Human Sacrifice

A lawyer on the death penalty as entertainment

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I once represented a man on San Quentin's death row, and it was the most entertaining experience of my legal career. That's an ugly way to put it, but it's accurate: The case thrilled me in the same voyeuristic, adrenaline-pumping way that death often thrills me in movies and books. Violence has always been a reliable source of amusement, from the Cyclops smashing the sailors in the *Odyssey* to the run of killings at the end of *Hamlet* and the computer-enhanced exploding heads in the latest Hollywood action flicks. When we talk about the death penalty, we usually pretend that our fascination with death—and our addiction to violence porn—has little to do with the discussion. Certainly I never told anyone that I was drawn to work on a death-penalty case in part because I felt the pull of violence, the lurid pleasures of dealing with questions of murder and execution. I was a young attorney, only a few years out of law school, and I was part of the team that prepared our client's federal habeas petition, a constitutional review of his original conviction and sentencing. The petition was ultimately successful, leading to a federal appellate ruling that reversed his death sentence and entitled him to a new trial. Yet my interest in death as an object of vicarious excitement—an interest that is still part of me—left me with a permanent sense of shame, both toward myself and toward the entire death-penalty process.

I know I'm not alone in feeling the gap between the seriousness of the death penalty and our often frivolous consumption of it in our thoughts. Every capital case comes to us with at least a double shot of killing: the actual death of each victim and the potential death of the accused. It gives us the exhilaration of danger without requiring us to take any risk.

The shame comes, I think, from our finding dishonest ways to mask this exhilaration. The dishonesty has consequences. In America our current form of capital punishment feeds a variety of cultural

and emotional cravings while hiding the real implications of convictions—the complexities of taking another life through a specific system with specific problems. Whether we oppose the death penalty or support it, we gorge on it and the debate surrounding it much as we gorge on junk food, and with similar results. The sheer number of our death-row inmates swells our laziest, most self-indulgent fantasies beyond healthy measure.

A vague national discomfort over the way we practice the death penalty has been in the air for several years. Gallup polls show that a substantial majority of Americans—65 percent—still favors capital punishment, a figure that has remained consistent since 2004. This is, however, a significant decline from the 80 percent of Americans who expressed support for the death penalty in 1994. Recent unease over the death penalty focuses less on the question of whether it's ever right to execute someone than on concerns about how the present system operates. The Innocence Project reports that DNA testing has already resulted in the exoneration of 266 convicts, 17 of them for death-penalty cases. This has made juries much more aware of the possibility that even their most confident decisions can prove disastrously wrong, and with the spread of life-without-parole sentencing options, juries in 2010 handed down a nationwide total of 114 death sentences, compared to 328 in 1994.

In addition, as most states face budget problems, many people are paying closer attention to the economics of capital cases. A 2008 report from the California State Senate's Commission on the Fair Administration of Justice estimated that the death penalty would cost the state $137 million per year, while an alternative system of lifetime incarcerations would cost only $11.5 million per year. In Illinois, similar findings fueled the legislature's recent decision to end capital punishment completely, even helping convince four Republicans to vote for the proposal.

David Garland, a well-known professor of law and sociology at New York University, brings a number of the issues surrounding capital punishment into calm, intelligent focus with his book *Peculiar*

Institution: America's Death Penalty in an Age of Abolition. Avoiding another polemic either for or against executions, Garland tries to answer a question that embarrasses both sides of the debate: How did we get here? What are the cultural, political, legal, and historical influences that have led America to strengthen its grip on the death penalty as the rest of the Western world has rejected it? Related, and equally troubling in their implications: How do we use the death penalty in America? What interests does it serve, and how does it gratify us even when we think we oppose it?

