



MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT

BY RICHARD SANDER AND STUART TAYLOR JR.

Basic Books, New York, NY, 2012. 348 pages, \$28.99.

Reviewed by Michael Ariens

Mismatch is one of the most important books about law and public policy published recently. The authors, Richard H. Sander, a professor at UCLA School of Law, and Stuart Taylor Jr., a journalist with a law degree, offer a provocative and deeply researched conclusion: Empirical evidence strongly suggests that affirmative action in the admission of African-Americans and Hispanics to selective colleges and law schools is more harmful than helpful.

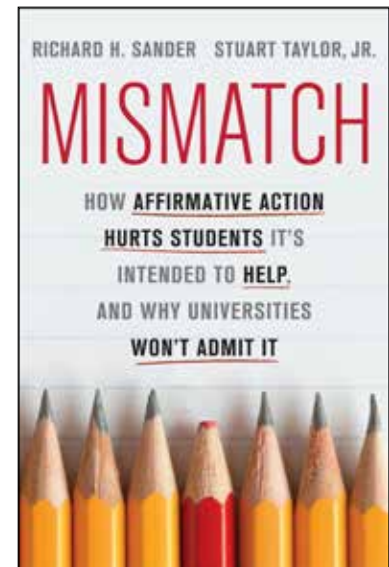
Mismatch has three major themes. The first concerns the results of Sander's empirical work on the efficacy of racial preferences in admission to institutions of higher learning. Some highly selective colleges and law schools give minority applicants, particularly African-American and Hispanic students, large admissions preferences based on their race or ethnicity. These preferences create what Sander and others call a "cascade" effect. The most elite schools get their pick of the most academically qualified students, including minority students (some of whom need no admissions preference). This requires second-tier schools to use significant preferences to build a representative class, and so on down the line through the eight tiers into which colleges are divided. The process works similarly in law school admissions. Sander and Taylor assert that, "[f]or many black and Hispanic students, ... the preference has proved to be a curse."

The second theme of *Mismatch* is that academics and the media tend to avoid candid discussions of the costs and benefits of racial preferences in admission to higher education institutions. Sander and Taylor investigate why affirmative action based on race and ethnicity remains so combustible a public policy issue. Closely related to the unwillingness of academics and the media to

discuss the instrumental value of affirmative action is the refusal of those who possess data that could provide evidence of mismatch (or evidence disproving mismatch) to share such data with empiricists who could analyze it objectively (and who might reach undesired conclusions). This stonewalling is both breathtaking and saddening. The authors offer several examples of efforts to limit the ability of Sander and others to evaluate (and thus, possibly, to find wanting) the effects of affirmative action based on race and ethnicity. For example, the Mellon Foundation "refused as a matter of policy to make the College and Beyond data available to other scholars to replicate and check" the conclusions supporting affirmative action made in the book *The Shape of the River* by William Bowen and Derek Bok, former presidents of Princeton and Harvard Universities. The unprofessional treatment of Sander by both the American Bar Foundation and the Law School Admission Council—treatment that was apparently due to the mismatch article that led to this book, and treatment that impinged on Sander's academic freedom—is shocking. Finally, at the time of the publication of *Mismatch*, Sander's request for data compiled by the California State Bar to test the mismatch thesis remained hostage in the California Supreme Court, where it remains at the time of this writing nearly a year later.

The third major theme of *Mismatch* is that "most universities' ... single-minded focus on racial identity" results in a "pervasive neglect of poor, working- and even middle-class students." Sander and Taylor make a persuasive argument that class-based affirmative action can be successfully undertaken and should replace affirmative action based on race and ethnicity.

In the late 1990s, half the black UCLA School of Law students graduated in the bottom 10 percent of the class, and half the Hispanic students graduated in the bottom 20 percent of the class. Both black and Hispanic UCLA graduates passed the California bar at a rate much lower than did their white classmates. Additionally, black and Hispanic UCLA School of Law graduates passed the California bar at a lower rate than did graduates of less elite law schools who



had similar LSAT scores and undergraduate grade point averages (which the authors call "academic indices"). Why? One explanation for this disparity was that the bar was racially biased. But the authors show that empirical research found no racial bias on the bar exam. The authors suggest that the reason for this disparity was "mismatch." Many though not all black and Hispanic law students were given relatively large admissions preferences based on race and ethnicity, so they were admitted to more elite law schools than were white students with similar academic indices. As a consequence, the black and Hispanic students tended to have lower academic indices than their classmates, and students with lower academic indices often graduated at or near the bottom of the class. Because the strongest predictor of bar exam passage was how well one performed in law school (no matter how elite the law school), this mismatch of students and law schools, created by affirmative action, "was roughly doubling the rate at which blacks failed bar exams."

