins, over spirited dissents" are more likely to be overruled). *But see id.* at 844 (Marshall, J., dissenting) ("Power, not reason, is the new currency of this Court's decisonmaking. . . . Neither the law nor the facts supporting [the overruled cases] underwent any change in the last four years. Only the personnel of this Court did.").

142. *See, e.g.*, Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death."); Walton v. Arizona, 497 U.S. 639, 673 (1994) (Scalia, J., concurring in part) ("I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that a sentencer's discretion has been unlawfully restricted.").

143. Many of the essayists in *The Killing State* apparently seek to impose the nearly

unlikely ever to be either uniform or perfect.

Robert Cover's apparent influence can be seen throughout *The Killing State*.[144] In some of his writings, Cover addressed the connection between legal interpretation and violence.[145] In the article Nomos *and Narrative*,[146] Cover stated the now-obvious idea that the world in which we live—including legal institutions and legal solutions—does not exist apart from our conception of it.[147] He argued that legal meaning is given context through the filter of culture.[148] Law is a system of tensions, and the legal interpreter's task is to link reality with an imagined alternative.[149] Cover labeled this imagined alternative a "nomos," or normative universe.[150] He maintained that "there is a radical dichotomy between the social organization of law as power and the

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impossible goal of uniformity on the law of death. Interestingly, though they come to opposite conclusions, two groups generally advocate for absolute consistency in the death penalty: abolitionists and supporters of a mandatory death penalty. The vast majority of the law of death, however, has occupied the middle ground—as have the Justices on the United States Supreme Court and the majority of United States citizens. It is on this ground that the law of death has been built.

144. A few of the essayists explicitly rely on Cover. For instance, in *Tokens of Our Esteem*, Simon and Spaulding note that advocates of enactment of more aggravating circumstances assert that legislating these circumstances is a valid way to fight crime because the circumstances define the most culpable criminal defendants. According to Simon and Spaulding, aggravating circumstances should remind us of Cover's observation that all law is founded on the possibility of death and violence. THE KILLING STATE, *supra* note 3, at 99. Similarly, Amsterdam's *Selling a Quick Fix for Boot Hill* cites to Cover (and others) in observing how the Court's involvement in appeals of stays of executions does not distance the Justices from the process of death, but, as Cover maintained, actually brings them closer to it. *Id.* at 182 n.131. Sarat in *The Cultural Life of Capital Punishment* also refers to this stay of execution example. *Id.* at 243. Sarat's essay relies on Cover in invoking Michel Foucault's assessment of public executions as a "manifestation of force," which reiterates Cover's claim that law is used to subordinate anyone who challenges legal authority. *Id.* at 228 (quoting MICHAEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 50 (Alan Sheriden trans., 1977)).

145. *See* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow et al. eds., 1992). A disconcerting aspect of *The Killing State* is that it does not stand on its own intellectual feet. One has to rely on sources outside of the book, which are frequently not mentioned in the book, to understand it fully. For instance, like me, in a review of a different book by Sarat, the reviewer relies on sources either alluded to or cited in the book yet that are not fully explained in Sarat's work. *See* Timothy V. Kaufman-Osborn, *Regulating Death: Capital Punishment and the Late Liberal State*, 111 YALE L.J. 681, 692-733 (2001) (relying on the work of Max Weber, John Locke, and Michel Foucault in reviewing AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION (2001)).

146. 97 HARV. L. REV. 4 (1983).

147. *Id.* at 4.

148. *Id.* at 9, 11-44.

149. *Id.* at 9.

150. *Id.* at 4.

organization of law as meaning."[151] After outlining how various communities defined their nomos, which sometimes contradicted the law, Cover maintained that legal meaning could not exist without the exercise of "superior brute force"[152] or "coercion."[153]

He then considered "the extent to which coercion is necessary to the maintenance of minimum conditions for the creation of legal meaning in autonomous interpretive communities."[154] Cover—metaphorically—viewed judges as having complementary and contradictory roles. He wrote:

> Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.
>
> But judges are also people of peace. Among warring sects, each of which wraps itself in the mantle of the law of its own, they assert a regulative function that permits a life of law rather than violence. The range of violence they could command (but generally do not) measures the range of the peace and law they constitute.
>
> The resistance of a community to the law of the judge, the community's insistence upon living its own law or realizing its law within the larger social world, raises the question of the judge's commitment to the violence of his office. A community's acquiescence in or accommodation to the judge's interpretation reinforces the hermeneutic process offered by the judge and extends, in one way or another, its social range. Confrontation, on the other hand, challenges the judge's implicit claim to authoritative interpretation.[155]

Cover thus used violence as an allegory on the real-life consequences of legal interpretation. Cover's description of legal interpretation should produce prudence and humility in judges. Prudence should be exercised due to the difficulty in reversing a given interpretation. Legal interpretation should also be undertaken with humility in light of the significant effects—including death—that may flow from how the law is construed.[156]

Cover returned to this theme in *Violence and the Word*.[157] In that essay he considered how legal interpretation is given meaning in the everyday world.

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151. *Id.* at 18.

152. *Id.* at 44.

153. *Id.* at 40.

154. *Id.* at 44.

155. *Id.* at 53 (footnotes omitted).

156. *See* Charles Fried, *Imprudence*, 1992 SUP. CT. REV. 155, 172-94 (surveying the evolution of death penalty habeas law developments from 1963 to 1992 and exploring which federal judges might be faulted for their rulings in capital cases).

157. 95 YALE L. J. 1601 (1986).

> Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.[158]

According to him, law carries with it an implied use of force. Cover used the death penalty as an example of the connection between legal interpretation and the conduct authorized by that pronouncement. He noted that

> in capital punishment the action or *deed* is extreme and irrevocable, there is pressure placed on the *word*—the interpretation that establishes the legal justification for the act. At the same time, the fact that capital punishment constitutes the most plain, the most deliberate, and the most thoughtful manifestation of legal interpretation as violence makes the imposition of the sentence an especially powerful test of the faith and commitment of the interpreters. Not even the facade of civility, where it exists, can obscure the violence of a death sentence.
>
> Capital cases, thus, disclose far more of the structure of judicial interpretation than do other cases. Aiding this disclosure is the agonistic character of law: The defendant and his counsel search for and exploit any part of the structure that may work to their advantage. And they do so to an extreme degree in a matter of life and death.[159]

Cover went on to observe that, by itself, a judge's interpretation is worthless.

> A judge who wishes to transform her understanding into deed must, if located on a trial court, attend to ensuring that her decision not be reversed. If on an appellate court, she must attend to getting at least one other judge to go along. It is commonplace that many "majority" opinions bear the scars or marks of having been written primarily to keep the majority. Many a trial court opinion bears the scars of having been written primarily to avoid reversal.[160]

The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role[161] was Cover's final writing on the issue. Though it largely repeats his earlier thoughts in *Violence and the Word*, Cover ends the article with:

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158. *Id.* at 1601 (footnote omitted).
159. *Id.* at 1622-23 (footnotes omitted).
160. *Id.* at 1627.
161. 20 GA. L. REV. 815 (1986).

> In law to be an interpreter is to be a force, an actor who creates effects even through or in the face of violence. To stop short of suffering or imposing violence is to give law up to those who are willing to so act. The state is organized to overcome scruple and fear. Its officials *will* so act. All others are merely petitioners if they will not fight back.[162]

Cover was not writing to denounce capital punishment.[163] Rather, he used capital punishment as an example of the real-world consequences of legal interpretation. In not advocating the abolition of capital punishment, Cover is a more forceful critic of the death penalty,[164] especially when it appears that the rule of law is being subverted in order to sustain the death penalty. Cover's position seemed to be that if the death penalty is going to exist, it should be administered according to the law and within its strictures and not merely under the pretense of following the law.

I read Cover as offering a metaphor that when law is interpreted, the interpreter relies as much on his or her perspective to interpret as on any other tool. "Violence" occurs when an interpreter, who has the power to declare the law, insists that his or her understanding or application of the law is either certain, inevitable, or inescapable. The interpreter then rejects all contrary interpretations or applications of the law as impermissible, even though the alternative interpretations are equally plausible. This is "violence" because the interpreter is allowed, by dint of his or her position in society, not only to impose a disputable legal interpretation on others, but also to banish contrary readings. In making these choices, interpreters have to be willing not only to be criticized but also to stand behind their decisions.[165] Understandably, the

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162. *Id.* at 833 (emphasis in original).

163. Cover claimed, "I am not an abolitionist." *Id.* at 831.

164. Mark Tushnet, *Reflections on Capital Punishment: One Side of an Uncompleted Discussion*, 7 J. L. & RELIGION 21, 25-27 (1989). Cover's criticism is more powerful partly because "he defined his position with respect to a particular society which already had a commitment to the death penalty, rather than offering a general defense of capital punishment applicable to all societies." *Id.* at 26.

As with most arguments, the participants' own moral virtues and the positions they take affect the persuasiveness of their claims. *See* Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869 (1988); Joseph William Singer, *Persuasion*, 87 MICH. L. REV. 2442 (1989). In this regard, Cover's essentially indifferent subscription to the death penalty gives the impression that, if administrated properly, he would more fully endorse it. In contrast, abolitionists tend to accept any and every reason to discard the sanction while pro-death penalty supporters sometime seem willfully blind to the problems of administrating a fair and effective capital punishment system. Thus, Cover's resistance to being an abolitionists was another distinctive feature of his critique. In doing so, he took a position apparently at odds with his expected cultural world view.

165. Today, in capital cases, judges, unfortunately, should expect public denunciation for any ruling that may be interpreted as favorable to a capital defendant. *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 784-93 (1995). Despite this

open-ended clauses of the federal and state constitutions and the not-always precise wording of penal statutes might lead some to think that "violence" is occasionally being wrought by judges in capital cases.

Cover's metaphor is also somewhat misleading. First, it is not inevitable that the law of capital punishment will result in death. In most capital prosecutions, the defendant receives a sentence other than death. Second, even when the defendant is sentenced to death, it is statistically unlikely that the defendant will be executed, as only a small percentage of condemned inmates are actually executed. Thus, it is the rare capital case in which a defendant meets with "violence" (i.e., his death) through the law. It is only in these relatively few capital cases that Cover's metaphor and assertion—that capital cases are "the most plain, the most deliberate, and the most thoughtful manifestation of legal interpretation as violence"[166]—might apply. Third, though the law of capital punishment outlines the circumstances under which a defendant can be executed,[167] the law also says when a defendant cannot be executed.[168] Consequently, to say that the law of capital punishment "results

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recognition, judicial rulings in capital cases should be based on the law and not external factors, such as the political palatability or popularity of a ruling.

In the United States, a judge does not often face physical violence or death for his or her court rulings, though a few have been killed. *See* Lee May & Ronald J. Ostrow, *Federal Judges Warned About Postal Bombs*, L.A. TIMES, Dec. 18, 1989, at A1 (describing the murder of federal circuit Judge Robert Vance by mail bomb, the murder of federal district Judge Richard Daronco by the angry father of a former litigant, and the murder of federal district Judge John Wood, Jr., who was killed in his home by a sniper carrying out a contract "hit"). Physical resistance and possible violence are more likely when enforcing highly contentious legal decrees. *See* David Rosenzweig, *On the Law: A Wake-Up Call for L.A. County's Judges*, L.A. TIMES, July 12, 2002, at B2.

166. Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1622 (1986).

167. Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (affirming that defendants who one at least sixteen years old at the time of the capital offense can be executed); Tison v. Arizona, 481 U.S. 137, 158 (1987) (stating that defendant who is recklessly indifferent to the likelihood of death and who is a major participant in a deadly felony can receive the death sentence); Jurek v. Texas, 428 U.S. 262, 268-76 (1976) (affirming the death sentence and upholding a capital punishment statutory scheme that limited imposition of the death sentence to five types of murder and which provided for the sentencer to consider mitigating evidence when deciding the sentence); Proffitt v. Florida, 428 U.S. 242, 246-53 (1976) (affirming the death sentence and upholding a capital punishment statutory scheme that limited imposition of the death sentence to first-degree murder and under which the trial judge had to weigh aggravating and mitigating circumstances in determining whether to impose a death sentence); Gregg v. Georgia, 428 U.S. 153 (1976) (affirming the death sentence and upholding a capital punishment statutory scheme under which the jury had to find that at least one of ten aggravating circumstances outweighed any mitigating circumstances before imposing the death sentence).

168. Atkins v. Virginia, 536 U.S. 304, 317-21 (2002) (holding unconstitutional the execution of mentally retarded defendants); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (plurality opinion) (affirming that execution of defendants who are under sixteen years old at the time of the capital offense is unconstitutional); Ford v. Wainwright, 477 U.S. 399, 410

in" or "causes" violence or death ignores the law's protective power.