Garland's book has already achieved a special historical distinction, as its publication last fall led retired Supreme Court justice John Paul Stevens to write an essay for *The New York Review of Books,* examining *Peculiar Institution* in detail but also talking about his role in shaping our modern capital-punishment system. Stevens used the review to clarify his reasons for turning against the death penalty and to describe many of the relevant Supreme Court decisions in which he participated. *Peculiar Institution* thus now stands at the center of a renewed discussion about capital punishment that attempts to leave behind some of the harsh zealotries of the traditional death-penalty debate and to view the subject with a fresh appreciation for its difficulties.

Garland believes that the death penalty is now largely unmoored from any practical effort to deter murders or influence crime rates. He notes that even supporters of capital punishment seldom claim deterrence as a serious goal of today's system. Instead, Garland argues, both sides of the debate use the death penalty to advance their larger interests, bolstering the discussion of broader cultural and political topics in a fashion that flatters or benefits the speakers. The death penalty has achieved its greatest prominence less as a series of actions than as a stylized topic of conversation and thought. In public it is discussed and analyzed in predictable, self-serving ways, deliberately obscuring its private or veiled dynamics. As part of this process, capital punishment also has become

absorbed by the American entertainment industry, which endlessly recycles the attention-catching battle between opposing forms of self-righteousness. Even in the news media, Garland maintains, death-penalty cases are reported in a style that tends to heighten their thrill value, as the stories are often pressed into one of two audience-pleasing forms: the horror of innocent victims being murdered by monsters, or the horror of innocent or at least understandable defendants being convicted by an unfair system.

A devastating example of the first storyline—ordinary people experiencing violent death—is the triple-homicide case in Cheshire, Connecticut, from 2007. The account in *The New York Times* of the crime depicted the stark, enraging brutality of a home invasion that ended in rape and murder:

> The men, the authorities say, had already strangled Dr. Petit's wife, Jennifer Hawke-Petit, 48, and in short order would also kill the couple's two daughters, Hayley, 17, and Michaela, 11. The elder suspect, Steven J. Hayes, 44, had poured gasoline on the girls and their mother, according to a lawyer and a law enforcement official involved in the case, in hopes of concealing DNA evidence of sexual assault. He had raped Ms. Hawke-Petit, and his partner, Joshua Komisarjevsky, 26, had sexually assaulted Michaela.
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> Moments after Dr. Petit escaped, as the house was being surrounded by police officers, the men lighted the gasoline. The girls were tied to their beds but alive when the gas Mr. Hayes had spread around the house was set aflame.[1]

How many of us could read this and not want to see the defendants forced to suffer and die just as they made their victims suffer and die? Yet with the change of a few key accusations, a similar home-invasion case can give rise to an entirely different reaction. This

[1] Manny Fernandez and Alison Leigh Cowan, "When Horror Came to a Connecticut Family," *New York Times,* August 7, 2007.

second storyline—the death penalty as a force for injustice—can be seen in another *Times* article, "Judges' Dissents for Death Row Inmates Are Rising," from August 2009.[2] The article describes the dissent written by Ninth Circuit judge William A. Fletcher in the case of *Cooper* v. *Brown* (2009).[3] Fletcher's opinion set forth evidence that the wrong person had been convicted for the home-invasion murders of two parents, their daughter, and a house guest on June 4, 1983. Kevin Cooper, the African-American given the death sentence for the murders, had escaped from prison two days before the killings took place. On June 4, Cooper was hiding in a vacant house near the victims' home. The police and other officials were convinced that Cooper's proximity couldn't be a coincidence. Yet Judge Fletcher suggested that the authorities ignored, concealed, or destroyed critical proof of Cooper's innocence. The only survivor among the victims—the eight-year-old son of the murdered parents—originally identified the killers as three white males and specifically said that Cooper wasn't one of the attackers. The coroner initially concluded that the nature of the victims' wounds indicated more than one killer, and a pair of women provided affidavits implicating three men who were supposedly attempting to collect a debt for an Aryan Brotherhood group. These men allegedly went to the wrong house—the victims' home—and killed them by mistake. Although Judge Fletcher presented only one side of the case, nearly anyone reading his account, or the summary of the account in the *Times,* would recognize it as a classic version of the abolitionist storyline, where the public's desire for revenge leads to a grotesque compounding of the original injustice of the killings. The wrong person is sentenced to death while the actual murderers go free: the worst outcome imaginable from just about every standpoint.

