

appellate strategy and again demonstrates the critical importance of good judgment and experience in the development of that strategy.

The final chapter not only recaps the book in a concise and clear way, but also draws important conclusions about the death penalty since *Strickland*. White concludes with the observation that “just as a defense attorney’s compelling narrative of injustice can produce a favorable result for a particular capital defendant, defense attorneys’ compelling narratives of the series of injustices perpetrated by the modern system of capital punishment may lead to a continuing decline in the use of the death penalty, and eventually its outright abolition” (p. 208). Books such as this one will serve the same purpose. I would be remiss if I did not take a moment here to comment on the prose. The case studies are written in a refined but accessible manner. In this sense, even those outside the bar or the academy might find this text enjoyable, enlightening, and informative. In the final analysis, White has made a persuasive case that whether a given defendant lives or dies at the hands of the state is largely dependent on the skill set of the attorney. That a penalty of such severity and finality is meted out based upon resources or the luck of the draw (in the case of appointed attorneys) seems to be unconscionably arbitrary. As the random nature of the application of the death penalty becomes more well known—thanks in part to this book—perhaps the defenders of the status quo will begin to rethink their positions. Until the death penalty is an artifact of history, this volume will remain a vibrant and compelling condemnation of the current system. **jsj**

Death by Design: Capital Punishment as a Social Psychological System, by Craig Haney.
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reviewed by Wanda D. Foglia

There are scores of studies showing that the death penalty is not a deterrent, is more expensive than life imprisonment, is applied in a racially biased manner, is not decided the way the law dictates, and is sometimes imposed on the innocent. Craig Haney describes much of this research and more in *Death by Design: Capital Punishment as a Social Psychological System*.

Haney incorporates much of his own twenty-five years of research and writing about various aspects of the death penalty into this book. For anyone not familiar with the outstanding contributions he has made, *Death by Design* will provide fascinating insights into the myriad psychological pressures that help perpetuate the death penalty, and the elegant research designs used to amass social-science evidence of how capital punishment actually operates. This book also is worth reading by those already familiar with Haney for the eloquent arguments and the discussion of the interdependence and cumulative impact of the multiple shortcomings of the death penalty.

The book is devoted to explaining how the media and the legal system prevent death penalty advocates from really understanding what they are advocating. This is not a conspiracy theory. Haney does not argue that the media and legal system are deliberately trying to mislead people. Rather, he is maintaining that for a variety of reasons, amply documented in the succeeding chapters, the media and legal system have operated in ways that mislead and obscure the true nature of the death penalty.

In the first chapter, Haney explains how the American legal system's emphasis on justice and due process has led to noble-sounding statutes and case law purporting to make the system fair. However, when social-science research demonstrated that these legal remedies were not working in practice, the United States Supreme Court chose to ignore the evidence and assume the death penalty was working in the idealized way they described in their legal opinions.

Chapter 2 describes how the news and entertainment media typically portray crime in sensationalistic and simplistic terms that ignore the "structural and contextual factors that help to cause crime" (p. 43). Although the ubiquitous impact of the media is not news, this chapter is especially important because of the broad implications it has, not only for the death penalty, but also for attitudes toward crime, the justice system, and social problems in general. Haney discusses research showing that the media is saturated with crime stories which foster fear of crime and support for tough policies, including the death penalty; emphasizes the dangers of crime, even when crime rates are falling; and focuses on the heinous acts of offenders without explaining how poverty, discrimination, and histories of abuse often lead to crime. Most of the research was published ten to twenty years ago, and some more recent dramas are more nuanced, but Haney is very persuasive when he argues that the media coverage during the 1970s, '80s, and '90s amplified support for the death penalty and dampened receptivity to mitigation.

The third chapter continues these themes by analyzing the way media coverage of specific capital crimes perpetuates a one-sided view of the death penalty. Haney discusses research he and Susan Greene conducted showing that the crime and what would be considered aggravating evidence get much more media coverage than anything about the offender's background or the social context that might constitute mitigation, and that cases resulting in death get more coverage than those resulting in a life sentence. Haney argues that this encourages people to develop a narrow view of crime that focuses blame on the individual and to erroneously assume that capital cases more often result in death rather than life verdicts.

The distortions and one-sided approach in the media help explain the support for the death penalty that is described in chapter 4. Here, Haney discusses opinion polls and surveys showing how support for the death penalty has varied over the years, is often based on misconceptions, and is more nuanced than media reports suggest. Haney describes research he did with Hurtado and Vega that showed widespread misconceptions, and that support for the death penalty was significantly higher among those who erroneously believed that decisions about the death penalty should only

focus on the crime, that the death penalty deters, that it is less expensive than life in prison, and that those sentenced to life without parole are often eventually released. Haney's summary of the evidence refuting these misconceptions is persuasive and instructive.