IV. TAKING COVER ELSEWHERE

The essayists in *The Killing State* apparently have a different understanding of Cover's metaphor, and in light of the import of his writings, Cover would likely agree that the essayists have a right to interpret his work differently than I do. They presumably believe that the law is most "violent" when it is interpreted to allow state-sanctioned executions. Put more bluntly, the state can never, as a criminal sanction, execute one if its citizens. If one maintains that executions are never permissible, then most efforts to justify the legitimacy of the death penalty will be futile. Cover, of course, sought to explain the law, including the death penalty, through the metaphor of violence. It is an overstatement, however, to say that legal interpretation—or the enforcement of legal decrees—is violence or foments violence. Nor does the metaphor of violence always apply even when the underlying law deals with matters of life and death, such as the regulation of funeral homes, wills, abortion, the law of homicide or the death penalty, and when the enforcement of the law will result in a human's death. Though creative and consistently presented, the thesis of *The Killing State*—that the present interpretation and application of laws related to capital punishment is legally sanctioned violence that itself denigrates the culture, politics, and laws of a society—is not established.

Even if one concedes that state-sanctioned, non-consensual executions are legally- authorized violence, such executions will not invariably denigrate a culture. In fact, Franklin Zimring and Gordon Hawkins have considered the link between mass media depictions of aggressive acts of violence and real world incidents of serious violence in the United States.[169] After reviewing the research and data of several behavioral scientists, Zimring and Hawkins concluded that proof of a link does not exist between media depictions of aggressive acts of violence and real world incidents of serious violence.[170] If the link between criminal violence in a society and its impact on either an individual or a society has not been substantiated, then it is difficult to conceive how the interpretation of legal texts and the authorization of

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(1986) (stating that execution of the insane is unconstitutional); Enmund v. Florida, 458 U.S. 782, 801 (1982) (stating that the death penalty cannot be imposed on a felony murder participant who did not kill, attempt to kill, intend that a killing take place, or intend to use lethal force); Coker v. Georgia, 433 U.S. 584, 600 (1977) (plurality opinion) (holding unconstitutional the death penalty for rape of an adult woman).

169. *See generally* FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 124-37 (1997).

170. *See id.* at 132-37, 237-47. Zimring and Hawkins did not completely rule out the possibility of some impact that deceptions of violence might have on a society and on individual, as they noted that "we may lack the capacity to measure significant dimensions of the pervasive influence of mass media communications." *Id.* at 137.

particular punishment foments violence in a society.

Despite the lack of a demonstrated causal link between legal interpretation and physical violence, one cannot deny that a somewhat paradoxical relationship exists between the death penalty and other social phenomena. For instance, there is a cylindrical connection between the death penalty, planned killings, and messages that executions send about the value of life. Some capital punishment supporters claim that a benefit of the death penalty is that it reduces the likelihood of murders by eliminating those who have previously committed that crime. In most instances, the intentional taking of a human life is itself a crime. An exception is when the state—to show how much it values human life—deliberately kills a murderer. Thus, the state's killing of a murderer signals that violence and killing are sometimes an appropriate means of resolving disputes. Executions may, in turn, devalue human life. This devaluing of human life can lead to more individuals deciding to murder, and those murders may be prosecuted as capital crimes.

Another contradictory social phenomena is the connection between the death penalty and self-help. The desire for self-help has been identified as a practical justification for the death penalty.[171] Survivors of murder victims are not to take private vengeance on the murderer. They are instead supposed to rely on the court system for justice. At the sentencing hearing, however, a state can allow survivors to tell of the emotional toll that the murder has had on their lives and expect the sentencer to consider that toll when selecting the sentence. Consequently, by allowing the victim's survivors to more directly influence the sentence imposed, capital punishment law now places its imprimatur on vengeance. In contrast, *Gregg* emphasized more the elimination of emotion from the decision to impose the death penalty.[172]

In short, Cover, in essays on legal interpretation, used a metaphor in discussing the death penalty to highlight possible consequences of legal interpretation. *The Killing State* uses Cover's metaphor to argue that maintaining the death penalty brings about legal, political, and cultural decay, but most of its essays over-emphasize that rhetorical possibility and come up short in demonstrating the present extent of such decay. As they failed to make evident the present decay, it is then not really surprising that the essayists did not go on to suggest how legal, political, and cultural components of United States society might be further impacted by continued decay. It is likely, therefore, that only through imagining a dimmer future that some will reconsider the role of capital punishment in the United States.

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171. *See* Gregg v. Georgia, 428 U.S. 153, 183-84 (1976) (plurality opinion) (suggesting that capital punishment promotes social stability because the governed will believe that offenders will get their just deserts and the governed will therefore renounce self-help, vigilante justice, and lynch law).

172. *See id.* at 195 ("[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.").

V. DEATH PENALTY'S INFLUENCE ON THE INTERPRETATION OF CRIMINAL LAW

The essayists in *The Killing State* assert that the law—particularly the federal Constitution—is being interpreted to legally sanction executions, which makes executions more likely to occur than if the law were properly interpreted to prohibit executions. This assertion is a half-told tale. In reality, in this nation, the death penalty has been influencing the path of the criminal law and criminal procedure for more than a century, and the United States Supreme Court has been a leading actor in the process.

Since the end of the Civil War, the Court has expansively interpreted the availability of habeas corpus, particularly in capital cases.[173] Initially the Court expanded the scope of the writ under the guise of considering whether the trial court had jurisdiction to prosecute; if the trial court lacked jurisdiction, the writ was granted.[174] Though likely influenced by institutional considerations, such as the availability of a federal forum in which the defendant could litigate federal constitutional claims, for the greater part of the Twentieth Century the Court seemed to have special solicitude for capital habeas petitioners.

It appears that concerns about both racist state officials and the death penalty motivated the United States Supreme Court to rework portions of habeas corpus law. During the first half of the Twentieth Century,[175] when the criminal litigation process was less governed by federal constitutional restrictions, the Court exhibited occasional concern about the fate of racial minorities in the South.[176] Prisoners increasingly sought relief from their criminal convictions in the federal courts via the writ of habeas corpus.

In brief, the federal habeas corpus statute permits federal courts to entertain a habeas petition on behalf of a state petitioner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the

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173. *See Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1045-55 (1970) (discussing how the concept of federal habeas jurisdiction changed from 1873 to 1942); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 465- 99 (1963) (reviewing the history and interpretation of federal habeas review of federal and state court convictions from 1789 to 1952).

174. *See Developments in the Law*, *supra* note 173, at 1046-50.

175. The full story of the intersection of race and federal habeas corpus has yet to be told, but there are some preliminary sketches of related issues. *See* MARK CURRIDEN & LEROY PHILLIPS, JR., CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED 100 YEARS OF FEDERALISM 175-76, 193-94 (1999) (asserting that the United States Supreme Court's criminal procedure decisions in 1920s and 1930s evidenced a sensitivity to plight of African-Americans in southern courts); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48-49 (2000) (same).

176. Despite his general belief in limited federal habeas review, one influential commentator allowed that federal habeas law should be able to address racism in the state court criminal process. *See* Bator, *supra* note 173, at 521-25.

United States."[177] Thus, state prisoners have to establish that their continued detention violates federal law in order to receive relief from a federal court. In 1923, for instance, the Court in *Moore v. Dempsey*[178] reinstated a federal habeas petition brought on behalf of five African-Americans who had been convicted of first degree murder and sentenced to death in Arkansas.[179] The defendants alleged that mob rule dominated their pretrial and trial proceedings, resulting in a denial of their Fourteenth Amendment right to due process of law.[180] The Court, citing and purporting to rely on *Frank v. Magnum*,[181] reversed the district court's dismissal of the petition.[182] The case was remanded to the district judge with instructions for him to perform his "duty of examining the facts for himself," because the facts, as alleged in the habeas petition, if true, would void the underlying trial.[183] Commentators have stated that *Moore* "carr[ied] the law beyond *Frank*" by "radically, albeit quietly, alter[ing] the federal habeas jurisdiction."[184] In any event, *Moore* is rightly viewed as an important case in the development of federal habeas law because it authorized the federal courts to more closely review the state court criminal process.

Another historic case, *Brown v. Allen*,[185] in 1953, consisted of three consolidated cases from North Carolina, all involving African-American men as defendants. Two defendants, Clyde Brown and Raleigh Speller, were tried and convicted separately of different rapes of white women and both received death sentences.[186] Two other defendants, Bennie Daniels and Lloyd Ray Daniels, were tried together, convicted of murder, and sentenced to death.[187]

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177. 28 U.S.C. § 2254(a) (2000). Though phrased differently, similar language has existed in the federal habeas statute since its original enactment. *See* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

178. 261 U.S. 86 (1923).

179. *Id.* at 92.

180. *Id.* at 90.

181. 237 U.S. 309 (1915). In *Frank*, the Court rejected a claim that the defendant's due process rights were violated because his trial was dominated by mob rule. However, the pages of history support the defendant's claim. *See generally* LEONARD DINNERSTEIN, THE LEO FRANK CASE (1966).

182. *Moore*, 261 U.S. at 90-91.

183. *Id.* at 90-92.

184. *Developments in the Law*, *supra* note 173, at 1052, 1053. *But see* Eric M. Freedman, *Milestones in Habeas Corpus—Part II: Leo Frank Lives: Untangling the Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions*, 51 ALA. L. REV. 1467, 1472 (2000) (contending that *Frank* and *Moore* are consistent and allow for extensive federal habeas review of state court convictions and proffering that the cases had different outcomes because of "no more than differing discretionary determinations in specific factual settings").

185. 344 U.S. 443, 447 (1953).

186. *Id.* at 466, 477. Justice Black noted the race of the rape victims. *Id.* at 548 (Black, J., dissenting).

187. *Id.* at 482.

On appeal, all four alleged federal constitutional violations. More specifically, they claimed that the North Carolina courts had a practice of excluding African-Americans from grand and petit jury service in violation of the Sixth Amendment and that their confessions were coerced in violation of the Fourteenth Amendment.[188]

The United States Supreme Court, in three splintered opinions, affirmed the denial of each defendant's habeas petition. In the process, the Court announced important interrelated rulings on federal habeas corpus law. *Brown* established that all federal constitutional questions raised in a habeas petition were cognizable on federal habeas review, even when the United States Supreme Court had earlier denied certiorari on the same questions in the case on direct review.[189] Thus, after *Brown*, a state court's adjudication of federal legal issues is not binding on the federal habeas court.[190] *Brown* also determined that federal habeas courts were not bound by the state court's factual findings and had the discretion to hold hearings.[191]

The Court was also protective of capital defendants in their direct appeals. In 1932, in a capital prosecution that originated in the South, the Court recognized an indigent defendant's constitutional right to counsel.[192] It took another thirty years before the Court held that non-capital indigent defendants had a right to counsel.[193] The practice of presuming prejudice when an unrepresented defendant entered a guilty plea was first developed in capital cases.[194] Thus, in the first half of the Twentieth Century, the Court typically expanded constitutional protections for all criminal defendants when death

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188. *Id.* at 467-76 (describing and rejecting Brown's claims); *id.* at 477-82 (describing and rejecting Speller's claims); *id.* at 482-87 (describing and rejecting the Daniels' claims).

189. *Id.* at 487-88 (statement of Justices Burton and Clark); *id.* at 496-97 (opinion of Justice Frankfurter); *id.* at 513 (statement of Justices Black and Douglas).

190. *Id.* at 459; *id.* at 500 (Frankfurter, J., concurring).

191. *Id.* at 464-65. Two other important decisions that expansively interpreted the availability of the writ of habeas corpus were also capital cases, *Fay v. Noia*, 372 U.S. 391, 438 (1963), which held that a state prisoner must have deliberately bypassed a state court process to bar federal habeas review of the claim, and *Townsend v. Sain*, 372 U.S. 293, 312-18 (1963), which detailed when federal habeas court should convene a hearing to help adjudicate the petition. The Court's indulgence of capital defendants was explicit in *Fay*, in which the Court excused the defendant's failure to appeal his conviction, reasoning that he faced a "grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence." *Fay*, 372 U.S. at 440.

192. Powell v. Alabama, 287 U.S. 45, 72-73 (1932) (holding that indigent defendants have a due process right to assistance of counsel in capital cases); *see also* Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (holding that indigent defendants have a Sixth Amendment right to counsel in federal prosecutions).

193. Gideon v. Wainwright, 372 U.S. 335, 339-45 (1963) (holding that indigent defendants have a Sixth Amendment right to appointment of counsel).

194. *See* Hamilton v. Alabama, 368 U.S. 52, 55 (1961).

was a possible sentence.[195]

In the second half of the Twentieth Century some Justices acknowledged that a death sentence influenced their decision-making. Justice Jackson wrote in a capital case: "When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance."[196] A few years later, Justice Harlan, concurring in the Court's judgment granting habeas relief in two capital prosecutions, wrote:

> So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority. I do not concede that whatever process is "due" an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel. . . nor is it negligible, being literally that between life and death.[197]

By 1977, the Court's Eighth Amendment jurisprudence incorporated this sentiment of demanding more in capital cases than in non-capital cases, under the general concept that "death is [] different."[198] Thus, for the first three

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195. Notwithstanding the Court's holdings, not every criminal defendant benefitted from the Court's largess. One of the many reasons for this is that there is often a gap between United States Supreme Court pronouncements and the actual operation of the criminal litigation process. *See, e.g.*, Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, *in* IMPACT OF SUPREME COURT DECISIONS: EMPIRICAL STUDIES 67 (Theodore L. Becker & Malcolm M. Feeley eds., 2d ed. 1973) ("The Supreme Court typically formulates general policy. Lower courts apply that policy, and working in its interstices, inferior judges may materially modify the High Court's determinations."); Kenneth N. Vines, *Federal District Judges and Race Relations Cases in the South*, *in* IMPACT OF SUPREME COURT DECISIONS: EMPIRICAL STUDIES 81 (Theodore L. Becker & Malcolm M. Feeley eds., 2d ed. 1973) (considering race relations cases decided in the federal district courts in the traditional Southern states from May 1954 to October 1962 and noting that "[a]pparently precedent alone, even from the U.S. Supreme Court, does not dictate the direction of the disposition of cases in the district courts").

