

The (Uncertain) "Withering Away" of the Death Penalty Due to Decreasing Popularity and Super-Regulatory Costs

By: Leona D. Jochowitz♦, 12/19/18

Abstract: This concept paper examines three new books on the death penalty, published from 2016-2018 for differing theses regarding possible abolition. Scholars during this period have interpreted the decreasing popularity of capital punishment and a super-regulatory costly legal environment as “the withering away” of the death penalty. The themes of the books center both on the slow demise of the death penalty due to expensive, time consuming legal regulation and racial inequality and on the expectations and upset results of the 2016 presidential race related to prospective Supreme Court appointments and the death penalty’s judicial abolition. The end result is not certain.

Introduction

The years 2016-2018 have been a time when issues regarding the American Death Penalty have again reached scholarly and popular attention. The themes of the books reviewed here center both on the slow demise of the death penalty due to expensive, time consuming legal regulation and racial inequality and on the expectations and upset results of the 2016 presidential race related to the prospects for Supreme Court appointments and the death penalty’s judicial abolition. The books juxtapose capital punishment’s slow decline and the reasons for it, against varying legal and political events and public opinion. Scholars during this period have interpreted the decreasing popularity of capital punishment and a super-regulatory costly legal environment as “the withering away” of the death penalty. ¹ In the 2017-2018 presidential election year, authors of books published before the election, addressed the prospects that a Democratic victory would lead to the appointment of more liberal judges and judicial abolition. ² For books published after the upset victory of President Trump, authors put aside the idea of a

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¹ Robert M. Bohm, *The Death Penalty’s Demise*, with Special emphasis on the United States, 652, 658-59, in *ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT* (Robert M. Bohm & Gavin Lee, eds., 2018).

² *Courting Death, The Supreme Court and Capital Punishment*. Carol S. Steiker and Jordan M. Steiker, 2016, 214, n. 31, quoting Hilary Clinton, “The use of the death penalty should be very limited and rare.”

judicial overturning of the death penalty, but stuck with the idea of its withering away, despite setbacks like the annulment and then popular reinstatement of capital punishment in Nebraska and California referenda. Yet popular support was fickle and unstable in this period. In 2016, competing referenda in California yielded a victory for the death penalty and time limits for appeals.³ Nebraska voters reinstated the death penalty after the 2015 legislative abolition. Oklahoma voters limited the power of the state courts to invalidate the death penalty and expanded execution methods.⁴ This volatility makes the review of 3 books on the future of the death penalty, published both before and after the 2016 election, pivotal in exploring the common themes of politics, law and social support for capital punishment.

This review examines three new books on the death penalty, published from 2016-2018 for common and differing theses regarding possible abolition. The books reviewed are: *Courting Death, The Supreme Court and Capital Punishment*. Carol S. Steiker and Jordan M. Steiker, 2016; *Deadly Justice, A Statistical Portrait of the Death Penalty*. Frank R. Baumgartner, et al. 2018; *Routledge Handbook on Capital Punishment*. Robert M. Bohm and Gavin Lee (Ed.), 2018.

Because of the changes predicted, many of these books and the death penalty were examined by author meets critic panels at the American Society of Criminology and Academy of Criminal Justice Sciences meetings in 2017-2018, forums where this reviewer learned of the books.⁵ At the ASC 2017 forum, Carol and Jordan Steiker stated that their book might have differed with regard to predictions of the demise of the death penalty had it been published a month after the election and not a month before. They discuss pending abolition in the concluding chapter of *Courting Death*. “As we approach what may be the final chapter of the American death penalty

³ California’s chaotic history of California death penalty referenda is laid out as a full chapter 25 in Mallicoat, Vogel and Crawford, *California’s Chaotic Death Penalty*, p. 446-464, ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT (Robert M. Bohm & Gavin Lee, eds., 2018).

⁴ Robert M. Bohm, *The Death Penalty’s Demise*, with Special emphasis on the United States, 652, 658-59, in ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT (Robert M. Bohm & Gavin Lee, eds., 2018).

⁵ ASC: Authors Meet Critics: *Courting Death: The Supreme Court and Capital Punishment* Thu, Nov 16, 9:30 to 10:50am, Marriott, Room 401, 4th Floor; Session Submission Type: Author Meets Critic; authors, Carol Steiker and Jordan Steiker; Marie Gottschalk, Chair, UP; critics, Andrea Armstrong, Loyola U.; Frank Baumgartner, UNC, Chapel Hill; Marsha Levick, Juvenile Law Center; Christina Swarns, NAACP LDF. https://convention2.allacademic.com/one/asc/asc17/index.php?cmd=Online+Program+View+Session&selected_session_id=1276199&PHPSESSID=ip66kn1dm7gdp77d08pv0do5g7

ASC: Author Meets Critics: *Deadly Justice: A Statistical Portrait of the Death Penalty* Wed, Nov 15, 5:00 to 6:20pm, Marriott, Room 302, 3rd Floor; Session Submission Type: Author Meets Critic; Author Frank Baumgartner; Lisa Miller, Chair; critics, Robert Dunham, DPIC, Marie Gottschalk, Daniel Gillion, and Diann Rust-Tierney. https://convention2.allacademic.com/one/asc/asc17/index.php?cmd=Online+Program+View+Session&selected_session_id=1275611&PHPSESSID=ip66kn1dm7gdp77d08pv0do5g7

ACJS: The Future of Capital Punishment Courts and Law/Death Penalty Roundtable Friday, February 16; 12:30 to 1:45 pm; Hilton 1st Floor: Grand Salon 6

Discussants: Robert M. Bohm, retired ; Stacy K. Parker, Muskingum University

Rebecca K. Murray, Creighton University ; Andrew Fulkerson, Southeast Missouri State University

Moderator: Gavin Lee, University of West Georgia

http://c.ymcdn.com/sites/www.acjs.org/resource/resmgr/annualmeeting/Final_2018_Annual_Meeting_Pr.pdf

story, we are struck by the odd and exceptional path capital punishment has traveled to the present moment.”⁶

The “Withering Away of the Death Penalty”

The common premise for these books relates to the growing judicial and public frustration with the death penalty after 40 years of administration due to its costs, legal complexity, unending appeals and time, botched executions, proof of racial and geographic equality and social fairness, and evidence of wrongful convictions. These scholars indicated that these problems together with the drop in violent crime rates had led to a decline in the support for the death penalty.⁷ This natural decline became even more vital for the authors whose books were published with the insight after the 2016 election, that independent non-political forces might affect the trajectory. The latter authors seem less certain of the death penalty’s non-judicial demise. The authors of the books all cite each other and are known scholars in the field.

