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PECULIAR TIMES FOR A PECULIAR INSTITUTION

Jordan M. Steiker*

DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* (2010). Pp. 393. \$35.00.

The persistence of the American death penalty remains something of a puzzle. Why has the United States emerged as the sole Western democratic society that retains and occasionally administers capital punishment? How can this retention be squared with the manifestly dysfunctional nature of the prevailing American capital system characterized by delays, high costs, and a trivial number of executions in relation both to homicides and even death sentences? David Garland's *Peculiar Institution: America's Death Penalty in An Age of Abolition*¹ constitutes an ambitious and wide-ranging effort to answer these questions. Garland's bottom line is both subtle and complex. The American present has been forged by distinctive aspects of American history, politics, and culture. Though he elegantly sifts through these explanatory strands, Garland resists highly deterministic accounts that suggest the present could not have been otherwise.

Much of Garland's work is persuasive and insightful, as he brings a refreshingly sociological lens to a field dominated by law and history. Surprisingly, though, in light of his cultural and historical frame, Garland fails to capture the distinctiveness of the American present along two dimensions. First, the contemporary effort to regulate the American death penalty amounts to an unprecedented departure from past types of "reform" both within and outside of the United States; judicially-imposed and state-embraced reforms have radically altered capital practices, which in turn have placed enormous pressures on the viability of American capital punishment.² Second, Garland seems to regard the modern American death penalty era as a monolithic whole, in which capital punishment remains vibrant because of its power as a wedge issue in the American cultural divide and other institutional and psychological factors.³ This account fails to come to terms with the truly remarkable — and perhaps "peculiar" — turn of the past decade, in which support for the American death penalty has dropped precipitously, and its survival, both in the near and far term, is newly in doubt.⁴ The first section of this re-

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1. DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* (2010). My thanks to Carol Steiker and Gretchen Sween for their helpful comments.

2. *Id.* at 146, 151–52 (discussing state-embraced reforms and explaining judicially imposed reformation).

3. *Id.* at 247.

4. See Kevin Johnson, *Death Penalty Support Is Declining*, HUFFINGTON POST (Apr. 25, 2012), http://www.huffingtonpost.com/2012/04/25/death-penalty-support-shift_n_1453953.html.

view will describe Garland's project and contributions, and the second will explore the two distinctive aspects of the present era that Garland's account does not fully illuminate or engage.

THE AMERICAN DEATH PENALTY, ITS FORM AND FUNCTIONS

Garland observes that the United States occupies an unusual position with respect to the death penalty.⁵ Some American states, such as Michigan and Wisconsin, secured abolition in the mid-nineteenth century, much earlier than the rest of the Western world.⁶ Today, though, a healthy percentage of American states have capital statutes on the books, a significant number continue to sentence offenders to death, and a few jurisdictions, mostly confined to the South, actually execute offenders.⁷ Garland's account of the variety of experience *within* American states focuses on American federalism and the relative weakness of the national government.⁸ On Garland's account, continued retention of the death penalty in some American states, just like its early abolition in others, is primarily attributable to the absence of a national mechanism for enforcing a criminal justice policy.⁹ Moreover, American federalism devolves power not simply to states, but to local actors within states — jurors, popularly-elected district attorneys, and crime victims — who create institutional pressures and momentum for draconian punishments, especially in jurisdictions with histories of racial conflict.¹⁰

Notwithstanding what he regards as the dim prospects for American abolition, given our federal structure and extreme localization and democratization of punishment, Garland traces the similar arc of the American death penalty *vis-à-vis* European counterparts in terms of efforts to rationalize its administration and tame its excesses.¹¹ Many of the salient capital reforms of the nineteenth and twentieth centuries — humanizing execution methods, privatizing executions by bringing them behind jailhouse walls, limiting the range of capital offenses — occurred in the United States and other Western countries at similar times and for similar reasons.¹² Thus, part of Garland's project is to account for similar paths of *reform* but divergent paths regarding *abolition*. Although Garland regards cultural essentialism as too crude an explanation for this divergence, much of his narrative draws on distinctive aspects of American culture, including chronically high rates of violent crime, American religiosity (especially its embrace of strands of religious fundamentalism), non-elite politics, and the absence of social solidarity.¹³ Ultimately, Garland provides a patchwork of explanations, mixing observations about political structure, racial history, and political experience (especially the backlash following

5. See generally GARLAND, *supra* note 1.

6. *Id.* at 194.

7. *Id.* at 195–97.

8. *Id.* at 188.

9. *Id.*

10. *Id.*

11. *Id.* at 70–100.

12. *Id.* at 87–96.