196. Stein v. New York, 346 U.S. 156, 196 (1953). Later that decade, Justice Jackson reportedly said that the death penalty "completely bitches up the criminal law," by which he apparently meant "not only that it unnecessarily multiplied trials and appeals but that the entire judicial process was sentimentalized and sensationalized by injection of life-and-death questions." MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 22 (1973).

197. Reid v. Covert, 354 U.S. 1, 77 (1957) (Jackson, J., concurring) (internal citations omitted).

198. *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 357 (1977) (plurality opinion) (noting that five members of the Court had "now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country").

quarters of the Twentieth Century the Court's rulings in criminal cases generally expanded the rights of capital defendants.

Since the late 1980s, however, the Court has exhibited considerably less concern about capital defendants, both on direct appeal and on habeas review. In fact, the Court has used capital cases to limit federal habeas court review in all types of cases.[199] *The Killing State* alludes to only this latter story, without mentioning the previous history. It thus presents an incomplete historical picture. Moreover, if one were concerned that judicial views on the death penalty inappropriately influenced habeas decisions, then comfort may be found in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[200] a law that, for the first time in history, imposed different rules for capital habeas cases from those for noncapital habeas cases.[201] The AEDPA is apt to be a mixed blessing for both abolitionists and supporters of capital punishment. One the one hand, the law promises a quicker adjudication of capital habeas cases and more defense resources for capital defendants to litigate their cases. On the other hand, its more arduous procedural requirements in capital cases may not allow courts to resolve capital habeas cases accurately. To be sure, the only objective that law promises is "justice." To the extent that the death penalty remains lawful, however, "justice" means neither that every death sentence should be overturned nor that the path to execution should be streamlined unnecessarily.[202]

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199. *See* McCleskey v. Zant, 499 U.S. 467, 470 (1991); Smith v. Murray, 477 U.S. 527, 529 (1986).

200. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8 U.S.C. and 28 U.S.C. (2000)).

201. Among other things, the AEDPA established a statute of limitation for the filing of state capital habeas petitions. *See* 28 U.S.C. § 2263 (2002). It proposed an accelerated schedule for the disposition of state capital cases if the prosecuting state has a mechanism for the appointment, payment, and certification of competent counsel in its post-conviction proceedings. *See* 28 U.S.C. §§ 2261-65 (2000). The law also imposed conditions on appeals by habeas petitioners. *See* 28 U.S.C. § 2253 (2000).

202. The federal courts have thus far been able to avoid several looming constitutional questions. One such issue is whether the AEDPA effectively suspends the writ of habeas corpus for capital defendants, in violation of the Suspension Clause. U.S. CONST. art. I, § 9, cl. 2; *see* Felker v. Turpin, 518 U.S. 651, 661-62 (1996) (ruling that the AEDPA's limits on availability of the habeas writ were constitutional and that AEDPA did not abolish prisoner's ability to file for habeas relief directly from the United States Supreme Court).

Scholars have already begun to lay the groundwork for challenging the constitutionality of such processes. *See, e.g.*, Eric M. Freedman, *Milestones in Habeas Corpus: Part I—Just Because John Marshall Said It, Doesn't Make It So: Ex Parte* Bollman *and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 534-37 (2000) (stating that constriction of the habeas corpus right "risks offending" the Suspension Clause of the United State Constitution); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 863 (1994) (arguing that the claim of a

VI. CULTURE AND THE DEATH PENALTY

While essentially packaged as a law and society book on the death penalty,[203] most of the essays in *The Killing State* fall short of engaging in a meaningful consideration of law, politics, and culture in the United States. *The Killing State* tries to assess the cultural impact of capital punishment without considering either the cultural expressions of groups that are most directly affected by the death penalty or the apparent dominant perspective of those regions of the United States that most frequently invoke the death penalty. In short, the essays fail to define culture so as to provide context for their assertions regarding the effects of the death penalty on culture.

The Killing State does not define the culture that it claims is corrosively impacted by the death penalty.[204] Two cultural studies scholars have noted

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constitutional right to habeas corpus is supported by the history, text, doctrine, and structure of the United States Constitution); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 699 (2002) (stating that the AEDPA has "undermine[d] reliability and fairness").

When the substantive limitations and time periods provided by the AEDPA begin to take effect—preventing capital habeas defendants from filing either an original petition or an application for a successive habeas petition—and it is apparent that defendants were never able to litigate meritorious federal claims, federal courts will have to confront the validity of such practices. One practitioner who is also a professor says that the AEDPA has prevented the Court from adjudicating, among other issues, the constitutionality of the execution methods. *See* Stevenson, *supra*, at 756-57. The operation of the AEDPA might provide the Court with the occasion to address whether the Suspension Clause is incorporated into the Fourteenth Amendment. Again, commentators have sketched the broad outlines of that argument. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 175-76 (1998); 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1129 (1953); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 103-04 (1993); Michael Kent Curtis, *Further Adventures of the Nine-Lived Cat*, 43 OHIO ST. L.J. 89, 120 (1982).

203. *See* THE KILLING STATE, *supra* note 3, at 9. The book jacket states that the book is "[e]dited by a leading figure in socio-legal studies." On that jacket, David Garland of New York University proclaims that, "the culture of lethal violence that produces America's astonishing level of homicides is now routinely reinforced by its rituals of state execution. This serious, thoughtful, innovative book provides us with the means to diagnose that culture and to explore the social roots of this modern tragedy."

204. Sarat might have thought that any definition would be worthless. He would share company with a leading cultural theorist who wrote, "[i]t is notorious that definitions establish nothing, in themselves they do, if they are carefully enough constructed, provide a useful orientation, or reorientation, of thought, such that an extended unpacking of them can be an effective way of developing and controlling a novel line of inquiry." CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 90 (1973). Another leading theorist writes:

> Culture it is argued, is not so much a set of *things*—novels and paintings or TV programmes and comics—as a process, a set of *practices*. Primarily, culture is concerned with the production and the exchange of meanings—the 'giving and taking of

> meaning'—between the members of a society or group. To say that two people belong to the same culture is to say that they interpret the world in roughly the same ways and can express themselves, their thoughts and feelings about the world, in ways which will be understood by each other. Thus culture depends on its participants interpreting meaningfully what is happening around them, and 'making sense' of the world, in broadly similar ways.

Stuart Hall, *Introduction*, *in* REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 2 (Stuart Hall ed., 1997).

Sarat, in a subsequent co-authored work, claims that "despite the growing sense that culture must be recognized, there is little consensus on what the boundaries of the cultural are, let alone how to 'read' it in any particular instance." Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3, 3 (2001). Even though they eschew proffering a definition of culture, Sarat and Simon claim that cultural study of the law is important. *Id.* at 21. Other books that Sarat has edited similarly suggest a cultural study of the law, but the reader is not told whose culture is being studied. *See, e.g.*, CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW (Austin Sarat & Thomas R. Kearns eds., 1999) (including essays analyzing culture and law); LAW IN THE DOMAINS OF CULTURE 1 (Austin Sarat & Thomas R. Kearns eds., 1998) (noting the importance of culture in law); RACE, LAW AND CULTURE; REFLECTIONS ON *BROWN V. BOARD OF EDUCATION* 3-5 (Austin Sarat ed., 1997) (analyzing culture in the wake of *Brown*). Professor Judy Cornett, a colleague at the University of Tennessee, tells me that

> a 'cultural' analysis . . . tries to provide a context for the object of analysis (whether a text or a person or a phenomenon) that sets it within a certain time and place, and, as appropriate, a certain race, class, occupation, belief system, . . . and also sets it against or compares it to other manifestations of the same culture. This is done purely in order to enrich our understanding of the object of analysis.

E-mail from Judy Cornett, Associate Professor of Law, University of Tennessee, to Dwight Aarons, Associate Professor of Law, University of Tennessee (Jan. 11, 2002) (on file with the *Tennessee Law Review*). As wonderfully instructive as this insight is, some indication of which "culture" that is the focus of *The Killing State* would help in assessing the book's accuracy and usefulness. For more on cultural analysis, see generally MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS (James Tully ed., 1988) (analyzing cultural theories of Skinner); CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS (1973) (analyzing various theories of culture).

The lack of a definition of culture and a description of the culture under study seems to be prevalent in the so-called cultural study of the law. For instance, in *The Perverse Law of Child Pornography*, Amy Adler purports to study "how censorship law responds to and shapes a cultural crisis." 101 COLUM. L. REV. 209, 211 (2001). Though she does not define the culture about which she writes, Adler acknowledges the contested nature of the term and concept of "culture." *Id.* at 214 n.20. She notes that the connection between use of child pornography and child molestation is "uncertain," including that no known documentation exists evidencing those who possess child pornography but who are not child molesters. *Id.* at 216 n.32. Ultimately, Adler says that she cares less about the frequency of child abuse than about the "charged cultural preoccupation" on the subject. *Id.* at 217 n.35. My criticism of Adler is not to justify child pornography or child molestation but to show how cultural studies of the law are actually more speculative than they first appear and how they are filled with normative views of society, which are rarely acknowledged explicitly. This "perspectivelessness" most often means that the "dominant culture"—white, Anglo-Saxon, Protestant, male—is being studied

that there are two common meanings given to "culture":

> The first refers to artistic output, defined and valued by aesthetic criteria and emerging from a community of creative people. The second meaning takes culture to be an all-encompassing concept about how we live our lives, the senses of place and person that make us human. These two definitions intertwine: the cultural human subject is both practical/sensual/active and theoretical/spiritual/judging.[205]

Anthropologists have defined culture as the "beliefs and perceptions, values and norms, customs and behaviors of a group or society."[206] Often the "group or society" in question is identifiable either geographically or through the sharing of ethnicity, language, religion, history, or other social factors.[207] In addition, the collective values of the "group" must be transmitted to successor generations if the "group" is to maintain its identity.[208]

Based on what they mention, the essayists in *The Killing State* seem to have adopted the more inclusive view of culture. The book's focus is largely on the United States of America in the late Twentieth Century, though one essay focuses on Argentina from 1976 to 1983[209] and another on France and England in the Eighteenth Century.[210] Thus, a logical inference is that the "culture" considered in the book is that which exists in most of the late

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and serves as the unwritten norm of evaluation. *See generally* Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1988) (calling the dominant mode of cultural characteristics "perspectiveless"), *reprinted in* Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L & WOMEN'S STUD. 33, 35, 44 (1994); *see also infra* note 220.

My calls for an explicit acknowledgment of the author's cultural "perspective" and for a more inclusive definition of culture are consistent with the work of critical race theorists. As one such scholar has noted, "culture is extremely important to critical race theory," and "cultural analysis is contextual. . . . Critical race theory is based significantly on culture; its adherents not only recognize this, we emphasize it. . . . [W]e reflect distinctively colored cultural backgrounds, valuations, and frames and reference." John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2185, 2188 (1992).

205. TOBY MILLER & ALEC MCHOUL, POPULAR CULTURE AND EVERYDAY LIFE 5-6 (1998).

206. Jonathan Drimmer, *Hate Property: A Substantive Limitation for America's Cultural Property Laws*, 65 TENN. L. REV. 691, 698 (1998) (quoting IRWIN ALTMAN & MARTIN CHEMERS, CULTURE AND ENVIRONMENT 3 (1980)).

207. *Id.* (citing Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 567 (1995); M. Catherine Vernon, Note, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE W. RES. J. INT'L L. 435, 446-46 (1994)).

208. *Id.* at 698-99.

209. *See supra* notes 33-36 and accompanying text.

210. *See supra* notes 12-18 and accompanying text.

Twentieth Century United States.[211] Though the book is presented as a cultural study of the death penalty, it does not fully capture the multiculturalism (and pluralism) that currently exists within this country.[212]

The cultural baseline of *The Killing State* may be most apparent in the three essays of the final section of the book, which purports to explore the death penalty's impact on culture. William Connolly, in *The Will, Capital Punishment, and Cultural War*, imagines the capital trial as a contest. He relies on Anglo-American history and criminal philosophy.[213] He also cites to Twentieth Century United States social science research, judicial opinions, news reports, election campaigns, jury selection processes, and jury deliberations reports to document his claim of what is "our culture."[214] Connolly essentially contends that capital prosecutors are better able than capital defenders to make the theory of their cases connect with prevailing cultural norms.[215] Jennifer Culbert's *Beyond Intention: A Critique of the "Normal" Criminal Agency, Responsibility, and Punishment in American Death Penalty Jurisprudence* basically argues that moral values instead of legal principles guide the imposition of the death penalty.[216] She notes that lawmakers and judges have resisted relying on social sciences and disciplines such as psychology and psychiatry, despite the insights that these disciplines can provide in helping to understand human behavior.[217] She offers little in detailing the content of moral norms. Austin Sarat's *The Cultural Life of Capital Punishment: Responsibility and Representation in* Dead Man Walking *and* Last Dance draws meaning about how the death penalty is understood from how it is presented in two mainstream movies. Sarat perceives that an almost hidden conservative cultural politics is present that

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211. Some Justices on the United States Supreme Court have suggested that the death penalty's evolving standard of decency found in the Eighth Amendment should only draw its meaning from "*American* conceptions," namely, practices within the United States of America. Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) (plurality opinion). If the Western hemisphere has a cultural norm on the death penalty, it seems to be toward the abolition of the death penalty and not the retention and expansion of capital punishment, which is occurring in the United States. *See* WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 249-83 (1993) (discussing the history and enforcement of the inter-American human rights system, which includes the Western hemishpere).

