David Garland, Peculiar Institution: America's Death Penalty in an Age of Abolition

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DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (Belknap Press, Cambridge, MA., 2010)

*Reviewed by Elisabetta Grande**

David Garland's *Peculiar Institution: America's Death Penalty in an Age of Abolition* deals with a thoroughly explored topic—why the death penalty is still in use in the United States—a subject so thoroughly explored that there had seemed no space for novelty. Yet, the peculiarity of *Peculiar Institution* is Garland's surprisingly fresh perspective. He elaborates on old material and raises new doubts about facets of the death penalty that had appeared conclusively answered. Without the baggage of normative ambitions or the need to forecast whether capital punishment will be abolished in the United States in the future, Garland develops a complex comparative analysis of the similarities and differences between Europe and the United States from a political, institutional and cultural point of view. The unexpected outcome is that the reader ends up asking herself not only why the death penalty is still used in the United States but also why it was abolished in Europe and whether it will return to Europe.

Garland investigates the American death penalty in its least visible and deepest aspects with the result that the usual narrative is replaced by an unusual one, and the reader is given new keys to understanding the many contradictions surrounding capital punishment in the United States. The first clue to the book's narrative strategy is its title: Is the death penalty's survival in the United States a function of American peculiarity, or is the "peculiarity" a product of a post-modern short-sightedness in so much of Europe? That is, has a lack of temporal and historical perspective distorted the way that the death penalty is perceived by Europeans? How many Europeans are aware, for instance, that it was not until 1981 that France abolished capital punishment? Given that fact, how accurate is it really to lay capital punishment, like so many other juridical institutions and developments, at the doorstep of U.S. peculiarism?

Perhaps in our evaluation of what is "peculiar" we need a comparative analysis that is highly nuanced or even radically modified. Consider, for instance, taking into account a comparative analysis that is internal to the United States, one that observes the vast plurality of attitudes towards capital punishment from one region of the United States to another and, indeed, from state to state within the same region. To carry out a comparative analysis that is wholly domestic is to reveal that a sharp and clear contraposition between the

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United States and Europe is definitely misleading. Alongside states of the South that still today impose and execute death sentences on a regular basis are states like California, where capital punishment is frequently imposed but rarely carried out. In states such as New Hampshire and Wyoming, the death penalty is on the books but never imposed. Other states, such as Michigan and Wisconsin, abolished capital punishment in the mid-1800s, long before Europe did so.

Notwithstanding the oversimplification that results from starkly contrasting Europe and the United States, Garland nevertheless shows that in some respects the American death penalty, as reinvented after *Furman v. Georgia*,[1] really is unique. That is, there are counter-intuitive, oxymora-producing characteristics of capital punishment in contemporary America that make it very different from the form of capital punishment that humankind has used for centuries. To be sure, labeling the death penalty as a "modern" penalty, as Americans do when they refer to post-*Furman* capital punishment, is indeed already an oxymoron. How can such an ancient sanction be a *modern* penalty? Even more contradictory seem to be the features that characterize America's death penalty in its "modern" version. Nothing can be *prima facie* more inhumane than the cold-blooded taking of a human life or more irrational than the execution of such a brutal sentence or a more obvious expression of authoritarian state power over the individual than physical elimination. Yet Garland argues that what insures the vitality of America's death penalty today are, paradoxically, its humanity, rationality and extreme democracy (pp. 257 ff.).

Garland argues that after *Furman*, America's death penalty is humane. It is a completely different punishment from the one of Foucaultian memory, when imposing excruciating pain on the executed was the true essence of the punishment and when ostentation in a public arena served to give legitimacy to a state power that was still in the process of formation. Of course, long ago and nearly everywhere on the globe, the sight, the sound, and the smell of the suffering body ceased to be the principal ingredients of the death sentence. At the beginning of the nineteenth century, the death penalty execution was transformed from a public happening into a discreet affair, conducted inside the prison and in front of selected witnesses. In its modern American version, though, death sentence execution not only excludes pain and suffering from public eyes but also eliminates the very idea of physical violence by "medicalizing" the passing away of the sentenced person. Lethal injection, practiced in structures that look like hospitals, bears more of a resemblance to the glass of lethal substance that the "death tourist" consumes while dying with dignity in a Swiss clinic than to some instrument of collective vengeance.