13. *Id.* at 197–99.

the U.S. Supreme Court's short-lived effort invalidating American capital statutes) for the continued embrace of the death penalty in (some of) the United States.¹⁴

A related but distinct question focuses on the current *role* of the American death penalty. Garland offers an illuminating account of the functions of capital punishment during various historical periods, distinguishing "early modern," "modern," and "late modern" uses of the death penalty in Western societies.¹⁵ Painting with a broad brush, Garland describes how capital punishment met a "practical need to demonstrate sovereignty" during the early modern period, and thus executions veered toward more extreme and sensational methods.¹⁶ By the late nineteenth century, the death penalty no longer served this nation-building role and gradually became absorbed into broader, newly-professionalized criminal justice systems.¹⁷ The death penalty increasingly came to serve "'ordinary' penal policy," subject to emerging bureaucratic values and structures.¹⁸ But as death sentencing and executions declined, and capital punishment was no longer a common response to serious crime, the instrumental value and logic of the death penalty diminished.¹⁹ In other countries, the combination of the death penalty's questionable utility together with emerging sensibilities regarding human rights and human dignity paved the way to abolition.²⁰ In the United States, too, those concerns led the Supreme Court in the early 1970s to invalidate the unstructured, overly-broad capital statutes that permitted the death penalty to be imposed on many offenders yet yielded virtually no executions in practice.²¹ In Garland's view, the Court's intervention, coming as it did on the heels of great social discord and upheaval in the United States around issues of race, poverty, and traditional values, spurred an unexpected transformative backlash.²² The death penalty "ceased to be a matter of penal policy and became instead a symbolic battlefield."²³ Garland draws on his prior work tracing the shift from the progressive penal policies of the 1960s to the law and order politics that began to emerge in the 1970s, and he locates the death penalty as an important marker in the shift to a "culture of control."²⁴ Whereas the death penalty had previously stood as something of an embarrassment in the professionalized, bureaucratized criminal justice system of the late 1950s and 1960s, with its focus on the rehabilitative function of punishment, capital punishment fit comfortably in the newly-triumphant paradigm of retributivism and incapacitation.²⁵ In fact, Garland goes even further to suggest that the heightened enthusiasm for the death penalty in some sense epitomized the shift to a new set of penal values by serving as its "symbolic leading edge."²⁶

14. *Id.* at 223.

15. *Id.* at 75–100.

16. *Id.* at 77.

17. *Id.* at 88–89.

18. *Id.* at 89–90.

19. *Id.* at 94–100.

20. *Id.*

21. *Furman v. Georgia*, 408 U.S. 238 (1972); see GARLAND, *supra* note 1, at 229.

22. GARLAND, *supra* note 1, at 253.

23. *Id.*

24. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

25. GARLAND, *supra* note 1, at 254.

26. *Id.*

Garland's embrace of the "backlash" explanation for the resurgence of the American death penalty, buttressed by his account of racial politics, rising violent crime, and Southern religious and cultural conservatism, tracks familiar ground. Garland goes further, though, in seeking to explain the continued retention of the death penalty in more recent years, despite its obvious failure to succeed as criminal justice policy. Drawing on the perspective of Michel Foucault, Garland invites us to consider not simply what the death penalty "does" in terms of achieving deterrence, incapacitating offenders, and serving other such penological goals; we should look also to the ways in which the existence of the death penalty machinery "*makes things happen* — even if much of what happens is in the cultural realm of death penalty discourse rather than in the biological realm of life and death."²⁷

Garland argues that there are many "users" of the death penalty, in the sense of constituencies that benefit from its continued availability, even if the death penalty has ceased having instrumental value in criminal justice terms.²⁸ Part of his argument here is conventional in asserting the ways in which elected officials — particularly district attorneys — embrace the death penalty to advance their professional careers and political objectives by trading on public fear and anxiety.²⁹ But Garland goes further in describing other "uses" of the death penalty that seem somewhat less intuitive and more speculative.³⁰ According to Garland, the death penalty's power stems in part from our simultaneous fascination with, but almost neurotic denial of, the fact of death.³¹ The American public enjoys the drama and intrigue surrounding the process of the State seeking death in response to violent crime.³² The performance of the death penalty — embodied in the declaration of the decision to seek the death penalty, the capital trial itself, and the jury's fateful declaration of its decision — provides both a cathartic outlet for an outraged citizenry as well as a form of entertainment, even if death sentences are never consummated by executions.³³ On Garland's account, the presence of the death penalty lends excitement and dramatic power to our criminal justice system, and that power is captured in media depictions of capital cases, public discourse about the death penalty, and the events of capital cases themselves.³⁴ Even the fiercest opponents of capital punishment, the abolitionist lawyers and volunteers who work on behalf of the condemned, earn "psychic" rewards by toiling in the intense and dramatic realm of capital litigation.³⁵ For the broader "'death-denying' culture that goes to great lengths to suppress the facts of death and dying," the death penalty provides a transgressive outlet.³⁶ Ultimately, Garland's explanation of the persistence of the death penalty — even as executions decline

27. *Id.* at 285–86 (citing MICHAEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Allen Lane, 1977)).

28. *Id.* at 291.

29. *Id.* at 289.

30. *Id.* at 286.

31. *Id.* at 301–07.

32. *Id.* at 296–301.

33. *Id.* at 301–06.

34. *Id.* at 296–301.

35. *Id.* at 290.