212. The cultures that exist within North America extend beyond the borders of its nation-states. *See, e.g.*, JOEL GARREAU, THE NINE NATIONS OF NORTH AMERICA (1981) (noting the cultural and regional similarities of area within the United States, Canada, Mexico, and the Carribean Islands that ignore the borders of each nation); Nancy Gibbs et al., *The New Frontier, A Whole New World*, TIME, June 11, 2001, at 36 (noting that the United States and Mexico do not stop at the geographic border).

213. THE KILLING STATE, *supra* note 3, at 187-205.

214. *Id.* at 195.

215. *Id.* at 197.

216. *Id.* at 206.

217. *Id.* at 215.

explains the guiding themes in both movies. Notably absent from these three essays is evidence that might be fairly characterized as indicating the beliefs, perceptions, values, norms, customs, or behaviors of a majority of people who live in the United States. Missing, too, is an explanation of which culture or subculture ought to be most influential in the operation of the death penalty.

Rather, *The Killing State* seems to offer a singular perspective—that of white, liberal-establishment, Northeasterners.[218] This approach should not be surprising, as Sarat, who fits that description, is the general editor and is also the apparent intellectual organizer for the book. However, the death penalty as administered in the Northeastern United States is manifestly different from the way it is administered in other parts of the country, especially the South.[219] Thus, it is unlikely that this Northeastern perspective fully reflects the diversity of attitudes in this nation on the death penalty. In fact, the Northeastern United States has historically rebelled, with abolitionist sensibilities, against some governmental policies, such as slavery and capital punishment.[220] Righteous indignation to the existence and administration of the death penalty without a corresponding alternative suggestion for eliminating the conditions that may give rise to capital offenses often makes this theorizing seem like both hand-wringing and pronouncements that are *pro tanto brutum fulmen*.[221] This description is apt for *The Killing State* because

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218. A similar observation has been made with regard to fundamental rights constitutional jurisprudence. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 58-59 (1980) (hypothesizing that judicial choice of fundamental values will favor upper or middle class professionals).

219. *Compare* Charles S. Lanier, *The Death Penalty in the Northeast*, 10 CRIM. J. POL'Y REV. 7 (1999) (reviewing death penalty in Connecticut, New Hampshire, New Jersey, New York, and Pennsylvania and examining four northeastern states without capital punishment: Maine, Massachusetts, Rhode Island, and Vermont), *with* KEITH HARRIES & DERRAL CHEATWOOD, THE GEOGRAPHY OF EXECUTION: THE CAPITAL PUNISHMENT QUAGMIRE IN AMERICA 12-40 (1997) (exploring the historical and contemporary distribution of the death penalty and execution rates in the United States).

220. For a brief glimpse into the lives of slavery abolitionists, see HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY 260-84, 349-47 (1998). Death penalty abolitionists can perhaps learn from the pages of history. The movement against slavery began as a conservative lobbying effort, advocating gradual legal reform. As the campaign became more inclusive, allowing African-American activists, female reformers, and nonelite whites more influence and leadership positions, it evolved into a grassroots reform movement. *See* RICHARD S. NEWMAN, THE TRANSFORMATION OF AMERICAN ABOLITIONISM: FIGHTING SLAVERY IN THE EARLY REPUBLIC (2002) (detailing the anti-slavery movement from the 1770s the to 1830s). For an overview of the distinctiveness of New England's regional identity and how that identity has been culturally transmitted, see JOSEPH A. CONFORTI, IMAGING NEW ENGLAND: EXPLORATIONS OF REGIONAL IDENTITY FROM THE PILGRIMS TO THE MID-TWENTIETH CENTURY (2001).

221. *Pro tanto* means "[f]or so much; for as much as may be; as far as it goes." BLACK'S LAW DICTIONARY 1222 (6th ed. 1990). *Brutum fulmen* means "[a]n empty noise; an empty threat." *Id.* at 194. Thus, arguments for abolition of capital punishment without corresponding

it is long on condemnation of the death penalty, but it is short on penal and moral alternatives.

A. Subcultures

Related to the apparent singular perspective of the book, another regret is that *The Killing State* does not deal with subcultures[222] or groups that exist within the larger United States' culture but that have their own distinctive values and norms.[223] Two important subcultures are those most heavily touched by capital punishment, namely the subcultures of young African-American and Latino/Hispanic men, who are disproportionally over-represented in capital prosecutions and on death row. The lives and culture of these young men is likely far different from the lives and cultures of the book's essayists. Therefore, mining the cultural work of these young men would have given the essayists in *The Killing State* a more inclusive picture

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social and penal alternatives are all sound and fury, signifying nothing.

In contrast, consider some reactions by minority scholars to *McCleskey v. Kemp*, 481 U.S. 279 (1987), which held that racially disproportionate capital sentencing does not violate either the Fourteenth or Eighth Amendments. These scholars have advanced proposals that move beyond judicial oversight of capital prosecutors. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 340-50 (1997) (exploring judicial, legislative, and societal reforms that might change the racial composition of death row); Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 439-47 (1988) (stating that the socially constructed notion of "victim" should be redefined); Randall Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1424-43 (1988) (expressing concern for the underprosecution of killers of blacks and proposing judicial remedies); Evan Tsen Lee & Ashutosh Bhagwat, *The* McCleskey *Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145 (advocating awarding damages to families of murder victims whose lives have been undervalued on the basis of race).

222. The term subculture describes "those special worlds of interest and identification that set apart some individuals, groups, and/or larger aggregations from the larger societies to which they belong." James F. Short, Jr., *Subculture*, *in* THE SOCIAL SCIENCE ENCYCLOPEDIA 839 (Adam Kuper & Jessica Kuper eds., 1985). According to Miller and McHoul, a subculture is "a fraction of a larger culture with its own practices, objects, and values (where these are often, but not always, in opposition to the larger culture)." MILLER & MCHOUL, *supra* note 205, at 195. Another commentator says that a subculture involves "a baseline symmetry of perspectives among participants, cumulatively stabilized and amplified by the back-and-forth flow of meaning among them." ULF HANNERZ, CULTURAL COMPLEXITY: STUDIES IN THE SOCIAL ORGANIZATION OF MEANING 70-71 (1992).

223. A leading authority on subcultures coined the term "contracultures" to describe the contrary values sometimes adopted by subgroups. J. Milton Yinger, *Contraculture and Subculture*, 25 AM. SOCIOLOGICAL REV. 625, 627 (1960). By end of the 1960s, the term had evolved into "counterculture." Yinger defined the term as meaning a "set of norms and values of a group that sharply contradict the dominant norms and values of the society of which that group is a part." J. MILTON YINGER, COUNTERCULTURES: THE PROMISE AND THE PERIL OF A WORLD TURNED UPSIDE DOWN 3 (1982).

of the cultural impact of capital punishment and violence.[224] Not much would have been required to do the mining. For instance, a rather "academic" inquiry—perusing the shelves of a university library for books on rap and hip-hop music—would have added some insight on the cultural perspective of persons of color and the poor on issues of law enforcement.

1. Hip-Hop and Rap Music Subculture

Since the late 1970s, rap and hip-hop music has been one mode of expression for largely African-American and Hispanic youth,[225] and it is now probably their most widespread contemporary cultural expression.[226] More importantly, this music and these subcultures have infiltrated contemporary media.[227] Though rap and hip-hop music does not pretend to represent the poor or capital criminals,[228] it does come closer to reflecting the attitude and mindset of potential capital defendants than most other cultural art.[229]

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224. Indeed, as a young black man, when answering questions after he had been charged with inciting a riot, H. "Rap" (Hubert Geroid) Brown famously declared, "Violence is part of America's culture. It is an American as cherry pie." John H. Averill, *Rap Brown Denounces Johnson as 'Mad Dog'*, L.A. TIMES, July 28, 1967, pt. 1, at 18. Years later, Brown explained his choice of words, "We all heard about little George Washington and his ax cutting down the cherry tree. Then he led this country in armed revolution, and it's been through wars ever since. People ask me if I didn't mean 'apple pie.' No, George Washington and cherry pie." David Kindres, *At Large: Inman Jamil Al-Amin has no regrets*, ATL. J. CONST., Aug. 16, 1995, at 5C.

225. *See generally* DROPPIN' SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE (William Eric Perkins ed., 1996); NELSON GEORGE, HIP HOP AMERICA (1998); S.H. FERNANDO JR., THE NEW BEATS: EXPLORING THE MUSIC, CULTURE, AND ATTITUDES OF HIP-HOP (1994).

226. Movies and television programs are generally not as reflective of minority experiences. In neither industry are a sufficient number of persons of color in decision-making positions. Further, production costs for motion pictures and television shows are sufficiently high that movies and television dramas are homogenized to attract the largest viewing audience, which, in turn, allows them to be profitable.

227. *See* Christopher John Farley, *Hip-Hop Nation: There's More to Rap Than Just Rhythms and Rhymes*, TIME, Feb. 8, 1999, at 54.

228. The thoughts of potential capital criminals are relevant to the extent that the death penalty supposedly deters crime. *See* Frank G. Carrington, *Deterrence, Death, and the Victims of Crime: A Common Sense Approach*, 35 VAND. L. REV. 587, 597 (1982) (reporting of a 1970 and 1971 Los Angeles Police Department survey of violent crime arrestees, which reported that half of the surveyed arresters said that they had not killed or had "deliberately . . . avoided placing themselves in a position where they could have killed" because of fear of the death penalty).

229. *See* Dwight L. Greene, *Naughty by Nature: Black Male Joyriding—Is Everything Gonna be Alright*, 4 COLUM. J. GENDER & L. 73, 84 & n.40 (1994) ("My claim is that rap, like Black music before it, can provide context and meaning to the behavior of those who do not accept the legitimacy of their own oppression.").

Rap music often uses symbols of criminality and violence both metaphorically and as descriptive narratives of life in the inner-city. There are several genres of rap music, including message or political rap and "gangsta" rap.[230] "Gangsta" rap often glorifies criminal activity.[231] Police oppression and brutality are common themes as well.[232] It achieved its largest commercial success in the 1980s. At that time, inner-city communities were experiencing the economic and social dislocation wrought by the policies of Presidents Ronald Reagan and George H.W. Bush.[233] That dislocation was partly caused by aggressive prosecutions of drug offenses and increased penalties for drug offenses. Though rap music is not a direct statement on the death penalty,[234] messages of abuse in rap music claim that not only are the

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230. Despite its continued evolution, critics maintain that rap music depicts women in an unflattering manner, and has too great of a focus on sex, violence, and materialism. More recent criticism has come from some artists themselves who question the impact of the music's images and messages on society. *See* Allison Samuels et al., *Battle for the Soul of Hip-Hop*, NEWSWEEK, Oct. 9, 2000, at 58 (describing some criticism of rap music's representations by hip-hop artists).

231. *See* Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1770 (1992) (describing the tensions between African-American communities, enforcement of the criminal law, and values).

232. Robin D.G. Kelley captures the many nuances of gangsta rap and places the genre and its creators in historical and sociological context. *See* Robin D.G. Kelley, *Kickin' Reality, Kickin' Ballistics: Gangsta Rap and Postindustrial Los Angeles*, *in* DROPPIN' SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE 117 (William Eric Perkins ed., 1996).

233. Rap music's more critical social commentaries on economic dislocation were written during the Reagan-Bush years, 1980 to 1992. *See, e.g.*, GRAND MASTER FLASH AND THE FURIOUS FIVE, *The Message*, *on* ADVENTURES ON THE WHEELS OF STEEL (Sequel 1982).