Garland also argues that after *Furman*, America's death penalty has become rational—surrounded by procedural protections and safe-

1. 408 U.S. 238 (1972).

guards intended to hold the infliction of death to a higher standard of legality. The jury's oracular power has been limited in order to ensure that death is not imposed in an arbitrary, capricious, or freakish manner. State procedures have been modified so as to channel and guide juror discretion by narrowing the class of cases in which capital punishment may be imposed (those presenting particularly aggravating circumstances) and ensuring that an individualized decision, one appropriate for each defendant, is made in each case. The juridification of the death penalty, carried on by the U.S. Supreme Court, has thus imposed a "super due process" in capital cases, making it harder for states to secure a death sentence. Likewise, being more and more constitutionally restricted in its application, barred for certain categories of defendants and for certain categories of crimes, the death penalty has become more and more "rational." Constitutionally prohibited with respect to the insane since 1986,[2] the death penalty was later held unconstitutional more broadly to the mentally retarded,[3] to juveniles,[4] and to those convicted of crimes that do not involve the taking of human life.[5] In Garland's opinion, it is precisely because of this rationalizing of the death penalty brought about by Supreme Court jurisprudence that the American death penalty maintains its legitimacy (p. 268). Juridification, however, is also why the contemporary administration of the death penalty in the United States lacks "efficacy." Of 3000 people across the country on death row today, fewer than fifty are actually executed in any given year. The result is a paradox: an extraordinarily high standard of legality allows the death penalty to survive in America, but this same super-due process legality makes its survival mostly symbolic.

Garland argues that it is the *democratic* character of capital punishment that most explains the death penalty's survival in the United States (pp. 272 ff & 151 ff.). Shaped from the Lockean idea of a minimal state and forged by the Jacksonian reforms of the mid-nineteenth century, the American state-building process stressed both liberalization and democratization. As a reaction to oppressive British rule, the American founders built a system of limited government with state power fragmented and authority divided both vertically and horizontally. From the horizontal perspective, both the federal and the state constitutions subject governmental power to crosscutting institutional checks and judicially enforceable individual rights. From the vertical perspective, the central government is held in check by the prerogatives of a large group of states with sovereign powers reserved by the federal Constitution. As Robert Kagan has observed, "[a] structurally fragmented state is especially open to popular demands."[6] This seems to be particularly true in the area of

2. *See* Ford v. Wainwright, 477 U.S. 399 (1986).
3. *See* Atkins v. Virginia, 536 U.S. 304 (2002).
4. *See* Roper v. Simmons, 543 U.S. 551 (2005).
5. *See* Coker v. Georgia, 433 U.S. 584 (1977); Kennedy v. Louisiana, 554 U.S. 407 (2008).
6. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM. THE AMERICAN WAY OF LAW 25 (2003).

criminal law, as Garland effectively shows (pp. 152 ff.). The Constitution allocates mostly to the states the responsibility for the enactment and enforcement of criminal law. Yet, the legislative power to enact criminal laws and punishments, including capital punishment, is shared with state executive branch officials, who are essential to carrying out the criminal laws, and these officials—district attorneys, attorneys general, county sheriffs, police chiefs—often are elected. These officials, as much as legislators, are very sensitive to the local electorate and seek to align themselves with majority sentiments. As Garland observes,"[e]lectoral politics affect criminal justice more directly and extensively in America than in any other liberal democracy" (p. 165).

This distinctive hyper-democracy of the American pluralistic system, in causing criminal policymaking to be directly expressive of community sentiment, only rarely permits top-down countermajoritarian processes in the formulation of criminal law. Far more insulated from democratic pressure than their American counterparts, European political elites more easily impose their policy preferences on the nation, despite public hostility to some of these preferences. In part this difference is due to the more centralized and hierarchically power structure of European states. In part it is a function of stronger political parties that are subject to greater discipline than political parties in the United States. European politicians have been able to succeed in a task almost impossible to realize by Americans: abolishing the death penalty despite the people's support for it.