One reason mismatch produced such a large negative effect on law school performance (and thus lesser success on the bar examination) was the way law professors teach. Most professors teach to the broad middle of the class. The farther a person's academic index is from the median of the student body, the more difficult it becomes to master the material. To describe

this effect, Sander used two hypothetical students, one black and one white, with the same academic index in college. The black student, he hypothesized, attended Columbia Law School, while the white students attended Fordham University School of Law, a very good law school but not as elite as Columbia. If the black student found himself in the bottom tenth of the graduating class at Columbia, and the white student graduated in the middle of the class at Fordham, the former was “three times as likely to fail the New York bar as his white Fordham counterpart.” The reason was that the Columbia graduate’s grades demonstrated “not only that he learned less than his Columbia classmates, but less than his counterpart at Fordham.”

As of the early 2000s, “about 47 percent [of black law students who enrolled in law school] were becoming lawyers,” whereas “83 percent of entering white students were becoming lawyers.” At that time, admissions preferences increased the overall pool of black law students by 14 percent, but less than a third of that 14 percent became lawyers. If the 86 percent of black students who would have been admitted to law school without affirmative action passed the bar exam at the rate their white academic counterparts did, then, with the addition of the fraction of the 14 percent who became lawyers, the overall result would be an increase in the number of black lawyers. But Sander found that mismatch “appeared to reduce the other 86 percent’s chances of becoming lawyers by nearly a third.” Sander concludes: “Admittedly, these were estimates; nonetheless, the negative effect on the success of black law students was clearly much larger than the positive effect of racial preferences in expanding the pool of blacks admitted into law schools.” Even a critic of Sander’s thesis acknowledged that, if law school admissions preferences were removed, the number of black law students who would become lawyers by passing a bar exam would remain steady.

This counterintuitive notion, that at least the same number of black law students will be licensed as lawyers without race-based admissions preferences as with such preferences, is based in large part on the theory that “[s]tudents who have much lower academic preparation than their classmates will not only learn less than those around them, but less than they would have learned in an environment where the academic index gap

was smaller or did not exist.” This sobering assessment suggests that some black and Hispanic students have been admitted to law school to make law school faculty and administrators (and their university counterparts) feel better about themselves, even as they consign those students to a reduced chance of becoming lawyers. Sander also found that affirmative action did not lead to increased overall earnings for minority students based on the credentialing effect of graduating from a more elite law school. Instead, such students will too often carry a large debt for student loans and relatively little means to pay off those loans. Given the wrenching reduction in opportunities for legal employment, the affirmative action mismatch problem requires an open discussion of the instrumental value of affirmative action.

Mismatch’s second theme—suppressing discussion of the actual costs and benefits of race- and ethnicity-based affirmative action—is distressing precisely because critics of Sander’s work too often chose not to rebut it with other careful empirical work, but to make it hard for Sander to see if his mismatch research was replicable. As Sander makes clear in the preface, he views himself as a progressive, as one interested in the economic and professional advancement of those who have suffered from discrimination. His opposition to race-based affirmative action is wholly instrumental, not ideological. Affirmative action isn’t working, and so must be changed. He and Taylor provide a variety of examples of institutional suppression of empirical work that might question the value of affirmative action. These examples describe a pattern that goes well beyond good faith disagreements about protecting the privacy interests of those individuals studied. A fair conclusion is that these examples constitute institutional malfeasance.

The problem of under-representation of African-Americans and Hispanics in the American legal profession is a continuing problem. But the work of Richard Sander strongly indicates that placing all our hopes in the power of affirmative action has generated deleterious effects for those this “solution” was designed to aid. Sander and Taylor suggest, echoing the work of others before them, that the proper turn should be to preferences based on class rather than race. They also suggest that this turn is not as difficult to implement as feared by those who continue to defend race-based affirmative

action. Discussing the issue of race is fraught with problems, but American lawyers and American society would do well to face this issue directly. ☉

Michael Ariens is a professor of law at St. Mary’s University in San Antonio, Texas, where he teaches American legal history, constitutional law, evidence, and other courses. He is the author of Lone Star Law: A Legal History of Texas (2011) and other books.