36. *Id.* at 303 (citation omitted).

and the punishment hardly functions as a penological tool — is our attraction to death penalty *discourse*, the comfort of dealing with the troublesome aspects of violent crime and mortality with the “pleasurable familiarity” of moral argument.³⁷ Garland provocatively encapsulates this view by claiming that “[w]e moderns may have lost the public ritual of execution, but we have substituted the ritual of the capital punishment debate.”³⁸

Peculiar Institution makes numerous valuable contributions. Like Frank Zimring’s *The Contradictions of American Capital Punishment*,³⁹ Garland usefully explores the connections between the practice of lynching and contemporary capital punishment.⁴⁰ He observes that many aspects of contemporary practice — the multiple layers of review and resulting lengthy separation between offense and punishment, the concealed execution administered by emotionless functionaries, the minimal pain and visible destruction visited upon the condemned and his body — are explicitly designed to disavow the embarrassing spectacle of lynching.⁴¹ Yet today’s death penalty, especially where it is most relevant in terms of executions — the Deep South, seems driven by similar political and social forces. The decision to seek death is made at the local level in a process that prioritizes claims of victims, racial animosity continues to play a role in its administration, and the death penalty — like lynching — remains an important means by which certain groups and communities “express their autonomy, invoke their traditional values, and assert their local identity.”⁴² Garland’s prose in this portion of the book is especially evocative, as he contrasts the ways in which the prevailing death penalty is “*designed* to be an antilynching” — “a radical inversion of form, a mirror image, a reformed present that vehemently rejects its past” — with its “underlying continuities and connections.”⁴³ Moreover, Garland’s exploration of lynching and capital punishment provides an effective transition to his broader claim about the causes of American retention. Both practices “bring[] into focus the weakness of the American state and the fragmented character of governmental authority.”⁴⁴ Some American states are drawn to capital punishment precisely because it gives voice to local values and signals a certain type of sovereignty, and the structure of American federalism prevents the imposition of a national policy of abolition.⁴⁵

Garland’s anthropological, political, and sociological analyses of the changing function or role of capital punishment over time also contributes to the existing literature. His account of the general movement in the West toward a more restrained, refined and reduced death penalty is a nuanced depiction of the ways in which the transition from monarchies to democracies, as well as the emergence of professional criminal justice systems, transformed capital practice.⁴⁶ Garland adds to this an insightful account of the

37. *Id.* at 305.

38. *Id.*

39. FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* (2003).

40. GARLAND, *supra* note 1, at 32–38.

41. *Id.*

42. *Id.* at 35.

43. *Id.* at 34.

44. *Id.* at 35.

45. *Id.*

46. *Id.* at 101.

cultural shifts in the eighteenth and nineteenth centuries that produced a bourgeois class defined by its enthusiasm for civilized refinement and humanitarian sensibilities.⁴⁷ He carefully parses the distinctive claims of “refinement,” on the one hand, which counseled against unseemly displays of violence and public exposure of the body largely on “decorum” grounds, and emerging enlightenment-based “humanitarian” commitments, on the other, which entailed an increased empathy for the plight of even lowly offenders and echoes contemporary arguments rooted in views of “human dignity” and the essential worth of individuals.⁴⁸

In describing the common reform of American and European capital practices, Garland keeps the anthropological and sociological lens at a high level of generality. He then shifts to a more detailed account of American politics and culture. Garland describes the origins of America’s weak political center — especially with regard to certain types of domestic issues, including crime and punishment.⁴⁹ Power is divided not only between national and local actors, but it is also fragmented at each level, with numerous obstacles to bold, decisive action.⁵⁰ American political arrangements ultimately reflect “fundamental disputes about the proper location of sovereign power.”⁵¹ Garland weaves a compelling and subtle account of the ways in which the defining features of American politics — “federalism, pluralism, localism, [and] separated powers” — both contribute to the demand for capital punishment and help sustain it.⁵² The very fact of “contested” sovereignty motivates local actors (states, counties, jurors) to exercise prerogatives (such as deployment of capital punishment) that in other countries belong to a single, central sovereign.⁵³ And the devolution of such decision-making to the local level insulates practices from national norms.⁵⁴

At first glance, Garland’s primary claim about the connection between American federalism and American retention seems obvious; federalism allows leeway for states to pursue different penological paths, and the centralizing function of national governments in most European states is simply unavailable in the American context.⁵⁵ But Garland’s account of American federalism perceptively ties American political arrangements to broader features of American culture. The weakness of the national American state has contributed to high rates of gun ownership and homicide.⁵⁶ Indeed, the failure of the national government “fully to disarm the population and fully to monopolize violence” has contributed to some persistent cultural features of American life, including a valorization of self-help and vigilantism, and the perpetuation of “frontier” values in many parts of the country (long after settlement).⁵⁷ Our political arrangements thus explain not only why top-down abolition has not occurred; they also explain some of the cultural dynam-

47. *Id.* at 101–12.

48. *Id.*

49. *Id.* at 183–86.

50. *Id.* at 186–88.

51. *Id.* at 188.

52. *Id.*

53. *Id.* at 188–89.

54. *Id.*

55. *Id.* at 188.

56. *Id.* at 189.

57. *Id.*

ics that continue to make the death penalty a desirable policy in (some) American states.⁵⁸ Perhaps the most important legacy of American federalism in this regard is the shameful history surrounding race — including localized implementations of slavery and segregation.⁵⁹ Garland’s story about the persistence of the death penalty — in which empowered local populations have managed to chart their own course respecting a contested social policy — draws on and interacts with familiar explanations for the persistence of American slavery (the original “peculiar institution”) long after its rejection by other Western nations implicated in the slave trade.⁶⁰ Federalism on racial issues permitted local jurisdictions to enforce racial subordination well into the twentieth century, and the resulting “low levels of group solidarity” likely contributed (and continue to contribute) to enthusiasm for the death penalty.⁶¹