[2] John Schwartz, "Judges' Dissents for Death Row Inmates Are Rising," *New York Times,* August 13, 2009.

[3] Judge Fletcher's published dissent in *Cooper* v. *Brown* (9th cir. 2009), no. 05-99004, D.C. no. CV-04-00656-H, dissent to denial of petition for rehearing, order filed May 11, 2009.

Garland doesn't suggest a moral equivalence between the abolitionist and pro-execution storylines. Despite his refusal to state his position openly, it's instantly clear from the title of his book—with its overt connection of capital punishment to slavery—that he favors abolition, apparently on the practical grounds that the system is unacceptably wasteful and ineffective. I don't believe, however, that even a staunch death-penalty supporter can dismiss *Peculiar Institution* in good faith. (I write this, obviously, as an opponent of the death penalty.) Garland isn't objective in the impossible sense of having no bias or personal viewpoint, but he does substantial justice to the opinions that help sustain capital punishment, and he goes out of his way not to score cheap points against death-penalty advocates. He is far less interested in attacking the survival of the death penalty than he is in understanding it.

Much of *Peculiar Institution* is devoted to comparing the American death penalty to the abolition movement in the rest of the Western world. I live in Finland these days, and for a number of years now I've taught law students at Helsinki University as well as students from other universities and institutions. I'm not sure most Americans understand how deep the international contempt is for our legal system, or how large a role the death penalty plays in stoking that contempt. My students come from all over Europe, and they're nearly unanimous in their belief that the death penalty is a blatant human rights violation, demonstrating a vast cultural gap separating them from Americans.

Garland, however, sets out to prove that the clash between the U.S. approach to the death penalty and the approach of other Western nations is less a matter of deep philosophical differences than of specific procedural and structural distinctions. *Peculiar Institution* proposes his own version of a fairly common historical thesis: European nations eliminated the death penalty through central, top-down authority, while the American government's deference to

local communities has given individual states the ability to derail all attempts at nationwide abolition.

Garland follows the view that the death penalty expanded in Europe during the fifteenth and sixteenth centuries as a tool for governments to solidify their power. Then in the 1700s, with the state more securely established, capital punishment shifted toward addressing public safety. As the Enlightenment took hold, executions became a target for secular criticism. Abolitionist views accompanied the growth of bourgeois culture, acknowledged liberal belief in individual rights, and reinforced the power interests of various rising social classes and existing elites.

This liberal attack on capital punishment quickly generated a liberal defense: "From the nineteenth century onward," Garland says, "authorities justified the death penalty by pointing to its capacity to deter criminals and control crime, thereby enhancing the general welfare." Where death-penalty opponents saw execution as violating the rights of the condemned, supporters saw it as protecting the rights of the victim, "a way of expressing respect for human life." A majority of citizens from most European nations favored the death penalty, and continued to favor it through the main period of European abolition, from the end of World War II through the 1970s. Even now, public opinion all around the world "tends to support the use of the death penalty for the most atrocious murders."

Meanwhile, for many years the United States was a leader in restricting and rejecting capital punishment. Connecticut's James Dana commented during the late 1700s on the contrast between America's handling of the death penalty and the large number of capital offenses in the English penal code: "It doth honor to the wisdom as well as the lenity of our legislators that not more than six crimes are capital by our law." Similarly, in 1830, decades before England, Austria, or Germany came to the same decision, Connecticut put a stop to holding its executions in public. Michigan, Rhode Island, and Wisconsin repealed their capital punishment statutes

altogether. Starting in the 1930s, America experienced a long-term drop in executions, from a high of 199 in 1935 to fewer than 100 in 1952 to zero in 1968. Gallup polls revealed that from 1953 to 1966 the share of people supporting the death penalty fell by 26 percent. In 1966 the polls showed that for the first time a majority of Americans had swung from accepting capital punishment to opposing it.

