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Supreme failures (reviewing Most Deserving of Death? An Analysis of the Supreme Court's Death Penalty Jurisprudence, by Kenneth Williams (Ashgate 2012))

Russell D. Covey

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Problems with capital punishment in the United States are legion, and the bill of particulars is familiar. Incompetent lawyers represent some capital defendants. Some capital trials are infected with racial bias, and race continues to shape the selection of which capital defendants receive death sentences and which do not. Despite efforts by the United States Supreme Court to shield mentally ill and retarded individuals from execution, procedural protections have fallen short. As a result, mentally disabled people continue to be executed in death chambers across the country. Recent headlines also call into question the criminal justice system's ability to accurately sort the innocent from the guilty. We are now aware of scores of wrongful convictions, often thanks solely to D.N.A. testing, about which we never would have learned otherwise. Capital trials in particular, for whatever reason, have proven to be especially fertile grounds for exonerations.[1] We consistently discover error in capital cases at higher rates than in non-capital cases.[2] Numerous innocents on death row have been exonerated of the crimes that put them there.[3]

Surveying these problems, one might think that lawmakers would put the brakes on executions and permit the appellate and post-conviction review process greater time and opportunity to ensure that capital sentences are carried out in appropriate cases, but just the opposite has occurred. Instead of investing resources in the investigation, litigation, and review of capital convictions, Congress and many state legislatures have stripped

[1]See Liebman et al. [1] (concluding based on extensive empirical study that capital convictions are "persistently and systematically fraught with alarming amounts of error").

[2]See Gross [2] (arguing that it is not coincidental that error rates in capital cases are higher than in non-capital cases because "the nature of capital cases multiplies the likelihood of error").

[3]To date, 18 people have been exonerated through DNA testing after having been sentenced to death. See Innocence Project website, available at http://www.innocenceproject.org/know/ (last visited on January 24, 2013). See generally BRANDON L. GARRETT, CONVICTING THE INNOCENT (2011).

R. D. Covey (✉)
Georgia State University, Atlanta, GA, USA
e-mail: rcovey@gsu.edu

away essential protections, starved indigent defense systems of resources, and imposed draconian procedural hurdles in an attempt to accelerate the pace of executions.[4] In MOST DESERVING OF DEATH? AN ANALYSIS OF THE SUPREME COURT'S DEATH PENALTY JURISPRUDENCE (Ashgate 2012), Kenneth Williams describes these features of the American capital punishment complex, and more, in a work that will serve as a reliable guide to many readers of the most pressing problems currently plaguing the contemporary death penalty.

Williams' book should find a ready audience among students and professors teaching graduate or undergraduate courses on capital punishment, as well as those looking for a broad overview of contemporary capital punishment jurisprudence. It ably discusses the above-noted problems, at a level pitched to readers encountering the Supreme Court's major capital cases for the first time. From there, Williams builds a picture of a United States Supreme Court struggling to acknowledge, but ultimately failing to address, some of the most important moral considerations underlying contemporary death penalty practices. Williams' account is enriched with material he has gathered from a wide variety of sources, including empirical data on the lower courts' application of precedent, broad research into a wide variety of domestic and international sources, and his own personal experience litigating death penalty cases.

In the first several chapters of the book, Williams walks through case law that will be familiar to those with a background in capital jurisprudence. After a brief and necessarily cursory overview of the history of the death penalty, Williams reviews and criticizes the approach to ineffectiveness of counsel claims adopted by the Court in *Strickland v. Washington*,[5] the cavalier dismissal of empirical evidence demonstrating that racial bias plays a major role in the distribution of death sentences in *McCleskey v. Kemp*,[6] and the various documented causes of wrongful convictions that have resulted in death row exonerations for tens of individuals, often as a result of DNA testing.[7] Additional chapters survey the Court's treatment of mental illness issues, appellate and collateral review procedures, and litigation challenging various methods of execution. Another chapter surveys treatment of the death penalty in international law.

In the final chapter of the book, Williams's account takes a somewhat surprising turn away from the development of doctrine and to the question of whether a judge who is personally opposed to the death penalty has, as Justice Scalia has argued, an obligation to resign from the bench. Williams' vehemently disagrees with Justice Scalia's position. As Williams' observes, there is a long tradition of judges upholding and enforcing legal rules with which the judge may personally disagree. In support of this point, Williams notes that many anti-slavery judges regularly enforced the fugitive slave laws, not because they agreed with those laws, but because they understood the necessity of separating their personal views from their professional obligations. He views today's anti-death-penalty judges as occupying a similar position and lauds the important role

[4] See, e.g., Marceau [3] (observing that as a result of enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 and Supreme Court decisions interpreting that statute, "federal habeas review of state convictions has become futile, illusory, and so improbable as to be 'microscopic'").

[5] 466 U.S. 668, 687–88 (1984) (holding that to prevail on an ineffective assistance of counsel claim, the claimant must demonstrate that counsel performed in a constitutionally-deficient manner and that, absent the error, there was a reasonable probability of a different outcome).

[6] 481 U.S. 279 (1987).

[7] *See* GARRETT, *supra* note 1.

that such judges can play in holding prosecutors to their burden of proof and sharing their views with other judges and members of the bar and public.

This final chapter is pointedly an argument with Justice Scalia, but that is true of the book's overall thrust as well. Indeed, Williams' goal throughout is to convince the reader that the Court's Scalia-led retreat from vigorous enforcement of constitutional prohibitions on cruel and unusual punishment, due process requirements, and its obligation to protect the "discrete and insular minorities" that are disadvantaged by the political process has been a great disservice to the criminal justice system. The title of the book is symbolic in this respect. When the Supreme Court sanctioned the resumption of executions in *Gregg v. Georgia*, it did so under the promise that states would develop rational and reliable mechanisms to identify the most culpable offenders and ensure that only those "most deserving of death" received the ultimate punishment.[8] As Williams notes in his conclusion, and as numerous scholars have documented, today's death penalty does nothing of the kind.[9] Instead, a variety of other factors, including race, class, and attorney competence, overwhelmingly determine who lives and who dies. Unable to live up to its most basic commitment, Williams makes a persuasive case that modern death penalty jurisprudence must be adjudged a complex, resource-intensive, and costly failure.

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[8] 428 U.S. 153 (1976). The Court has explained that its effort to narrow the class of death-eligible persons is intended "to ensure that only the most deserving of execution are put to death". Atkins v. Virginia, 536 U.S. 304, 319 (2002).

[9] See, e.g., Hughes [4] (reporting empirical study finding that death sentences continue to be imposed in a fundamentally arbitrary manner); McCord [5] (surveying popular press accounts of capital trials and concluding that death sentences continue to be arbitrarily imposed).