234. For a notable rap commentary on the death penalty from the perspective of a juvenile on death row, see TUPAC SHAKUR, *16 on Death Row*, *on* R U STILL DOWN? [REMEMBER ME] (Interscope Records 1997). Though albums or song titles suggest otherwise there are few rap songs that directly address capital punishment. Songs in other music genres, such as the bluesy *Strange Fruit* also comment on the death penalty. Steve Earle has recorded several death penalty related songs, and one of these is written from the perspective of a prisoner who is soon to be executed. *See* STEVE EARLE, *Billy Austin*, *on* SHUT UP AND DIE LIKE AN AVIATOR (Universal/MCA 1991). Another is written from the perspective of a guard on a strap down team, see STEVE EARLE, *Ellis Unit One*, *on* DEAD MAN WALKING: MUSIC FROM AND INSPIRED BY THE MOTION PICTURE (Sony Music Entm't 1995), and another was written by Earle after witnessing the execution of his pen-pal Jonathan Nobles. *See* STEVE EARLE, *Over Yonder (Jonathan's Song)*, *on* TRANSCENDENTAL BLUES (E Squared Records 2000). Phil Ochs has written anti-death penalty songs as well. Ochs' *Another Country* from the chronicles various human rights abuses that occur in other countries, including capital punishment, and makes the satirical statement, "I know it couldn't happen here [America]." THE BROADSIDE TAPES 1 (Smithsonian Folkways 1989); *see also* PHIL OCHS, *Iron Lady*, *on* I AIN'T MARCHING ANYMORE (Hannibal 1965) (questioning the execution of Caryl Chessman); PHIL OCHS, *Paul Crump*, *on* A TOAST TO THOSE WHO ARE GONE (Rhino Records 1989) (regarding a former Illinois death row inmate); PHIL OCHS, *The Trial*, *on* A TOAST TO THOSE WHO ARE GONE (Rhino Records

gatekeepers to the criminal litigation process—the police on the street—racists, but that the entire criminal litigation process is permeated with racism, especially in the administration of the death penalty.[235] Message rap

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1989) (alternating among a satirical criminal trial, a chorus and, the prisoner's subsequent execution by firing squad). Two complete albums are comprised entirely with abolitionist songs. *See* DEAD MAN WALKING: MUSIC FROM AND INSPIRED BY THE MOTION PICTURE (Sony Music Entm't. 1995); THE PINE VALLEY COSMONAUTS, THE EXECUTIONER'S LAST SONGS (Bloodshot Records 2002).

235. The apparent indifference to racism in the criminal litigation process by the judicial appointees of Presidents Ronald Reagan and George H.W. Bush might be most poignantly summarized by *McCleskey v. Kemp*, 481 U.S. 279 (1987), which by a 5-4 vote held that imposing death sentences in a racially disproportionate manner does not violate either the Fourteenth or Eighth Amendments. *See* DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 82-98 (1992) (discussing the Court's actions during the *McCleskey* arguments); JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 171-84 (1995) (same). One commentator has compared *McCleskey* to both *Dred Scott v. Sanford*, 60 U.S. 393 (1856), and *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See* Hugo Adam Bedau, *Someday McCleskey Will be Death Penalty's Dred Scott*, L.A. TIMES, May 1, 1987, at 5.

Others have suggested that the *McCleskey* majority was unable to empathize with black murderers but was equally confident in its own perceptions of social reality, which may have been based on stereotypes. Julian A. Cook, Jr. & Mark S. Kende, *Color-Blindness in the Rehnquist Court: Comparing the Court's Treatment of Discrimination Claims by a Black Death Row Inmate and White Voting Rights Plaintiffs*, 13 THOMAS M. COOLEY L. REV. 815, 851-52 (1996). Of course, the dissenters, especially Justice Brennan, wrote with empathy and passion. Just as importantly, in his dissent, Justice Brennan documented his assertions to the record before the Court. The empathetic beginning to Justice Brennan's dissent is worth repeating, as he wrote:

> At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, while, among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.

McCleskey, 481 U.S. at 321 (Brennan, J., dissenting) (citations omitted).

or political rap music, on the other hand, often comments on society with a black nationalist or progressive political bent.[236] Discussing message rap, one commentator stated:

> No theme—be it education, family structure, poverty, teenage pregnancy, incest, AIDS, crack cocaine, or alcoholism—is too sensitive for unreserved public discussion. . . . Overall, the message tends to portray, in vivid and urgent terms, the contours of existing social breakdown, and in the best of cases may offer a vision of a new and more just way of life.[237]

Police abuse and misconduct are also targets of critique in message rap. Unlike gangsta rap, message rap more frequently promotes political and social consciousness, self-discipline, education, and control of a community by its indigenous members as ways to cure social ills.[238]

2. The South: Its History and Subculture

The South is another subculture that is under-explored in *The Killing State*. Since 1976, most of the states that have executed criminals are southern states; these states also typically have large death row populations.

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236. Message rap can be rightly viewed as a successor to the political ideas articulated and advocated by groups such as the Black Panther Party, Student Nonviolent Coordinating Committee, and the Congress of Racial Equality. "There is little doubt, however, that black nationalism had its most complete and sophisticated theoretical development, as well as its greatest mass appeal, during the 1960s and early 1970s, when it was articulated as an alternative worldview to integrationism and as part of a program of radical social transformation[.]" Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 785-86 (citing *inter alia* H. RAP BROWN, DIE NIGGER DIE! (1969); STOKLEY CARMICHAEL & CHARLES HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA (1967); CLAYBORNE CARSON, IN THE STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S (1981); ELDRIDGE CLEAVER, SOUL ON ICE (1968); THE BLACK PANTHERS SPEAK (Philip Foner ed., 1970); HERBERT H. HAINES, BLACK RADICALS AND THE CIVIL RIGHTS MAINSTREAM: 1954-1970 (1988); GEORGE JACKSON, SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON (1970); G. MARINE, THE BLACK PANTHERS (1969); HUEY NEWTON, TO DIE FOR THE PEOPLE: THE WRITINGS OF HUEY P. NEWTON (1972); BOBBY SEALE, SEIZE THE TIME: THE STORY OF THE BLACK PANTHER PARTY AND HUEY P. NEWTON (1970); MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X (A. Haley ed., 1965)). More recent writings convey the depth of black nationalist thought. *See, e.g.*, ELAINE BROWN, A TASTE OF POWER: A BLACK WOMAN'S STORY (1992); JAMES FORMAN, THE MAKING OF BLACK REVOLUTIONARIES (1972); DAVID HILLIARD & LEWIS COLE, THIS SIDE OF GLORY: THE AUTOBIOGRAPHY OF DAVID HILLIARD AND THE STORY OF THE BLACK PANTHER PARTY (1993); HUGH PEARSON, THE SHADOW OF THE PANTHER: HUEY NEWTON AND THE PRICE OF BLACK POWER IN AMERICA (1994).

237. Ernest Allen, Jr., *Message Rap*, *in* DROPPIN' SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE 159, 160 (William Eric Perkins ed., 1996).

238. For the uninitiated, Chuck D Presents *Louder Than a Bomb* (Rhino Entertainment 1999) contains a representative selection of message rap.

To the extent that regional differences matter, one might wonder whether southern history or southern culture fully accounts for that region's firm embrace of the death penalty and what impact that history and culture have today on the retention of the death penalty.

Traditionally, the South[239]—Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia—has been viewed as valuing honor and tradition. From this, some have inferred that southerners have a value system and behavior patterns that make them more tolerant of violence and the use of force than others in the United States.[240] The South has a distinctive history,[241] an important feature of which is racial domination of blacks by whites. Some of the region's racial and cultural development was influenced by its agrarian economy. In order to generate economies of scale sufficient for profitability, farms and plantations had to be large, which, in turn, required a large number of slaves. The size of plantations tended to isolate each farm and its workers from outsiders. This isolation coupled with fear of insurgency fostered the use of localized force, especially on each plantation.

Today, the South tends to be bound to custom, which results in its resistance to social and cultural changes. It also has a great respect for hierarchy and authority. Somewhat schizophrenically, Southerners respect people in authority positions, such as governmental officials, but are generally distrusting of the power that they wield.[242] Consequently, Southerners dislike having governmental power exercised against them or their interests.

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239. Even if viewed as only the former states of the Confederacy, the South is itself a generalization; it is a diverse region with many subcultures, including, for instance, the Appalachian section of Tennessee and Virginia, the Creole of Louisiana, and indigenous Native American populations.

240. *See* RICHARD E. NISBETT & DOV COHEN, CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH 25-40 (1996); JOHN SHELTON REED, THE ENDURING SOUTH: SUBCULTURAL PERSISTENCE IN MASS SOCIETY 45-56 (1972). Generalizations are inherently imprecise. For observations on violence, the life of one white southern laborer, and the lives of others within his class, see THE CONFESSIONS OF EDWARD ISHAM: A POOR WHITE LIFE OF THE OLD SOUTH (Charles C. Bolton & Scott P. Culclasure eds., 1998).

241. *See* JOHN B. BOLES, THE SOUTH THROUGH TIME: A HISTORY OF AN AMERICAN REGION (1995); Drew Gilpin Faust, *The Peculiar South Revisited*, *in* INTERPRETING SOUTHERN HISTORY: HISTORIOGRAPHICAL ESSAYS IN HONOR OF SANFORD W. HIGGINBOTHAM 78-119 (John B. Boles & Evelyn Thomas Nolen eds., 1987); FRANCIS BUTLER SIMKINS, A HISTORY OF THE SOUTH (3d ed. 1963); C. VANN WOODWARD, THE BURDEN OF SOUTHERN HISTORY 3-39 (rev. ed. 1968); BERTRAM WYATT-BROWN, SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH (1982).

242. These are my personal observations, but seem to be supported by research. *See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000); Jamie Satterfield, *Study gives an idea of what typical East Tennessean is all about*, KNOXVILLE NEWS-SENTINEL, Mar. 1, 2001, at A1 (pointing out certain contradictory behavior patterns of East Tennesseans).

Southerners are generally socially and politically conservative and often view governmental regulation as an unnecessary intervention and an attempt to centralize power. Though these traits tend to set the South and Southerners apart from the rest of the nation, they may not completely explain either the pervasiveness or continuity of the death penalty in the South.

The South's legal legacy should also inform death penalty cultural research. The death penalty has been legally sanctioned in the South since each southern state entered the Union. Though southern legal history remains largely under-explored, commentators have noted that many aspects of southern law were affected by slavery and a culture of violence.[243] Legal authority was more localized than in other regions of the nation. Thus, the prerogatives of local citizens typically prevailed in the judicial system. One aspect of this localized justice was a particular form of executions—"lynch law."[244] Whether at the hands of the Ku Klux Klan, from the mid-1860s until the mid-1870s, or through mob rule, from the mid-1870s through the mid-1900s, lynchings were used to retain a social structure "in which every white stood above all blacks" by targeting primarily "politically active or successful African-Americans, northern carpetbaggers, and southern scalawags."[245] Generally, neither federal officials nor the federal courts provided relief. In other words, lynching and "lynch law" were vernacular methods of administering justice, which underscored the social control that some whites exercised over the indigenous black population and anyone who was sympathetic to former slaves.[246] Mob lynchings were most likely to occur when southern whites felt threatened by blacks and when other cultural factors, such as economic leverage and social ostracism, could not be used quickly to assuage the perceived threat.[247] The criminal litigation process was of little concern to the mob—"lynch mobs appear to have been impressively

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243. *See* James W. Ely, Jr. & David J. Bodenhamer, *Regionalism and the Legal History of the South*, *in* AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 3 (David J. Bodenhamer & James W. Ely, Jr. eds., 1984); Lawrence M. Friedman, *The Law Between the States: Some Thoughts on Southern Legal History*, *in* AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 30 (David J. Bodenhamer & James W. Ely, Jr. eds., 1984); Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77, 90 (1985); *see also* MARK V. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST (1981) (examining how slavery influenced the development of law).

244. Lynching's imprint on contemporary culture is reflected in *Strange Fruit*, a song written by Lewis Allen and made famous by Billie Holliday, and in a 1944 novel of that name by Lillian E. Smith. For more on the song, see DAVID MARGOLICK, STRANGE FRUIT: THE BIOGRAPHY OF A SONG (2001).

245. STEWART E. TOLNAY & E.M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930, at 14 (1992).

246. *See* UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH (W. Fitzhugh Brundage ed., 1997); TOLNAY & BECK, *supra* note 245; BERTRAM WYATT-BROWN, SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH 435-40, 453-61 (1982).

247. TOLNAY & BECK, *supra* note 245, at 81-82.

insensitive to the vigor with which the state imposed the death penalty on blacks"[248]—and the mob apparently knew that it could circumvent the formal criminal litigation process by imposing instant vengeance on the suspected offender with little fear of legal redress. By the mid-1900s, lynching had largely ended because of a number of factors, including a comprehensive anti-lynching campaign,[249] changes in southern economic conditions, and the influence of outsiders' opinions on the practice.[250]

It is disappointing that none of the essayists in *The Killing State* draw parallels between the extralegal historical lynchings and the possible impact on the South of more recent legal developments. For example, in the past, local southern law enforcement officials were ineffectual and at best indifferent toward preventing lynchings. More recently, Congress has been seemingly indifferent to the foreseeable consequences of some statutes it has enacted, notably eliminating federal funding of capital defender programs and the AEDPA.[251] Well-reasoned and extensively documented research should challenge supporters of capital punishment to explain how the "legal lynchings"[252] of the modern death penalty are different from the illegal historical lynchings. It is difficult to believe that a comprehensive cultural study of the death penalty would not have discussed these matters. A welcome first step would have been the inclusion of an essay in *The Killing*

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248. *Id.* at 112.

249. *See* DONALD L. GRANT, THE ANTI-LYNCHING MOVEMENT: 1883-1932 (1975); ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950 (1980).

250. *See* TOLNAY & BECK, *supra* note 245, at 233.