AMERICAN DIVERGENCE: THE MODERN ERA OF AMERICAN CAPITAL PUNISHMENT

Garland’s historical account of the American death penalty focuses chiefly on the 1960s to the present, the period that marks the American departure from Western abolition. He offers strong evidence for his claim that the U.S. Supreme Court’s short-lived invalidation of prevailing capital statutes in *Furman v. Georgia*⁶² strengthened the American death penalty by infusing the issue with increased political salience.⁶³ Garland does not suggest that the Court alone was responsible for the death penalty’s revival; in fact, the Court’s intervention was a victim of terrible timing, coinciding as it did with rising anxiety about violent crime and rapidly declining support for progressive penal policy.⁶⁴ Thus, the reaction to *Furman* did not “cause” the failure of the United States to abolish the death penalty so much as it reflected the declining power of American liberalism.⁶⁵

In his somewhat terse summary of the Court’s subsequent path of *regulation* rather than *abolition* post-*Furman*, Garland regards the Court’s efforts as performing functions similar to those achieved by “uniform, bureaucratically administered systems of criminal justice that characterized other Western nations.”⁶⁶ The Court essentially imposed national norms of procedure in capital cases (a process Garland terms “juridification”⁶⁷), and enforced outer substantive limits on the reach of the death penalty, excluding juveniles,⁶⁸ offenders with mental retardation,⁶⁹ and offenders convicted of non-homicidal offenses, such as rape of a child.⁷⁰ In these efforts of “*rationalizing and civi-*

58. *Id.* at 188–90.

59. *Id.* at 190.

60. *Id.*

61. *Id.* at 190–92.

62. *Furman v. Georgia*, 408 U.S. 238 (1972).

63. GARLAND, *supra* note 1, at 231–34.

64. *Id.* at 233–34.

65. *Id.*

66. GARLAND, *supra* note 1, at 265.

67. *Id.* at 264.

68. *Roper v. Simmons*, 543 U.S. 551 (2005) (invalidating the death penalty for offenders whose crimes were committed when they were under the age of eighteen).

69. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (concluding that “death is not a suitable punishment for a mentally retarded criminal”).

70. *Kennedy v. Louisiana*, 554 U.S. 407, 447 (2008) (stating that the administration of the death penalty

lizing” the death penalty, Garland argues, the federal courts were engaging in “familiar processes, common through the Western world.”⁷¹ At the same time, though, the U.S. Supreme Court has been committed to preserving state and local prerogatives in the capital context, and reinforcing the local character of the death penalty decision. Garland describes the decisions allowing the use of victim-impact evidence at capital sentencing,⁷² requiring jury (rather than judge) determinations of death-eligibility,⁷³ and rejecting claims of impermissible race-based administration of the death penalty,⁷⁴ as exemplifying the Court’s “democratizing” jurisprudence, which allocates the ultimate decision of abolition versus retention to the states themselves.⁷⁵

Garland’s overview of America’s post-*Furman* capital system understates the distinctiveness of this particular path. The “juridification” of American death penalty law — and its consequences for state capital practices — finds no corollary in other Western jurisdictions.⁷⁶ Garland seems to regard the contemporary web of Court-imposed death penalty regulation as an unremarkable extension of other types of capital reforms, such as limits on the range of death-eligible crimes, which occurred in the United States and elsewhere before the contemporary era.⁷⁷ But prevailing American death penalty practice is different not simply in degree, but in kind from prior incarnations.⁷⁸ Over the past four decades, American capital trials have increasingly diverged from their non-capital counterparts.⁷⁹ The Court’s insistence that state schemes permit consideration of essentially any mitigating details related to the offender or the offense has dramatically altered the focus of capital trials.⁸⁰ Capital trial lawyers, aided by a new class of professional “mitigation specialists,” increasingly devote their efforts to the punishment (rather than guilt-innocence) phase of the proceedings.⁸¹ The Court, following the lead of the American Bar Association, has imposed more demanding standards for capital trial representation, especially relating to the punishment phase.⁸² The emphasis on whether the defendant deserves death — rather than whether the defendant committed the offense — has added enormous time and cost to capital litigation by transforming the nature of pre-trial investigation, voir dire, and the sentencing phase itself.⁸³ Moreover, the Court’s “juridification” efforts have included the promulgation of numerous, elaborate doctrines governing capital trials apart from the new-found emphasis on mitigation and the increased

should be reserved to “cases of crimes that take the life of the victim”).

71. GARLAND, *supra* note 1, at 272.

72. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

73. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

74. *McCleskey v. Kemp*, 481 U.S. 279, 314–20 (1987).

75. GARLAND, *supra* note 1, at 272.

76. *Id.* at 280.

77. *See id.* at 265–66.

78. *See* Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211 (2012) (describing shifts in American death penalty practice).

79. *Id.*

80. *Id.* at 231–33.

81. *See id.* at 232–33.

82. *Id.* at 227 n.66 (citing generally *Rompilla v. Beard*, 545 U.S. 374 (2005)); *see* *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000)).

83. Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 138–39.

professionalization of the defense mission.⁸⁴ As a result, reversal rates in capital cases reached astonishing levels in the first two decades following *Furman* and remain significant (albeit diminished) today.⁸⁵

The shift in American capital practice and law post-*Furman* is not fairly characterized as the United States catching up to its European counterparts in terms of “rationalizing” the death penalty.⁸⁶ It constitutes an unprecedented “experiment” with intensive procedural regulation of capital punishment — an effort to tame the death penalty decision through law.⁸⁷ Abolitionist European jurisdictions never afforded the level of procedural protections in their trials that the United States embraced in the pre-*Furman* era (e.g., exclusionary rules for illegally-seized evidence and improperly-obtained confessions); moreover, the decline in capital practice prior to European abolition eclipsed any need to embrace a *regulatory* system with respect to capital punishment, as death sentences were exceedingly rare in the European context post-World War II.⁸⁸ Hence, American capital punishment jurisdictions are essentially alone in their new practice of expensive, time-consuming capital trials followed by years of appellate and post-conviction review. The United States diverges from Europe not only in its retention of capital punishment in some states, but in its *form* of retention. Garland’s collapsing of all capital reform efforts into the generic category of “rationalization”⁸⁹ obscures the distinctiveness of the post-*Furman* American experience.