THE DIVORCE PAPERS

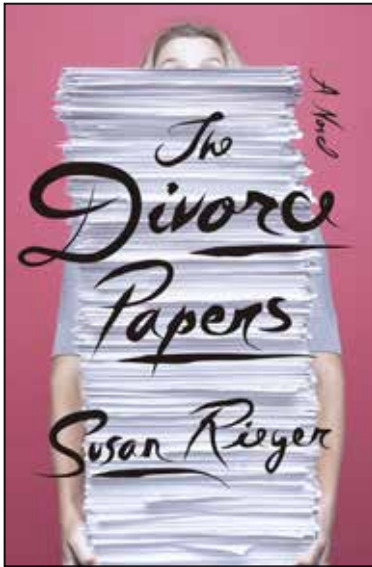
BY SUSAN RIEGER

Crown Publishers, New York, NY, 2014. 461 pages, \$25.00.

Reviewed by JoAnn Baca

This first novel by lawyer Susan Rieger is a charming account of a divorce. If that sounds improbable, it is because you have not yet cracked the covers of this unusual and engaging novel. It is not only a terrific story, but the protagonist, Sophie Diehl, is as three-dimensional as a character on paper can be.

The Divorce Papers has no narrator, but is told through e-mails, memoranda, letters, draft agreements, and other documents pertaining to Diehl’s first divorce case and to her personal life during the case. Diehl is an almost-30-year-old associate in the prestigious firm of Traynor, Hand, Wyzanski in New Salem, a fictitious city in the fictitious state of Narragansett. She has specialized in criminal defense work during her year and a half with the firm. She likes criminal law and is good at it, having settled in comfortably at the firm and gained a mentor with whom she has an easy camaraderie. When Maria Durkheim, the daughter of a major client, comes to the firm to find a lawyer to handle her divorce, none of the firm’s divorce specialists is immediately available, and Diehl reluctantly steps in to do the intake interview. Diehl advises the client to have one of the divorce specialists handle her case, but, unfortunately—in Diehl’s view as well as that of some of the partners—the client ignores Diehl’s advice and insists that Diehl represent her. Diehl tries to convince the partners that her “rank inexperience as a lawyer who’s never done a civil case, let alone a divorce,” should preclude her from handling the case. She adds, “I am ill equipped tem-



peramentally. ... I don't like divorcing parents. I had my very own set, both of whom behaved very, very badly in ways that would make your hair stand on end."

Diehl's protestations, for which the members of the law firm feel varying degrees of empathy, nonetheless cannot trump the fact that Durkheim, who is from what is considered New Salem royalty, insists that Diehl is the only lawyer in the firm with whom she will work. Durkheim does not even balk at paying extra to allow a divorce specialist in the firm to oversee Diehl's work. The specialist explains things to Diehl, such as that the members of the firm that Durkheim's husband has hired are "not good lawyers, only mean ones, but the latter often passes for the former."

Diehl embarks on a crash course to provide her client the best representation she can, stressing and second-guessing herself at every turn, and running into resistance and criticism from within the firm. She is a fish out of water, but captivates us due to her honesty and diligence as she faces a steep learning curve. Rieger doesn't set her protagonist up as Super Lawyer; time and again she is brought up short by her imperfect understanding of how to handle a divorce case.

Maria Durkheim is being divorced by her husband of 16 years, Daniel, a superstar in the field of pediatric oncology. The Durkheims' daughter, Jane, has a good relationship with both her parents, but the acrimony of the divorce is causing her severe distress. In the memoranda and letters she provides, Rieger skillfully reveals the emotional and mental strain of the divorce upon her client, allowing glimpses into the inner-

most thoughts of client and attorney alike as the divorce negotiations progress. The novel portrays the divorce process well, as all parties learn, even if against their will, how to navigate within the rules.

Interwoven within the larger story is that of Diehl herself, how her parents' marriage and divorce affected and shaped her, and how her upbringing affects her relationships with men. Through e-mails and notes, Diehl and her best friend Maggie Pfeiffer, an actress, show how good friends help each other through everything from workplace jitters to new-boyfriend ecstasy to parental visits, each bit of correspondence revealing how a solid friendship can be a bulwark against life's storms.