Nor can such a countermajoritarian undertaking be accomplished in the United States by the federal Supreme Court through litigant activism, as one might expect in a system of "adversarial legalism." Constraints imposed in the American pluralistic and fragmented institutional setting greatly limit the Court's activism even during periods when individual justices are inclined toward activism. Working in a checks-and-balances context, and with a constant need to demonstrate that its decisions are the product of technical legal expertise and not naked political power, the Court is very much pressured by public opinion and the need to safeguard its legitimacy. Always in search of a difficult to achieve balance between the implementation of constitutional policy and the risk of being accused of invading the sphere of legislative power, the Court imposes sea changes in national law only with extreme caution and only when supported by the cultural and social context. So, for example, a decade after *Brown v. Board of Education*[7] the federal Supreme Court had succeeded in moving the law in a direction that would make widespread racial desegregation possible, although at the high cost of seeing the executive branch send federal troops to Southern states to enforce judicial desegregation rulings. After decades of upholding segregation, arguably the Supreme Court and lower federal courts then changed course because the new post-War cultural context made it feasible to do so. Even then, the timetable for accomplishing segre-

7. 347 U.S. 483 (1954).

gation was not immediately, but rather "with all deliberate speed." In contrast, the post-War social and cultural context has provided less of an opening for judicial abolition of the death penalty. If the period from Franklin Roosevelt to Lyndon Johnson was marked by American social solidarity and progressive income convergence, by the mid-1970's the United States was home to a high crime rate and levels of social alarm never attained before. The Court could attempt to reinvent the death penalty but not abolish it.

In analyzing *Furman* and *Gregg*, the two decisions that, in 1972 and 1976 respectively, reinvented the American death penalty, Garland seems very much in line with the legal process approach, especially as refined by Alexander Bickel.[8] In *Furman*, the Court held unconstitutional the death penalty as it had long been applied in state courts. Yet in 1976, in the wake of the promulgation of new death-penalty statutes by thirty-five out of thirty-six states responding to *Furman*, the Court in *Gregg v. Georgia*[9] and subsequent decisions gave birth to a "modern" and constitutionally legitimate form of capital punishment, one limited by special procedural safeguards. The death penalty was therefore given back to the people in the form of state legislatures. Hence, the death penalty became "democratic" in the sense that post-*Furman* state death penalty laws were the product of the popular will. Capital punishment also became democratic in a second sense: the people, in the form of juries, now were to decide in each individual case whether the defendant deserved to live or to be put to death. Indeed, since *Ring v. Arizona*,[10] decided in 2002, only a jury can find the presence of aggravating factors that bear on whether the defendant deserves a death sentence. Only the jury, as the authentic voice of the community and safeguard against the governmental power represented by the judge, can impose any sentence of death.

The post-*Furman* death penalty is "democratic" in another sense; it serves the interests of the people. After *Furman,* the capital punishment narrative has been that the defendant's death is useful not so much in legitimating the power of the state but rather in relieving the pain and suffering of the victim's family and friends. In the dominant rhetoric, the execution can provide psychological closure in the wake of the terrible emotional experience that people suffer because of the murder of a loved one.[11] In this regard, *Payne v. Tennessee,*[12] a case permitting the state to present "victim-impact" evidence during the penalty phase of capital trials, ended up strengthening the bond between the victim's relatives and the jury and making possible a psychological transfer from one to the other.[13] In sum, the death pen-

8. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

9. 428 U.S. 153 (1976).

10. *536 U.S. 584 (2002).*

11. *See generally* FRANKLYN ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT (2003).

12. 501 U.S. 808 (1991).

13. *See* ZIMRING, *supra* note 11, at 98.

alty in America can be regarded as deeply democratic not only because it is put on the books by democratically accountable legislatures, implemented by democratically accountable officials, and imposed in individual cases by lay juries, but also because it is seen as addressing the needs of victims.

Garland maintains his strategy of highlighting hidden and provocative contradictions of America's death penalty throughout the entire book. On the issue of the veritable interests served by the death penalty and by criminal punishment at large, David Garland teaches us the most interesting lesson: the real purpose of the criminal law, Garland seems to say, is always (at least in part) very different from what it appears to be. For example, in the centuries during which the modern state was still in the making, criminal punishment and, given its high public visibility, the death penalty above all, worked chiefly as instruments of power centralization (p. 127). In this period of time, in a hostile transfer of power from groups to the state, the latter was able to monopolize the force of the law by showing in public and in the most noticeable way, the atrocious consequences to befall those who violate its rules. In so doing, it gained legitimacy and strength. Afterwards, for having had by then consolidated its power, the state no longer needed the splendour of public torments and the death penalty became much more discreet. A different penal institution slowly replaced it: the prison.