Garland similarly understates the significance of the Court’s recent proportionality decisions exempting certain offenders from the death penalty. On his account, these decisions perform a “civilizing” function at the edges of the death penalty to make it more palatable, without threatening the core of states’ right of retention.⁹⁰ In this respect, Garland seems to regard these decisions as comparable to other civilizing efforts, such as the reform of execution methods.⁹¹ But the Court’s proportionality decisions have a different and more important relation to the American death penalty than either the essentially procedural protections described above or reforms related to execution methods. They elaborate a method for assessing substantive limits on the death penalty, and in fact, chart a path toward the ultimate judicial abolition of the death penalty.⁹²

Prior to *Furman*, the Court had essentially no history of enforcing the Eighth Amendment’s ban on cruel and unusual punishment against state criminal practices. In *Furman* itself, the Court was notoriously fractured in its decision invalidating prevailing capital statutes, and offered no coherent interpretive theory regarding the Eighth Amendment’s scope.⁹³ Over the next two decades, in both capital and non-capital cases,

84. See Steiker & Steiker, *supra* note 78, at 231–33.

85. See, e.g., Frank R. Baumgartner, *Rates of Reversals in the North Carolina Death Penalty* 1 (2010) (finding “[s]ixty-seven percent of all death sentences imposed in the modern era in North Carolina have subsequently been overturned on appeal”).

86. GARLAND, *supra* note 1, at 263.

87. *Id.* at 265.

88. See *id.* at 97–99.

89. *Id.* at 263.

90. *Id.* at 268–72.

91. *Id.* at 272.

92. See Steiker & Steiker, *supra* note 78, at 244.

93. *Furman v. Georgia*, 408 U.S. 238 (1972); see GARLAND, *supra* note 1, at 225.

the Court emphasized the importance of state statutes in discerning whether a particular punishment violated “evolving standards of decency.”⁹⁴ That approach was reflected in the Court’s decisions upholding the execution of juveniles and persons with mental retardation in the late 1980s,⁹⁵ as well as its decision invalidating the death penalty for the crime of adult rape in the late 1970s.⁹⁶ The more recent decisions, however, are much less deferential to legislative decision-making in gauging the permissibility of a challenged practice. In its opinion reversing course on an exemption for persons with mental retardation, the Court focused less on the legislative headcount (more death penalty jurisdictions *permitted* such executions than prohibited them) than the Court’s perception of the “consistency of the direction of change.”⁹⁷ Moreover, the Court looked to other sources of prevailing values, including expert opinion, international opinion, polling data, and actual practices.⁹⁸ In its opinions striking down the death penalty as applied to juveniles and offenders convicted of raping children, the Court reinforced its methodological shift, again eschewing a focus on state laws and focusing instead on a mix of elite and professional opinion, as well as actual practices.⁹⁹ Lastly, the Court has increasingly privileged its own “independent evaluation” of whether a challenged practice measurably advances the purposes of punishment, enhancing its own role in gauging standards of decency.¹⁰⁰

Whereas Garland views these decisions as “[c]ivilizing tropes”¹⁰¹ that might in fact *stabilize* the death penalty (by shedding its most objectionable uses), these decisions actually represent an enormous threat to American capital punishment. They offer a basis for the Court to declare the death penalty inconsistent “with prevailing standards of decency” notwithstanding a numerical majority of retentionist jurisdictions.¹⁰² Many recent developments, including the dramatic decline in death sentencing over the past decade, a significant decline in executions during the same period, the repeal of capital statutes in several jurisdictions, and increasing professional doubts about the success of the Court’s “rationalizing” efforts, lend support for judicial abolition under the Court’s newly-embraced methodology.¹⁰³ In fact, the Court has created a doctrinal framework much more hospitable to a global challenge to the American death penalty than at any other point in our history, including the moment prior to *Furman*.¹⁰⁴

Part of the reason Garland misses the transformative potential of the recent proportionality cases is his tendency to view Court decisions primarily in terms of their holdings and immediate consequences. Although he recounts some of the details of the vari-

94. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 330–31 (1989) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

95. *Penry*, 492 U.S. 302 (mental retardation); *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (juveniles).

96. *Coker v. Georgia*, 433 U.S. 584 (1977).

97. *Atkins v. Virginia*, 536 U.S. 304, 315 (2002).

98. *Id.* at 308–21.

99. See *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (striking down the death penalty for adult offenders convicted of raping children).

100. *Atkins*, 536 U.S. at 321.

101. GARLAND, *supra* note 1, at 270.

102. Carol S. Steiker & Jordan M. Steiker, *Abolition in Our Time*, 1 OHIO ST. J. CRIM. L. 323, 331, 341 (2003).

103. *Id.* at 341–42.