Being a state, Narragansett has its own dissolution-of-marriage statutes and legal precedents, which allows Rieger to avoid having her lawyer-readers assess the accuracy of her descriptions of any real state's divorce laws. But the law does not take center stage: the personal grudges and demands of the divorcing couple, and their root causes, do.

Rieger's writing is clever. For instance, Diehl suggests to her friend that newspapers ought to print "separation and divorce announcements, to go ... alongside (as a bracing, cautionary note) the engagement and wedding announcements. ... [I]t would operate as a combo stealth dating service and real estate classified section. And there could be pictures—wedding photos torn in half. People love this kind of thing." Her writing can also be witty enough to provoke laughter. For example, Diehl reveals her mother's advice to "never make sacrifices for your husband or children; they hold it against you forever."

At one point, Diehl's father tells her that his family physician "sent me to a barber-shop quartet of specialists, all eminent but with the personality disorders we would expect to find. ... They were in descending order of pathology: Sweeney Todd (bass/classic butchery), Dr. Who (baritone/robotic laparoscopy), Johnny Appleseed (countertenor/radiation pellets), and Jack Frost (tenor/cryosurgery)." As this quotation suggests, Rieger's novel contains cultural references that add to the pleasure of the reader who recognizes them. For another example, as the novel begins, Pfeiffer talks about performing in Tom Stoppard's *The Real Thing*. Although being unfamiliar with the play doesn't diminish one's understanding

of Rieger's story, knowing that the play is about a troubled marriage adds something to it. Rieger does a bit of preaching too. When Diehl admits to her mentor at the firm that she had to ask where a particular snippet of poetry came from, he comments upon the whole younger generation: "I read it in English 101 my freshman year. ... Maybe we old guys were better educated back then, but that's no excuse for not having read Keats. ... People over 21 are allowed to read Keats. Your education doesn't stop when you graduate."

Diehl is a character you will like immediately and want to get to know better. She, her friends, family, and co-workers are deliciously interesting. Even when it plumbs the depths of a divorce negotiation that includes settlement offers and memoranda of law and fact, Rieger's writing is crisp and irreverent and highly entertaining, and its epistolary style not only makes for quick reading, but saves one from feeling voyeuristic as one enjoys the naughty personal details of the characters' lives. *The Divorce Papers* is a must for summer reading, but it also might serve as a great gift for any friend who is contemplating a divorce. Maria Durkheim already paid for the advice, so why not pass it along? ☺

JoAnn Baca is retired from a career with the Federal Maritime Commission. Her husband, Lawrence Baca, is a past president of the Federal Bar Association.

THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS

BY MICHAEL AVERY AND DANIELLE
McLAUGHLIN

Vanderbilt University Press, Nashville, TN, 2013. 294
pages, \$35.00.

Reviewed by Heidi Boghosian

In 2005, the Associated Press, the *Washington Post*, and other media, were forced to print corrections after reporting that Supreme Court nominee John G. Roberts Jr. was a member of the Federalist Society. Although Roberts was listed in the Federalist Society's 1997-1998 leadership directory as a member of the steering committee of the Washington, D.C., chapter, when he was a partner at the D.C. law firm

of Hogan & Hartson, the chief justice claims to have no memory of having been a member. Why was it important to disavow the affiliation? It is likely because, although the Federalist Society holds itself out as a forum for the exchange of legal viewpoints, it is in fact the standard-bearer of uncompromising conservative legal thought of the late 20th and early 21st centuries, and its influence spreads more effectively under the radar. If this seems duplicitous, it is. Their members know how radical they are, but they have camouflaged their extremist views to gain legitimacy.

Inscrutability is, by design, a hallmark of the Federalist Society and its 45,000 members. It was founded in 1982 as a law student organization in response to what its website describes as a legal profession “strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society.” Calculated public relations initiatives include training members as media spokespersons while also ensuring that their affiliation with the Society is underplayed or hidden. According to a 2005 *New York Times* article, the Society hired the public relations firm Creative Response Concepts (the firm that represented Swift Boat Veterans for Truth, whose ads maligned John Kerry’s war record) to train members and place them on television shows during Roberts’ confirmation process.