Public Support

In one of the latter 2018 books reviewed here, Bohm states that until the presidential election of 2016, “a realistic path to the death penalty’s complete abolition was in sight...,” with declines in the number of death sentences (from 315 in 1996 to 30 in 2016), the number of executions (from 98 in 1999 to 20 in 2016) conducted, the number of states that had abolished the death penalty (19 states without the death penalty in 2016), and the concentrations of executions in a few states and counties (15% of 3,143 counties account for executions).⁸

Cost

On the legal and court side, Carol and Jordan M. Steiker indicate in their book that the decisions regarding bifurcated death penalty trials in *Furman v. Georgia*⁹ and *Gregg v. Georgia*¹⁰ have ushered in an unsustainable super judicial regulation of the death penalty that focuses on the extensive, expensive and time-consuming investigation and development of mitigating evidence and capital defense teams.¹¹ Much of this might have been avoided had the Court focused on race issues rather than become a super monitor of arbitrariness which was in fact a surrogate for race.

Baumgartner, et al. affirms this, citing the Steikers, stating that the new death penalty has dramatically increased the cost of the death penalty. “A typical capital defense team today

⁶ *Courting Death, The Supreme Court and Capital Punishment*. Carol S. Steiker and Jordan M. Steiker, 2016, p. 320.

⁷ Talia Roitberg Harmon & Diana Falco, Wrongful Capital Convictions 575, 581-585 in ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT (Robert M. Bohm & Gavin Lee, eds., 2018).

⁸ Robert M. Bohm, The Death Penalty’s Demise, with Special emphasis on the United States, 652, 658-59, in ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT (Robert M. Bohm & Gavin Lee, eds., 2018).

⁹ 408 U.S. 238 (1972)

¹⁰ 428 U.S. 153 (1976)

¹¹ *Courting Death, The Supreme Court and Capital Punishment*. Carol S. Steiker and Jordan M. Steiker, 2016, 200

involves an entire team of specialists, with multiple attorneys working with investigators and mitigation specialists.”¹²

Race

The Steikers discuss the Supreme Court’s “race avoidance” in *McClesky v. Kemp*¹³ and *Coker v. Georgia*¹⁴ and conclude that this has led to the unchecked unjust influence of race in the death penalty process. This is another reason for the demise. They state that the court’s failure to address race in its death penalty jurisprudence will produce “more enduring and intrusive regulation of capital punishment ---perhaps even laying the ground work for constitutional abolition -than the more limited, more threatening, race-based intervention that the Court abjured.”¹⁵ The authors emphasis on the Supreme Court’s race avoidance is a central issue regarding the death penalty controversy.

Mitigating Evidence

The Steikers continue their argument about the regulatory imploding of the death penalty in their own contribution to the Bohm and Lee book. Their chapter focuses on the well-known and long-established dichotomy between juror guidance and standards and individualized sentencing through consideration of mitigating evidence.¹⁶ Justices Scalia and Blackmun split over these conflicting roles as seen in *Walton v Arizona*¹⁷ and *Callins v Collins*.¹⁸ The Steikers state, “The tension between the commands of guidance and discretion has become a substantial destabilizing force.”¹⁹ The authors suggest that the court’s strong approach to mitigation has also increased the cost of imposing the death penalty to the point that leads to a drop in capital sentencing. This undermines the use of the death penalty to mere marginality, a random, arbitrary and unusual punishment. The authors, somewhat counterintuitively, conclude that robust mitigation practice is an existential threat to the death penalty. While it enhances death penalty defense, it raises the costs and limits death sentencing to the point that it “unusual” and unconstitutional under the eighth amendment, failing to serve deterrence or retribution purposes.²⁰ This argument obviously transcends the short-term effects of politics and focuses on the underlying legal theory permitting capital punishment. The Steikers’ original insight and understanding of the self- imploding of

¹² *Deadly Justice, A Statistical Portrait of the Death Penalty*. Frank R. Baumgartner, Marty Davidson, Kaneesha R. Johnson, Arvind Krisnamurthy and Colin P. Wilson, 2018, 299-300.

¹³ 481 U.S. 279 (1987)

¹⁴ 433 U.S. 584 (1977)

¹⁵ *Courting Death, The Supreme Court and Capital Punishment*. Carol S. Steiker and Jordan M. Steiker, 2016, 115

¹⁶ In addition to their own 2016 book, The Steikers contributed a chapter 15 to the Bohm and Lee book (2018). *Aggravating and Mitigating Evidence*, Carol Steiker and Jordan Steiker, ch. 15, p. 279-294, in *Routledge Handbook on Capital Punishment*. Robert M. Bohm and Gavin Lee (Ed.), 2018. Routledge.

¹⁷ *Walton v Arizona*, 497 U.S. 639 (1990).

¹⁸ *Callins v Collins*, 510 U.S. 1141 (1994).

¹⁹ *Aggravating and Mitigating Evidence*, Carol Steiker and Jordan Steiker, ch. 15, p. 279, at 292 in *Routledge Handbook on Capital Punishment*. Robert M. Bohm and Gavin Lee (Ed.), 2018. Routledge.

²⁰ “Robust mitigation practice, by raising costs and limiting death sentences, thus represents the greatest existential threat to the continued retention of the American death penalty.” *Aggravating and Mitigating Evidence*, Carol Steiker and Jordan Steiker, ch. 15, p. 279, at 292 in *Routledge Handbook on Capital Punishment*. Robert M. Bohm and Gavin Lee (Ed.), 2018. Routledge.

death penalty regulation has been influential on all scholars predicting the future of capital punishment and is cited ubiquitously.

Some scholars answer the possible contradiction between juror guidance and standards and individualized sentencing by stating that narrowing the penalty for death eligible aggravated crimes does not impair discretion by jurors for those who are found to be death eligible, using a pyramid analogy. Attempts have been made to reconcile the Supreme Court doctrines of narrow guided discretion with the broad mitigation mandate of *Lockett v Ohio* (1978)²¹ for broad and less restrictive mitigation evidence. “The demand for clear, consistent, objective standards (the “nonarbitrariness” principle applies to the threshold requirement for defining a relatively narrow class of “death-eligible” offenders. Thereafter, the “individualization” principle -or the requirement that the sentencing authority be allowed to consider all relevant mitigation evidence is used at the selection stage, i.e., in determining which among the death-eligible offenders should be punished by death.”²² Justice Stephens in his dissent in *Walton*, suggested a pyramid analogy, “in which progressively narrow bands of criminal homicides and offenders are identified, with the highly discretionary consideration and use of mitigation evidence applying only at the apex to a class already determined to be death eligible....”²³ But even the pyramid analogy does not take away from and supports the Steikers’ critique that “The tension between the commands of guidance and discretion has become a substantial destabilizing force.”²⁴ The Court’s burdensome oversight and regulatory role in assuring individualized sentencing in each death penalty case has raised the costliness and arbitrariness of death sentencing to the point of “existential” failure and super regulation

Political and Long-Term Trends

The tension between the politics and the atrophying of the death penalty leads reviewers to conclude that the process is bound to continue despite presidential judicial appointments. Future rulings regarding the constitutionality of the death penalty relate to the composition and interpretation by members of the Supreme Court. The addition of Neil Gorsuch rather than Merrick Garland to the court and of Brett M. Kavanaugh to fill the vacancy of Anthony Kennedy may strengthen the grasp of conservatives and tilt the 5- judge majority toward the death

²¹ *Lockett v Ohio*, 438 U.S. 586 (1978)

²² J. Acker, "Questioning Capital Punishment" (Routledge 2014), p. 129-130.