104. *Id.* at 342.

ous opinions in *Furman*, his account of subsequent jurisprudential developments amounts to a series of decision points that he then locates in a broader narrative.¹⁰⁵ In his view, though the Court has added some procedural safeguards to achieve rationality and imposed some limits in the name of civility, its overall posture is one of deference to local decision-making, especially on the ultimate question of retention versus abolition. This account certainly contains large kernels of truth, but it overlooks the nuance and overall trajectory of the Court's opinions. The first two or so decades of decisions post-*Furman* certainly conform to this account, as the center of the Court seemed simultaneously committed to the constitutionality of the death penalty as a punishment but also to the importance of needed procedural reform.¹⁰⁶ But over the past decade, several Justices have expressed substantially greater doubts about the reformist project. In arguing for jury (rather than judge) sentencing on the ultimate decision of life or death in 2002, Justice Breyer catalogued the many perceived flaws of the American death penalty, including its arbitrary and discriminatory imposition, its cruelty in the delays between sentence and execution, and the inadequacy of representation for those charged with capital crimes.¹⁰⁷ In light of the substantial doubts about whether capital punishment is in fact cruel and unusual punishment in all circumstances, Justice Breyer insisted that we should at a minimum preserve the connection between community values and capital sentences safeguarded by jury decision-making.¹⁰⁸ Four years later, in the wake of the exoneration of over a dozen death-sentenced inmates on Illinois's death row, Justice Souter, joined by three other Justices, insisted that the Court should rework its jurisprudence in light of "a new body of fact [that] must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate."¹⁰⁹ Justice Souter expressed grave doubts as to whether prevailing doctrine sufficiently accounts for the difference of death.¹¹⁰ Most recently, in response to lethal injection litigation (and the declining retributive value of the death penalty given our countervailing commitment to the avoidance of pain in the execution process), Justice Stevens questioned whether the American death penalty continues to serve any important state interests, or instead represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes."¹¹¹ Citing many of the same concerns as Justice Breyer and Justice Souter — the troubling persistence of discrimination and the risk of wrongful convictions — Justice Stevens declared that "[a] penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment."¹¹²

These sentiments reflect a growing disillusionment with the prevailing administration of capital punishment and suggest that the Court may well revisit the constitutional-

105. *Id.* at 258–60.

106. *See, e.g.,* *Gregg v. Georgia*, 428 U.S. 153 (1976).

107. *Ring v. Arizona*, 536 U.S. 584, 614–19 (2002) (Breyer, J., concurring).

108. *Id.* at 615–16 (Breyer, J., concurring).

109. *Kansas v. Marsh*, 548 U.S. 163, 207 (2006) (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting).

110. *Id.* at 210.

111. *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) (quoting *Furman* 408 U.S. 238 (1972)).

112. *Id.* (citation omitted).

ty of American punishment. Together with the Court's proportionality decisions, these sentiments also cast doubt on Garland's important point of distinction between abolitionist Europe and retentionist America: the role of elite opinion in establishing penal policy.¹¹³ Garland is certainly correct that the United States will not achieve abolition via top down, legislative leadership at the national level, with governing elites overriding popular support for retention.¹¹⁴ But American elites — lawyers, professional organizations, and media — will certainly inform the Court's decision whether to invalidate capital punishment as a constitutional matter. Indeed, the Court's emerging gauge of "evolving standards of decency"¹¹⁵ affords an explicit role for elite opinion and thus openly invites the possibility of abolition notwithstanding contrary popular opinion. Even without the new methodological framework, the Court could have enforced abolition in the 1970s, and in fact came quite close; had the temporary abolition of *Furman* stuck, there would be no American divergence to explain.¹¹⁶ Although Garland explicitly recognizes this point, his embrace of contingency goes only so far. Looking back at *Furman*, Garland suggests that the Court was "tightly constrained" in its ability to "impose a forceful resolution to a highly charged social issue" without greater external support.¹¹⁷ And much of the book seems designed to explain the enduring role of capital punishment in modern American politics and culture. In this respect, Garland seems to overstate the institutional barriers to American abolition. It is easy to imagine a world in which the Court had imposed abolition and it is even easier to imagine a world in which the Court will do so. Garland's account of the distinctive features of American federalism, history, and criminal justice politics is ultimately better suited to explaining the prevailing *type* of retention in the United States (characterized by enormous regional variation, continuing influence of race, local politicization, etc.) than the *fact* of American retention, which is both contingent and precarious.

Garland's static account of the judicial status of capital punishment parallels his static account of the political and cultural status of the American death penalty.¹¹⁸ Garland portrays a robust death penalty culture — Southern politicians grandstanding for the return of the death penalty post-*Furman*,¹¹⁹ cheering crowds gleefully celebrating Ted Bundy's execution in Florida,¹²⁰ and national politicians (including Presidents Nixon, Reagan, and George H.W. Bush) exploiting the death penalty as a wedge issue with great success.¹²¹ State legislators and local district attorneys use the death penalty to advance their careers, and victims' rights advocates seek participatory rights for victims both at trials and executions.¹²² Garland's descriptions of the contemporary American landscape

113. GARLAND, *supra* note 1, at 23 (stating that the comparison of American death penalty and European death penalty "grow[s] now closer, now further apart").

114. *Id.* at 24–27.

115. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

116. Carol S. Steiker, *Capital Punishment and Contingency*, 125 HARV. L. REV. 760, 778–82 (2012) (describing the contingency of the Warren Court's failure to abolish the death penalty).