Up to this point America followed much the same course as the international abolition movement, which during the 1960s was advancing across continental Europe, Britain, Ireland, Australia, New Zealand, and Canada. Here, however, is where Garland draws his sharpest line between the United States and other Western nations. He believes that in most Western governments, with their traditions of top-down, centralized authority, modern liberal elites could impose abolition on their citizens. Judges, lawyers, intellectuals, politicians, and other European opinion makers simply disregarded the broad public support for the death penalty and instituted abolition.

In the United States, however, Garland feels that top-down authority can't easily ignore local viewpoints. The Constitution makes it procedurally and politically difficult to override local opinion on criminal law issues. Abolitionist bills could be passed in states that didn't want the death penalty, and four states repealed capital punishment in 1965. Yet it was nearly impossible to pass a national ban that would encompass states where local authorities and local communities preferred executions to continue.

Because this "local democratic populism," as Garland terms it, is built into the legislative structure, American abolitionists concentrated on attacking capital punishment through the legal system. The goal was to have the Supreme Court declare the death penalty unconstitutional, an approach that had already effectively dismantled segregation and undermined Jim Crow. The Legal Defense Fund, at its start a department of the NAACP, led the litigation against the death penalty as part of the larger assault on American racism. At first the strategy worked, as the Legal Defense Fund attempted to bring cases in every death-penalty jurisdiction and

achieved a complete suspension of executions for a full ten years, from 1967 to 1977. In 1972 the Supreme Court issued the *Furman* v. *Georgia* decision, which invalidated all the nation's existing death-penalty statutes, seemingly on the grounds that they were too arbitrary under the Fourteenth Amendment and constituted cruel and unusual punishment under the Eighth Amendment. "Overnight," Garland says, "capital punishment ceased to exist anywhere in the United States." Many people at the time assumed that *Furman* had ended the death penalty forever.

It didn't turn out that way, as the reaction to *Furman* launched a startling new American commitment to capital punishment, and Garland thinks the reaction was greatly strengthened by the decision to throw abolition into the courts. Far from ending the death penalty, the litigation process generated an organized resistance to abolition. "What had previously been a rarely used penal sanction dogged by moral controversy," Garland says, "was rapidly transformed into a hot-button political issue with multiple meanings, all of them highly charged and deeply contested."

The fiercely adversarial nature of our court proceedings encourages extreme oppositions, and the Legal Defense Fund's arguments required death-penalty supporters to come up with fresh and more effective reasons for continuing capital punishment. The most successful justification for the death penalty has been the concept that it's an issue of local law, to be decided by local authorities and local communities. The localization approach allows death-penalty supporters to accomplish a number of otherwise problematic political and social goals. In the 1960s and 1970s, it helped the Republicans win over voters from the Southern states who had historically supported the Democrats, and it deepens the Southern commitment to Republican candidates to this day. The Southern Strategy, crucial to Nixon's victories in 1968 and 1972, used the death penalty as a symbol for protecting states' rights, enforcing law and order, and honoring traditional values.

Localization also was immensely effective at repackaging Southern anger over the civil rights movement. "The Republican embrace of states' rights," Garland says, "could be represented to the nation as a principled belief that overreaching federal government was the problem and local control the solution." This representation cloaked localization's other message to Southerners, which was that Republicans "would seek to undo the gains of the civil rights movement and restore the 'Southern way of life' with its racial inequalities and its religious commitments."