Prison initially served the interests of newly born industrial capitalism in Europe because it worked as a disciplinary mechanism to educate poor people to sell their labor.[14] In the United States, the practice of leasing out convicts fostered the same interests, forcing prisoners to work for railroad or highway building companies or for coal or iron mining firms in a renewed form of slavery.[15] Today, recent mass incarceration that locks up into United States' prisons the highest number of people ever in the history of humankind serves the interests of corporate capitalism. Mass incarceration by means of the new prison industrial complex transforms the poor from a non-consumer (hence a non-profitable human being) when out of prison, into a profit producing human being when incarcerated—that is, one who produces profits for businesses that benefit from prisons.[16] No longer useful for state power legitimization, especially because in the modern era of globalization the state is greatly receding, the sentence of death now seems to have definitely lost its *raison d'être*. Yet, Garland demonstrates how even today the death penalty maintains its profound and subliminal logic in serving interests that are not so obvious. As he puts it: "Capital punishment in America today operates primarily on the plane of the imaginary, and the great majority of its

14. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH. THE BIRTH OF THE PRISON (Eng. trans.1977; orig.1975).

15. *See* ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH (1996).

16. *See, e.g.*, TARA HERIVEL & PAUL WRIGHT, PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION (2007).

HERIVEL

deaths are imagined ones. But the political and economic effects of these grim fantasies are no less real for being imagined" (p. 312).

To the disenchanted eyes of this author, the real reasons for the persistence of the death penalty in the United States go well beyond the proclaimed goals of retribution and deterrence. These goals are deeply undermined in present days, both by the rarity of the executions and by the very long time span that runs between the imposition of the death penalty and its actual occurrence. According to Garland, late-modern death penalty uses are "more petty and more partisan" (p. 286), serving the sectarian interests of those who take advantage of its symbolic presence. Prison officials use the threat of a death sentence to control prisoners sentenced to life imprisonment without parole who, as a result of a zero tolerance policy, are far more numerous today than in previous decades. In the absence of capital punishment, these prisoners have nothing to lose by committing offenses within prison. Prosecutors use the threat of lethal punishment to secure confessions or guilty pleas otherwise difficult to obtain, or as a platform for gaining media attention or as a means of mobilizing public support for their political stand. The death penalty is also sometimes useful to those defence attorneys who benefit from high visibility or who enjoy the professional and psychological rewards of taking part in a capital trial. Moreover, capital punishment satisfies, as Garland sharply notices, the psychological needs of a society that, in an omnipotence frenzy, tries to remove mortality. In a world in which mortality, and the limits of human control associated with it, is a cause of deep discomfort, the death penalty ironically provides a kind of collective reassurance: for society to be able to control the passing away of a sentenced person actually reinforces a sense of collective empowerment. At the same time, as Garland points out (p. 302), the fact that it is the death of someone else sends the public a subliminal message of its own immortality. Furthermore, in American criminal sentencing, the availability of capital punishment permits "very lengthy sentences of imprisonment, even life imprisonment without parole, to appear comparatively humane, thereby contributing to the nation's extraordinary rates of imprisonment" (p. 312), which in turn contributes to corporate profit from prisons.

Finally the death penalty, no matter if rarely imposed or executed, can be used effectively in the political arena. In a society such as the United States, where to be "tough on crime" is very much valued, the ruling security syndrome (that persists irrespective of the falling crime rate) makes everyone feel extremely at risk. The death penalty offers a great opportunity to win elections. To be sure, constant appeal to the most selfish human instincts in an atmosphere that increasingly is marked by a security syndrome is typical of the European experience too. In searching for political consensus, left and right parties in Italy, France, and England compete on the electoral playing field by using the most repressive arguments against those portrayed as socially dangerous—immigrants, the drug addicted, or simply the poor. And of course the media play their part in the game, producing and amplifying people's fears. In Italy, as in

most of Europe, individualism is on the rise, accentuated by income disparity and the present economic depression. In this atmosphere, social solidarity is greatly decreasing, making possible not only the dismantling of the welfare state but also the portrayal of life as a *homo homini lupus* combat. In this new scenario, one can seriously envision a new alignment of the United States and Europe on the death penalty, one that takes the form of the reintroduction of capital punishment in Europe. For as paradoxical as it may sound, Europeans should probably be "thankful" to Nazism and Fascism for an era of horror that led Europeans to abandon the death penalty. The hope now, of course, is that Europe's enlightened political elites (who seem unfortunately to be less and less enlightened) will be able to resist the pressure of the people's demand for increasingly severe penalties, a demand which is overly influenced by the media and by the corporate power that controls them to be deemed really democratic.

We should be grateful to David Garland for helping us grasp the least visible aspects of the American death penalty and for giving us an intriguing, provocative and multileveled analysis of a gruesome and inflammatory subject like capital punishment.