Book Review

A Peculiar Study of the American Death Penalty

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PECULIAR INSTITUTION: THE AMERICAN DEATH PENALTY IN THE AGE OF ABOLITION. By David S. Garland*. Cambridge: Belknap Press of Harvard University Press, 2010. Pp. 417.[*] $35.00.

In America, more people die of lightning strikes than state-administered lethal injection; most prisoners on death row die of natural causes related to aging.[1] One might conclude that the modern death penalty, like some rare disease, properly concerns only the few people it affects. But on hearing "death penalty," many people rush headlong into arguments about it, such as whether it deters,[2] or does not deter;[3] whether it marks a vital expression of community outrage,[4] or debases us into a state of savagery and backwardness;[5] whether it is essential as retribution,[6] or is needless and ineffectual.[7]

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[*] Hereinafter cited by page number only.
[1] *See* p. 312.
[2] *See* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005). *See also* Paul G. Cassell, *In Defense of the Death Penalty*, *in* DEBATING THE DEATH PENALTY 192-93 (Paul G. Cassell & Hugo Bedau eds., 2004).
[3] *See* p. 245.
[4] *See* Alex Kozinski, *Tinkering with Death*, THE NEW YORKER, February 10, 1997. *See also* Cassell, *supra* note 2, at 198.
[5] Justice Thurgood Marshall wrote in his concurrence in *Furman v. Georgia*, 408 U.S. 238, 371 (1976), which held death penalty statutes as applied unconstitutional,

In *Peculiar Institution: America's Death Penalty in an Age of Abolition*, David S. Garland seeks to explain the bitter politics and cultural tensions surrounding the death penalty. Garland's careful and thorough study of the death penalty makes his book an important addition to the admittedly crowded shelf of resources about the death penalty.

Garland does not want to argue. By training he is a sociologist, and apropos of this social-scientific background, he aspires in *Peculiar Institution* toward a studied detachment from the emotional death penalty discourse. As he writes, "The aim of this book is not to challenge the legitimacy of American capital punishment . . . . Rather, it is to describe and explain [it]."[8] He takes up what he calls "a new challenge for analysis," namely, "the need to make sense of the peculiar institution that has emerged in the United States since the 1970s."[9]

The problem with his supposedly objective approach is that the suggestion that someone needs to "make sense" of the institution is itself a rather loaded argument. He writes that the "practice of capital punishment in America today is as much about discourse as it is about death, and as much about cultural politics as it is about the punishment of crime."[10] In so doing, he essentially argues that the severest punishment practiced in this country is less significant as a punishment than as a subject of discussion and a token of certain political commitments.

Notwithstanding the judgment implicit in his approach to studying the death penalty, Garland offers a new and valuable perspective by probing antiseptically into the cultural conflicts that make the American death penalty difficult to understand. In doing so, he offers a number of provocative hypotheses about the current character and shape of the discussion. His most curious proposition is that the American death penalty arises from a fixation with death.

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that abolition marked "a major milestone in the long road up from barbarism" and served to celebrate "civilization" and "humanity."

[6] *See* IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 198 (W. Hastie trans., T. & T. Clark 1887).

[7] *See* Hugo Bedau, *Survey of the Death Penalty in America Today*, *in* DEBATING THE DEATH PENALTY, *supra* note 2.

[8] P. 10.

[9] *Id.*

[10] P. 7.

Specifically, he theorizes that the mix of contradictions entailed in support for the death penalty arise from a desire to control, if not withstand, our own death.[11] Some of his other theories look to the modern American political structure to explain why the United States, as a nation, continues to lag behind other Western democracies and may do so indefinitely.

Garland begins his investigation of the American death penalty by describing three "peculiarities" about the death penalty in the United States. The first is that, of all modern Western democratic nations, only the United States has jurisdictions that still impose the death penalty. For Garland, what makes the United States peculiar as a laggard is that its pathway toward the current state of compromise—some executions are acceptable some of the time—closely resembles the pathway in other Western nations that led to abolition. The second peculiarity is that America's enacted forms of the death penalty are "ambivalent and poorly adapted" to the stated aims of criminal justice. That is, the death penalty in America does not work very well.[12] The causes of this ambivalence and ineptitude are as fascinating as the tragedies they entail, and indeed, the strongest analyses in the book attempt to explain this pathology. The last peculiarity is the persistent connection between the American institution of the death penalty and the legacy of lynching and racialized violence. The original "peculiar institution," slavery, is the specter of the modern death penalty in America.