The localization stance was so successful that it worked not only in the South, but in many communities throughout the country. With Southern states leading the way, thirty-five states passed rewritten death-penalty legislation within two years of *Furman* and dared the Supreme Court to strike the statutes down. Since then, the death penalty has become nearly as accepted in Democratic circles as it has in Republican ones, though the South's special devotion to the death penalty remains striking: Since 1976, the South has been responsible for 80 percent of all American executions. Texas alone is responsible for 449 executions, followed by Virginia with 105, Oklahoma with 91, and Florida with 68.[4]

The Supreme Court has come to endorse localization with great enthusiasm. The 1976 *Gregg* v. *Georgia* decision officially revived capital punishment and held that the court would allow the new death-penalty statutes so long as local communities followed heightened due-process requirements. Since *Gregg,* the court has given local elites broad scope to act as they see fit. It has declined to question the constitutional implications of the powers of local prosecutors, who choose when to seek the death penalty, are often locally elected, and are extremely responsive to public opinion in their jurisdiction. The court further refused, in *McCleskey* v. *Kemp* (1987), to give

[4] Some readers might quibble with Garland's broad definition of the South, but certainly all of these states belong to the geographical areas that the Southern Strategy was designed to influence.

practical recognition to evidence of systematic local racism in capital cases. The study at issue in *McCleskey* indicated that in Georgia "murderers of white victims were sentenced to death 4.3 times more frequently than murderers of black victims."[5] The court held that, even if the study was correct, no constitutional violation existed unless the evidence proved that the specific decision makers in the case acted with a discriminatory purpose, producing a deliberate discriminatory effect. *McCleskey* has almost entirely eliminated the constitutional review of racism in the way that local communities apply the death penalty to minorities.

As Garland notes, cases like *Gregg* and *McCleskey* represent an extraordinary abdication of the court's established duty to prevent local majorities from violating the constitutional rights of individuals. The Constitution was never intended to defer automatically to the opinion of either local or national democratic majorities. Rather, it was designed to require the overruling of majority opinion when that opinion violates substantive constitutional principles. If the Supreme Court had applied its current analysis of local majorities to segregation, for instance, it would have been forced to conclude that the federal government had no business interfering with the racist decisions of the Southern communities that supported Jim Crow.

[5] It's hard not to notice the prominent role Georgia has played in the Supreme Court's death penalty decisions, and Garland samples some of the more aggressive pro-death-penalty quotes that Georgian politicians like Lester Maddox and James H. Floyd made during the backlash against *Furman*. Lately, Georgia's by-any-means-necessary attitude toward capital punishment might have driven the state to break the law. In March 2011, the federal Drug Enforcement Administration seized Georgia's supply of sodium thiopental, the drug Georgia uses as part of the lethal injection process. The DEA is investigating an allegation that Georgia obtained the sodium thiopental illegally from a supplier in Great Britain after the sole American manufacturer of the drug abandoned its production.

In a similar vein, the Supreme Court has now determined that jury sentencing is "a constitutional requirement of capital cases." This is a new demand, Garland says, and an odd one, since few jurisdictions require jury sentencing in any other area of criminal law. The court, however, has stated that the correct purpose of capital punishment is to express "the community's moral sensibility." To achieve this, "a representative cross-section of the community must be given the responsibility for making that decision."

The thinking behind these cases gives us a clue as to why the public's emotional reactions to the death penalty have become so important, so isolated from nuanced criticism, and so vulnerable to the oversimplifications of mass entertainment. With the court's apparent conclusion that the death penalty is valid as long as local communities accept it, capital punishment has left the realm of closely reasoned legal or factual analysis. Instead, it has defaulted to the realm of public prejudice. After all, one of the least likely places for a calm and balanced response to a murder is the community where it occurs, especially when the Supreme Court has given local authorities such unrestricted freedom to play up the most inflammatory aspects of capital cases. Consequently, the melodramatic way that the death penalty is presented in the entertainment media has grown increasingly influential, and increasingly divorced from any scrutiny that would recognize standards other than the public's immediate emotional reactions to the issue. The Supreme Court has not merely allowed the death penalty's validity to turn heavily on its entertainment value, but has actively encouraged the process.