²³ J. Acker, "Questioning Capital Punishment" (Routledge 2014), p. 131, citing Justice Stephen’ dissent in *Walton*, *Walton v Arizona*, 497 U.S. 639 (1990), p. 717: “ ‘All cases of homicide of every category are contained within the pyramid. The consequences flowing to the perpetrator increase in severity as the cases proceed from the base of the apex, with the death penalty applying only to those few cases which are contained in the space just beneath the apex. To reach that category a case must pass through three planes of division between the base and the apex.... ‘The first plane of division above the base separates from all homicide cases those which fall into the category of murder.... ‘The second plane separates from all murder cases those in which the penalty of death is a possible punishment. This plane is established by statutory definitions of aggravating circumstances. ‘The third plane separates, from all cases in which a penalty of death may be imposed, those cases in which it shall be imposed. There is an absolute discretion in the factfinder to place any given case below the plane and not impose death. The plane itself is established by the factfinder. In establishing the plane, the factfinder considers all evidence in extenuation, mitigation and aggravation of punishment....., citing *Zant v Stephens*, 462 U.S. 862 (1983).

²⁴ *Aggravating and Mitigating Evidence*, Carol Steiker and Jordan Steiker, ch. 15, p. 279, at 292 in *Routledge Handbook on Capital Punishment*. Robert M. Bohm and Gavin Lee (Ed.), 2018. Routledge.

penalty.²⁵ In 2018, Bohm concludes, “Because of Trump’s election and his appointment of Neil Gorsuch, a justice unsympathetic to death penalty abolition, the aforementioned legal argument cannot be expected to sway a majority of the Court. No argument could. Still, as noted previously, *the death penalty simply may continue to wither away* in most death penalty jurisdictions. For now, that may be all death penalty abolitionists can realistically anticipate.”²⁶ Bohm states that the death penalty abolition movement was held back not only by the Trump election, but by the referenda and laws in California, Oklahoma and Nebraska. “...[T]he election year of 2016 may well be remembered as the year the death penalty abolition movement was slowed, if not stopped in its tracks...”²⁷

Much of this shows that no prediction is better than 20/20 hindsight, even for a short few months. At the end of 2016, scholars like Steiker may have been ready to predict the legal demise of the death penalty, based on its reduced popularity and statistics. The election of 2016 came as a surprise to most Americans and scholars and this forced them to reevaluate death penalty trends. Yet as Baumgartner, et al. (2018) illustrates the prediction of death penalty trends involves long term statistical analysis regarding popular support and use. In the long run, the long-term trends of historical importance about community values may still be significant over fluctuations in short term election results and judicial personalities.

Individual Books

Courting Death, The Supreme Court and Capital Punishment. Carol S. Steiker and Jordan M. Steiker, 2016.²⁸

Courting Death (2016) is the first published of the books reviewed here, published in October, 2016, just prior to the upset presidential victory of Donald Trump. Its release date may have helped guide legal policy in the new administration if the more liberal candidate Hillary Clinton had been victorious. Co-authors Carol S. Steiker, Henry J. Friendly Professor of Law at Harvard Law School, and Jordan M. Steiker, Judge Robert M. Parker Endowed Chair in Law at the University of Texas School of Law are highly respected capital punishment scholars.²⁹ They are siblings. Both authors gained perspectives on the death penalty while clerking for Justice Thurgood Marshall on the U.S. Supreme Court, three years apart. They have numerous

²⁵ On July 9, President Trump nominated another conservative, Judge Brett M. Kavanaugh, for consideration of filling the vacancy created by the retirement of swing vote, moderate Anthony Kennedy. Justice Kennedy authored or joined decisions limiting the scope of the death penalty, authoring the decision in *Roper v Simons* (2005), prohibiting the execution sentences of juveniles. Scott Shane, et al. NYT July 14, 2018. Influential Judge, Loyal Friend, Conservative Warrior — and D.C. Insider. Death-Penalty Experts Describe Justice Kennedy’s Mixed Legacy on Capital Punishment, <https://deathpenaltyinfo.org/node/7139>.

²⁶ Robert M. Bohm, *The Death Penalty’s Demise*, with Special emphasis on the United States, 652, 664, in *ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT* (Robert M. Bohm & Gavin Lee, eds., 2018).

²⁷ *The Death Penalty’s Demise*, with special focus on the United States, Robert M. Bohm, ch. 37, pp. 652, in *Routledge Handbook on Capital Punishment*. Robert M. Bohm and Gavin Lee (Ed.), 2018. Routledge.

²⁸ Carol Steiker discusses the book in a podcast on DPIC.

<https://deathpenaltyinfo.org/podcast/audio/discussions/discussions-e18.mp3>

²⁹ <http://www.hup.harvard.edu/catalog.php?isbn=9780674737426&content=bios>

individual and joint publications which include: Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race* (2015).³⁰

The structure of *Courting Death* includes 9 chapters.³¹ These are: An introduction entitled, *Regulating the Death Penalty to Death*; Chapters 1-2 on the history of Supreme Court constitutional regulation before and after *Furman*; Chapter 3 on the invisibility of race in the constitutional revolution; Chapter 4 on the US Supreme Court and the States; Chapter 5 on the failures of regulation; Chapter 6 entitled, *An Unsustainable System*; Chapter 7 on recurring patterns of constitutional regulation including the gay marriage ruling and *Roe v. Wade* and backlash³²; Chapter 8 on the future of the death penalty, and a concluding chapter 9 entitled, *Life after Death*.

One of the book's salient features includes a discussion about how super Supreme Court regulation has failed due to the Court's avoidance of the race issues, as it focuses by proxy on individualized mitigating evidence. The thesis is that the Court adopted a guided discretion and aggravating and mitigating balancing approach in the *Furman v. Georgia*³³ and *Gregg v. Georgia*³⁴ decisions to avoid the freakish arbitrary imposition of the death penalty. However, the cases before the court implicated the arbitrary imposition of the death penalty based on extralegal race and other considerations. By focusing on this approach, it ignored overt aspects of arbitrary and discriminatory macro level race discrimination, raised again in *McCleskey v Kemp*³⁵ and the rape cases. Race discrimination was in fact arbitrary and freakish. Instead, the Court adopted a burdensome regulatory role to avoid arbitrariness on a case by case basis, and avoided the issue of illegal race discrimination. This instead led to the super regulation by the Court on the issue of arbitrariness. Every death case is ultimately litigated in the Supreme Court. By ignoring the statistical evidence of race discrimination in favor of an individual case by case approach, the Supreme Court also failed to remedy the most serious issue in death penalty administration, race discrimination and its historical legacy. The Steikers suggest that the court's silence on the issue of race was designed to preserve capital and prevent a popular backlash which had occurred after *Furman* when states reinstated the death penalty. However, the Court's rulings were still

³⁰ Carol Steiker & Jordan M. Steiker, *The Racial Origins of the Supreme Court's Death Penalty Oversight*, 42 Hum. Rts. 14 (2016); and Carol S. Steiker & Jordan M. Steiker, *Abolishing the American Death Penalty: The Court of Public Opinion Versus the U.S. Supreme Court*, 51 Val. U. L. Rev. 579 (2017); Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. Chi. L. Rev. 243 (2015); *Judicial Developments in Capital Punishment Law*, Carol S. Steiker & Jordan M. Steiker in *America's experiment with capital punishment: reflections on the past, present, and future of the ultimate penal sanction* / edited by James R. Acker, Robert M. Bohm, Charles S. Lanier, 3rd ed. 2014, ch. 3, p. 77.

