

BOOK REVIEW

ANATOMY OF A DEATH PENALTY DEFENCE LAWYER: REFLECTIONS ON LEGAL REPRESENTATION AND REFORM IN THREE BIOGRAPHIES

THE AUTOBIOGRAPHY OF AN EXECUTION. *By David R. Dow. Twelve Books, 2010. Pages x + 273. Price: \$24.99*

ANGEL OF DEATH ROW: MY LIFE AS A DEATH PENALTY DEFENCE LAWYER. *By Andrea Lyon. Kaplan Publishing, 2009. Pages xix + 265. Price: \$24.95*

THE LAST LAWYER: THE FIGHT TO SAVE DEATH ROW INMATES. *By John Temple. University Press of Mississippi, 2009. Pages 234. Price \$25.00*

The statistics would be shocking enough even if death were not involved. Large numbers of prisoners have inadequate legal counsel and, in later stages of the appellate process, no counsel at all.¹ Death sentences, in the aggregate, continue to be disproportionately imposed on persons of limited economic means and members of disadvantaged minority communities.² Chance

¹ As one scholar-practitioner has noted, “[p]oor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters.” Indeed, the quality of legal representation alone can make all the difference. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994). For more on the legal representation crisis later in the death penalty appeals process, see Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 516 (1988) (noting that many capital punishment states do not provide appellate attorneys to death row inmates). “Even lawyers find capital post-conviction to be among the most complex, nuanced, and rapidly changing litigation.” *Id.*, 531 (explaining the importance of attorneys to capital appeals). “Incompetent habeas corpus representation occurs all too frequently in death-penalty appeals,” even though post-conviction proceedings are, after trial, the most common and effective means of preventing injustice. Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. APP. PRAC. & PROCESS 347, 348 (2003).

² The literature on the correlations among race, economic standing, and the imposition of the death penalty is voluminous. See e.g., DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE CRIMINAL JUSTICE SYSTEM 132-33 (1999) (citing the Baldus study, the most extensive racial breakdown of death row inmates and the race of their victims ever performed, analyzing 2,000 cases). Prosecutorial discretion played an especially large role in the racial disparities of death penalty sentencing; prosecutors sought the death penalty at higher rates when a victim was white and the defendant was a racial minority. *Id.*, 133. A divided Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987), found that this racially disparate pattern was not inherently unconstitutional without a showing of discriminatory purpose or intent. See also, John Blume, Theodore Eisenberg & Martin T. Wells, *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 204 (2004) (noting black defendants accused of murdering white victims are overrepresented on death row).

plays a large role in determining who dies, where and when. Then there is the problem of wrongful conviction. Since the late 1990s, high profile exonerations, the successes of law school clinics devoted to innocence issues, and the promise of scientific advances in gathering evidence have revealed that hundreds of erroneous death sentences were erroneously imposed.³ Scholars have posited the error rate to be between 0.5%⁴ and 3-5%.⁵ The high wrongful conviction rate is variously attributed to faulty forensic science, police and prosecutorial misconduct, and inadequate defence counsel.⁶ The adequacy of defence counsel, however, may be the most important, as a good lawyer could prevent the other potential shortcomings of the death penalty process.⁷

The autobiographies of Texas-based capital defence attorney David Dow and his counterpart Andrea Lyon of Illinois, along with the biography of North Carolina capital defender Ken Rose by journalist John Temple, provide intimate perspectives on the crisis of the capital defence legal aid regime.⁸ These

³ STANLEY COHEN, *THE WRONG MEN: AMERICA'S EPIDEMIC OF WRONGFUL DEATH ROW CONVICTIONS* x-xi (2003).

⁴ C. Ronald Huff, *Wrongful Convictions: The American Experience*, 46 *CAN. J. CRIMINOLOGY & CRIM. JUST.* 107, 109 (2004); C. Ronald Huff, *Wrongful Conviction: Causes and Public Policy Issues*, 18 *CRIM. JUST.* 15, 16-18 (2003).

⁵ D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 *J. CRIM. L. & CRIMINOLOGY* 761, 762, 768-780 (2007).

⁶ These three reasons are listed in Jean Coleman Blackerby, *Life After Death Row: Preventing Wrongful Convictions and Restoring Innocence After Exoneration*, 56 *VAND. L. REV.* 1179, 1185-1193 (2003). Other factors include eyewitness error, plea bargaining, community pressure for a conviction, and admission of character evidence at trial. C. Ronald Huff, Arye Rattner & Edward Sagarin, *Guilty Until Proved Innocent: Wrongful Conviction and Public Policy*, 32 *CRIME & DELINQUENCY* 518, 524, *et seq.* (1986). False confessions, particularly among persons with intellectual or developmental disabilities, may also be a cause. See Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 *HARV. J. L. & PUB. POL'Y* 523, 525 (1999) (providing a critical view of these cases but conceding, nonetheless, that some exist).

⁷ Defence Attorney Barry Scheck of Cardozo Law School's Innocence Project made this comment during his keynote address at American Bar Association's Sixth Annual Summit on Indigent Defence Improvement in Orlando, Florida (February 6, 2010) (author's personal notes). According to Scheck, improving the legal aid regime for criminal defendants would be much more efficient than better forensic evidence, police oversight, and other remedial measures. *Id.*, The legal scholarship tends to agree. "Arbitrary results, which are all too common in death penalty cases, frequently stem from inadequacy of counsel." Bright, *supra* note 1, 1837.

⁸ DAVID DOW, *AUTOBIOGRAPHY OF AN EXECUTION* (2010); ANDREA LYON, *ANGEL OF DEATH ROW: MY LIFE AS A DEATH PENALTY DEFENCE LAWYER* (2009); JOHN TEMPLE, *THE LAST LAWYER: THE FIGHT TO SAVE DEATH ROW INMATES* (2009).

books join a long literary tradition of attorney memoirs, capturing public fascination with trial lawyers and courtroom dramatics dating from Clarence Darrow and Atticus Finch. Such personal narratives of death row, told from a capital defender's perspective, are less common.⁹ The three subjects would likely insist that they intended to tell the stories of their clients, innocent and guilty, and of a death row in crisis. But all three books reveal a great deal about the person of a capital defender as well.

