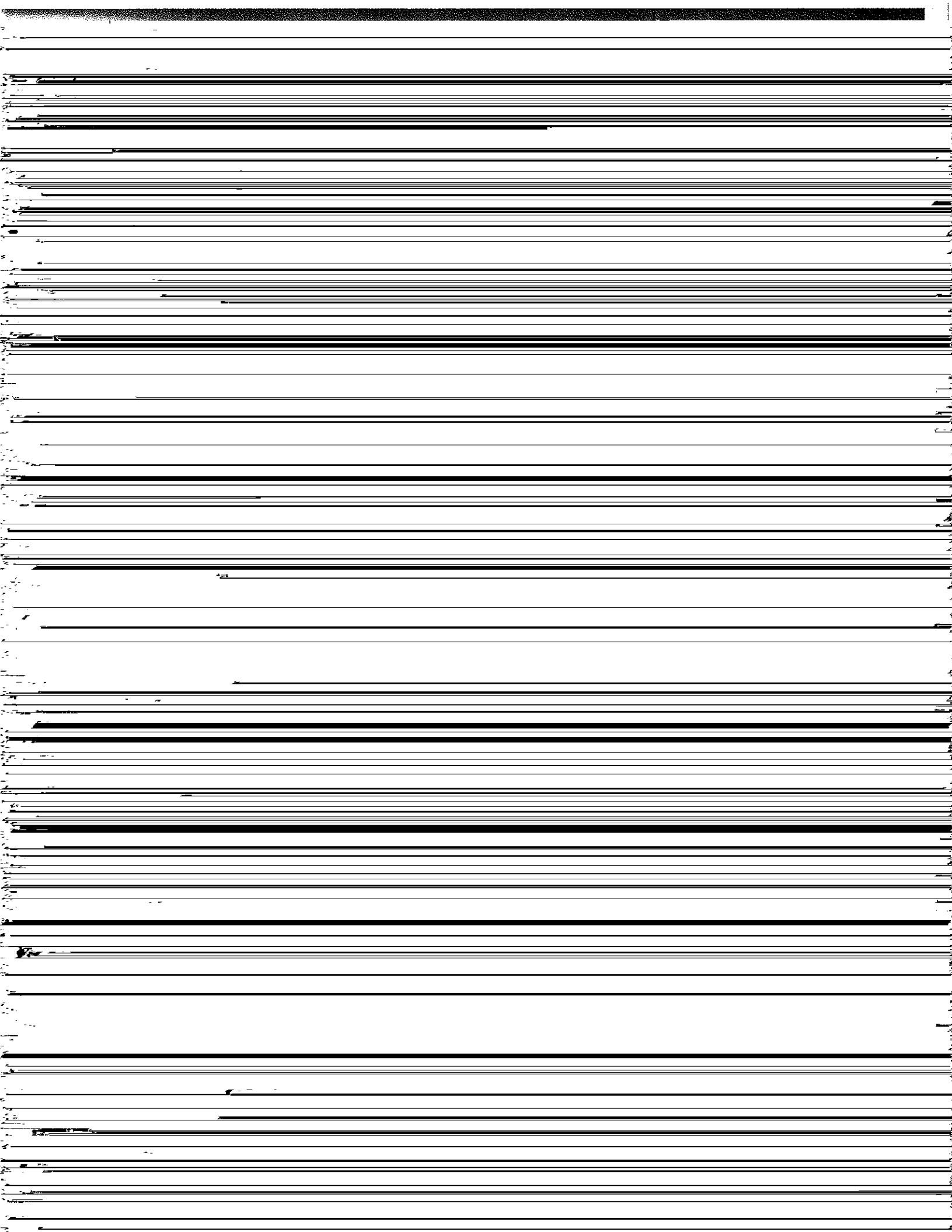


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client, Steve Edward Roach, whom I had represented for nearly four years: the second juvenile executed by the commonwealth in the first two weeks of January 2000.³

So I write this review from a position of one who understands the legal reasoning of Professor Peppers, and who has shared the searing experiences of Ms. Anderson.

Chris Thomas was executed for his role in a double murder: the gruesome shotgun killings of the parents of his girlfriend, Jessica Wiseman. There is no question that the murders were committed as part of a plot hatched between the couple, driven by her parents' insistence that they stop seeing each other. Of course, many readers of this review probably recall having been ordered by a mother or father in their teenage years to break off relations with their one true love. Some obeyed, and some did not. But none felt driven to commit a brutal murder as a response. The authors do not ask sympathy for their confused subject, who had no support or reservoir of self-esteem with which to deal with such a development. They do not make excuses, nor do they proffer explanations. They recount the facts, including the facts of the killings of J. B. and Kathy Wiseman, but also the facts of Chris Thomas's desperate and lonely life.

