

be true, but Garrett does not even attempt to probe alternative possibilities. It is certainly true that, according to the last census, African-Americans constitute roughly 12.3% of the population in this country, but, as of 2016, 42.3% of the population on death row.¹⁵ This is a shocking disparity until one considers that, as of 2016, African-Americans constitute 52.6% of those arrested on charges of murder and non-negligent manslaughter¹⁶ and only 34.3% of those who have been executed since the death penalty was reinstated in 1976.¹⁷ Moreover, in terms of inter-racial murders, there are far more black-on-white crimes than there are white-on-black crimes.¹⁸ Inter-racial violent crimes are committed at much higher rates by strangers usually in the act of committing other crimes such as a rape or armed robbery, the kinds of aggravating factors that are often taken into account by prosecutors in deciding whether to pursue the death penalty.¹⁹ None of this is to deny the possibility that race plays a role in decisions about when to seek or impose the death penalty. But these facts are offered to suggest that there may be other, non-racial explanations for some of these disparities; Garrett does not mention, much less discuss, any such alternative possibilities.

A reader would think based on the descriptions in this book that every time the death penalty is imposed, it is due to ignorance or heartlessness by juries, crooked and overzealous prosecutors, biased “Hang ‘Em High” judges, incompetent defense attorneys, and poor and misunderstood defendants. In leaving that impression, Garrett mischaracterizes the process, the difficult decisions that jurors face, and the sobriety and earnestness with which they approach their grim task.

There are other noteworthy omissions. For example, Garrett points to a handful of horrific, high-profile botched executions as another reason why some people have turned against the death penalty. He fails to mention, however, that the successful lobbying efforts of death penalty opponents—which have resulted in reputable drug manufacturers refusing to supply drugs for lethal injections and in trained medical professionals refusing

to participate in carrying out executions—have dramatically increased the likelihood that executions will be botched.

And Garrett points to a number of so-called exonerations (some of which are actual exonerations in the sense that it was definitively determined that the accused did not commit the murder, while others are reversals because of some procedural irregularity or new evidence that casts doubt upon the verdict) as proof that innocent people have clearly been executed since the Supreme Court reinstated the death penalty in 1976. Despite the best efforts of death penalty opponents, however, it has never been definitively established that anyone has been wrongfully executed since then. But this does not stop Garrett from confidently declaring that “[d]eath penalty states are no doubt still executing innocent people.” Has an innocent person been executed since the Supreme Court reinstated the death penalty? It is certainly possible. As is the case with any human endeavor, mistakes can be made in the imposition of the death penalty. Nonetheless, in addition to the fact that there would still be arguments to support the death penalty even if an innocent person has been executed, it is also true that virtually all death penalty cases receive multiple layers of judicial review. This is especially so in cases when there is even a colorable claim of innocence, and governors have not hesitated to commute death sentences, even when the accused’s guilt was never in doubt, when they believe that imposing the sentence would constitute a miscarriage of justice.²⁰

But Garrett’s agenda is more radical than simply abolishing the death penalty. He makes it quite clear that life without parole is equally objectionable, if not more so, in his eyes because “life rows have mushroomed in size, dwarfing the population of death rows even at their height.” Instead, he favors a justice system based on mercy which is, in turn, premised on “empathy for another person,” specifically, the perpetrator of crimes. And not just non-violent crimes. According to Garrett, we “have to embrace mercy for the most serious offenses,” and ought to be “willing to shorten prison terms and release” those who commit those offenses. After all, Garrett declares, “This is the land of the free.” Under this utopian (some might say Pollyannaish) view of the world, those who have committed heinous crimes will simply be overwhelmed by this gesture of grace, see the light, and go forth into the world and sin no more. But this is a mighty bold and risky gamble in a world where recidivism rates among formerly-incarcerated individuals remain staggeringly high.²¹

In making his case, Garrett implies that in order to be in favor of criminal justice reform, one must be against the death penalty (“the sudden decline in the American death penalty is a social trend that speaks volumes about the present and future of our criminal justice system”) and that one will simply not be able to address the former unless and until the latter is abolished (“the death penalty’s demise will allow us to focus on remedying” the

15 ELIZABETH DAVIS & TRACY L. SNELL, CAPITAL PUNISHMENT, 2016 7, BUREAU JUSTICE STATISTICS (Apr. 2018), <https://www.bjs.gov/content/pub/pdf/cp16sb.pdf>.