The three books inevitably have much in common. All three attorneys must confront prosecutorial mismanagement, ineffective defence counsel, judicial corruption and bias, fickle juries, and a criminal justice system heavily resistant to change. All three must openly face racial discrimination in the legal system; the special challenges of youth, disability, and gender in the sentencing process; and public opposition to their work. All three capital defenders, agnostic in spiritual faith despite a common Jewish upbringing, nonetheless have very clear notions of justice and injustice and a sense of moral imperative. And all three tell the stories of the one client, probably innocent, who completely changed the course of their legal careers. For Dow, that client was Henry Quaker, a man sentenced to death for the murder of his family because he had inept defence counsel. For attorney Ken Rose that client was Bo Jones, convicted for a homicide on unreliable witness testimony. Lyon's book does not follow a single narrative, as each of her chapters relates to a different client, but she did represent Madison Hobley, an innocent man sentenced to death for the arson murders of his family members. Illinois Governor George Ryan pardoned Hobson and cited the case when he issued a moratorium on death sentences in the state.¹⁰

Of the three books, Dow's is narrowly the best, written with a tighter, nonlinear prose that reads like a punch to the gut. His plot progresses as a series of vignettes, dramatically alternating between the dangerous, high-stakes legal work on the one hand and the safe, loving world of home on the other. He writes with a compelling sense of urgency, and his use of dry, ironic understatement gives the book a deep personality. Dow's narrative is the most intimate and dramatic of the three, and he is haunted by the constant regret of

⁹ *But see* MICHAEL MELLO, *DEAD WRONG: A DEATH ROW LAWYER SPEAKS OUT AGAINST CAPITAL PUNISHMENT* (1997). Mello was an appellate capital defender in Florida for over a decade, and like the authors studied here, speaks of the injustices confronting death row inmates in the post-conviction stage of the criminal process. In addition, a number of former death row inmates, wrongly accused, have been the subjects of biographies and autobiographies. *See, e.g.*, JOHN HOLLOWAY & RONALD M. GAUTHIER, *KILLING TIME: AN 18-YEAR ODYSSEY FROM DEATH ROW TO FREEDOM* (2010) (describing the saga of Louisiana inmate John Thompson); *See also* KERRY MAX COOK, *CHASING JUSTICE: MY STORY OF FREEING MYSELF AFTER TWO DECADES ON DEATH ROW FOR A CRIME I DIDN'T COMMIT* (2008); JARVIS JAY MASTERS, *THAT BIRD HAS MY WINGS: THE AUTOBIOGRAPHY OF AN INNOCENT MAN ON DEATH ROW* (2009); MICHAEL MELLO, *THE WRONG MAN: A TRUE STORY OF INNOCENCE ON DEATH ROW* (2001) (describing the experience of Florida inmate Joe Spaziano).

¹⁰ Lyon, *supra* note 8, 261-63.

the one client he could not save. This contrasts markedly with the narratives of Lyon and Rose. Lyon's book, weaving together aspects of her various cases from different points in the legal process, reminds the reader how varied criminal defence work can be. Told with an emotional stiffness, the book ties in aspects of Lyon's personal life and her development as a criminal defender, albeit not as intimately as Dow. Given the nature of her work she can tell a much more diverse story than appellate defender Dow, with anecdotes from the investigatory, trial, appellate, and clemency phases of the death row process. At times Lyon speaks from her other occupation as a clinical professor of law rather than as solely a defence attorney, providing suggestions for trial and appellate strategy. The efforts of Ken Rose in saving a client convicted of murder are interpreted through the journalistic eye of John Temple. Temple is able to tell a tight, closed, and compelling narrative, even without the benefit of first-hand knowledge, but the book still lacks the intimacy of Dow's narrative. The three biographies together provide an interesting comparative perspective among three death penalty schemes: Dow's Texas, ground zero, where executions occur frequently; Lyon's Illinois, where executions no longer take place; and Rose's North Carolina, where public opinion has eroded. Despite the differences among the books, all three biographies chronicle remarkable, even heroic stories about three individual lawyers taking on an unfair system virtually alone.

I. THE LAWYERS

Being a capital defence attorney requires thick skin and strong commitment to principle. "The public appears to dislike lawyers of all kinds, but it reserves a special contempt for those who represent indigent clients charged with crimes," Professor Charles Ogletree writes.¹¹ Ogletree has posited that heroism and empathy are required to sustain a career as a public defender; the more a defender identifies with her client, the likelier she is to last.¹² Professor Abbe Smith has suggested that something more is required: a sense of conviction and outrage at perceived injustice in the criminal justice system.¹³ The subjects of the three biographies would probably agree; each is driven by a mixture of optimism and outrage.

A capital defender must develop defence mechanisms. The burn out rate is high, Temple explains, as "capital defence lawyers were a troubled lot," who suffer from hypertension, depression, alcohol problems, and divorce.¹⁴ Death row cases felt "meaningful, high-stakes" to Rose, and he was "attracted by the

¹¹ Charles J. Ogletree, *An Essay on the New Public Defender for the 21st Century*, 58 L. & CONTEMP. PROBS. 81, 82 (1995).

¹² Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1270-71 (1993).

¹³ Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1259 (2004).

¹⁴ Temple, *supra* note 8, 79.

heavy responsibility of capital cases.¹⁵ Dow is a closeted optimist with a jaded shell, preparing himself for defeat even as he hoped for a last-ditch miracle. As evidenced by her history of political activism, Lyon was driven by outrage at those who failed to strictly adhere to the important constitutional principles that she championed. As Temple notes, newbie attorneys required some combination of “steadfast empathy or rebellious impulse or bleeding-heart delusion” in order to become career capital defenders.¹⁶ Regardless of the precise motivator, a career as a capital defender requires a strength of character almost unmatched in the legal profession. Only the strongest survive.