³¹ Introduction: *Regulating the Death Penalty to Death*; 1. *Before Constitutional Regulation*; 2. *The Supreme Court Steps In*; 3. *The Invisibility of Race in the Constitutional Revolution*; 4. *Between the Supreme Court and the States*; 5. *The Failures of Regulation*; 6. *An Unsustainable System?*; 7. *Recurring Patterns in Constitutional Regulation*; 8. *The Future of the American Death Penalty*; 9. *Life after Death*

³² *Roe v. Wade*, 410 U.S. 113 (1973); *Courting Death, The Supreme Court and Capital Punishment*. Carol S. Steiker and Jordan M. Steiker, 2016, p. 228.

³³ 408 U.S. 238 (1972)

³⁴ 428 U.S. 153 (1976)

³⁵ 481 U.S. 279 (1987)

interpreted as “taking sides in the culture wars regarding racial status, even as [it] omitted the history of deliberate discrimination that offered the greatest justification for its intervention.”³⁶

Race avoidance also led to the Court’s proportionality doctrine, found in the white offender rape case in *Coker v. Georgia*.³⁷ The doctrine has been expanded to prevent the execution of juveniles and intellectually disabled. The litigious proportionality doctrine broadened the standards of decency test of the eighth amendment and, according to the Steikers, this invites challenges and more opportunities for the abolition of the death penalty. Proportionality which was a surrogate for race therefore is leading to the demise of the death penalty.

This over- regulation leads to the demise of the death penalty and its fall in popularity. While the Court originally focused on the absence of guidelines in sentencing, the Court ultimately settled on a commitment to open-ended individualized sentencing. This focus created tension between guidance and discretion. Although the focus on mitigation has improved capital defense, it has expanded the cost, duration and appeals in capital sentencing. This has led to the phase of super regulation. The Steikers’ thesis of over-regulation is so compelling that it is quoted in all other books reviewed here which come after.³⁸

Aside from the drop in violent crime rates which helped in the decline of the death penalty, the Steikers indicate that the constitutional regulation which in the short term allowed the states to implement capital punishment, has now undermined the death penalty for the long term. The destabilizing effect of this regulation is seen in the development of intricate and long capital trials, and the institutionalization of capital defenders. There are many levels of appeals and judicial review. There are costs and delays. It is bloated and inefficient. “Judicial regulation, once embraced as the alternative to judicial abolition may be the death penalty’s greatest threat.”³⁹ The Steikers conclude that constitutional regulation is beyond repair.

While the Steikers conclude that the Supreme Court jurisprudence on mitigation has vastly improved capital defense, it may come as a surprise to readers that this same regulation is the Achilles heel of the death penalty. The reforms designed to make the death penalty less arbitrary have mired it in judicial bureaucracy. It would have been simpler to cure arbitrariness by acknowledging the reality of illegal race discrimination. This novel thesis has now been adopted by many death penalty scholars.

Deadly Justice, A Statistical Portrait of the Death Penalty. Frank R. Baumgartner, Marty Davidson, Kaneesha R. Johnson, Arvind Krisnamurthy and Colin P. Wilson, 2018.

Deadly Justice, A Statistical Portrait of the Death Penalty by Frank R. Baumgartner, et al. was also published at the end of year in November, 2017. It has a copyright date of 2018. One of the

³⁶ *Courting Death, The Supreme Court and Capital Punishment*. Carol S. Steiker and Jordan M. Steiker, 2016, p. 111.

³⁷ 433 U.S. 584 (1977)

³⁸ Susan A. Bandes, All Bathwater; No Baby: Expressive Theories of Punishment and the Death Penalty, 116-6 Michigan Law Rev. 905-924 (2018); Deborah Denno, Book Review *Courting Death*, 130 Harvard Law Review 1827 (2017).

³⁹ *Courting Death, The Supreme Court and Capital Punishment*. Carol S. Steiker and Jordan M. Steiker, 2016, pp. 195, 212

aspects of the book which interests this reviewer is that it involves a collaboration between political scientist Baumgartner and four undergraduate student researchers who took his courses in the decline of the death penalty taught at UNC Chapel Hill. The book's epilogue is entitled "Teaching, Research and Teaching Research," and this reviewer did not realize it involved undergraduate authors until she read the epilogue.⁴⁰ This reviewer teaches criminal justice to undergraduates and has also collaborated with the students on research about wrongful convictions and the death penalty. The method is a rewarding and exciting form of education and discovery for both Professor and students. Professor Baumgartner who is the Richard J. Richardson Distinguished Professor of Political Science at UNC-Chapel Hill, has used the method of collaboration with undergraduate students in several other books including *Suspect Citizens: What 20 Million Traffic Stops Tell Us about Policing and Race* (Cambridge, 2018, co-authored with two UNC graduate students).⁴¹ The course which generated the book *Deadly Justice* was based on Dr. Baumgartner's research and book on the death penalty and wrongful convictions, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge, 2008, with Suzanna DeBoef and Amber Boydston). The authors provide an updated website on the book which includes supreme court cases cited in the book and interactive updated data associated with it beyond 2016 which is provided for replication and research.⁴² As a political scientist, Baumgartner began his research on the death penalty focusing on how evidence of innocence and media discussion had facilitated in part steep declines in popular support for capital punishment.⁴³

The book is organized in 17 chapters.⁴⁴ According to the website, it poses the question of whether the post *Gregg* death penalty system is working to narrow the death penalty to

⁴⁰ <http://www.unc.edu/~fbaum/books/DeadlyJustice/authors.html>.

Frank R. Baumgartner is the Richard J. Richardson Distinguished Professor of Political Science at UNC-Chapel Hill. He continues to teach about the death penalty and is currently finishing a book with two graduate students about racial disparities in traffic stops.

Marty Davidson graduated from the University of North Carolina Chapel Hill in May of 2016 and is a PhD student in Political Science at the University of Michigan. Currently, he is interested in how behavior within legal institutions creates racial and gender-based disparities.

Kaneesha Johnson graduated from the University of North Carolina Chapel Hill in May of 2016 and is a PhD student in Government at Harvard University. Her primary research interests concern inequality, social policy, identity politics, and the criminal justice system.