In *The Federalist Society: How Conservatives Took the Law Back from Liberals*, Michael Avery and Danielle McLaughlin analyze how the Federalist Society has mentored young conservative attorneys and placed them in positions of ideological influence in politics and the law. The book’s significance lies in its tackling a powerful society, the most influential members of which often refuse to own up to their membership or allegiance. Long fascinated by the Federalist Society, Avery is a civil rights attorney, law professor, and former president of the National Lawyers Guild. McLaughlin is an associate at Nixon Peabody LLP in Boston. Together, they bolster well-researched insights with a daunting amount of information. Avery and McLaughlin demonstrate that the Federalist Society has operated during the past three decades to undermine New Deal programs and subsequent ones designed to provide relief for the poor and unemployed.

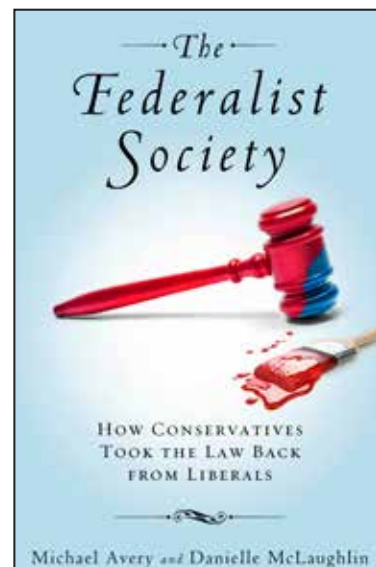
The Federalist Society was formed in 1982, during Ronald Reagan’s tenure in the

White House, as reactionary policies were being turned into law. It came of age a few presidential administrations later, according to Avery and McLaughlin. “The high point for Federalist Society influence in government,” they write, “was the second term of George W. Bush. By the time President Bush left office, what had begun as a counterestablishment movement had become the establishment.” Edwin Meese played a crucial role as Reagan’s attorney general, and later as a principle figure at the Heritage Foundation, in opening doors for young conservatives, helping them to land clerkships with influential judges, become judges themselves, secure jobs in leading corporate law firms or in the White House or Department of Justice, and expand their network of influence. This network, with its emphasis on filing amicus briefs, issuing publications, and holding a blitz of programs annually, has shaped the makeup of the federal judiciary and political discourse, up to and including who runs the country, as brought to light by its role in the 2000 Florida voting recount.

Generous financial support has helped nurture and sustain the Federalist Society. In researching the Society’s funding, Avery and McLaughlin note that most of its foundation grants have been unrestricted in nature, thereby giving the Society “the freedom for long-term goal setting and institution building.” Its five largest funders, which include the Olin Foundation and foundations operated by the Koch brothers, contributed more than \$17 million in grants, of which nearly \$12 million were unrestricted.

In 2010 alone, the Federalist Society sponsored more than 1,100 law school events attended by more than 70,000 people. Debates at these events provided a forum in which the Society could “air conservative views in a neutral environment” and provide the chance to introduce students to eminent conservatives.

Four members of the Supreme Court—Scalia, Alito, Thomas, and Roberts (despite his lapsed memory)—are or have been members. Federal and state courts, including the Supreme Court, have considered and ruled on a plethora of cases brought by Federalist Society members challenging affirmative action, economic regulation, and marriage equality, and invalidating laws that provide access to court by consumers, environmentalists, and labor activists. Avery and McLaughlin note, “The Federalist Society has moved the judiciary further to the right



than the traditional orientation of judges appointed by Republican presidents. ... [T]he judicial decisions of appointees of Presidents Reagan, Bush Sr., and George W. Bush were more conservative than the appointees of Presidents Eisenhower, Nixon, and Ford.” They cite “ideological amplification” as one explanation of “the ever increasing influence of the Federalist Society approved judges on the law.” This is “the tendency of both Democrats and Republicans to become respectively more liberal or more conservative the more of their party members there are on the panel” (the three-judge panels of federal courts of appeals).

The Federalist Society focuses on legal doctrine related to government regulation of economic rights and private property, and post-New Deal jurisprudence. Since 1937, when the Supreme Court approved progressive legislation, outlining when government regulation of private property is constitutional, conservatives have fought to build into the law obstacles to the regulation of private property. Avery and McLaughlin explain how conservatives have used the Takings Clause in their efforts, arguing that any time government regulates private property it is a taking. During the George W. Bush administration, they also began to argue that federal regulations preempted state tort suits, so that, if people were injured by a drug, for example, they couldn’t sue under state tort law if the Food and Drug Administration had approved the drug. The Federalist Society continues to aggressively pursue this agenda.