The attorneys reveal a hidden, ironic sense of optimism as a primary motivation driving the capital defence attorney. Dow writes that he always went down without surrender, firing wildly into the night, attempting to run out the clock on each execution with last-minute clemency appeals and petitions for review.¹⁷ “You don’t have to be hard-hearted to do this work, but you have to develop some defences,” he writes. “We can’t save everyone. We can’t even try to save everyone,” he adds before telling a colleague to pursue another dead-end lead, revealing the irony of his inner optimism.¹⁸ He hoarded a thousand tricks to convince himself that abandoning a case was surrender, even when it actually was hopeless.¹⁹ “Hope is an impotent indulgence,” he writes with classic irony. “One day soon, I swear, I am going to give up on it completely.”²⁰ Temple writes that Rose “would not allow himself too much confidence.”²¹ Rose would rein himself in; he “couldn’t afford to dream about winning. He’d suffered too many moments of crushing loss.”²² Both Dow and Rose were nourished more by incremental triumphs than outright victories.

The authors also had a healthy sense of anger at the system. Lyon recalls her “rage and despair” when she discovered how many innocent people were on death row.²³ She describes her fury at a judge who failed to follow rules of impartiality and judicial conduct; she would later campaign against the judge in his retention election, resulting in his removal from office.²⁴ When Rose witnessed his first execution, he felt “sick with rage and disbelief” that, despite a strong case in favor of a retrial, the system had failed.²⁵ He struggled to grasp that any case, no matter how strong, could be lost. This combination of outrage and shock was

¹⁵ *Id.*

¹⁶ *Id.*, 155.

¹⁷ Dow, *supra* note 8, 249.

¹⁸ *Id.*, 209.

¹⁹ *Id.*, 231.

²⁰ *Id.*, 215.

²¹ Temple, *supra* note 8, 11.

²² *Id.*

²³ Lyon, *supra* note 8, 201.

²⁴ *Id.*, 100-02.

²⁵ Temple, *supra* note 8, 5.

familiar to David Dow as well, who had constant regrets following a client's execution.²⁶ This constellation of emotions, of hidden hopefulness and devout adherence to principle masked by a hard and pervasive cynicism, forms the chemical makeup of a capital defence attorney.

II. THE CLIENTS

The clients on death row in the United States disproportionately share common characteristics. In their narratives, each of the authors encounters racial, economic, and gender bias in the criminal justice system. The racial biases inherent in the death penalty regime are a major undercurrent in all three biographies. Widely-cited statistics reveal a high correlation between the race of a victim and the likelihood of death penalty imposition; the race of the defendant is also often correlated.²⁷ A prosecutor's discretion in seeking the death penalty plays a role in producing the discriminatory consequences.²⁸ Each of the authors confronted racial discrimination and sentencing disparities in their narratives, and each reflected on the implications of the racial divide that often existed between criminal defence attorneys and their clients. Lyon would mention race to a jury if she believed it had played a role. In making a closing argument in a harassment case, Lyon broached the taboo subject of the prosecutor's jury selection, in which the prosecutor had used all ten of his peremptory strikes on racial minorities.²⁹ She told the jury to recall the prosecution's misuse of his peremptory challenges; she looked at the three African-American jurors and said, "You are here because he ran out of challenges."³⁰ Following the acquittal, one of the jurors thanked her for bringing up the issue of race so openly, as it allowed the jurors to discuss it.³¹

²⁶ See Dow, *supra* note 8, 249-50.

²⁷ Locality-specific studies show relatively uniform results. Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161, 206 (2006) ("South Carolina murder defendants receive systematically different treatment based on the geographic location and the race and gender of the parties involved"); Stephanie Hindson, Hillary Potter & Michael J. Radelet, *Race, Gender, Region and Death Sentencing in Colorado, 1980-1999*, 77 U. COLO. L. REV. 549, 549, 581 (2006) (noting that the death penalty is most likely to be sought in cases where the victim is white and female, and defendants who killed a white victim are 4.2 times as likely to receive the death penalty as those who kill a black victim).

²⁸ Michael Mears, *The Georgia Death Penalty: A Need for Racial Justice*, 1 JOHN MARSHALL L.J. 71, 86 (2008) (noting that unfettered prosecutorial discretion can lead to racially discriminatory results); Isaac Unah, *Choosing Those Who Will Die: The Effect of Race, Gender, and Law in Prosecutorial Decision to Seek the Death Penalty in Durham County, North Carolina*, 15 MICH. J. RACE & L. 135, 135, 174 (2009) (noting that prosecutors were 43% more likely to seek the death penalty when a black defendant killed a white victim as when a black defendant killed a black victim).

²⁹ Lyon, *supra* note 8, 104-06.

³⁰ *Id.*, 105.

³¹ *Id.*, 106.

Later, Lyon successfully repeated the tactic in the closing argument of a death penalty case where a black defendant had murdered a white judge, daring to “speak the unspeakable” so that the jury could overcome the issue.³² Temple describes a case where Rose “built a near-perfect case of racial discrimination” in the jury selection process, based on the prosecutor’s own sworn admission.³³ He lost the appeal. The hidden narrative of race runs throughout Dow’s memoir, although he only directly addresses the topic at rare intervals with his characteristic understatement.³⁴

As a female, Lyon is able to add a unique perspective on the challenges that women face representing death row inmates. The conservative legal profession questioned her pregnancy as a single mother, and she describes overt hostility not only from a judge and prosecutor in the courtroom, but from her own colleagues.³⁵ Her perceived vulnerabilities as a woman aggravated the potential dangers of interacting with clients and informants.³⁶ Women continue to be underrepresented in the criminal defence bar and hold different perceptions of peer support, job satisfaction, and work-life balance.³⁷ Gender bias on death row is also well-documented. Female offenders are unlikely to be arrested for murder, only rarely sentenced to death, and almost never executed.³⁸ Men are more than seven times as likely to be sentenced to death as women.³⁹ Jury selection almost always omits questions of gender bias.⁴⁰ In addition, defendants are more likely to be sentenced to death when a victim is female.⁴¹ These statistical differences may be related both to underlying patterns of crime and to structural bias.⁴² Lyon confronts the gendered nature of criminal activity

³² *Id.*, 73.

³³ Temple, *supra* note 8, 4-5.

³⁴ In describing one of his clients, a black man who was accused of murdering a white child, Dow notes that it was “a bad combination,” and the jury took less than two hours to sentence him to death.” Dow, *supra* note 8, 7. Dow’s memoir is heavily infused with the topic of racial discrimination in the sentencing process. That he can reveal this without directly stating it, however, underscores the sophistication of his writing style.