The Supreme Court's defense of the death penalty as an expres-sion of the local community's will has, Garland asserts, expanded in importance "as the rationales for the death penalty have grown fewer." Part of the public's recent disenchantment with our capital punishment system comes from the increasingly clear ineffectiveness of our executions as a deterrent. For the death penalty to have any chance to decrease homicide rates, it must be applied swiftly, certainly, and

frequently, with high visibility. The current death penalty meets none of these requirements, and can't meet them while still complying with any modern sense of due process. The average time between sentencing and execution is twelve years. Around 66 percent of capital sentences are reversed before execution, giving a country with 14,000 murders per year an average of 60 executions per year. Even in states with the least rigorous approach to due process, the connection between murder and execution is far too tenuous for deterrent purposes. The same factors also make executions more harrowing than effective as a form of retribution, for both the survivors of the murder victims and the community overall. Yet short of throwing out due process altogether, which is unacceptable to any credible movement even in extreme political circles, it's hard to see how capital punishment can seriously contribute to lowering homicide rates.

One of Garland's most important points about today's death penalty is that it reflects contradictory urges in our society, clashing needs that have made death-penalty law chaotic, inefficient, and counterproductive. The *Gregg* due-process requirements aren't an artificial afterthought grafted onto capital cases without public support. Quite the opposite: The heightened due-process oversight that the Supreme Court imposed after 1976 was precisely what allowed many Americans to stop worrying about the death penalty as a blatantly unjust institution. We don't practice the death penalty of the past, but a new form of execution that incorporates much of the criticism from the international abolition movement. And as today's concerns about DNA testing, wrongful convictions, and lethal injections demonstrate, our society is still deeply sensitive to the long-standing abolitionist concerns with decency and due process.

As more time passes, though, and as our death rows remain flooded with thousands of inmates, the tensions in the system have grown more extreme. On the one hand, we have no serious desire to dismantle the bulk of the due-process standards that make capital punishment so time-consuming and expensive. Supporters of the death penalty rely on those standards as much as opponents do: Due

process is always cited as proof that capital punishment has broken its historical connection with lynching. On the other hand, we're finding it harder to ignore the lack of deterrence, the absence of any measurable benefit in penal policy terms, the massive economic drain on our resources, and the DNA-spotlighted risks of still convicting the innocent. If executing people is so costly and inefficient, and if it isn't lowering murder rates or providing dependable retribution, why are we so committed to it? Whose interests is the death penalty serving?

Garland has a range of answers to that question. First, the death penalty benefits quite a few professionals either financially or by providing them with a sense of personal satisfaction. A large number of people, from lawyers and judges to prison wardens and psychiatric experts, are involved in the death-penalty system, and all of them receive tangible or intangible compensation for their work. Second, political figures use the death penalty for all kinds of purposes. In addition to assisting specific political efforts like the Southern Strategy, the death-penalty debate can be customized to function as a popular symbol of what Garland calls "masculine resolve" for both Republicans and Democrats. By standing up for capital punishment, politicians can demonstrate "a determined, warrior-like commitment to face down murderous criminals and protect the lives of citizens." Third, as already noted, the mass media and the public have a mutually reinforcing relationship with each other on death-penalty cases. As part of our perpetual loop of entertainment, the presentation of capital punishment offers a constant pandering to our sweet tooth for sensationalism. The abolitionists' storyline of innocent defendants alternates with the death-penalty supporters' storyline of innocent victims, and we enjoy the emotional charge of both—the pleasure of agreeing with the simplified views we accept, disagreeing with the simplified views we reject, and secretly thrilling to the fascination of violent death. The death penalty, Garland says, "commands our attention, especially when the killing is done in our name and at our behest." It satisfies our revenge fantasies, our

dreams of ourselves as Dirty Harry or Lisbeth Salander retaliating against human beasts. And for those of us who are abolitionists, the death penalty also satisfies our smug protecting-the-weak fantasies, allowing us to indulge in condescending *To Kill a Mockingbird* visions of helping the disadvantaged through our superior sensibility. These tawdry pleasures are so much easier and more gratifying than thinking hard about the actual intricacy of capital punishment that we fall back on them in relief. The roller coaster ride goes on and on, amusing us without changing anything.