251. The elimination of federal funding of capital resource centers means that the states have to fund indigent defense, which they have historically been reluctant to do. *See* Roscoe C. Howard Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 866 (1996) (discussing how states have historically abdicated responsibility of finding competent counsel). The AEDPA has lead to the streamlining of capital cases in the federal courts and has reduced the authority of the federal courts to review alleged violations of federal law. The federal government's withdrawal of the mechanisms designed to guarantee the enforcement of criminal defendants' constitutional rights parallels the federal government's retrenchment in enforcing the federal civil rights of African-Americans in the South beginning in the late 1880s. *See* C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1951). One southern practitioner, who is also a professor, says that the capital litigation process in the South did not comply with federal guarantees before the most recent changes to federal law. *See generally* Stephen B. Bright, *Can Judicial Independence be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GEO. ST. U. L. REV. 817 (1997) (recounting the history of the death penalty in the South, the impact of judicial elections on capital case processing, and the regional attitudes toward those developments); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (1994) (detailing race prejudice against African-Americans in the operation of the death penalty).

252. *See* JESSE JACKSON & JESSE JACKSON, JR., LEGAL LYNCHING: RACISM, INJUSTICE AND THE DEATH PENALTY 96-110 (1996).

State that explored connections between these themes.

In short, *The Killing State* tries to assess the cultural impact of capital punishment without considering either the cultural expressions of groups that most directly feel the brunt the death penalty or the perspectives of those that most frequently apply it. As such, it presents an incomplete picture of the cultural and social impact of capital punishment. Thus, despite its contention otherwise, *The Killing State* is not a true cultural study of the death penalty.

B. Law and Society Scholarship and the Death Penalty

One irony of *The Killing State* is that it appears to be largely the product of Sarat, a law and society scholar.[253] Though it may be nearly impossible to capture the breath and differences in approaches of all who claim that their work falls within the law and society genre, Lawrence Friedman, one of the group's recognized principals, has said that generally speaking, law and society adherents are interested in illuminating how legal and social processes

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253. Sarat co-wrote with Neil Vidmar one of the first modern social science articles using empirical data to evaluate the death penalty. *See* Austin Sarat & Neil Vidmar, *Public Opinion, The Death Penalty, and The Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WISC. L. REV. 171. In their article, Sarat and Vidmar attempted to test empirically Justice Marshall's claim in *Furman* that support for the death penalty would decline if those polled were "fully informed as to the purposes of the penalty and its liabilities," *Furman*, 408 U.S. at 361, and that the death penalty is unconstitutional under the Eighth Amendment if public support for it were based solely on retribution. *Id.* at 343-45. Sarat and Vidmar concluded that, notwithstanding the limited scope of their study, Marshall was basically correct. Among those they surveyed, support for the death penalty declined when their subjects were informed of how capital punishment was administered. According to Sarat and Vidmar, their findings had "narrowed the field of reasonable argument for those who subscribe to the normative approach in death penalty litigation." Sarat & Vidmar, *supra*, at 197. They suggested that the next area for research was "to evaluate the legitimacy of retribution as an element in constitutional construction" within the meaning of the "evolving standards of decency." *Id.*

When the United States Supreme Court next considered the constitutionality of the death penalty, in *Georgia v. Gregg*, it ignored Sarat and Vidmar's research. The exception was Justice Marshall, who cited the article, noting that "[a] recent study, conducted after the enactment of the post-*Furman* statutes, has confirmed that the American people know little about the death penalty, and that the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty." *Gregg*, 428 U.S. at 232 (Marshall, J., dissenting). Sarat and Vidmar's findings were not determinative for him, as he continued, "Even assuming, however, that the post-*Furman* enactment of statutes authorizing the death penalty renders the prediction of the views of an informed citizenry an uncertain basis for a constitutional decision, the enactment of those statutes has no bearing whatsoever on the conclusion that the death penalty is unconstitutional because it is excessive." *Id.* at 232-33. In this regard Sarat and Vidmar were unsuccessful—even with Justice Marshall—in their attempt to use empirical information to engage in "reasonable argument" on the interpretation of the law.

actually operate and what problems, if any, may exist.[254] They use the methodologies of the social sciences to study and explain both law and the legal system and law's impact on culture.[255] Unlike most "orthodox legal scholarship," studying law and legal phenomena often involves grappling with the "grubby facts of day to day life."[256] Equally important is that "empirical research is hard work, and lots of it."[257] In other words, law and society scholars seem to embody the claim that law is no longer "an autonomous discipline," that is, "a subject properly entrusted to persons trained in the law and in nothing else."[258] The hope of the law and society movement is that when properly calculated and calibrated, their theories and research will help explain—and in some instances—solve the problems facing the legal system and legal processes.[259] In short, the law and society movement tries to answer questions by moving beyond traditional or accepted explanations of the law.[260]

Elsewhere, Sarat and a co-author described the law and society movement.[261] According to them, law and society scholars explore "how law matters."[262] The study of the relationship between law and society has resulted in two distinct approaches. An instrumentalist approach was dominant in the 1960s. This method tries to assess how law or legal rules have impacted a society. Implicitly, law is viewed as an independent variable

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254. *See* Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 770-72 (1985).

255. *Id.* at 764-70.

256. *Id.* at 775.

257. *Id.* at 774.

258. Posner, *supra* note 111, at 762.

259. *See generally* Richard D. Schwartz, *From the Editor . . .*, 1 L. & SOC'Y REV. 6, 7 (1966) ("[f]ew would deny the value of social sciences ultimately combining insights to understand the larger picture").

260. The traditional legal process-based explanation for why a state has the death penalty is that the legislature has enacted a statute authorizing the death penalty in appropriate cases because a majority of the voters, whom the legislators represent, desire that the jurisdiction have capital punishment as a sentencing option. Law and society members, however, might focus on how capital offenders are portrayed by supporters of the death penalty and what sociological factors are most likely to lead to the commission of a capital crime and to the imposition of the death sentence. Further, a social-scientific inquiry into the impact of the death penalty may well try to ascertain why a nation in general, and its voters in particular, believe that death as punishment serves a proper penological or societal goal. Answers to these questions could lie in surveys of voters and capital jurors and in a review of how issues of crime, law, and justice are portrayed popularly and are communicated. Such inquiries, particularly when replicated over time, might truly measure the impact of capital punishment on a particular society. The social sciences and empirical research, therefore, should be able to assist in determining the apparent attractiveness of capital punishment.

261. Bryant G. Garth & Austin Sarat, *Studying How Law Matters: An Introduction*, *in* HOW DOES LAW MATTER? (Bryant G. Garth & Austin Sarat eds., 1998).

262. *Id.* at 1.

whose influence can be measured.[263] In other words, this approach asks, "How does law influence society?" A second level of inquiry more recently has become pronounced. This constitutive approach "sees law more as a pervasive influence in structuring society than as a variable whose occasional impact can be measured."[264] Constitutive law and society scholars treat law as more than the formal legal rules of a society. This approach asks, "What is the law, norms or values of a society?"[265] The essays in *The Killing State* seem to reflect both approaches in trying to assess the impact of the death penalty on politics, culture, and the law.

VII. ON TENNESSEE: A CASE STUDY?

The Killing State's thesis that the death penalty corrupts politics, culture, and the law can be tested by looking at Tennessee, which in 2000 became the last southern state to resume executions after *Gregg*. Tennessee has had a checkered history on the death penalty. As in many states, that history shows periods of apparent rejection of the death penalty and times in which the ultimate criminal sanction was fervently supported and promoted.[266] As is true with every state, Tennessee's administration of the death penalty has been influenced by racism and class bias.

The death penalty was authorized when Tennessee was admitted to the Union in 1796.[267] As with other states with a significant black population, the penal laws imposed harsher punishment on slaves and on free blacks than on whites for the same conduct.[268] In 1829, the state's first penal law codified the state's homicide provision into a single statute.[269] Consistent with a prevailing

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263. *Id.* at 2.

264. *Id.*

265. In a different essay, Sarat and his co-author explore the themes of power and justice as key organizing concepts in law and society scholarship from the late 1960s through the 1990s. *See* Bryant G. Garth & Austin Sarat, *Justice and Power in Law and Society Research: On the Contested Careers of Core Concepts*, *in* JUSTICE AND POWER IN LAW SOCIOLOGICAL STUDIES (Bryant G. Garth & Austin Sarat eds., 1998).

266. *See generally* Robert H. White, *Historical Background* Re *Capital Punishment in Tennessee*, 19 W. TENN. HIST. SOC'Y PAPERS 69 (1965) (detailing capital punishment in Tennessee from 1807 to 1965).

267. North Carolina adopted the common law of England, including the death penalty, as its law. Thereafter, The Cession Act, N.C. Pub. Acts of 1789, ch. 3, which brought about the creation of Tennessee out of western North Carolina territory, provided that North Carolina's laws would remain in effect in Tennessee until changed by the new territory's government. Tennessee's 1796 Constitution adopted North Carolina law as the state's law.

268. *See* Margaret Vandiver & Michel Coconis, *"Sentenced to the Punishment of Death": Pre-*Furman *Capital Crimes and Executions in Shelby County, Tennessee*, 31 U. MEM. L. REV. 861, 867-73 (2000).

269. *See* Act of Dec. 9, 1829, ch. 23, 1829 Tenn. Pub. Acts 27, §§ 3, 4.

national reform movement,[270] this statute divided murder into degrees and reserved the death penalty as mandatory punishment for first-degree murder.[271] The condemned were to be executed by hanging by the neck.[272] In 1838, Tennessee Supreme Court justices were authorized to make a binding certification to the governor that due to extenuating circumstances a death sentence was to be commuted to life imprisonment.[273] Nineteen years later, the governor's authority to follow that recommendation was made discretionary.[274] Also in 1838, Tennessee was the first state to give juries unguided sentencing authority in first-degree murder cases.[275] Then in 1842, the governor was given unbridled authority to commute death sentences.[276] The death penalty was expanded in the 1860s and 1870s.[277] Executions became private events, and local wardens were removed from the process in 1909.[278] The 1909 statute also designated Nashville as the central place for all executions and permitted the prisoners' families to attend.[279] The next major change occurred in 1913, the result of another capital punishment reform movement.[280] Tennessee's method of execution was changed from hanging to electrocution.[281] For two years—1915 to 1917—the death penalty was partially abolished.[282] After a series of lynchings, the General Assembly

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270. Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 703 (1937); *see also* MASUR, *supra* note 7, at 73-92 (discussing the reform movement).

271. *See* Act of Dec. 9, 1829, ch. 23, 1829 Tenn. Pub. Acts, §§ 3, 4.

272. *Id.* at § 4.

273. *See* Act of Jan. 10, 1838, ch. 29, 1837-38 Tenn. Pub. Acts 55, § 1.

274. *See* CODE OF TENN. § 5259 (1858).

275. *See* Act of Jan. 10, 1838, ch. 29, 1837-38 Tenn. Pub. Acts 55, § 1.

276. *See* Act of Jan. 26, 1842, ch. 55, 1841 Tenn. Pub. Acts 75.

277. *See* Vandiver & Coconis, *supra* note 268, at 873-75.

278. *See* Act of Apr. 22, 1909, ch. 500, 1909 Tenn. Pub. Acts 1810, § 1.

279. *Id.*

280. *See* Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 WM. & MARY L. REV. 551, 565-77 (1993) (detailing the reform movement and the adoption of electrocution as a method of execution).

281. *See* Act of Mar. 26, 1913, ch. 36, 1913 Tenn. Pub. Acts 91, § 1. The change was retroactive. *See* Shipp v. State, 172 S.W. 317, 318 (Tenn. 1914).

282. *See* Act of Mar. 28, 1915, ch. 181, 1916 Tenn. Pub. Acts (Acts of the Extra Session) 5, § 1; *see also* White, *supra* note 266, at 84 n.37 (stating that "Chapter[] 181 . . . of the Public Acts of 1915 will not be found in the bound volume of Public Acts of 1915. [It was] inserted in Acts of the Extra Session of 1916"). In addition to substituting life imprisonment as the punishment for the death penalty, the bill contained two exceptions. It provided: "That this Act shall not interfere with the operation of statutes providing for the death penalty as a punishment for the offense of rape" and "that the provisions of this Act shall not apply to convicts serving life terms in the State penitentiary who shall be convicted of any offense, now punishable under the law by death by electrocution." *Id.* The partial abolition occurred over an attempted veto by Governor Rye. Rye returned five bills, including the abolition bill, to the General Assembly but did so after the five day period required the by Tennessee Constitution. *See* Johnson City

in 1917 reenacted the death penalty for all murders and rapes.[283] Debates in the General Assembly indicate that some legislators believed that the death penalty assuaged mob violence. Apparently unsure of the legal status of the 1917 statute, the legislature two years later passed two other statutes authorizing the death penalty.[284] The following year, Maurice Mays, a well-known African-American in Knoxville, was convicted of murdering a white woman and sentenced to death. After his first conviction was reversed on appeal,[285] Mays was retried, convicted again, and after his appeals failed,[286] he was eventually executed. Today, Mays' case is often viewed as a wrongful conviction[287] brought about by racism and the threat of mob violence.[288]

Criminal law in general and capital punishment in particular remained largely within the states' care until the 1960s, when the United States Supreme Court slowly began to articulate federal constitutional principles for criminal cases. Most of these decisions involved the process by which criminal suspects and defendants were tried; a few involved substantive criminal law.[289] In 1960, William Tines, an African-American, was executed

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v. Tenn. E. Elec. Co., 182 S.W. 587, 589 (1916) (declaring the attempted vetoes invalid). The most extensive source on the matter declares that the "listing of executions 1909-1915 is probably incomplete and the exact number of executions is unknown." WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982, at 502 app. A (1984). It lists Julius Morgan's July 16, 1916 execution for rape as the only one occurring during the partial abolition. *Id.*

283. *See* Act of Jan. 31, 1917, ch. 14, 1917 Tenn. Pub. Acts 29, § 1.