³⁵ Lyon, *supra* note 8, 21-22, 27 (colleagues), 83, 176 (judges), 166 (prosecutors).

³⁶ For Lyon, this was complicated by her large stature. See Lyon, *supra* note 8, 28-29, where a prison guard makes a comment. She also noted that jurors did not like when she shouted or overwhelmed a witness in court with her physical presence. *Id.*, 162.

³⁷ Donna L. Hall, *Job Satisfaction Among Male and Female Public Defence Attorneys*, 18 JUST. SYS. J. 121, 133 (1995).

³⁸ Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433, 434 (2002).

³⁹ *Id.*, (Only 46 (0.6%) of over 8,000 persons lawfully executed since 1900 were female offenders.)

⁴⁰ *Id.*, 435.

⁴¹ See, e.g., Jefferson E. Holcomb, Marian R. Williams & Stephen Demuth, *White Female Victims and Death Penalty Disparity Research*, 21 JUST. Q. 877, 877 (2004).

⁴² Women statistically commit fewer offenses than men, but it may also be true that women are selected out of the death penalty pool of defendants because of structural bias at earlier stages in the process, such as in prosecutorial discretion and plea-bargaining. According to one study, women account for 10% of murder arrests, 2% of death sentences, and only

in her representation of a domestic abuse victim accused of infanticide, winning an outright acquittal for the woman, who had been induced to confess to a capital crime so she could go to her child's funeral.⁴³ Even though women may be sentenced to death at lower rates than men, they may be disadvantaged at other points in the criminal justice process.

Like gender, the authors reveal that sexual orientation still matters in the defence bar and in legal representation. Nearly 40% of gay and lesbian defendants in the courtroom reported feeling threatened or intimidated due to their sexual orientation.⁴⁴ As many as 77% of judges and attorneys reported hearing disparaging comments about gays and lesbians, and 47% reported hearing these in court.⁴⁵ “[B]ias against sexual minorities among key players in the legal system may actually be a factor in the imposition of the death penalty” by playing on the private biases of jurors and judges.⁴⁶ Temple described how Rose's openly gay colleague, Mark Kleinschmidt, organized the gay community in response to homophobic remarks by a prosecutor directed at a gay defendant in a jury trial.⁴⁷ He achieved this success despite the gay community's historic apathy to such involvement in the criminal justice reform movement.⁴⁸ In the course of the lobbying effort, Kleinschmidt was outed to his clients, and he was relieved that they did not seem to care.⁴⁹ “Mark hadn't purposely kept his sexual orientation secret,” Temple writes. “It had just never come up,” which was not necessarily a bad thing “given the hyper-macho environment of [death] row.”⁵⁰ Dow represented a probably-innocent gay defendant who found total isolation devastating.⁵¹ Lyon notes that she was internally conflicted when a client of hers was given a light sentence from a homophobic judge because the victim in the murder case was gay.⁵² Despite her initial revulsion and lingering concern that her silence meant agreeing with the judge's bigotry, Lyon concedes that she was not there to discuss her political views of the world—her only goal was to save the life of her client.⁵³ Both gender

1.1% of executions. Harry Greenlee & Shelia P. Greenlee, *Women and the Death Penalty: Racial Disparities and Differences*, 14 WM. & MARY J. WOMEN & L. 319, 321 (2007).

⁴³ Lyon, *supra* note 8, 145-46.

⁴⁴ Michael B. Shortnacy, *Sexual Minorities, Criminal Justice, and the Death Penalty*, 32 FORDHAM URB. L.J. 231, 232 (2004) (citing a 2001 study of defendants in the California court system).

⁴⁵ *Id.* (citing a 1999 report of the Arizona state bar association)

⁴⁶ *Id.*, 234. The author cites several cases where a prosecutor directly referenced an accused's sexual orientation during the trial “as another reason to condemn the convicted criminals to death.”

⁴⁷ Temple, *supra* note 8, 147.

⁴⁸ Shortnacy, *supra* note 35, 234. (noting relative inattention of LGBT community toward criminal justice issues).

⁴⁹ *Id.* Mark Kleinschmidt is the current mayor of Chapel Hill, North Carolina.

⁵⁰ *Id.*, 133.

⁵¹ Dow, *supra* note 8, 123.

⁵² Lyon, *supra* note 8, 117.

⁵³ *Id.*

and sexual orientation still matter both in the public defence bar and on death row.

Although the U.S. Supreme Court has found that the execution of persons who are insane or mentally retarded is unconstitutional, each of the three memoirs reveals the limitations of this jurisprudence in preventing the execution of defendants with mental, intellectual, or developmental disabilities.⁵⁴ Scientific and psychological research developments on mental health have outpaced criminal justice reform.⁵⁵ An illogical constitutional distinction between mental retardation, which is protected, and other forms of mental illness, which are generally not protected, may not coincide with psychological realities.⁵⁶ Furthermore, juries may ignore or misinterpret expert data and witnesses.⁵⁷ Lyon, reflecting on why an insanity plea ultimately failed for a client who routinely had insane delusions, explains that jurors often wrongly perceived of “not guilty by reason of insanity” as tantamount to an acquittal.⁵⁸ Following a change in the North Carolina law preventing the execution of mentally retarded, Temple recounts how Rose and his colleagues somewhat controversially tailored mental retardation challenges to only the most egregious cases so as not to flood the system with frivolous motions simply as a delay tactic.⁵⁹ He explained that “many mentally retarded people, especially those whose IQs hovered around 70, bore no physical signs and were not always easy to distinguish. Under pressure to fit in, many became surprisingly skilled at masking their disabilities, pretending to understand.”⁶⁰ As Dow cynically explains, the gap between the letter of the law and the realities of capital legal representation are vast. The bar on executing mentally retarded and insane defendants “is an example of a lofty principle that has almost no practical application.”⁶¹ Although juries, judges, and even attorneys may assume otherwise, not all mental disabilities are visible. The death penalty’s exclusion of mentally retarded and insane defendants, as distinguished from defendants who are only mentally ill, is poorly understood by those in the legal profession.