Arvind Krishnamurthy graduated from the University of North Carolina at Chapel Hill in December of 2016 and will begin his PhD program in Political Science at Duke University Fall 2017.

Colin Wilson graduated from the University of North Carolina Chapel Hill in May of 2016 and is currently working as a paralegal at a civil rights law firm in Washington, D.C.

⁴¹ <https://www.unc.edu/~fbaum/>

⁴² <http://unc.edu/~fbaum/books/DeadlyJustice> updated November 2017.

⁴³ <http://podcasts.wpsu.org/Pennsy04042008173000.mp4>

⁴⁴ Chapter 1. *Furman, Gregg, and the Creation of the Modern Death Penalty*; Chapter 2. The Capital Punishment Process; Chapter 3. Homicide in America; Chapter 4. Comparing Homicides with Execution Cases; Chapter 5. Which Crimes Are Capital Eligible, and is Death Reserved for the Worst Offenders? Chapter 6. Which Jurisdictions Execute and which Ones Don't? Chapter 7. How Often Are Death Sentences Overturned? Chapter 8. How Long Does It Take? Chapter 9. How Often Are People Exonerated from Death Row? Chapter 10. How Are the Executions Carried Out? Chapter 11. How Often Are Scheduled Executions Delayed or Cancelled? Chapter 12. Mental Illness and Death Row; Chapter 13. How Deep Is Public Support for the Death Penalty? Chapter 14. Why Does the Death

“particularly heinous crimes and the most deserving criminals for the ultimate punishment, or do various elements of caprice, bias, and arbitrariness continue to make the application of the death penalty akin to “being struck by lightning” as the Court noted in *Furman*?”⁴⁵ The book innovatively uses an empirical focus citing statistical evidence regarding the issues of arbitrariness. The conclusion is that the modern death penalty fails the arbitrariness test on race, gender, geography, etc. and raises a host of new problems, cost, botched executions, prolonged delays and stays, high error rates and reversals. The book concludes that the death penalty in its current form remains arbitrary and unconstitutional. While the book was published a bit later than the Steiker book in November 2017 and cites Steiker on the issue of costs, the message is the same: The death penalty has failed. This finding is consistent with that of the Steikers, and empirically confirms their findings of super regulation and arbitrariness.

Noteworthy chapters include chapters 3-4 which present data on America’s homicide rate in comparison with the execution rate, a baseline for evaluating who gets the death penalty and whether there is deterrence. Chapter 5 focuses on capital eligible crimes: are these the worst of the worst?

Chapter 6 focuses on which jurisdictions conduct executions, using statistical analysis to conclude that the concentration of executions in only some localities shows the arbitrary imposition of the death penalty. Baumgartner explains the frequency of executions in a few select jurisdictions by the “power law” or fat tailed distribution, as opposed to a normal distribution. The power law distribution arises from the idea of “self-reinforcement,” or “the rich get richer,” unlike a normal, random curve. In a normal distribution, more heinous, death worthy crimes resulting in executions would be evenly spread across locations. But, the relation between homicides and executions is not normally distributed by heinous crimes. “Executions are, in fact, highly correlated at the local level. Having carried out an execution in one case increased the odds of carrying out another quite dramatically. ”⁴⁶ This local effect undermines the equal protection clause of the constitution. Executions are not reserved for the most heinous crimes, but for those where prior executions occurred. There is a self-reinforcing process. Local legal cultures have developed separately, and they focus on their own history. In one locality where there have already been 25 executions, the prosecutor’s decision-making for a violent murder will be inclined towards death. Some of the local prior executions may not have been for as horrible a crime. Locally, the prosecutor knows that the jury will support death and that the courts will condone it. This skews the jurisdiction towards death. Jurisdictions separate between high and low users of the death penalty. In other words, Houston does not have more heinous murders than Chicago or New Orleans, but its execution rate is self-reinforcing. “The distributions of executions across jurisdictions is consistent with the rich get richer phenomenon of self-reinforcement.”⁴⁷ This is an example of how this book effectively explains long term arbitrary statistical factors in the death penalty.

Penalty Cost So Much? Chapter 15. Does the Death Penalty Deter? Chapter 16. Is the Death Penalty Dying? Chapter 7. Does the Modern Death Penalty Meet the Goals of *Furman*? Epilogue: How This Book Came About.

⁴⁵ <http://www.unc.edu/~fbaum/books/DeadlyJustice/index.html>

⁴⁶ Baumgartner, et al., p. 134.

⁴⁷ Baumgartner et al. , p. 134.

Chapter 7 focuses on the reversal rate of death penalty punishments, furthering the research of Liebman, et al. that the death penalty is broken.⁴⁸ Chapter 8 focuses on delays and Chapter 9 focuses on exonerations. Chapter 10 focuses on the methods of execution and botched executions. Chapter 11 focuses on delays. Chapter 12 focuses on Mental Illness and Intellectual disability. The mean IQ scores of death row inmates are estimated to be in the average to low range, generally consistent with the general prison population with 27% of the death row sample in one state having IQ scores below 74.⁴⁹ Chapter 13 focuses on public opinion. Chapter 14 focuses on cost, citing the Steikers,⁵⁰ while chapter 15 focuses on the tough, unsubstantiated issue regarding deterrence.

Because *Deadly Justice, A Statistical Portrait of the Death Penalty* is empirical, it effectively circumvents temporal political issues, and explains long term arbitrary statistical factors in the death penalty. *Courting Death* by the Steikers focuses on the legal environment, and necessarily addresses the composition of the Supreme Court as a factor in exploring the future of the death penalty.

Routledge Handbook on Capital Punishment. Robert M. Bohm and Gavin Lee (Ed.), 2018. Routledge

Routledge Handbook on Capital Punishment. Robert M. Bohm and Gavin Lee (Ed.), 2018 is the most recent of the books discussed here, and aside from presenting long term research in the field by noted experts, it was published in time to reflect on the pessimistic implications of the 2016 presidential election on the judicial abolition of the death penalty. Still the book concludes that based on the problems discussed, “the death penalty simply may continue to wither away in most death penalty jurisdictions.”⁵¹

⁴⁸ Baumgartner, et al, p. 152; Liebman, James S. ; Fagan, Jeffrey; West, Valerie, A Broken System: Error Rates in Capital Cases, 1973-1995 (June 2000). Columbia Law School, Public Law Research Paper No. 15. Available at SSRN: <https://ssrn.com/abstract=232712>. (determined the numbers and types of errors made in death penalty trials while this study).

Liebman, James S. ; Fagan, Jeffrey ; Gelman, Andrew, West, Valerie, et al. A Broken System Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It" <http://www2.law.columbia.edu/brokensystem2/>; (identifies those factors that lead to the high error rates).