117. GARLAND, *supra* note 1, at 229.

118. *See id.* at 40.

119. *Id.* at 247.

120. *Id.* at 58.

121. *Id.* at 247.

122. *Id.* at 50.

suggest the persistence of a culture war in which the death penalty continues to play a prominent if not central role.¹²³ He treats the modern era as one continuous period in which a variety of political, social, and psychological forces give life to the death penalty notwithstanding practical limitations imposed on its actual use by judicial (and other) actors.¹²⁴

Garland's account fails to capture the extraordinary shifts in the American death penalty over the past decade. Beginning in the late 1990s, with the discovery of numerous innocents on the Illinois death row, the American death penalty has been in retreat.¹²⁵ Executions nationwide over the past five years have declined about forty-four percent from the peak years (1997 to 2001), from an average of about seventy-eight per year to a more recent average of forty-four per year.¹²⁶ The decline in death sentencing has been even more dramatic (and is more revealing of prevailing attitudes towards capital punishment). After reaching a nationwide high of 315 in 1996, death sentences have plummeted, falling below 125 per year by 2007, and dropping again last year below 100, a greater than sixty-five percent decline.¹²⁷ In addition, five states have jettisoned the death penalty (New York (2004), New Jersey (2007), New Mexico (2009), Illinois (2011), Connecticut (2012)), and several others are on the cusp.¹²⁸

These concrete changes reflect a growing discomfort with the American death penalty. Interestingly, the discomfort does not appear to be rooted — as in the European elite — in a view of the death penalty as inhumane or contrary to human dignity. Rather, the prevailing critique rests on a new pragmatism: a concern that the system is plagued with error coupled with concerns about its excessive cost (especially in relation to its limited tangible benefits).¹²⁹ Indeed, American “abolitionists” have been careful to recast their opposition to the death penalty in utilitarian terms, and successful state campaigns against the death penalty have been termed “‘repeals’ rather than ‘abolition’” of the punishment, precisely to avoid the deep moral connotations association with the latter.¹³⁰

Given Garland's extraordinary insight as a sociologist, and his sustained attention both in *Peculiar Institution* and *Culture of Control* to underlying shifts in Western penological theory and practice, it would have been illuminating to hear his account of this

123. *Id.* at 17–18.

124. *Id.* at 18–19.

125. Editorial, *America's Retreat From the Death Penalty*, N.Y. TIMES (Jan. 1, 2013), http://www.nytimes.com/2013/01/02/opinion/americas-retreat-from-the-death-penalty.html?_r=0.

126. See Searchable Execution Database, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/views-executions> (last visited Feb. 9, 2013).

127. See *Death Sentences By Year: 1997–2000*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-sentences-year-1977-2009> (last visited Feb. 9, 2013); *The Death Penalty in 2012: Year End Report*, DEATH PENALTY INFO. CTR. 1 (Dec. 2012), <http://deathpenaltyinfo.org/documents/2012YearEnd.pdf>.

128. See Bryan Weakland, *Maryland Move Closer to Abolishing Death Penalty*, MSNBC (Feb. 7, 2013 12:53 PM), <http://tv.msnbc.com/2013/02/07/maryland-moves-closer-to-abolishing-death-penalty/>; *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Feb 9, 2013).

129. See generally *Costs of the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/costs-death-penalty> (last visited Feb. 9, 2013).

130. Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 676 (2010).

important and unprecedented transformation in American death penalty practice and discourse. His sense of a stable death penalty debate — “a formulaic litany of *pro* and *con* that helps us bring this difficult issue under control”¹³¹ — obscures the many ways in which the current iteration of death penalty discourse is surprisingly new. Opponents of the death penalty, for the first time, emphasize the harms to victims’ families wrought by the never-ending legal process and the elusive hope for “closure” that the death penalty promises but rarely delivers.¹³² Opponents (including prominent civil rights organizations like the ACLU) also highlight the virtues of life-without-possibility of parole (LWOP) as an alternative to capital punishment; the harshness of the present moment (LWOP was essentially unpracticed prior to the modern era) paradoxically has weakened the appeal of the death penalty because incapacitation can be achieved without the extraordinary costs associated with capital proceedings.¹³³ At the same time, few of the pro-death penalty voices Garland cites remain as vocal today. Celebrating revelers at executions have all but disappeared. National politicians rarely discuss capital punishment, and virtually all of the state legislative energy over the past decade has been directed toward limiting rather than expanding the reach of the death penalty.¹³⁴ The remarkable nation-wide decline in death sentencing is attributable primarily to the decisions by local district attorneys to forego seeking death, reflecting a declining enthusiasm in the death penalty’s most important constituency.¹³⁵

Perhaps the most striking illustration of the death penalty’s decline over the past decade is the extent to which lethal injection litigation managed to grind the American death penalty to a halt. Compared to the robust grounds for challenging the death penalty at the time of *Furman* (chiefly its patently arbitrary and racially discriminatory administration, in combination with its infrequent use¹³⁶), the challenge presented by the prevailing lethal injection protocol was relatively modest — the risk of undetected pain if execution teams improperly administer drugs designed to sedate the condemned.¹³⁷ The fact that this challenge slowed and continues to slow executions in numerous states is surprising in itself, especially given the Court’s rejection of an Eighth Amendment challenge to the protocol in 2008.¹³⁸ Even more notable is the absence of any significant or sustained backlash against the claim by death penalty supporters. After all, lethal injection litigation posed a direct challenge to states’ authority to implement the death penalty, producing the first and only moratorium on executions in the modern era (for a period of almost seven months, stretching from the Court’s decision to address the challenge until its subsequent decision denying relief).¹³⁹ Given Garland’s account of the high po-

131. GARLAND, *supra* note 1, at 305.

132. *Id.* at 687.