⁵⁴ For a summary of cases protecting defendants with mental retardation but excluding defendants with less serious forms of mental illness, see Helen Shin, Note, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants*, 76 *Fordham L. Rev.* 465, 466 (2007). In 1986, the Supreme Court decided *Ford v. Wainwright*, 477 U.S. 399, finding that the constitution prohibits execution of mentally insane prisoners, who are deemed not to be competent for execution. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court extended this prohibition to defendants who were mentally retarded.

⁵⁵ Liliana Lyra Jubilut, *Death Penalty and Mental Illness: The Challenge of Reconciling Human Rights, Criminal Law, and Psychiatric Standards*, 6 *SEATTLE J. SOC. JUST.* 353, 354, 356-57 (1997) (describing deficiencies in legal standards and noting constitutional guarantees are inadequate).

⁵⁶ *Id.*, 361.

⁵⁷ *Id.*, 358.

⁵⁸ Lyon, *supra* note 8, 61 (She explains the extent of the client’s insane delusions at 55).

⁵⁹ Temple, *supra* note 8, 132.

⁶⁰ *Id.*

⁶¹ Dow, *supra* note 8, 146.

Each of the attorneys was driven by the humanity of their clients, regardless of their crimes. “Despite what they’d done, they were human beings who’d been mostly discarded by the world,” Temple writes of Rose’s clients.⁶² “My clients did a terrible, sometimes unforgivable, thing, but most of them were worth saving,” Dow admits.⁶³ One of Lyon’s motives for writing her book was to “reveal the humanity that our criminal justice system so vigorously strives to deny.”⁶⁴ She adds, “[N]o matter what they did or did not do, I believe that every person I have defended is a human being of value.”⁶⁵ Her goal was to reveal the humanity of her clients to the judge and jury.⁶⁶ Clients were fundamentally human beings, the authors wrote, regardless of their treatment by the criminal justice system. The theme of humanity runs at least as deep through all three books as the theme of inhumanity.

III. THE SYSTEM

The United States Constitution requires effective representation for all persons guilty of capital crimes during trial and initial appellate stages of the criminal justice process.⁶⁷ The Sixth Amendment guarantees that all accused persons have access to counsel and the Supreme Court has suggested that a death sentence resulting from ineffective assistance of counsel may constitute cruel and unusual punishment, in violation of the Eighth Amendment.⁶⁸ “Because of constitutional requirements and the diligence of attorneys in capital cases, death penalty litigation is a long, expensive process,” often with more pretrial motions, higher expert fees, longer voir dire of jurors, a bifurcated trial, and automatic appeals.⁶⁹ To make out a constitutional claim of ineffective assistance of counsel, the defendant must make a two part showing: first, that the attorney’s performance was unreasonable under professional norms; and second, the

⁶² Temple, *supra* note 8, 79.

⁶³ Dow, *supra* note 8, 139.

⁶⁴ Lyon, *supra* note 8, xix.

⁶⁵ *Id.*

⁶⁶ Lyon, *supra* note 8, 69-70, 199-200. (She often did this by putting the defendant’s relative on the stand to testify).

⁶⁷ The seminal cases include *Gideon v. Wainwright*, 372 U.S. 335, 335 (1963) (felony cases); *Argersinger v. Hamlin*, 407 U.S. 25, 25 (1972) (misdemeanor cases resulting in imprisonment); and *Alabama v. Shelton*, 535 U.S. 654, 654 (2002) (misdemeanor cases resulting in suspended jail sentences). According to the U.S. Supreme Court, due process requires that a state provide court-appointed counsel for indigent defendants in death row cases. *Powell v. Alabama*, 287 U.S. 45 (1932).

⁶⁸ The Sixth Amendment states, “In all criminal proceedings, the accused shall enjoy the right...to have the Assistance of Counsel for his defence.” U.S. CONST. AMEND. VI. *See also The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 8, *et seq.* (1994).

⁶⁹ Margot Garey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1245, *et seq.* (1985). In more recent years, this figure might include such expensive costs as procurement of DNA testing.

deficient performance resulted in prejudice.⁷⁰ The challenges of a strained legal aid regime for indigent defendants are universal.⁷¹ As caseloads of capital defence attorneys become heavier and funding dries up, the potential for harm of constitutional magnitude grows, despite major advances toward legal aid reform in a number of states.⁷²

The inadequacy of defence counsel for indigent accused persons is a strong theme in each of the three memoirs relating to deficiencies in the criminal justice process. A defence attorney has additional duties in a capital case because of special procedures constitutionally required in capital trials and the uniqueness of death as a punishment.⁷³ A capital defence attorney has a responsibility to develop a relationship with a client and investigate his or her life, present mitigating factors in court, and respond to every aspect of the prosecution's case.⁷⁴ Each of the three authors describes the failings of prior defence counsel in their clients' cases. Rose discovered that Bo Jones's initial defence attorney spent much of his time trying to convince Jones to accept a plea; the attorney never investigated Jones's childhood, mental health, schooling, or addiction problems nor hired an expert witness.⁷⁵ Dow explains how Henry Quaker's initial attorney at trial failed to call any witnesses, interview Quaker's family members, or even make a closing argument.⁷⁶ His appellate attorney likewise failed to raise important issues on direct appeal, which had implications for Quaker's future legal team.⁷⁷ Lyon, speaking from her clinical professor persona, describes how she develops a case from the investigatory phase through sentencing and appeals. Allow the facts to emerge naturally, she counsels. "You also have to listen to, and hear, what's being said beneath the surface."⁷⁸ Bring up every possible issue during the original trial to preserve them for appeal.⁷⁹ A defence attorney should aim for the fairest possible outcome, considering the circumstances and mitigating factors.⁸⁰

⁷⁰ Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1072 (2009).

⁷¹ For an overview from a defence bar association, particularly as to how the War on Drugs is straining the legal aid regime, see National Legal Aid and Defender Assoc., "Blue Ribbon Advisory Committee on Indigent Defence Services: Crisis in Criminal Justice" (1996), available at http://www.nlada.org/Defender/Defender_Standards/Blue_Ribbon (Last Visited on September 10, 2010).