An appendix to *The Federalist Society*, titled “Federalist Society Members and Allies,” is a veritable *Page Six* of the legal

world. It provides painstakingly compiled brief professional biographies of “people who speak frequently at Federalist Society meetings and debates, publish in Federalist Society journals, or who work closely with Federalist Society members on lawsuits, amicus briefs, or public issue campaigns.” In a radio interview, Avery called the people named in the appendix “the 100 most powerful people in the country and most of them you never heard of.” He noted that about half the judges that George W. Bush appointed to courts of appeals were members of the Federalist Society. Perhaps even more important is that Federalist Society members and allies in the White House and the Department of Justice vetted every appointment the younger Bush made. The same held true for his father: C. Boyden Gray, then White House counsel and now a member of the Federalist Society’s board of directors, and his principal aide Lee Liberman Otis, a Federalist Society founder, had primary responsibility for vetting federal judges for the elder Bush.

Progressives can learn a lot from the Federalist Society. Liberals are often so concerned with specific aspects of political messages that they fight with one another and fail to move forward on broader social agendas. Federalist Society members have agreed to disagree, finding it better to tolerate disagreement among themselves than to be 100 percent right all the time. As the authors write, “Through its network, its institutional projects, its publications, and its debates, it spreads a realist world view that is hinged on an originalist interpretation of the Constitution and tied to the protection of sovereignty at all costs. This view has taken hold. ... Presidents have seized on the unitary executive theory as a means to reject international law and to place their constitutional interpretation above all others.”

The Federalist Society imparts a singularly useful lesson of how conservatives, armed with abundant funding and a long-term strategy, have shaped the legal landscape in America. It is an especially invaluable contribution to legal literature given the lack of transparency in how this shift has transpired over the past three decades. ☺

Heidi Boghosian is the executive director of the National Lawyers Guild and the author of Spying on Democracy: Government Surveillance, Corporate Power, and Public Resistance (City Lights Books, 2013).

MURDER AT THE SUPREME COURT: LETHAL CRIMES AND LANDMARK CASES

BY MARTIN CLANCY AND TIM O'BRIEN

Prometheus Books, Amherst, NY, 2013. 410 pages, \$26.00.

Reviewed by Paula Mitchell

The debate over the death penalty in the United States has long been framed in terms of its morality and constitutionality. In *Murder at the Supreme Court: Lethal Crimes and Landmark Cases*, Martin Clancy and Tim O'Brien rightly point out that there is no consensus about the morality of the death penalty in the United States. They also concede that, “given its deep roots in our history and the specific references to the practice in the Constitution, ... the death penalty is not unconstitutional per se.”

Rather than belabor either of those longstanding and unwinnable debates, Clancy and O'Brien—both ABC News veterans who have covered capital punishment for more than 30 years—examine the nation's *actual experience* with the capital punishment through the lenses of legal news reporters. The authors walk the reader through the evolution of our death penalty jurisprudence by examining an array of carefully selected Supreme Court rulings in capital cases. They conclude that our experience with the death penalty as a nation shows “that we, as a society committed to due process and the rule of law, have become incapable of implementing it in a meaningful, rational, nondiscriminatory manner.” They believe not only that the system is broken, but that it “cannot be fixed.”

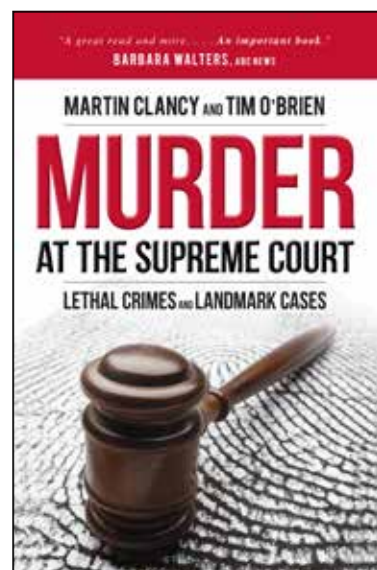
Relying on a variety of source materials, the authors lay bare the sordid details surrounding the perpetrators, their crimes, and ensuing legal proceedings of some of the high court's most important death penalty cases. Throughout the book, graphic crime scene photos add texture to the already gruesome crimes recounted. Readers are invited to view video footage through hyperlinks to various supplemental audio and video materials, including audio recordings of some inmates' last words and news footage featuring the authors themselves covering the stories as they were unfolding. The authors' journalistic integrity is exhibited in their decision to highlight the perspectives of the victims who have been left behind—perhaps the most heartbreaking part of

the book. Overall, this journalistic approach works to corroborate the authors' views regarding the irrational and discriminatory manner in which capital punishment has been meted out over the years.