The next two chapters focus on how the selection of jurors to decide a capital case actually enhances the chances of a death sentence. In chapter 5, Haney describes evidence of prejudicial pretrial publicity and discusses the inadequacies of typical voir dire questions to reveal potential bias against the defendant. He then goes on to explain the history and purpose of death qualification, an area where he has done extremely important research. Again discussing the research he did with Hurtado and Vega, along with studies done by others, Haney describes results showing that when people who oppose the death penalty are excluded because they would not be able to vote for a death sentence, the resulting jury is composed of people who are atypically conviction prone, punishment prone, and less informed about the death penalty.

Chapter 6 describes what Haney calls the "process" effect because the process of going through jury selection, with so much emphasis on whether they would be willing to impose death, biases the jurors against the defendant. He explains how the less effective approach to life qualification fails to counteract this prejudicial impact. Again, Haney relies on his prior work to support his argument. He also discusses research done by others and excerpts from transcripts of jury selection to buttress his point.

Like an earlier law-review article on which it is partially based, chapter 7 describes how the way the capital trial is structured makes it easier to impose the death penalty. Haney calls this "(s)tructural (a)ggravation" (p. 141). In addition to starting with questions about the death penalty during jury selection, as discussed previously, Haney argues that dwelling on the crime during the guilt phase dehumanizes the defendant and often instills fear in the jurors. The formal language and atmosphere of the trial further distances the jurors from the defendant. This chapter includes discussions of some very interesting psychological literature, including Albert Bandura's term for how people distance themselves from the moral implications of their behavior: "mechanisms of moral disengagement" (p. 143). Although cited later in the book, *Wiggins v. Smith* (2003), which now imposes a duty on trial counsel to present mitigating evidence, should have been discussed here when Haney was arguing that attorneys often do not effectively present evidence of the defendant's background. However, it is certainly true that there have been many cases in the past where mitigation was not presented, there is still a question regarding how effectively it is presented, and there are limits to how persuasive it will be coming after the dehumanizing evidence in the guilt phase.

The extensively documented difficulties with understanding sentencing instructions are the focus of chapter 8. Haney discusses research he did with various colleagues, as well as some of the studies done by others, demonstrating that people (including former capital jurors) have trouble understanding what the law means by

aggravation and mitigation, and are especially confused about the idea of mitigation. Haney effectively explains how the misunderstandings make the jurors more likely to vote for death. Although the Supreme Court has assumed the instructions can take the arbitrariness out of the death penalty system, the research shows they do not.

Chapter 9 persuasively illustrates how the problems with the death penalty are especially acute when the defendant is African-American. Here, Haney makes the important point that “(t)he practice of capital punishment and the social evil of racism . . . are both forged from many of the same human emotions, including anger, hatred, and fear . . . (and) are both facilitated when their adherents treat people as though they were not human” (p. 192). An abundance of social-science evidence documenting the increased exposure of African Americans to criminogenic risk factors such as poverty, discrimination, and violence, is cited here. Unfortunately, for jurors to appreciate the impact of these factors, jurors must cross what Haney calls an “empathic divide” (p. 203), which is difficult when mitigation is not presented effectively or the defendant’s experience is very different from what jurors have experienced.

Somewhat surprisingly given the extent and interconnectedness of all the problems Haney discusses, he does not call for the abolition of the death penalty in chapter 10. Rather, he provides an array of suggestions for reforms that might enhance the fairness of the process. Some of these, such as providing more adequate funding for defense attorneys, increasing the willingness to change the venue of capital trials, and paying more attention to social-science evidence may be achievable. However, as Haney admits, other challenges, such as “correcting media-related biases” are “daunting” (p. 217). In “Concluding Thoughts: Death Is Different,” Haney eloquently describes the symbolic power of the death penalty and laments that “it is still too often a stereotype-driven outcome based on partial and inaccurate beliefs that are widely disseminated and supported by society in general and by the legal system in particular” (p. 245).

This is an ambitious book about an important topic. There were times when it could have included discussion of more-recent law and research, but it is difficult to consider everything in an area where there has been so much litigation and research. It also sometimes seemed that there could have been more details in the text about research done by other people to further corroborate the extensive work Haney and his colleagues have done. However, Haney cites an enormous amount of law and research, which provide important insights on a whole array of problems with capital punishment.

Anyone willing to take an honest look at how the death penalty operates in the United States should read this book. Craig Haney provides an eloquent presentation of the harsh realities of capital punishment and persuasively argues that support for the death penalty often is based on ignorance and legal fictions. **jsj**