⁷² Roscoe C. Howard, Jr., *The Defunding of the Post-Conviction Defence Organizations As a Denial of the Right to Counsel*, 98 W.VA. L. REV. 863, 901-03, 920 (1996) (explaining how the failure to fund post-conviction defence organizations may lead to constitutional violations).

⁷³ Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 317 (1983).

⁷⁴ See generally, *id.*, 317-334.

⁷⁵ Temple, *supra* note 8, 182.

⁷⁶ Dow, *supra* note 8, 34-35.

⁷⁷ *Id.*, 36.

⁷⁸ Lyon, *supra* note 8, 86-87.

⁷⁹ *Id.*, 207.

⁸⁰ *Id.*, 169.

The challenges of heavy caseloads for public and legal aid defenders are well-documented. An excessive caseload and strained budgets can cause attorneys to employ substandard representation that violates constitutional, ethical, and other professional norms.⁸¹ Overcoming the dangerous consequences of excessive workloads and strained resources requires “moral courage and dedication.”⁸² Indeed, a defence attorney may have the professional obligation to withdraw lest she risk ineffective assistance of counsel.⁸³ With such high stakes, capital defence work is an all-encompassing profession for each of the three authors. Lyon raised a child as a single mother and tried to maintain romantic relationships through some of her most trying cases.⁸⁴ While the group of attorneys and paralegals at the Center for Death Penalty Litigation (CDPL) in North Carolina, including lead attorney Ken Rose, had families and lives outside work, the all-encompassing nature of death row representation forged the co-workers into a family of their own.⁸⁵ Dow warmly describes his relationship with his wife and young son, both of whom he felt he constantly disappointed because the rigors of work often interfered with family plans.⁸⁶ He describes the coping mechanisms he used when an execution was pending. The closer the execution date came, he wrote, the higher the priority he and his staff gave to a case. But some things still had to remain undone.⁸⁷

Each of the attorneys portrayed in the three books had to confront prosecutorial and police misconduct. Common forms of potential prosecutorial misconduct in the courtroom include telling the jury that a defendant risks release from prison; referring to the prosecutor’s discretion in bringing the case; and advocating the death penalty to protect society and not for reasons related to the defendant.⁸⁸ Other forms of misconduct may include tampering with evidence,

⁸¹ Bennett H. Brummer, *The Banality of Excessive Defender Workload: Managing the Systemic Obstruction of Justice*, 22 ST. THOMAS L. REV. 104, 106-07 (2009). (Brummer notes that high workloads in a state like Florida, which has 800,000 cases per year and 100,000 in Miami-Dade County alone, can have a deleterious effect not only on individual rights and freedoms, but on families and communities as well). *Id.*, 107.

⁸² Brummer, *supra* note 81, 189.

⁸³ Jessica Hafkin, Note, *A Lawyer’s Ethical Obligation to Refuse New Cases or to Withdraw from Existing Ones when Faced with Excessive Caseloads that Prevent Him from Providing Competent and Diligent Representation to Indigent Defendants*, 20 GEO. J. LEGAL ETHICS 657, 659 (2007) (detailing recent ABA ethics opinion interpreting ethical obligation of attorney).

⁸⁴ See, e.g., Lyon, *supra* note 8, 79, 102, 159-60, and 171.

⁸⁵ For more on the group dynamics of the CDPL staff, which Temple variously describes as the “CDPL team” and “CDPL community,” see, e.g., Temple, *supra* note 8, 80, 218.

⁸⁶ Dow, *supra* note 8, 4-5, 50, 60, 159, 216.

⁸⁷ *Id.*, 88. (Dow described how he could do nothing more for Ronnie O’Neill, a death row inmate who refused to, or was unable, to cooperate and who had exhausted his appeals. “We can’t help everyone,” he confessed. “All decisions to do nothing are hard”).

⁸⁸ These examples are provided in Welsh White, *Curbing Prosecutorial Misconduct in Capital Cases: Imposing Prohibitions on Improper Penalty Trial Arguments*, 39 AM. CRIM. L.REV. 1147, 1172, 1179, 1181 (2002).

interfering with witnesses, making prejudicial statements to the media, or seeking capital punishment in order to trigger a plea bargain.⁸⁹ Withholding exculpatory evidence or presenting false evidence violates both due process and the Eighth Amendment.⁹⁰ Lyon describes a prosecutor attempted to use a defendant's failure to testify as proof of his guilt, a clear Fifth Amendment violation.⁹¹ The prosecutor later casually told Lyon that his goal was to keep a bad guy off the street for a few years, even if he would be reversed on appeal.⁹² This stoked her outrage against the game-playing mentality of criminal lawyers on both sides. However, Temple describes the reluctant efforts of the prosecutor in the original trial of Rose's client Bo Jones to convince the district attorney's office to drop the case.⁹³ The prosecutor admitted that he continued to have misgivings about such a weak case, which was successful only because the defence counsel was so ineffective.⁹⁴

Biased judges and appellate courts produced further obstacles for each of the attorneys. Judges, often elected, may be sensitive to public opinion and media attention.⁹⁵ In addition, research shows that judges are more likely to sentence a defendant to death than juries hearing the same evidence.⁹⁶ Dow confesses that he had little faith in the impartiality of judges after he uncovered a sexual relationship between a district attorney and a judge in a death penalty case, sparking a new trial two weeks before a pending execution.⁹⁷ Both Lyon and Rose had an inkling of the outcome of their cases based on the judge to which they were assigned. Rose's case was initially assigned to a very religious retired judge that the attorneys referred to as "the Deacon."⁹⁸ "They had no chance of winning, not with this judge," Temple wrote.⁹⁹ They changed the trial strategy to a defensive posture, to create a record for appellate courts rather than try to win at the trial phase.¹⁰⁰ Later, when Bo Jones's case was assigned to a different judge, the attorneys dreaded any delays as it risked losing a sympathetic judge.¹⁰¹ Lyon also had nicknames for the judges before whom she appeared: the Hanging Judge,

⁸⁹ Natasha Minsker, *Prosecutorial Misconduct in Death Penalty Cases*, 45 CAL. W. L. REV. 373, 401 (2009) (listing common forms of misconduct by prosecutors).