16 FED. BUREAU INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES 2016 TABLE 21A (2017), <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-21/#overview>.

17 See DEATH PENALTY INFO. CTR., *supra* note 8. The Supreme Court placed a moratorium on the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972), then reinstated it four years later in *Gregg v. Georgia*, 428 U.S. 153 (1976).

18 See Matthew Cella & Alan Neuhauser, *Race and Homicide in America, by the Numbers*, U.S. NEWS (Sept. 29, 2016), <https://www.usnews.com/news/articles/2016-09-29/race-and-homicide-in-america-by-the-numbers>.

19 Rachel E. Morgan, *Special Report: Race and Hispanic Origin of Victims and Offenders, 2012-15*, Bureau of Justice Statistics (Oct. 2017), <https://www.bjs.gov/content/pub/pdf/rhovo1215.pdf> (see table 4); Tim Wadsworth & Charis Kubrin, *Structural Factors and Black Interracial Homicide: A New Examination of the Causal Process*, 42 CRIMINOLOGY 647 (Aug. 2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029081 (“This suggests that economic deprivation leads to more robbery, which, in turn, increases blacks’ killings of whites.”).

20 See, e.g., *Map of Humanitarian Clemencies Granted in the U.S. Since 1976*, DEATH PENALTY INFORMATION CTR. (updated July 20, 2018), <https://deathpenaltyinfo.org/clemency>.

21 See MARIEL ALPER, MATTHEW R. DUROSE & JOSHUA MARKMAN, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014), BUREAU JUSTICE STATISTICS (May 2018), <https://www.bjs.gov/content/pub/pdf/18upr9yufup0514.pdf>.

myriad of problems with the current criminal justice system). As a supporter of much of the criminal justice reform movement, color me skeptical. One can focus on remedying the lingering problems with the death penalty without abolishing it, while at the same time addressing some of the problems with our criminal justice system. Indeed, working to remedy some of the problems with death penalty procedures will likely help address some of the problems with the broader criminal justice system.

None of this is to suggest that Garrett does not point to some very legitimate problems with the current death penalty process and the broader criminal justice system. He points to police interrogation and suspect identification techniques that may be unduly coercive or suggestive, and which may result in false confessions and improper out-of-court identifications. Others have also pointed out problems with these techniques.²² And Garrett points to problems with forensics labs, which can be particularly troublesome given the outsized influence that forensic evidence, with its patina of objectivity and irrefutability, can have in the courtroom (a problem that I have also written about).²³ These are certainly areas that call for improvement, but they hardly support the call for abolition of the death penalty on their own.

He also points to some promising developments on the criminal justice reform horizon. For example, Garrett notes the increasing availability of mental health courts which are designed to deal with certain offenders who suffer from severe, untreated mental illnesses that likely precipitated the crimes they committed. These and other diversionary courts, such as drug courts and veterans courts, may reduce recidivism and constitute a more just way of treating certain categories of offenders (whether that should include murderers, of course, is a different matter).

Is the death penalty on its way out? Who knows? Are there sound reasons to support or oppose the death penalty? Of course. This is a serious subject about which reasonable people can and do disagree, and disagree passionately. If you want to join that debate and are looking for an effective opening argument against the death penalty, then this book is for you. If, on the other hand, you are looking for a balanced exposition of a complicated and contentious issue, then keep looking.

22 See, e.g., Brent Snook et al., *Reforming Investigative Interviewing in Canada*, 52 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 215 (2010), http://www.mun.ca/psychology/bri/publications/Snook_et_al_CJCCJ.pdf; JAMES L. TRAINUM, *HOW THE POLICE GENERATE FALSE CONFESSIONS: AN INSIDE LOOK AT THE INTERROGATION ROOM* (2016); Lisa Black & Steve Mills, *What Causes People to Give False Confessions?*, CHI. TRIBUNE (July 11, 2010), http://articles.chicagotribune.com/2010-07-11/news/ct-met-forced-confessions-20100711_1_confess-dna-evidence-interrogation.

23 John Malcolm, *Persistent Forensics Lab Problems Undermine Faith in Our Criminal Justice System*, HERITAGE FOUND. (Jan. 21, 2016), <https://www.heritage.org/crime-and-justice/report/persistent-forensics-lab-problems-undermine-faith-our-criminal-justice>.