Many who write about the system of judicial executions in the United States—whether in scholarly journals or in the popular literature—emphasize the essential randomness with which the penalty of death is handed down by judges and juries. Whether someone is sentenced to die may depend, in the end, on the identity of the lawyer assigned from the roster of those willing to do the work of representing such defendants. Or it may turn on some incredibly arcane point of construction of the dense, unreadable Antiterrorism and Effective Death Penalty Act, which governs the availability of post-conviction relief in federal courts.⁴

But the book under review presents a compelling demonstration of one particular aspect of the arbitrariness with which the state's ultimate penalty is doled out, almost always to those who are unable, emotionally and especially financially, to contribute to their own defense. In Virginia, as in many states, a prosecutor may seek death only for the crime of "capital murder," which is defined to include a murder in the first degree compounded by a characteristic that makes it substantively "worse" than a garden-variety homicide. So, for example, a murder committed in the course of another first-degree felony, like robbery or rape, will qualify. So too will the killing of a police officer or (as in this case) a multiple murder.

Even after a defendant is proved guilty of capital murder, the prosecution must demonstrate the presence of an "aggravator" to persuade the jury to recommend that the defendant be sentenced to die.⁵ In Virginia, an "aggravator" may be found when

³ I wrote about my experiences on January 13, 2000, in "How Steve Roach, of Stanardsville, Virginia, and Kingman Brewster, President of Yale University, Combined to Teach Me About the Meaning of Democracy," *University of Toledo Law Review* 35 (2004): 641-653.

⁴ See the Antiterrorism and Effective Death Penalty Act, as amended, and especially 28 U.S.C. § 2254(d).

⁵ In Virginia, as in most states, the jury merely "recommends" a sentence of death or life without parole; it is up to the judge to pronounce sentence. This system is meant to allow members of the jury to distance themselves from actually ordering that the life of a fellow human being be taken.

the crime was especially "vile," meaning that an excessive degree of force was used, or the victim was subjected to egregious indignities such as being forced to beg for his or her life. Another "aggravator" asks the jury to decide whether the defendant, if allowed to live, would pose an unacceptable risk that he might commit additional acts of violence.

Chris Thomas was prosecuted for capital murder on the grounds that he was responsible for killing both of Jessica Wiseman's parents. His defense team did not contest the charge that he had murdered her father. Yet there was substantial reason—elaborately and dispassionately explained by the authors based on facts in the record—to believe that Jessica, and not Thomas, fired the shot that killed her mother. The only people alive at the time of Thomas's trial who knew what really happened were Chris and Jessica. He did not testify;⁶ she took the stand, but, although a juvenile already convicted for her role in the killings, invoked her rights under the Fifth Amendment not to provide testimony that might tend to incriminate her.⁷ There was forensic evidence, but it was equivocal. Nevertheless, the jury concluded, beyond a reasonable doubt, that Thomas had fired both fatal shots.

The authors deal straightforwardly with the evidence that the plot to kill the Wisemans was premeditated, as surely it was. But the question for the jurors was much more specific: it was whether Chris Thomas was guilty of a single homicide or two. If one, he could be sentenced to life without parole, but not to death. The defendant's life hung in the balance as the jurors deliberated on whether he had killed one person or two people on that fateful night. And Chris Thomas was executed based on the jurors' inference that he, and not she, fired the point-blank shotgun blast that ended the life of Kathy Wiseman. How the members of the jury reached that conclusion with such confidence will never be known.

The "aggravator" on which the prosecution relied in seeking capital punishment for Thomas was "future dangerousness." The term is a misnomer, as even a cursory review of the question the jury must address will show. "Is there a probability," the members of the jury are asked, "that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society?" An affirmative answer, beyond a reasonable doubt, is required for the sentencing recommendation to be death.⁸

⁶ The authors provide a compelling argument that the failure of Thomas's counsel to put him on the stand was literally a fatal error, not least because, in their opening statement to the jury, counsel promised that Thomas would explain what happened on the night of the murders. But they had not developed their defense strategy sufficiently, and their promise to the jury was broken. One can only imagine what the jurors must have thought, despite the judge's instruction that no negative inferences should be taken from any defendant's assertion of his constitutional right not to testify.