In addition to examining these major peculiarities, Garland provides a comprehensive history of the death penalty. Essentially, he tells three stories: the origins of capital punishment, the decline and fall in almost all other Western-Democratic jurisdictions, and the puzzling state of retention in the United States. Garland describes three phases in the history of the modern death penalty, which closely track these three stories: the early-modern, modern, and late-modern phase. The early-modern phase sought to terrorize citizens and

[11] Garland writes, "In today's death-denying, Thanato-phobic culture, it can be liberating to talk of death in a positive way and pleasurable to exert some control over its imposition" (p. 288).

[12] This is to speak only of the death penalty's instrumental value, such as its power to deter future murders or to incapacitate a dangerous offender. Retributivist proponents of the death penalty make strong arguments that non-instrumental values, such as symbolic value or the power to "heal" or assuage the grief of survivors, are equally important. For some discussion of these values, see Cassell, *supra* note 2, at 198-99.

subjects by advertising the power of the state; the modern phase sought to acknowledge the growing power and reach of liberal and humanist philosophy by restricting the cruelty and breadth of the death penalty as a mode of political expression; and the late-modern phase, as experienced in the United States, seeks to sanitize the death penalty of its connotations with racialized violence and barbarism by severely restricting its use and frequency. Though Garland does not connect the history with the argument, Garland's history serves well to illuminate the various points of contention on which modern debate centers. The values that seem to define the discussion—efficiency, retribution, community will—were present from the beginning.

Garland's historical treatment culminates into two primary theses about American capital punishment. First, the late-modern form American capital punishment takes shape as a reaction to America's history with lynching and racialized violence. Second, in this weakened form, the punishment has become more of a political prop than a justifiable criminal sanction.

A. The Anti-Lynching Thesis

Garland proposes that modern death penalty jurisprudence takes shape from the assumption that modern executions cannot *appear* like lynchings. "The official forms and administrative arrangements of contemporary capital punishment – which take great trouble to ensure extensive legal process, dispassionate administration, and dignified humane execution – are a mirror image of the lynching process."[13] The struggle to maintain appearances cannot hide the sickening parallels: the death penalty occurs most often in the South; it is infused with local politics and populism; it is imposed by lay people; it is administered disproportionately on black men whose victims were white; and it serves as an echo chamber for local sovereignty, traditional values, and popular sentiments about justice.[14]

On its face, the anti-lynching thesis suggests nothing controversial. Indeed, what better way to refine the Court's attitude than by setting as a starting point the elimination of what no respectable legal system should allow? The Supreme Court has taken "legal lynching to be the central problem and devoted its energies to eradicating this legacy," and informed citizens everywhere should

[13] P. 288.
[14] *Id.*

therefore applaud.[15] Garland, however, points out two problems with this approach.

First, in setting out to eliminate legal lynching, the Court has obfuscated the most fundamental problems with capital punishment. "The Court's central focus, from *Gregg* onward," Garland points out, "has been process and the violation of due process rights, not the larger questions of the death penalty's value as a social practice or the pattern of its disparate impact."[16] After *Gregg*, the Court moved from concern about the moral value of capital punishment to celebration of the triumph of procedure. The Court presumed that the death penalty is an unimpeachable democratic punishment supported by a majority of citizens in need only of higher legal standards, not new justifications in light of "evolving standards of decency."[17]

The second problem with the anti-lynching approach is that it assumes uncritically that higher procedural standards can eradicate racially disparate outcomes. The assumption arises from the vain optimism that uniform principles of procedural fairness can overcome even unconscious racism at every level—from the local prosecutor poring over a case file to the governor staring at his phone on execution day. The Court, even in the face of contrary evidence, has refused to budge on this point. Along these lines, *McCleskey v. Kemp*, 481 U.S. 279 (1987), is revealing. Evidence in that case uncovered a racial bias in death penalty convictions in Georgia vis-à-vis the race of the victim: defendants charged with killing white victims were 4.3 times as likely to be sentenced to death than defendants charged with killing black victims.[18] The Court ruled that discriminatory impact across the board was not enough to invalidate the fairness of the death penalty in this particular case.[19] Rather, the appellant, McCleskey, would have had to prove that the prosecutors in *his* case acted with a discriminatory purpose. Garland rightly points out that the Court fails