⁹⁰ Gilbert Stroud Merritt, *Prosecutorial Error in Death Penalty Cases*, 76 TENN. L. REV. 677, 677 (2009).

⁹¹ Lyon, *supra* note 8, 133.

⁹² *Id.*

⁹³ Temple, *supra* note 8, 216. (The prosecutor, identified in the book as one Dewey Hudson, confessed that he believed the original defence counsel's failure to cross-examine witnesses was part of the trial strategy.)

⁹⁴ *Id.* See also, *id.*, 223.

⁹⁵ CATHLEEN BURNETT, JUSTICE DENIED: CLEMENCY APPEALS IN DEATH PENALTY CASES 101 (2002).

⁹⁶ *Id.*, 102.

⁹⁷ Dow, *supra* note 8, 248-49.

⁹⁸ Temple, *supra* note 8, 91.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*, 152, 160.

the Corrupt Judge, the Vicious Judge, and the Bigot.¹⁰² Although she used motions to avoid the Corrupt Judge and the Hanging Judge, she was eventually assigned to the Bigot.¹⁰³ Although the Bigot ruled against her in a skewed trial, she used a defensive strategy at the proceeding simply to create a record for a later appeal; the appeal was successful, overturning her client's conviction.¹⁰⁴

All three of the authors eventually take their cases out of the legal system and into the political arena when their legal remedies are exhausted. Every death penalty state has a provision for the governor or a board of advisors to grant clemency, but the nature of pardons and paroles are erratic.¹⁰⁵ Executive clemency "is idiosyncratic at best, and arbitrary at worst," overall seeming to "add, rather than subtract, an element of luck in the ultimate decision of who ends up being executed."¹⁰⁶ Dow recounted his experience with the Texas Board of Pardons and Paroles, a politically-appointed body that made mercy recommendations to the governor. The purpose of the Board, he writes, is to shield the governor from personal responsibility for the execution.¹⁰⁷ Temple recounts an unsuccessful public clemency campaign launched by Rose's organization to persuade the governor to spare a defendant's life.¹⁰⁸ Later, as director, Rose lobbied the legislature for a moratorium on executions in order to save the life of his client, Bo Jones, after the media reported the release of an innocent man from death row.¹⁰⁹ Anti-death penalty campaigners succeeded in persuading the state senate to approve a moratorium, but the measure died in the lower house.¹¹⁰ Lyon had more success when she persuaded the governor of Michigan, an abolitionist state, to grant clemency in a case involving life without parole. She recalled using every political connection she could find, collecting letters of support from politicians, clergy, and acquaintances.¹¹¹ Later, Lyon petitioned Illinois governor George Ryan, a Republican and lifelong supporter of capital punishment, to grant a pardon; Ryan not only granted the pardon but declared a moratorium on all executions.¹¹² Given their all-encompassing commitment to saving their clients' lives, the three attorneys were armed not only with legal reasoning and case law, but with tools of political persuasion as well.

¹⁰² Lyon, *supra* note 8, 78-81.

¹⁰³ *Id.*, 81.

¹⁰⁴ *Id.*, 101-02.

¹⁰⁵ Burnett, *supra* note 81, 155

¹⁰⁶ Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. CH. L. REV. 289, 305 (1993) (finding judicial expediency and the idiosyncrasies of specific governors to be more determinative of successful clemency proceedings than the characteristics of the defendant or the crime).

¹⁰⁷ Dow, *supra* note 8, 220.

¹⁰⁸ Temple, *supra* note 8, 147.

¹⁰⁹ Temple, *supra* note 8, 144.

¹¹⁰ *Id.*

¹¹¹ Lyon, *supra* note 8, 257.

¹¹² *Id.*, 261-62.

While all three books have an implicit political agenda favoring the abolition of the death penalty, the authors generally shy away from abolitionist rhetoric. While Lyon's book is probably the most political of the three, she is subtle and effective at revealing the flaws of the death penalty system through her vignettes, showing rather than telling. Lyon was a political activist in her younger days and a lifelong opponent of capital punishment, but this overt activist persona is often hidden in her narrative.¹¹³ Dow is much less politically-driven; he is not a typical abolitionist. He confessed that he supported the death penalty at one point until he saw how lawless the system was.¹¹⁴ While most abolitionists focus on easy cases, such as wrongful convictions, Dow opposed the death penalty even for the clients he hated: the guilty ones who did precisely what the jury found that they did.¹¹⁵ He considered himself a "judgmental and not-very-forgiving guy," one who reluctantly opposed the death penalty regime on its own merits and not on behalf of any particular client.¹¹⁶ Nor is Temple's biography a self-conscious political treatise. As Temple describes when the North Carolina legislature took up the issue of a moratorium, Rose was a novice political activist, unused to legislative lobbying, publicity campaigns and "political arm-twisting."¹¹⁷ The position of a capital defender may be inherently political, but the authors deemphasize that aspect.

Each of the attorneys had to confront their own ethical dilemmas in pursuing their cases or resolve the ethical dilemmas created by other attorneys. Lyon describes how she had to deal with a death penalty "volunteer": those driven by depression, fear, or guilt to accept a pending death sentence and give up the will to appeal. Death row volunteering often creates a conflict for an attorney who seeks to protect her client's autonomy while advocating on her behalf; the result could lead to litigation over the competency of a prisoner to consent to a death sentence.¹¹⁸ In addition, to the extent that conditions on death row cause a defendant to waive appeals, death row volunteering may have constitutional implications.¹¹⁹ To a female client who simply wanted to die so that she would not have to spend her life in prison, Lyon said that she refused to help the State to murder her.¹²⁰ The woman fired Lyon and hired an attorney who would stop the appeals. Conflicts of interest may create another ethical dilemma for capital defence

¹¹³ *Id.*, 7-8, 194.

¹¹⁴ Dow, *supra* note 8, 17.

¹¹⁵ *Id.*, 17, 19.

¹¹⁶ *Id.*, 21.

¹¹⁷ Temple, *supra* note 8, 144-45.

¹¹⁸ C. Lee Harrington, *A Community Divided: Defence Attorneys and the Ethics of Death Row Volunteering*, 25 *LAW & SOC. INQUIRY* 849, 850, 855 (2000) (The author's survey data reveals that defence attorneys are sharply divided as to the ethics of death row volunteering and of attempting to persuade a client to continue the appellate process). *Id.*, 865.