Clancy and O'Brien reveal just how close the Supreme Court has come to ending the death penalty at various points by including notes taken by the justices during post-argument conferences in some of the Court's most difficult cases. The justices' notes both telegraph the difficulty these cases present to the Court and reveal the shifting views and the struggle among the members of the Court to reach a consensus on one capital case after another. Ten of the 15 cases profiled in the book were decided by a 5-to-4 vote.

As the authors point out, “capital punishment continues to have widespread popular support from a public that is repulsed by violent crime. Yet many still struggle with the idea of state-sponsored killing, including the justices who sit on the Supreme Court.” Indeed, five members of the Court—Thurgood Marshall, William Brennan, Lewis Powell, Harry Blackmun, and John Paul Stevens—all came to oppose the death penalty, albeit at different times. Justice Stevens concluded in the end that the death penalty represents “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.”

The capital cases profiled in *Murder at the Supreme Court* illustrate with inescapable clarity that the rules we apply in death penalty cases are mercurial. This fact alone is cause for great concern and perhaps reason enough to consider ending the death



penalty once and for all.

How is the application of the death penalty mercurial? First, there are the rules governing *which crimes* may be punishable by death. In early America, for example, the Colony of Virginia established in 1610 that any man shall be punished with death who commits the “detestable sins of Sodomie” or “Adultery,” or who “shall ravish or force any woman, maid or Indian, or other.” Other colonies made counterfeiting, horse theft, and arson capital offenses. The crime of rape was a capital offense throughout most of American history. By 1954, rape was punishable by death in 18 states. In 1977, however, in *Coker v. Georgia*, the Supreme Court declared that “a sentence of death is grossly disproportionate and excessive punishment for the crime of rape, and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.” 433 U.S. 584, 592 (1977). Similarly, in 1982, the Supreme Court declared in *Enmund v. Florida* that the Eighth Amendment does not permit imposition of the death penalty on a defendant who is charged with aiding and abetting a felony that resulted in a murder being committed by another, where the defendant did not himself kill, attempt to kill, or intend that a killing take place or that lethal force be used. 458 U.S. 782, 797 (1982).

So what does the system say to those who were executed under criminal laws that were later repealed as unconstitutional, rendering their offenses no longer punishable by death as a matter of law? “We’re sorry?”

Another rule that has changed concerns *who* may be punished by death. Until about 10 years ago, there was no constitutional prohibition on executing defendants who were mentally incapacitated. But that changed in 2002 when the Supreme Court decided in *Atkins v. Virginia* to “put an end to the execution of anyone who met their state’s definition of mental incapacity.” Similarly, in 2005, the Court decided in *Roper v. Simmons* that juveniles are “categorically less culpable” than average criminals and, therefore, that executing juveniles violates the Eighth Amendment. The book superbly illustrates, here again, how the inconsistent application of the death penalty compromises its legitimacy as an institution. What do we say to those executed prior to *Atkins* and *Simmons* who fit the description of persons the Supreme Court later determined were constitutionally beyond the reach of the death penalty?

One of the more macabre ever-changing rules governing the administration of the death penalty concerns *permissible methods* of execution. As the authors explain, early executions in the United States were carried out by “breaking on the wheel,” “gibbeting (hanging the criminal’s body in public for weeks or months after execution), and ... by burning.” Hanging became the primary instrument of execution for much of the country until the 1920s.

In 1881, a coroner in Buffalo, NY, performed “an autopsy on a man who had, while intoxicated, stumbled against a generator terminal in a power plant.” The coroner reported that the man had died immediately and apparently painlessly. “A three-man commission ... unanimously reported that electrocution was ‘the most humane and practical method of carrying into effect the sentence of death.’” When electrocution became the accepted execution method of the day, both Thomas Edison and George Westinghouse fought the state’s attempts to use their electricity to execute prisoners because they did not want their “brand” tarnished by its use in executions. Westinghouse lost the battle, but not before financing a case that went to the Supreme Court challenging the use of the electric chair as cruel and unusual punishment. The Supreme Court disagreed and upheld the New York state legislature’s determination “that the use of electricity as an agency for producing death constituted a more humane method” of carrying out executions. *In re Kemmler*, 136 U.S. 436, 443 (1890). By 1950, 25 jurisdictions had wired up their own electric chairs. Over time, however, the “humaneness” of electrocution came under attack, fueled by occasional botched executions during which “condemned men would be ‘executed’ twice, or would die amid flames, smoke, and stench.”