284. *See* Act of Jan. 28, 1919, ch. 5, 1919 Tenn. Pub. Acts 28, § 1. The second enactment was apparently done out of an abundance of caution. *See also* Gohlson v. State, 223 S.W. 839, 840 (Tenn. 1920) (speculating regarding motive behind the first 1919 statute). The notes in the compilation of state law say that the 1917 law was "clearly unconstitutional" because it violated Article II, Section 17 of the Tennessee Constitution, but the notes do not refer to a judicial declaration of unconstitutionality. ANNOTATED CODE OF TENNESSEE BY SHANNON § 6442, at 5951-51 (1917).

285. *See* Mays v. State, 226 S.W. 233, 235 (Tenn. 1920).

286. *See* Mays v. State, 238 S.W. 1096, 1104 (Tenn. 1921).

287. *See* ROBERT J. BOOKER, THE HEAT OF A RED SUMMER: RACE MIXING, RACE RIOTING IN 1919 KNOXVILLE (2001); *see also* Hugo Adam Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 53 (1987) (noting that a white woman confessed to crime). *But see* Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 139-40 (1988) (disputing Bedau's and Radelet's contention).

288. John Egerton, *A Case of Prejudice: Maurice Mays and the Knoxville Race Riot of 1919*, S. EXPOSURE, July/Aug. 1983, at 56. For a more recent telling of the pursuit of Mays and subsequent race riots see Matthew Lakin, *"A Dark Night": The Knoxville Race Riot of 1919*, 72 J. E. TENN. HIST. 1 (2000).

289. *See, e.g.*, Powell v. Texas, 392 U.S. 514, 517 (1968) (regarding a Texas statute outlawing public intoxication); Robinson v. California, 370 U.S. 660, 660 (1962) (regarding a California statute making an addiction to narcotics illegal); Lambert v. California, 355 U.S. 225, 226 (1957) (regarding a California statute regarding registration of previously convicted

for raping a white woman while on escape from a previous conviction. He was officially the 134th person executed by Tennessee.[290] Consistent with developments in other states, the General Assembly in 1967 enacted a Post-Conviction Procedure Act, which provided a mechanism for prisoners to challenge their conviction and sentence[291] and which created the Court of Criminal Appeals as a forum for adjudicating criminal appeals and post-conviction claims.

In 1972, the United States Supreme Court invalidated the existing system of capital punishment in the United States,[292] but four years later it upheld the practice, as provided for in rewritten statutes.[293] Since 1972, a number of Tennesseans have supported the death penalty and have worked toward resuming executions.[294] In 1974[295] and again in 1977[296] the Tennessee Supreme Court determined that the state's rewritten capital punishment statutory schemes were unconstitutional. The General Assembly's third effort was ruled constitutional in 1979.[297] During the 1980s and 1990s, the state supreme court addressed a number of legal issues, often relying on approaches taken in federal courts in dealing with similar issues in other states.[298] Tennessee resumed executions in April 2000 with the execution of Robert

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criminals). For thoughts on how the Court's view of the criminal process affects substantive criminal law, see Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1272 (1998).

290. BOWERS, *supra* note 282, at 505 app. A.

291. *See* Gary L. Anderson, *Post-Conviction Relief in Tennessee—Fourteen Years of Judicial Administration Under the Post-Conviction Procedure Act*, 48 TENN. L. REV. 605, 608 (1981) (describing the context giving rise to the enactment of the statute and its subsequent interpretation).

292. *See* Furman v. Georgia, 408 U.S. 238 (1972).

293. *See* Gregg v. Georgia, 428 U.S. 153, 207 (1976).

294. *See, e.g.*, Michael Finn, *State, Federal Reforms to Hasten Justice: Appeals Help Keep Killers Alive*, CHATTANOOGA FREE PRESS, Sept. 3, 1996, at A1. Consistent opposition to the resumption of executions was also present. *See, e.g.*, Mary Rehyansky, *Executing Justice?: Death Penalty Debate Comes to Chattanooga*, CHATTANOOGA TIMES, Apr. 18, 1999, at A1 (noting anti-execution rallies).

295. State v. Hailey, 505 S.W.2d 712, 717 (Tenn. 1974) (holding that the bill authorizing the death penalty was unconstitutional because it violated the Tennessee Constitution's single subject and caption provisions).

296. Collins v. State, 550 S.W.2d 643, 646-47 (Tenn. 1977) (holding the mandatory death penalty unconstitutional under Eighth Amendment).

297. Cozzolino v. State, 584 S.W.2d 765, 767 (Tenn. 1979) (holding that the death penalty statute does not violate the cruel and unusual punishment provision of the Tennessee Constitution); Miller v. State, 584 S.W.2d 758, 759 (Tenn. 1979) (holding that the ex post facto provision of the Tennessee Constitution required reducing a death sentence to life imprisonment, which was the most serious legally available punishment when the crime occurred).

298. *See* Penny J. White, *A Survey of Tennessee Supreme Court Death Penalty Cases in the 1990s*, 61 TENN. L. REV. 733, 734 (1994).

Glen Coe for the murder of a girl.[299]

To be sure, the legislative, executive, and judicial branches of state government played a role in the resumption of executions in 2000. For instance, while campaigning for governor in 1994, Congressman Don Sundquist promised that if he were elected, executions would resume during his tenure.[300] Sundquist was elected, and unlike his two immediate predecessors, he helped enact legislation that streamlined the state post-conviction process. Accordingly, since 1995, Tennessee post-conviction petitions have been subject to a one-year statute of limitations, and prisoners are now presumptively limited to a single petition.[301] In 1996, Justice Penny

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299. Jon Yates & Jay Hamburg, *Coe Execution Brings Conflicting Reactions; Victim's Mother Finds Closure After 21 Years*, THE TENNESSEAN, Apr. 20, 2000, at 1A.

Months before the Coe execution, the five-member Tennessee Supreme Court issued four opinions, in a single case, addressing whether it should exercise its powers under section 4-27-106 of the Tennessee Code Annotated to recommend that the governor commute a capital sentence. The case, *Workman v. State*, 22 S.W.3d 807 (Tenn. 2000), is a particularly good display of Cover's thesis that law and legal interpretation impose violence upon those subject to it. Four of the justices concluded that they should not make the recommendation. *Id.* at 809. Two of these justices concluded that the facts contained in the court record did not demonstrate that extenuating circumstances existed for commutation. *Id.* (Anderson, C.J., with Holder, J., concurring). The other two justices, each for different reasons, concluded that no legal basis existed for recommending commutation; one emphasized executive clemency as a potential avenue for relief, *id.* at 812-13 (Drowota, J., concurring), and the other believed that the statute was obsolete and possibly unconstitutional as an infringement of separation of powers principles. *Id.* at 814-16 (Barker, J., concurring). The remaining justice recommended commutation, but did not offer a rationale. *Id.* at 816-17 (Birch, J., concurring and dissenting).

The various opinions are a cornucopia of interpretative methodologies; they prove that legal interpretation is an art. *Cf.* Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949) (offering fictional high court opinions, through differing jurisprudential and interpretative methods and addressing the court's legal authority to order a remedy in a capital case); Symposium, *The Case of The Speluncean Explorers: Contemporary Proceedings*, 61 GEO. WASH. L. REV. 1754 (1993) (giving fictional high court opinions based on Fuller's hypothetical but incorporating modern jurisprudential methods). Cover's metaphor applies here. All justices wrote knowing that the possibility of death hinged on their individual votes. To the extent that any of the justices in *Workman* proffered a forced legal interpretation, "violence" was done, according to Cover.

300. *See* Mark Curriden, *Is justice denied? Legal agency reaps blame as a barrier to executions*, CHATTANOOGA TIMES, Mar. 27, 1995, at A1 (describing criticism of Tennessee's Capital Case Resource Center, which assisted capital defendants in challenging their convictions and sentences).

301. The original Post-Conviction Procedure Act of 1967 did not include a statute of limitations. *See* Act of May 25, 1967, ch. 310, 1967 Tenn. Pub. Acts 801, § 1. In 1986, the General Assembly adopted a three-year statute of limitations for post-conviction petitions. *See* Act of Mar. 3, 1986, ch. 634, 1986 Tenn. Pub. Acts 348, § 1. The limitations period was shortened to one year for petitions filed after May 10, 1995. *See* Post-Conviction Procedure Act, ch. 207, 1995 Tenn. Pub. Acts 305, § 1 (amended by Act of Apr. 25, 1996, ch. 995, 1996 Tenn. Pub. Acts 753, § 1 and codified at Tenn. Code Ann. § 40-30-202(a)).

White was not retained as a Justice on the Tennessee Supreme Court after a campaign alleging that she did not support the death penalty.[302] Two years later, in response to increasing public criticism, the state courts implemented changes to more quickly process capital cases.[303] Also in the late 1990s, the federal courts began to deny more federal habeas capital petitions from Tennessee inmates than they granted.[304] Most significantly, the Coe execution was made possible by the Tennessee Supreme Court's ruling on two previously unaddressed issues: a protocol for a prisoner's competency for execution[305] and a process for setting execution dates and the filing of commutation motions.[306]

The lull in executions in Tennessee might be best explained by Franklin Zimring's *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990s*.[307] Zimring observed that those states that have been historically

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302. Tom Humphrey, *White Becomes 1st Appellate-Level Judge to be Defeated in 'Yes-No' Vote; Massive Opposition to Death Penalty Vote Overcomes Support*, KNOXVILLE NEWS-SENTINEL, Aug. 2, 1996, at A1.

303. Phil West, *Chief justice gives state of judiciary*, CHATTANOOGA TIMES, Feb. 20, 1998, at B3.

304. *See infra* note 310. In a speech, Sixth Circuit Judge Gilbert Merritt noted that in the preceding fifteen years, a federal writ of habeas corpus had been issued in eight of the twelve Tennessee capital cases that had completed review. John Shiffman, *Death penalty system needs fix, judge says*, THE TENNESSEAN, Sept. 27, 2002, at 1A (citing Judge Gilbert Merritt, Speech Before the Tennessee Bar Association (Sept. 26, 2002)).

305. *See* Van Tran v. State, 6 S.W.3d 257, 273-74 (Tenn. 1999), *cert. denied*, 529 U.S. 1091 (2000). *Van Tran* held that a death row prisoner could only raise the issue of mental competency to be executed in response to the Tennessee Attorney General's motion to the Tennessee Supreme Court to set an execution date. *Id.* at 274. The Tennessee Supreme Court would then issue an order on the execution date and remand the case to the trial court in which the prisoner was sentenced for a ruling on the competency claim. *Id.* If appropriate documentation by the prisoner was necessary, the trial court would then decide if a hearing was necessary. *Id. Van Tran* also established the time period by when subsequent court proceedings had to occur, the standard by which mental competency claims were to be adjudicated, the time period that trial courts had to decide the claim, the form and content of the trial court's opinion on the claim, the appellate review process of the claim, and the requirement that there should be subsequent monitoring of mentally incompetent prisoners. *Id.* at 273-74.

306. Coe v. State, 17 S.W.3d 251, 251 (Tenn. 2000) (stating that once the original execution date has expired as a result of a stay, the Tennessee Supreme Court has continuing jurisdiction to issue another execution date and the Tennessee Attorney General need not move the court to set a new execution date); Coe v. State, 17 S.W.3d 249, 259 (Tenn. 2000) (declaring that the time to file motion for commutation is generally after the direct appeals process is completed; the standard for granting a commutation is that facts in the record or combination of record facts and new evidence show that extenuating circumstances exist that warrant commutation); Coe v. State, 17 S.W.3d 191, 192 (Tenn. 1999) (stating that defendant has a duty to challenge his present mental competency to be executed when the Attorney General files motion to set the execution date).

307. 20 FLA. ST. U. L. REV. 7 (1992).

inclined to execute did so in the 1980s and early 1990s.[308] According to Zimring, whether states proceeded with executions depended heavily on the political climate within the state and on the interaction between federal law and procedure in the capital litigation process.[309] Similarly, in Tennessee, executions eventually resumed because both the legal and political climates indicated sufficient interest and no state or federal institution was interested in preventing that resumption.[310]

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308. *Id.* at 12.

309. *Id.* at 12-13.

310. A common perception is that federal district Judge John T. Nixon was the cause of the suspension of executions from 1960 to 2000. For instance, by 1997 the following "joke [was] circulated through the Tennessee Attorney General's Office. Q: 'When will the state finally execute someone? A: Two years after Nixon leaves the bench.'" Louis Graham, *39 Beat Death Without Nixon*, COMMERCIAL APPEAL, June 9, 1997, at A1. At least half of the forty year delay is no way attributable to him, however, as he did not become a federal judge until 1980. The first state capital cases reached him in 1985. He granted habeas corpus relief in each of the five cases that he decided, after considering each petition for years. *Id.* In actuality, from 1977 to 1997, state courts ordered a new trial or a re-sentencing in 55 of 141 capital cases, with 39 capital defendants receiving a sentence other than death at their re-sentencing. *State courts order most death penalty rejections*, CHATTANOOGA TIMES, June 10, 1997, at B2.