¹¹⁹ Amy Smith, *Not Waiving but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 *B.U. PUB. INT. L.J.* 237, 253 (2008).

¹²⁰ Lyon, *supra* note 8, 234.

attorneys. Conflicts of interest may arise out of past representation of a victim or a witness, concurrent representation of multiple defendants, or representation of an employee of the office or a relative.¹²¹ A defendant has a constitutional right to conflict-free representation.¹²² Rose wondered why Bo Jones's initial attorney did not cross-examine inconsistent statements or introduce evidence of the defendant's mental health and history of abuse.¹²³ He later discovered that the attorney was a relative of the victim, a clear conflict of interest that he used as a basis for an ineffective assistance of counsel claim.¹²⁴ An improper relationship with a judge may violate ethical boundaries. Dow recounted how the trial judge in his case made a sexual advance toward him, and his family and his client flashed in front of him before he declined.¹²⁵ These ethical dilemmas revealed the attorneys' integrity to the reader.

The most compelling argument against the continued survival of the modern death penalty in the United States is the risk of the wrongful execution of an innocent person. Despite high profile exonerations since the mid-1990s, not all states allow the introduction of DNA evidence in post-conviction proceedings to prove innocence.¹²⁶ Wrongful executions are the result of a confluence of factors: presumption of guilt, perjured testimony of a co-accused, wrongful identification of suspects, faulty forensic evidence, prosecutorial misconduct, ineffectiveness of counsel, jailhouse informants, and police misconduct.¹²⁷ Scholars have noted the increasing centrality of innocence in the death penalty debate and the advent of more sophisticated forensic technology, especially DNA testing.¹²⁸ Indeed, no

¹²¹ Jeff Brown, *Disqualification of the Public Defender: Toward a New Protocol for Resolving Conflicts of Interest*, 31 U.S.F. L. REV. 1, 7-8 (1996); Mary Broderick & Peter Cohen, *When Public Defenders Have Conflicts of Interest*, 2 CRIM. JUST. 18, 19 (1987).

¹²² Broderick & Cohen, *supra* note 98 at 19, *citing* Glasser v. United States, 315 U.S. 60 (1942) (holding that a conflicted counsel does not satisfy the requirements of the Sixth Amendment).

¹²³ Temple, *supra* note 8, 85-86.

¹²⁴ *Id.*

¹²⁵ Dow, *supra* note 8, 223.

¹²⁶ Rachel Steinback, Comment, *The Fight for Post-Conviction DNA Testing is Not Yet Over: An Analysis of the Eight Remaining 'Holdout States' and Suggestions for Strategies to Bring Vital Relief to the Wrongfully Convicted*, 98 J. CRIM. L. & CRIMINOLOGY 329, 333-34 (2007).

¹²⁷ Jerome P. Kennedy, *Writing the Wrongs: The Role of Defence Counsel in Wrongful Convictions: A Commentary*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 197-200 (2004) (writing in the Canadian context).

¹²⁸ David S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1551-52 (2008) (a positive view of this trend). *Id.* (As Medwed summarizes, not all commentary on this phenomenon is positive. He notes that some scholars have argued that innocence activists inflate the number of wrongful convictions by including factually ambiguous ones). *Id.*, 1552. (Others argue that wrongful convictions are episodic and not epidemic). *Id.*, 1553. (He also notes the additional criticism that an overemphasis on innocence and guilt may paper over more serious structural flaws in the criminal justice regime, such as a shortage of legal aid). *Id.*, 1555.

single issue has the power to transform public opinion on capital punishment like the risk of executing the innocent.¹²⁹

Each of the attorneys portrayed in the three biographies had to represent a client that they truly believe was innocent. Lyon promised to give her clients “the best defence possible. That was my job and that was what he deserved, whether he was guilty or innocent,” she wrote in one instance.¹³⁰ But innocent clients were simply more difficult than the guilty ones. Lyon writes, “I discovered, to my rage and despair, how many innocent people—more than even I had imagined—were living on death row.”¹³¹ She confessed that the realities sometimes weighed her down in a cloud of depression.¹³² All three attorneys describe the innocence of a client as the hardest part of their job as a death row defender. “Damn, I hate innocent clients,” Lyon’s colleague confessed to her during the defence of a client identified as Jose.¹³³ She wrote that losing is a reality of a defence attorney’s career; the burden of representing an innocent client could be “painful.”¹³⁴ Dow confesses at the end of his biography, “Of the hundred or more death-row inmates I’ve represented, there are seven, including [Henry] Quaker, I believe to be innocent.”¹³⁵ His conclusion is damning: “They get sentenced to death because they have incompetent or underpaid trial lawyers, and because human beings make mistakes.”¹³⁶ Upon witnessing the first execution of one of his clients, Rose admitted that no matter how hard he worked, how sound his argument, or how compelling his facts, he could not guarantee his client’s life if he got the wrong judge in the wrong political atmosphere.¹³⁷ Of all the variables in a capital case, from police and prosecutorial discretion to appellate and executive review, the wildcard variable of chance remains the most problematic element of the criminal justice process.

All three biographies are ultimately worthwhile narratives not only of death row clients and their attorneys, but of the structural flaws and procedural bias of the death penalty process as well. Taken together, they reveal largely consistent attitudes and trends toward the death penalty in the United States, even though the location and political environment of each book differs. While David Dow’s book is ultimately the most thorough and readable of the three, both

¹²⁹ Lawrence Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 579 (2004); Michael L. Radelet, *The Role of the Innocence Argument in Contemporary Death Penalty Debates*, 41 TEX. TECH L. REV. 199, 219 (2008).

¹³⁰ Lyon, *supra* note 8, 190.

¹³¹ *Id.*, 201.

¹³² *Id.*

¹³³ *Id.*, 131.

¹³⁴ *Id.*

¹³⁵ Dow, *supra* note 8, 254.

¹³⁶ *Id.*

¹³⁷ Temple, *supra* note 8, 6.

Andrea Lyon and John Temple testify to remarkable stories and to the urgency of criminal justice reform.

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