133. *Id.* at 672–73.

134. See, e.g., Jessica Fender, *Rep. Fields Wants Colorado Voters to Decide Death Penalty Question*, DENVER POST (Dec. 30, 2012 12:01 AM), http://www.denverpost.com/news/ci_22281760/rep-fields-wants-colorado-voters-decide-death-penalty.

135. Steiker & Steiker, *supra* note 130, at 671–72 n.124.

136. *Furman v. Georgia*, 408 U.S. 238 (1972).

137. See *Baze v. Rees*, 553 U.S. 35, 53–54 (2008).

138. *Id.*

139. See Adam Liptak, *Challenges Remain for Lethal Injection*, N.Y. TIMES (Apr. 17, 2008), <http://www.nytimes.com/2008/04/17/washington/17lethal.html>.

litical salience of the death penalty and its centrality in a continuing culture war, the lethal injection challenge should have provoked a significant response.¹⁴⁰ Indeed, in a prior era, one would have expected dismissive, derisive rejections of the effort to spare inmates the “risk” of undetected pain, especially given that lethal injection was adopted precisely because of its perceived humaneness compared to alternative means of execution. But the claim was (and continues to be) received with respectful engagement and seriousness by most official actors, including state executives, state attorneys, and both federal and state judges. This has been true not only in states with low numbers of executions and marginal commitment to the death penalty such as California, Kentucky, and Maryland, but also in leading capital jurisdictions like Arkansas, Georgia, and Missouri (all of which have slowed or stayed executions pending litigation surrounding newly-revised lethal injection protocols).¹⁴¹

Instead of classifying the ongoing lethal injection controversy as simply another illustration of a “civilizing” but relatively minor reform of states’ death penalty systems, Garland should have explored how and why dramatic shifts in the cultural and political landscape have managed to confer legitimacy on this challenge in the present moment and weakened the nation’s appetite for death sentences and executions overall. There are many candidates for explanation, beyond those mentioned above (discovery of wrongfully-convicted inmates on death row, establishment of LWOP as virtually the sole alternative to death, and the explosion of costs associated with capital punishment). National rates of violent crime have dropped significantly,¹⁴² perhaps decreasing the siege mentality that initially triggered the shift toward more punitive sanctions. The experience of 9/11, and the ongoing threat of catastrophic terrorism, has changed the face of “evil,” with Osama bin Laden replacing Willie Horton as the most chilling image of the dangerous “other.” Perhaps the “culture wars” themselves have been recast over the past two decades, such that criminal justice issues are less closely tied to the current fault lines of social and political contestation; certainly the most recent presidential election reveals greater discord surrounding top-down interventions in medical insurance and financial markets than approaches to penal policy.

Garland’s failure to wrestle with the newly diminished status of the American death penalty leads him to speculate about the “real” functions of the death penalty in an age where it so patently fails as penal policy.¹⁴³ These speculations about the drama and intrigue surrounding capital cases, the psychic rewards of high-stake professional encounters, and the pleasurable, transgressive outlet of death penalty discourse simply do not resonate with the declining support and salience of American capital punishment.¹⁴⁴ Garland seems to be on stronger ground when he ties the prevailing system more simply and more directly to the cultural and racial divides of the 1980s and 1990s, rather than seeking some broader psychological explanation of the continuing role of capital pun-

140. GARLAND, *supra* note 1, at 185.

141. See *Lethal Injection: Official State Actions*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/lethal-injection-official-state-actions> (last visited Feb. 9, 2013).

142. See Terry Frieden, *U.S. Violent Crime Down for Fifth Straight Year*, CNN (Oct. 29, 2012, 2:15 PM), <http://www.cnn.com/2012/10/29/justice/us-violent-crime>.

143. GARLAND, *supra* note 1, at 246.

144. *Id.*

ishment in contemporary American life.¹⁴⁵ Even on their own terms, Garland's speculations fail to explain the European/American divide on retention because they speak in general terms about human psychology rather than to particular features of American culture; for the same reason, they fail to explain the divergence among American jurisdictions, especially given the recent momentum to repeal the death penalty notwithstanding these purported "uses." In the end, Garland's informative account of why the death penalty survived post-*Furman* needs to be followed by an equally insightful account of how we arrived at the precarious present moment and whether the palpable shifts in popular and professional support will inevitably give way to further restriction and abolition, or whether the winds might shift back toward a more stable and robust retention.

Overall, *Peculiar Institution* is a remarkable achievement. Garland's overview of American capital punishment offers an impressive range of history, sociology, politics, and law. Garland locates American capital practice in the broader Western context and offers an illuminating narrative of the American departure from the abolitionist path. His claims are subtle and rooted in an extraordinary exploration of institutional design, culture, and unexpected consequences. The eleven chapters of *Peculiar Institution* capture many slices of the American experience. One senses, though, that Garland's project ended too soon. He failed to capture the most recent chapter of the American death penalty or to anticipate its final chapter.

145. *Id.* at 243.