⁴⁹ FRANK R. BAUMGARTER ET AL. DEADLY JUSTICE, A STATISTICAL PORTRAIT OF THE DEATH PENALTY 241 (2018), citing Cunningham & Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAV. SCI. LAW. 191-210 (2000). Leona D. Jochnowitz, *WHETHER THE BRIGHT-LINE CUT-OFF RULE AND THE ADVERSARIAL EXPERT EXPLANATION OF ADAPTIVE FUNCTIONING EXACERBATES CAPITAL JUROR COMPREHENSION OF THE INTELLECTUAL DISABILITY*, 34 Touro Law Review 377, 396, n. 80 (July 2018).

⁵⁰Deadly Justice, A Statistical Portrait of the Death Penalty. Frank R. Baumgartner, Marty Davidson, Kaneesha R. Johnson, Arvind Krisnamurthy and Colin P. Wilson, 2018, 299-300. “A typical capital defense team today involves an entire team of specialists, with multiple attorneys working with investigators and mitigation specialists.”

⁵¹ Robert M. Bohm, The Death Penalty’s Demise, with Special emphasis on the United States, 652, 664, in ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT (Robert M. Bohm & Gavin Lee, eds., 2018).

In the tradition of academic compendia, Editors Bohm and Lee have assembled a collection of chapters and articles on the death penalty contributed by many of the top experts in the field.⁵² The book has 37 chapters organized in five sections: 1) Capital Punishment: History, Opinion, and Culture; (2) Capital Punishment: Rationales and Religious Views; (3) Capital Punishment and Constitutional Issues; (4) The Death Penalty's Administration; and (5) The Death Penalty's Consequences.⁵³ Editors Bohm and Lee are well known death penalty scholars and criminologists. Robert M. Bohm is Professor Emeritus of Criminal Justice at the University of Central Florida. He has published many books and articles on the death penalty including *DEATHQUEST: An Introduction to the Theory and Practice of Capital Punishment in the United States*, 5th ed. (2017) and *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Sanction*, 3rd ed. (with James R. Acker and Charles S. Lanier, 2014). Gavin Lee, Ph.D., is an Assistant Professor of Criminology at the University of West Georgia. He specializes in the death penalty and criminological theory, and has published several articles and book chapters in the field.

The expansive nature of a compendium of scholarly works on the death penalty of this kind combined with the timing of its publication after the 2016 presidential election, failed California referenda and Nebraska reinstatement powerfully help to demonstrate that the “withering away” of the death penalty is a real phenomenon related to, among other things, racial bias, cost, super regulation, the failure of juror decision making and wrongful conviction error. The volume also focuses on the hopeful Marshall hypothesis that an educated public is more likely to accept the death penalty's failures.⁵⁴ Since the publication, on October 11, 2018, the Washington State Supreme Court found the state death penalty unconstitutional on the grounds that evidence showed that death sentences had been “imposed in an arbitrary and racially biased manner.”⁵⁵ The court relied on the empirical study a study by researchers at the University of Washington, finding that “In aggravated murder cases, jurors are more than four times more likely to impose a death sentence if the defendant is black.”⁵⁶

The volume begins with the premise that “the current trend suggests the eventual demise of capital punishment in all but a few recalcitrant states and countries”.⁵⁷ The facts are that since 2007, there has been a sharp decline nationally and internationally in death sentences and executions. Eight states have abolished capital punishment. The total number of states and D.C. without the death penalty is 19. Unfortunately, by referendum, Nebraska overruled its legislature and reinstated its death penalty in 2016. Based on the decline, discussed above, this book

⁵² Another compendium death penalty series in the field is found in *America's experiment with capital punishment : reflections on the past, present, and future of the ultimate penal sanction / edited by James R. Acker, Robert M. Bohm, Charles S. Lanier*, 3rd ed. 2014, reviewed by Leona D. Jochowitz, 51 No. 4 *Crim. Law Bulletin* (2015).

⁵³ <https://www.routledge.com/Routledge-Handbook-on-Capital-Punishment/Bohm-Lee/p/book/9781138651579>

⁵⁴ Bohm, et al, Introduction at p. 2. ; Chapter 4. The Marshall Hypotheses by John Cochran, University of South Florida.

⁵⁵ *State of Washington v. Allen Eugene Gregory*, Supreme Ct WA. Oct 11, 2018, 427 P.3d 621 (2018), citing Beckett, et al, (2014), *The Role of Race in Washington State Capital Sentencing, 1981 -2014*; NY Times, 10/11/18, Kirk Johnson.

⁵⁶ *State of Washington v. Allen Eugene Gregory*, Supreme Ct WA. Oct 11, 2018, 427 P.3d 621 (2018), citing Beckett, et al, (2014), *The Role of Race in Washington State Capital Sentencing, 1981 -2014*; NY Times, 10/11/18, Kirk Johnson.

⁵⁷ <https://www.routledge.com/Routledge-Handbook-on-Capital-Punishment/Bohm-Lee/p/book/9781138651579>

provides a fresh look at the death penalty. The editors reference the Marshall hypothesis and the role of this book in educating the citizenry about the decline. “A U.S. citizenry knowledgeable about capital punishment may be the impetus to end the practice....Clearly, capital punishment is not a necessary component of a nation’s criminal justice process, and, one day may become merely a relic of a more barbaric past.”⁵⁸

This section summarizes a few of the many diverse and interesting book chapters by scholars in this volume. In chapter 2, Margaret Vandiver, a well-known scholar who focuses on victims’ and offenders’ families from the University of Memphis, provides research on the relationship between capital punishment and lynching. The relationship of the southern death penalty to mob violence has been a running theme on the popular support for the death penalty, cited by scholars Garland.⁵⁹ In Chapter 7, Andrew Fulkerson a former judge and prosecutor, also on the ACJS 2018 panel, argues that while the death penalty should be retained for the most aggravated crimes, severe constitutional flaws would have to be remedied if it is to survive. These include arbitrariness, geographical disparity, prosecutorial discretion and plea bargaining, defense representation, delay, botched executions, cost, and innocence. This long list of recognized troubles leads the reader to wonder if Fulkerson is serious about remedying the death penalty to make it workable. “States that cannot, or will not, address these issues may be better off to conclude the death penalty is more trouble than it is worth.”⁶⁰

In Part 2, Sorenson and Reidy present the research on incapacitation and life without parole as a further compelling rationale to abolish the death penalty. LWOP inmates tend to settle into stable patterns of adjustment and are less likely to engage in serious acts of violence. Yet the correlates of misconduct are just one measure of prisoner adaptation. Research should be conducted on the coping of LWOP inmates, related to separation from family, the health and emotional well-being of aging inmates, and housing and mainstreaming. The contributors in Part 2 discuss religious views of the death penalty, arguing that stereotypes of Christianity, Judaism and Islam often misstate the religions’ death penalty support, misciting biblical sources. For example, in his review of the ancient roots of the death penalty in Acker, et al, Blecker misconstrues the Talmudic origins of capital punishment.⁶¹ In the Mishnah, it was preserved in theory, but was rarely put in practice. Chapter 12 by Erez and Laster corrects this misconception, citing Mishnah Tractate Makkoth, 1:10 which states, “A Sanhedrin that puts a man to death once in seven years

⁵⁸ Bohm, et al, Introduction at p. 2. Chapter 4. The Marshall Hypotheses by John Cochran, University of South Florida.