In the search for more humane methods, 11 states adopted the use of lethal cyanide gas. The warden at San Quentin between 1940 and 1952 presided over 90 gas chamber deaths and reported that the executioner likes gas better than electrocution “because he didn’t feel so directly responsible for the death of the condemned.” As with electrocutions, however, the gas chamber was also prone to malfunctions, causing results that were troubling to watch and that “were enough to nauseate prison employees who had witnessed hundreds of hangings.”

“The unspoken element in the search

for ‘more humane’ methods of execution was the effect on executioners, prison staff, and witnesses, not simply the pain of the condemned.” Enter execution by lethal injection. Texas carried out the first lethal injection execution in 1982. Since then, there have been more than 1,000 executions by lethal injection nationwide. Hailed by its advocates as the most humane method of carrying out executions, lethal injection is not without its problems. For example, as the authors point out, doctors and other medical professionals, needed for the intravenous administration of the drugs, feel constrained from participating by the codes of their profession. Controversy also surrounds the use of certain drugs, such as pancuronium bromide, which is illegal for euthanizing animals and is considered cruel by the Veterinary Medical Association. Just as Edison and Westinghouse wanted nothing to do with the electric chair for fear of tarnishing their “brands,” manufacturers who produce drugs used in executions have been increasingly shutting down production. In 2011, for example, Hospira, the sole drug maker in the United States that produced sodium thiopental, announced that it would no longer manufacture the drug, because it does not condone its use in capital punishment.

Although lethal injection litigation has stalled executions in some jurisdictions, in *Baze v. Rees*, the Supreme Court upheld the procedures used in Kentucky, finding that “the Constitution does not demand the avoidance of all risk of pain.” The Court stated that “progress has led to the use of lethal injection” as the “more humane” method of execution. 553 U.S. 35, 41 (2008).

If the Court’s ruling sounds familiar, it may be because it is reminiscent of its 1890 ruling that the electric chair was not cruel and unusual punishment but “constituted a more humane method” for carrying out executions. As Clancy and O’Brien put it, the “search for the most efficient and ‘humane’ method of execution, fine-tuning the process of death, continues.”

The authors demonstrate that the death penalty has frequently been implemented in a discriminatory manner but that, unlike in the cases discussed above, the rules governing the presence of racial discrimination in death penalty jurisprudence do not appear to be rules the Supreme Court is willing to change. The book profiles *McKleskey v. Kemp*, in which the majority of the Court

rejected as evidence of race discrimination the findings presented in the Baldus study. The now-infamous Baldus study delved into 2,484 murder cases and concluded that defendants charged with murdering a white victim were 4.3 times more likely to be sentenced to death than those charged with killing black victims, and that black defendants who kill white victims have the greatest likelihood of receiving the death penalty. The Court was again split 5 to 4. Justice Powell was assigned to write the opinion for the majority. He rejected the Baldus study out of hand as indicating, at most, that “a discrepancy that appears to correlate with race.” In what some may consider to be the most tragic of all ironies, after his retirement, Justice Powell said that his views on capital punishment had changed radically and that if he could change his vote in any one case, it would be in *McCleskey* and in every other death penalty case, because he had come to believe that the death penalty should be abolished.

The fact that Martin Clancy is an investigative journalist and that Tim O'Brien is a lawyer, and that they have both reported on capital punishment for more than 30 years, lends enormous credibility to their conclusion that the death penalty in America has not been and cannot be implemented in a meaningful, rational, nondiscriminatory manner. A national consensus seems to be emerging that the authors are right that capital punishment is not a viable option. Since 2007, six states have repealed the death penalty and more states are considering following suit. ☉

Paula Mitchell is Counsel in the Appellate Practice Group of Reed Smith LLP. Prior to joining Reed Smith, Paula was a career law clerk for Senior Circuit Judge Arthur L. Alarcón on the Ninth Circuit Court of Appeals, with whom she has written and published extensively on the subject of the death penalty in California.