During this period, Nixon, as the Chief Judge of the Middle District of Tennessee, in which the state's death row population is housed (Riverbend Maximum Correctional Institution), was the only federal judge considering state capital habeas petitions. Judge Nixon granted the writ of habeas corpus in each capital habeas cases he reviewed, and the Sixth Circuit usually affirmed his decision. *See, e.g.*, Houston v. Dixon, 50 F.3d 381 (6th Cir. 1995) (vacating the issuance of the writ to the extent that it was based on insufficient evidence to convict for murder and affirming the issuance of the writ based on unconstitutional jury instructions but reversing issuance to the extent that it vacated the petitioner's armed robbery conviction); Austin v. Bell, 938 F. Supp. 1308 (M.D. Tenn. 1996), *aff'd in part, rev'd in part, and remanded*, 126 F.3d 843 (6th Cir. 1997) (reversing issuance of the writ to the extent that it found the jury instruction unconstitutional but affirming issuance based on ineffective assistance of counsel); Groseclose v. Bell, 895 F. Supp. 935 (M.D. Tenn. 1995), *aff'd*, 130 F.3d 1161 (6th Cir. 1997) (affirming issuance of the writ because the petitioner was denied effective assistance of counsel); Rickman v. Bell, 864 F. Supp. 686 (M.D. Tenn. 1994), *aff'd*, 131 F.3d 1150 (6th Cir. 1997) (affirming issuance of the writ because the petitioner was denied effective assistance of counsel). *But see* Coe v. Bell, 161 F.3d 320 (6th Cir. 1998), *rev'd*, 535 U.S. 685 (2002) (reversing grant of the writ after concluding that the jury instructions were constitutionally sufficient, procedurally barred, or if defective, harmless error).

After he took senior status in 1996, other Tennessee federal district judges handled state habeas capital petitions. These other federal district judges usually have not granted the writ, and their decisions typically have been affirmed by the Sixth Circuit, also. *See, e.g.*, House v. Bell, 283 F.3d 737 (6th Cir. 2002) (affirming denial of the writ by Judge Jarvis); Hutchinson v. Bell, 303 F.3d 720 (6th Cir. 2002) (affirming denial of the writ by Judge Jarvis); Caldwell v. Bell, Nos. 99-6219; 99-6307, 2001 U.S. App. LEXIS 10769, at *26 (6th Cir. May 17, 2001) (affirming denial of the writ); Abdur'rahman v. Bell, 226 F.3d 696 (6th Cir. 2000) (reversing the district court's vacatur of the death sentence), *dismissed*, 537 U.S. 88 (2002); Alley v. Bell, 307 F.3d 380 (6th Cir. 2000) (affirming denial of the writ by Judge Donald); Workman v. Bell,

Though it is nearly impossible to prove a negative, there are virtually no signs that the nonlegal cultural indicia that *The Killing State* relies on—movies, television programs, and books—as produced and consumed by Tennesseans, were becoming or have become more degenerate either before or since the resumptions of executions in Tennessee.[311] Thus, it cannot be said, as represented in *The Killing State*, that having executions "undermine[d] democracy and the rule of law" or "nurture[d] a culture of . . . resentment and recrimination," any more than it can be claimed that not having executions did so.[312]

VIII. CONCLUSION: DEATH PENALTY SCHOLARSHIP AND MOVING TOWARD ABOLITION

It is past time for a cultural examination of the modern capital punishment system; however, *The Killing State* is not it. As laudatory as its goal of being an interdisciplinary book on the death penalty, *The Killing State* largely misses the mark of detailing capital punishment's impact on law, politics, and society. Though *The Killing State* does not achieve fully its objective of a cultural study of the death penalty, it nonetheless might cause some to ponder the larger meaning and potential influence of death penalty scholarship.[313]

Death penalty abolitionist scholarship that considers matters beyond legal doctrine would be welcome.[314] This kind of scholarship would more likely bring about reconsideration of the penal laws to more directly address

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178 F.3d 739 (6th Cir. 1998) (affirming denial of the writ by Judge Gibbons), *motion for en banc proceeding denied*, 227 F.3d 331 (6th Cir. 2001); King v. Dutton, 17 F.3d 151 (6th Cir. 1994) (affirming denial of the writ by Judge Hull). *But see* Cone v. Bell, 243 F.3d 961 (6th Cir. 2001), *rev'd*, 122 S. Ct. 1843 (2002) (reversing that part of Judge McCalla's decision denying the writ for ineffective assistance of counsel); Carter v. Bell, 218 F.3d 581 (6th Cir. 2000) (reversing denial of the writ by Judge Hull); O'Guinn v. Dutton, 88 F.3d 1409 (6th Cir. 1996) (en banc) (reversing the grant of the writ by Judge Morton and dismissing the "mixed" petition); *see also* Black v. Bell, 181 F. Supp. 2d 832 (M.D. Tenn. 2001) (denial of the writ by Judge Campbell).

311. One might argue that the Tennessee General Assembly's refusal to enact a state income tax in 2000 and 2001, and its related curtailing of TennCare, a medical network of health care providers for Medicaid patients, uninsured, and uninsurable Tennesseans, is evidence that state policies reflect greater indifference to the plight of its more vulnerable citizens than in previous years. This argument ignores several variables including that the tax issue has been repeatedly disfavored by Tennesseans, and that not everyone who supports a state income tax opposes the death penalty, and vice versa.

312. *See* THE KILLING STATE, *supra* note 3, at 4.

313. One benefit of reading *The Killing State* and other ambitious scholarship is that it might inspire some to think about the death penalty and the support that exists for it. A forthcoming project of mine considers an aspect of empirical documentation of the death penalty. *See* Dwight Aarons, *Keeping It Real: Empiricism, the Death Penalty and Death Penalty Legal Scholarship* (work in progress).

314. According to the book's Introductory Essay, *The Killing State* is such a work.

criminal violence, perhaps leading to a full re-evaluation of the need for and use of the death penalty. Rather than championing the broad-sided slogan of legal interpretation as violence, abolitionist death penalty scholarship should rely on enduring principles. In the United States, a starting place for the cataloguing of some enduring precepts might be with beliefs that are "implicit in the concept of ordered liberty,"[315] those "principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"[316] such that a "fair and enlightened system of justice would be impossible without them."[317] To the extent that inquiries such as this are too limited,[318] abolitionists might appeal as well to what the United States Supreme Court has called the "Anglo-American tradition of criminal justice"[319] that protects the "dignity of man."[320] Abolitionists should embrace the idea that the "power to punish [has to] be exercised within civilized standards."[321] Deviations from civilized standards should be documented, prosecutions under uncivilized standards reversed,[322] and those responsible for the deficiencies should be taken to task. Capital punishment abolitionists in the United States should remind those who support the death penalty that the United States Supreme Court has repeatedly declared that the concept of cruel and unusual punishment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[323]

A majority of United States citizens probably have not embraced the abolitionist position on the death penalty because no legal, cultural, or social framework for abolition has been created.[324] *The Killing State* only indirectly sheds light on present legal, cultural, and social conditions. Abolitionist

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315. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

316. *Palko*, 302 U.S. at 325 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

317. *Id.*

318. *Cf.* Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1782-84 (1970) (arguing that long usage of the death penalty cannot be determinative of its continued use and advocating for reliance on enlightened standards in society to determine the constitutionality of capital punishment).

319. Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).

320. *Id.*

321. *Id.*

322. *E.g.*, Domingues v. State, 961 P.2d 1279, 1280-81 (Nev. 1998) (Rose, J., dissenting) (asserting that Senate reservations to an international treaty prohibiting the execution of individuals under age 18 were invalid and therefore the convicted juvenile's death sentence was illegal).

323. *Trop*, 356 U.S. at 101.

324. Herbert H. Haines has documented the history of the grassroots opposition to the death penalty, its reasons for failure, and future prospects of death penalty abolitionism. *See* HERBERT H. HAINES, AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972-1994 (1996). As with the abolition of slavery, death penalty abolitionists have to expand their efforts to create a more widespread grassroots campaign. *See* NEWMAN, *supra* note 220.

writings should try to shift the terms of the debate.[325] This paradigm shift might be helped by eventually tying the rejection of capital punishment to substantive criminal law[326] and human rights-based principles.[327] In short,

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325. Perhaps the so-called moratorium movement that seems to exist presently will lead to abolition. One commentator has discussed this movement, compared it with other law reform movements, and outlined strategies and other factors necessary for sustaining it. *See* Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1 (2002).

326. Years ago, a commentator noted that there were relatively few constitutional limitations on substantive criminal law. *See* Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 655 (1966). That remains largely true today. More recently Louis Bilionis has argued that "the Constitution and substantive criminal law in fact are engaged in a serious, long-running relationship that is amply manifested in dozens of Supreme Court opinions . . . ." Bilionis, *supra* note 289, 1272. He says that this relationship began at least as early as the late 1950s. *Id.* at 1269. Bilionis recounts the legal academy's exploration of substantive criminal law, citing to law review articles that have considered the interaction between the Constitution and substantive criminal law. *Id.* at 1294-98 & nn.113-15. Bilionis briefly discusses capital cases. *Id.* at 1319-20, 1326-27. He says that the Court's capital decisions have stimulated political deliberation based on moral sensibilities. *Id.* at 1326-27.

327. Some philosophical justifications for recognizing "human rights" in the United States Constitution are found in MICHAEL J. PERRY, THE CONSTITUTION, THE COURT, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY (1982). Perry defines "human rights" as individual constitutional rights. He primarily discusses freedom of expression, equal protection of the laws, and substantive due process rights relative to the family. *Id.* at 5. After his most pertinent discussion regarding the death penalty, see *id.* at 100-15, Perry writes that the type of United States Supreme Court review that he advocates can serve "as an agency of moral reevaluation and moral growth." *Id.* at 115. The answers that the Court provides are not dependent on the views of the majority, either now or in the future. Rather, the Court should aspire to give right answers to fundamental political-moral problems. *Id.*

Martha Davis observes the negative consequences of the United States judicial system's continued failure to consider international and human rights principles:

> The issue is, for want of a better word, legitimacy. Globalization has now so pervaded our national culture and identities that a court that consistently ignores international precedents and experiences when considering human rights issues, even if merely for their persuasive or moral weight, risks irrelevancy. Historically, the United States judicial system has not ignored, but responded, to such threats to its legitimacy. Based on that history, it would be remarkable if a response to the changes marked by globalization and the breakdown of the dichotomy between national and international human rights law were *not* in the offing.
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> . . . .
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> To maintain their legitimacy, courts—and particularly higher courts—considering human rights issues must routinely consider the practices of other nations and the international norms reflected in customary international law and international instruments.
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> . . . .
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> To date, U.S. judges have stood back from these developments. As this isolationist

abolitionist lawyers do not have to wait for the courts to abolish the death penalty; for the courts to outlaw the death penalty, however, abolitionists have to advocate for its abolition.[328] Unfortunately, *The Killing State* may only dimly point the way toward abolition of the death penalty.

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approach continues, the legitimacy and relevance of U.S. judicial decisions will be increasingly open to question. However, as with the Court's response to the challenges of the Progressive era, the United States judicial system has always shown an ability to incorporate such paradigm shifts into its modes of decisionmaking.

Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417, 421, 424, 436 (2000). Another scholar has noted:

the original Bill of Rights was essentially negative. It marked off a world of the spirit in which government should have no jurisdiction . . . . It assumed . . . the citizen had no claim upon government except to be let alone. Today, the political theory which acknowledges the duty of government to provide jobs, social security, medical care, and housing extends to the field of human rights and imposes an obligation to promote liberty, equality, and dignity.

Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 93 (1966); Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983) (advocating incorporating human rights norms through the Bill of Rights).

328. One author outlines generally how lawyers litigating for social change should proceed.

To restrict oneself to arguments the Court now accepts is to forget the basic legal realist tenet that the reason a judge votes the way he votes is not necessarily the reason he is prepared to set forth as his official rationale. A judge will be more likely to read precedent as permitting a broader range of action if the judge is personally convinced there are good reasons to do so, even if those good reasons are reasons. . . . that must go unstated. Ultimately the ideal is to convince the Court to bring its stated rationale into line with its felt commitments, and to do so where necessary by reconsidering its prior opinions and decisions. Until that happens, the advocate has two jobs: to convince the Court it wants to go her way and that there is an intellectually honest way to do so. To the extent that advocates limit their arguments to ones that are currently acceptable to the Court as permissible rationales, they do only part of their job.

Suppose, however, that we stop being judicial realists for the moment and take the view that, in advocacy to the courts, one cannot allude to arguments the courts have rejected in the past. Does that mean that *public discourse* on [matters under litigation] should restrict itself to rationales upon which the courts are presently willing to rely? Absolutely not.

Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 946-47 (1997) (footnotes omitted). Professor Fran Ansley graciously provided this citation.