⁷ As a juvenile, Jessica Wiseman was not actually "convicted" of anything. (It is a common misunderstanding: in refusing to intervene on the day of his execution, Governor James S. Gilmore III incorrectly observed that Steve Roach had been "convicted" of several earlier "felonies.") She was found "involved" and was remanded to custody until her eighteenth birthday.

⁸ The authors' discussion of the penalty phase of the trial, pp. 118-140, is especially compelling.

Yet most English speakers recognize immediately that they cannot say what “would” happen unless they are provided a factual assumption or predicate.⁹ “Would” Chris Thomas kill again, in the highly improbable event that he was confronted with the same circumstances? Or “would” he kill again if he were angry enough? “Would” he commit acts of violence if he were sentenced to life imprisonment without the possibility of parole? Or “would” he use a firearm if he were in a position to do so without being apprehended? While the Supreme Court has upheld such counterfactual and ultimately nonsensical questions—presenting the very real possibility that the twelve members of the jury are interpreting this vital interrogatory in twelve different ways—as constitutionally adequate guidance, it is nearly impossible to understand how Thomas’s jury could have come to the conclusion beyond a reasonable doubt that this teenager, without any significant record of violence, had been transformed into a career murderer.

Surely the authors are correct in pointing out the literally fatal strategic and tactical mistakes made by Thomas’s defense counsel at trial. Surely the system that provides overworked and underpaid appointed lawyers to represent people on trial for their lives is broken. If there is one characteristic shared by everyone on Death Row in the United States today, it is not race, not pathology, and not even poverty as such: it is having had inadequate assistance of counsel at trial.

Our system is supposed to protect clients against the ineffectiveness of their defense counsel through the ancient writ of habeas corpus. Reviewing courts are meant to determine whether the assistance of defense counsel was sufficiently “effective” to meet constitutional standards, and whether the trial judge properly applied the law. But no one who has ever been involved in the representation of a Death Row client has any faith that habeas corpus procedures are not just as arbitrary in their application as the unreviewable rulings made by trial judges in the courtroom. So flimsy are the vagaries that separate life from death in our capital jurisprudence.

Had even one member of the jury had the courage to question seriously whether Kathy Wiseman was killed by the defendant rather than her own daughter, Chris Thomas would be alive today. Had counsel retained the services of a mitigation expert, who would have shown them how to present their client in a light not as harsh as that shone by the commonwealth, Chris Thomas would be alive today. Had the state or federal court on collateral review found that it was ineffective assistance for defense counsel to promise the jury an account of the killings from their client himself and then fail to follow through, Chris Thomas would be alive today.

None of those things happened. And because they did not, Douglas Christopher Thomas was executed by lethal injection on January 9, 2000.

The authors recount, through the eyes of Laura Anderson, the last hours of Chris Thomas’s life. They describe how, as he was led to the death chamber, his

⁹ Moreover, there must be some legitimate doubt about the hypothetical premise: it cannot be taken as a given. A deeply religious person, if asked whether she “would” act in a certain way if God existed, would surely not be able to answer the question, since to do so would concede that the existence of God is indeterminate.

cellmate, Steve Roach, fell to his knees in prayer for his young friend. I know that this anecdote is true, because on the very next day, Steve told me about the execution that had taken place the night before. He told me of his friend's courage in facing his jailers and walking calmly through the door from which he knew he would not exit alive.

Four nights later, Steve Roach—who for reasons no one will ever understand murdered his elderly neighbor, one of the few people on Earth who had ever cared for him—walked those same steps. He set for himself the challenge of dying with no less dignity than had his friend. I was there as he met that challenge.

The executions of Douglas Christopher Thomas and of Steve Edward Roach did not restore the victims of their crimes to life. They did not deter, and will not deter, any other dysfunctional and neglected young person from committing similar horrible acts. What those executions did do, however, was permit us to ignore our inability to devise a system of punishment that does not demean and degrade the state, and therefore all of us, by assigning its resources and personnel to the methodical killing of human beings. The trials and convictions of those two young men—both of whom committed unspeakable acts of violence entirely unanticipated in light of anything in their pasts—were no more than exercises in what the late Justice Harry Blackmun derisively called "tinkering with the machinery of death."¹⁰

Professor Peppers and Ms. Anderson have written an important book, which brings these abstractions down to the very real, personal story of Douglas Christopher Thomas, a murderer, who was killed by the commonwealth of Virginia ten years ago to show other people that killing people is wrong. jsj

¹⁰ *Callins v. Collins*, cert. denied, 510 U.S. 1141 (1994) (Blackmun, J., dissenting).