⁵⁹ David Garland (2010) Peculiar Institution, Harvard University Press; Equal Justice Initiative (2015) Lynching in America: Confronting the Legacy of Racial Violence, www.eji.org; Bedeau, Hugo (2002). Causes and consequences of wrongful convictions, *Judicature* 86: 115; Zimring (2003) Contradiction of American Capital Punishment. Oxford U. press.

⁶⁰ Fulkerson in Boehm and Lee, p. 146.

⁶¹ America’s experiment with capital punishment : reflections on the past, present, and future of the ultimate penal sanction / edited by James R. Acker, Robert M. Bohm, Charles S. Lanier, 3rd ed. 2014, reviewed by Leona D. Jochnowitz, 51 No. 4 *Crim. Law Bulletin* (2015). This misconception by Blecker was also corrected by Jochnowitz in the 2015 book review. “A Sanhedrin that puts a man to death once in seven years is called destructive. Rabbi Eliezer ben Azariah says: even once in seventy years. Rabbi Akiba and Rabbi Tarfon say: had we been in the Sanhedrin none would ever have been put to death. Rabban Simeon ben Gamaliel says: they would have multiplied shedders of blood in Israel.” Rabbi Louis Jacobs, *The Death Penalty in Jewish Tradition*, available at [Rahttp://www.myjewishlearning.com/life/Life_Events/Death_and_Mourning/About_Death_and_Mourning/Death_Penalty.shtml?p=2](http://www.myjewishlearning.com/life/Life_Events/Death_and_Mourning/About_Death_and_Mourning/Death_Penalty.shtml?p=2).

is called a murderous one....Or even once in 70 years...” The authors indicate that this discussion is “considered to be the most significant rabbinical statement on the issue and well captures the largely abolitionist stance of Jewish law....Amelioration of the harshness of the law was achieved through procedural means as well as strict interpretation of the substantive and evidentiary requirements for conviction in capital cases.”⁶²

In Part 3, chapter 15, the Steikers present their post-election discussion of the super regulatory effect of the court’s emphasis on aggravating and mitigating evidence discussed above. “The tension between the commands of guidance and discretion has become a substantial destabilizing force.”⁶³ It leads to high costs and marginal use of the death penalty. “Robust mitigation practice, by raising costs and limiting death sentences, thus represents the greatest existential threat to the continued retention of the American death penalty.”⁶⁴ The Steikers conclude that mitigation practice greatly improves death penalty defense, the increase in costs and rareness of the imposition counterintuitively make the death penalty procedures unusual, unconstitutional, with no retributive or deterrence result. In chapter 16, Peggy Tobolowsky discusses her extensive research on capital offenders’ intellectual disability and insanity defenses.

In Part 4, Gordon Waldo discusses the costs studies for the death penalty in chapter 17. In chapter 18, Stacy Parker, a former prosecutor, discusses the issues raised by prosecutorial discretion in seeking death. She focuses on the well know case *Johnson v. Pataki* where the NYS Court of Appeals held that NYS State Governor Pataki and State Attorney General Vacco could supersede the elected Bronx District Attorney, Robert Johnson, when he adopted a blanket policy against the death penalty in a police murder case, Angel Diaz. The State’s highest court ruled that supersedure was permitted because the blanket refusal by the prosecutor could amount to arbitrary geographic discrimination by the District Attorney. At the 2018 ACJS session, Ms Parker elaborated that she believes that the prosecutor should have the power of discretion in deciding to pursue death penalty cases.⁶⁵

In Chapter 20, Wanda Foglia and Marla Sandys analyze the phases of the capital juror project research. Juror misunderstanding regarding the role of mitigating evidence has stubbornly persisted throughout the history of the Capital Jury Project from the 1980s through the 2000s, and is not expected to improve. “The empirical evidence demonstrates that whether you are looking at capital jurors who decided cases in the late 1980s and early 1990s or cases from the first decade of the new millennium, substantial percentages are misunderstanding how to handle

⁶² Erez and Laster in Boehm and Lee, pp. 222-223.

⁶³ Aggravating and Mitigating Evidence, Carol Steiker and Jordan Steiker, ch. 15, p. 279, at 292 in *Routledge Handbook on Capital Punishment*. Robert M. Bohm and Gavin Lee (Ed.), 2018. Routledge.

⁶⁴ Aggravating and Mitigating Evidence, Carol Steiker and Jordan Steiker, ch. 15, p. 279, at 292 in *Routledge Handbook on Capital Punishment*. Robert M. Bohm and Gavin Lee (Ed.), 2018. Routledge.

⁶⁵ ACJS: The Future of Capital Punishment Courts and Law/Death Penalty Roundtable; Friday, February 16, 2018, New Orleans ; Discussants: Robert M. Bohm, retired ; Stacy K. Parker, Muskingum University
Rebecca K. Murray, Creighton University ; Andrew Fulkerson, Southeast Missouri State University
Moderator: Gavin Lee, University of West Georgia

mitigating evidence in ways that make it harder to find mitigation than it would be if jurors were following the law.”⁶⁶

In Chapter 21, Costanzo, et al. provide a social-psychological analysis of the penalty phase of a capital trial. In Chapter 23, Cathleen Burnett discusses her extensive research on failure of clemency as a failsafe, and in Chapter 24, Deborah Denno discusses her research on execution methods. One of the most compelling chapters is the discussion in Chapter 25 by Stacy Mallicoat of the chaotic referenda in California in 2016 on the death penalty, an example of the variability of public opinion in this area. The chapter is essential to understand that popular support for the death penalty is unstable and fickle. The authors focus on the contradictory California referenda which resulted in a victory for the death penalty and time limits for appeals.⁶⁷ In the years leading to the 2016 referenda, competing referenda were considered to abolish and to strengthen the death penalty. California is one of the states with a large death row, low executions, and prolonged appeals. There was a temporary judicially imposed moratorium due to time on death row. Supporters of the death penalty sought to streamline the process, while abolitionists sought to invalidate it, and the supporters for the death penalty had a narrow victory. The story of the California referenda confirm Bohm’s statement that the death penalty abolition movement was held back not only by the Trump election, but by the referenda and laws in California, Oklahoma and Nebraska.⁶⁸

Chapter 27 by Mizrahi focuses on the administration of the federal death penalty. The discussion by Catherine Grosso in Chapter 28 who worked with David Baldus on his final research about the Death Penalty and the US armed forces is particularly absorbing. Like Baldus, Grosso concludes that race-based discrimination in the military and civilian murder is strongest where the death penalty focuses indiscriminately and broadly on a great array of crimes. Baldus found that B/W discriminatory death sentencing was highest in the middle level aggravated crimes, where jurors had most discretion, and not in the high-level crimes. “Narrowing the reach of capital murder into civilian style death eligible murders may be an advisable course of action. These kinds of amendments would bring law into line with practice and may also eliminate some of the race effects document by the Baldus study.”⁶⁹

⁶⁶ Wanda D. Foglia & Marla Sandys, *The Capital Jury and Sentencing, Neither Guided Nor Individualized*, in ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT (Robert M. Bohm & Gavin Lee, eds., 2018); Leona D. Jochnowitz, *WHETHER THE BRIGHT-LINE CUT-OFF RULE AND THE ADVERSARIAL EXPERT EXPLANATION OF ADAPTIVE FUNCTIONING EXACERBATES CAPITAL JUROR COMPREHENSION OF THE INTELLECTUAL DISABILITY*, 34 Touro Law Review 377, 389, n. 45 (July 2018).