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[15] P. 281.
[16] *Id.*
[17] This phrase originated from *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (holding that the Eighth Amendment must draw its meaning from civilized standards in a case involving the expatriation of a man convicted of deserting the U.S. military).
[18] *See* p. 282. *See also* David C. Baldus, Charles Pulaski, & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 661-753 (1983). Legal Defense Fund lawyers relied on this study in presenting their case in *McCleskey v. Kemp*, 481 U.S. 279 (1987). *See* p. 282-83.
[19] *See* p. 283.

to acknowledge the shakiness of its assumption about new procedural standards: if these procedures can supposedly eradicate racial biases, why then does the evidence in *McCleskey* nevertheless indicate racial bias?[20] The answer is not clear. Indeed, failure to acknowledge the problem at all may be the most offensive part of the *McCleskey* decision. Garland suggests, rather tendentiously, that the Court "seemed willing to tolerate racism so long as it stayed hidden."[21]

B. Death as Discourse

Beyond the anti-lynching approach and its patent failure, Garland also proposes that the late-modern mode of the American death penalty serves a new purpose: it is a way of communicating. Garland explains:

> The system of capital punishment that exists in America today is primarily a communications system. For the most part the system is not about executions, which . . . are relatively rare . . . . It is about mounting campaigns, taking polls, passing laws, bringing charges, bargaining pleas, imposing sentences, and rehearing cases . . . . What gets performed, for the most part, is discourse and debate.[22]

Such debates and discourse allow people to assert some control over their anxiety about death. As Garland writes: "The unfathomable mystery of death and the evil of killing are transformed into the reassuring experience of a moral debate. We moderns may have lost the public ritual of execution, but we have substituted the ritual of the capital punishment debate."[23] In addition, the discourse allows politicians to mark themselves as "hard on crime" or enlightened by "evolving standards of decency." The ease of aligning oneself through this simple declaration can define an election.[24]

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[20] *Id.*
[21] *Id.*
[22] P. 312.
[23] P. 305.
[24] Consider the recent Attorney General's race in California in which Kamala Harris suffered criticism for her opposition to the death penalty. *See* Phil Willon, *Attorney general rivals spar; Cooley takes a law-and-order stance while Harris vows modern leadership*, L.A. TIMES, Oct. 6, 2010, at AA.1. Consider also Michael Dukakis, who lost credence among voters in the 1988 presidential election for his opposition to the

The purpose of the modern death penalty, Garland manages to show, has only thin connections to penology, crime control, or justice. It has become more or less an amusing moral debate, a channel through which to express oneself about politics and crime. In this way, it has reverted to its origins. In the beginning, the death penalty was mostly about politics and power. In the late-modern phase, it remains so.

Here lies the chief weakness of Garland's approach throughout the book. He describes a devastating critique of capital punishment in America, but refuses to call it an argument against the institution. Still, Garland sets forth a powerful insight: as society has given up asking about the all-too-common fallibility of an irreversible punishment, *the state is permitted to kill people* seemingly only to keep alive a politically convenient debate about whether the state should kill people. Western society has spent centuries debating this issue, and the greatest achievement in the greatest of democracies is an absurdly limited system whose reasons for existence would comport well with the political strategies of a 16th-century prince.

In *Peculiar Institution*, Garland intends nothing polemical. But, in aspiring toward detachment, he seems to prove that detachment—including from history, from demonstrable racial disparities, and from a theory of crime control—is the primary problem with the modern death penalty in America. One wonders whether it was an argument all along.

death penalty. *See Death Penalty a Symbol to Voters Though Dukakis, Bush Talk Tough, Presidential OK of Execution Unlikely*, THE MIAMI HERALD, Oct. 22, 1988, at 1A.