⁶⁷ California’s chaotic history of California death penalty referenda is laid out as a full chapter 25 in Mallicoat, Vogel and Crawford, *California’s Chaotic Death Penalty*, p. 446-464, ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT (Robert M. Bohm & Gavin Lee, eds., 2018).

⁶⁸ *The Death Penalty’s Demise*, with special focus on the United States, Robert M. Bohm, ch. 37, pp. 652, in *Routledge Handbook on Capital Punishment*. Robert M. Bohm and Gavin Lee (Ed.), 2018. Routledge. “...[T]he election year of 2016 may well be remembered as the year the death penalty abolition movement was slowed, if not stopped in its tracks....”

⁶⁹ Grosso, ch. 28, p. 517, in Bohm, et al. citing, *RACIAL DISCRIMINATION IN THE ADMINISTRATION OF THE DEATH PENALTY: THE EXPERIENCE OF THE UNITED STATES ARMED FORCES (1984—2005)*

In Part 5, several chapters discuss the arbitrary consequences of race and geographic discrimination in the death penalty. There are two articles on wrongful convictions, Chapter 32, by Talia Roitberg Harmon, et al. and Chapter 36 by Vollum on exoneration after death row. Roitberg Harmon writes that some studies suggest that the growing information about innocence is one of the reasons for the reduced public support for capital punishment, which has been declining. More research is needed to study the relationship between this decline and the innocence movement.⁷⁰ Scott Vollum discusses his interviews with exonerated persons from death row. The Innocence movement is referred to as a “collective network”, not based on DNA evidence alone.⁷¹ In chapter 33, Robert Johnson discusses his experience with inmates in “Living and Working on Death Row.” There are chapters which deal with families of victims and offenders and on secondary victims, like corrections officers working on death row.

The most poignant chapter of the book is the conclusion by Bohm. Bohm states that until the presidential election of 2016, a path to the abolition of the death penalty was in sight. There were declines in the number of death sentences (from 315 in 1996 to 30 in 2016), the number of executions (from 98 in 1999 to 20 in 2016) conducted, the number of states that had abolished the death penalty (19 states without the death penalty in 2016), and the concentrations of executions in a few states and counties (15% of 3,143 counties account for executions). Discussing the legal arguments against the death penalty, Bohm concludes that Trump’s 2016 election led to the appointment of unsympathetic judges which will preclude the judicial abolition of the death penalty. “Still, as noted previously, *the death penalty simply may continue to wither away* in most death penalty jurisdictions. For now, that may be all death penalty abolitionists can realistically anticipate.”⁷² The death penalty abolition movement was held back not only by the Trump election, but by the referenda and laws in California, Oklahoma and Nebraska. “...[T]he election year of 2016 may well be remembered as the year the death penalty abolition movement was slowed, if not stopped in its tracks...”⁷³

DAVID C. BALDUS, CATHERINE M. GROSSO, GEORGE WOODWORTH and RICHARD NEWELL, *The Journal of Criminal Law and Criminology* (1973-)Vol. 101, No. 4 (Fall 2011), pp. 1227-1335

⁷⁰ Talia Roitberg Harmon & Diana Falco, Wrongful Capital Convictions 575, 581-585 in ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT (Robert M. Bohm & Gavin Lee, eds., 2018). *Exonerated: A History of the Innocence Movement*. Norris, Robert J., 2017; Leona Jochnowitz, Book Review, publication pending vol.55, issue 2 Criminal Law Bulletin (2019)

⁷¹ Rather than DNA, the collective network “has had the greatest sustained impact on the exoneration of death row inmates,” Scott Vollum, Exoneration – Life After Death Row. 631, 636 in ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT (Robert M. Bohm & Gavin Lee, eds., 2018), citing Norris’ 2017 article. Norris (2017), Framing DNA, Social Movement Theory and the Foundations of the Innocence Movement, *Journal of Contemporary Criminal Justice*, 33(1), 26-42. *Exonerated: A History of the Innocence Movement*. Norris, Robert J., 2017; Leona Jochnowitz, Book Review, publication pending vol.55, issue 2 Criminal Law Bulletin (2019)

⁷² Robert M. Bohm, The Death Penalty’s Demise, with Special emphasis on the United States, 652, 664, in ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT (Robert M. Bohm & Gavin Lee, eds., 2018). “Because of Trump’s election and his appointment of Neil Gorsuch, a justice unsympathetic to death penalty abolition, the aforementioned legal argument cannot be expected to sway a majority of the Court. No argument could. Still, as noted previously, the death penalty simply may continue to wither away in most death penalty jurisdictions. For now, that may be all death penalty abolitionists can realistically anticipate.”

⁷³ The Death Penalty’s Demise, with special focus on the United States, Robert M. Bohm, ch. 37, pp. 652, in *Routledge Handbook on Capital Punishment*. Robert M. Bohm and Gavin Lee (Ed.), 2018. Routledge.

The above summary shows that the volume is comprehensive and deep on many issues of research on the death penalty. Because it was completed after the 2016 presidential election, it also provides the after word by Bohm, that in most jurisdictions, there is reason to believe that the death penalty will continue to wither away because of issues discussed: over regulation, cost; delay and racism. The expansiveness of the compendium and the time of its release all work to illustrate the “withering away” of the death penalty based on racial issues, cost, super regulation, the failure of juror decision making and the wrongful conviction error.

Conclusion

The year 2016 led to the publication of many death penalty book linked to the withering away of the death penalty. These reviews have explained the phenomenon and discussed the limitations of full abolition. Bohm, et al. premises the book with the statement that based on current trends the eventual demise of capital punishment is anticipated. The authors rely on the Marshall hypothesis and the role of the book to educate the citizenry that capital punishment is not necessary to the criminal justice process and that it is withering away and may end. This review has shown that while all authors make a good argument in this regard, the end result is not certain and many other books will be required to analyze and to educate the public on the death penalty. However, the guidance of the Washington State Supreme Court and an educated public may lead to the conclusion that the death penalty is racially biased and unconstitutional. ⁷⁴

⁷⁴ State of Washington v. Allen Eugene Gregory, Supreme Ct WA. Oct 11, 2018, 427 P.3d 621 (2018), citing Beckett, et al, (2014), The Role of Race in Washington State Capital Sentencing, 1981-2014;