In his essay on *Peculiar Institution* for *The New York Review of Books,* former justice John Paul Stevens praises Garland while defending or reinterpreting some of the cases that Garland criticizes. Most intriguingly, Stevens condemns the current capital-punishment system and offers a new five-point test for determining when death-penalty legislation should be allowed under the Constitution.

Stevens makes a formidable death-penalty opponent because he started as a moderate conservative who supported the reinstatement of capital punishment. President Ford appointed Stevens to the court at the end of 1975. One of the earliest Stevens cases was the *Gregg* decision's validation of the new death-penalty statutes enacted after *Furman*. Stevens voted in favor of the validation, on the basis that fuller attention to due process could guarantee "even-handed, rational, and consistent imposition of death sentences under law."

Stevens devotes much of the *New York Review* essay to explaining how his death-penalty opinions grew out of his understanding of *Furman*'s rejection of the earlier statutes. He thinks that Garland takes an all-or-nothing view of capital punishment by assuming that the only choice is between total acceptance of the death penalty and total abolition. For Stevens, however, *Furman* should have established the "narrowing approach" that Justice Stewart set forth in one of the case's concurring opinions, and should have resulted in far fewer executions under a far stricter due process scrutiny.

We now have a much larger number of death sentences than we did before *Furman,* and Stevens blames this on "the regrettable judicial activism" of the court's recent, more conservative justices. One of the rulings that Stevens singles out for special criticism is *Uttecht* v. *Brown* (2007), which held that the prosecution can disqualify or exclude jurors who are personally opposed to the death penalty, and can ensure that a jury is "death qualified." Stevens scorns the decision as mandating a hanging jury that nonetheless "may be accepted as a fair cross-section of the community." He also attacks the court's approval of victim-impact statements and *McCleskey*'s exclusion of racial evidence. Yet he follows these criticisms not with a clear call for the death penalty's permanent abolition but for a new test that would consider five different factors in examining the constitutional validity of all death-penalty statutes. "To be reasonable," he writes, "legislative imposition of death-penalty eligibility must be rooted in benefits for at least one of the five classes of persons affected by capital offenses."

He specifies the five classes as the victims; the family and close friends of the victims; the participants in the judicial process, that is, prosecutors, judges, jurors, and so forth; the general public; and the condemned inmates awaiting execution. Drawing heavily on Garland's analysis, Stevens then goes through each class and finds that none of them receives a valid, significant benefit from the death penalty. Since murder victims are dead, they "have no continuing interest" in the execution of their killers. The family and friends of the victims suffer immeasurable harm, but the harm can't be compensated adequately by killing the condemned, and retribution alone is an insufficient justification for execution. "We do not, after all, execute drunk drivers who cause fatal accidents," Stevens writes. Any benefits to the participants in the judicial process are outweighed by the financial costs of the death penalty and by "the impact on the conscientious juror obliged to make a life-and-death decision despite residual doubts about a defendant's guilt." Similarly, the benefits to the public in Garland's terms of "political exchange and

cultural consumption" provide "woefully inadequate justifications for putting anyone to death," especially when the alternative of life-without-parole sentencing exists. The bulk of the thousands of death row inmates would obviously receive no personal benefit from their execution—a doubly significant factor because, according to Stevens, many inmates "have repented and made important contributions to society," a controversial contention that the essay doesn't argue in detail. Finally, Stevens notes that going forward with the death penalty always "includes the risk that the state may put an actually innocent person to death."

Stevens is a bit coy on whether he thinks any death-penalty statute could survive his five-point review. He has already expressly rejected the death penalty in the *Baze* v. *Rees* decision from 2008, and his *Peculiar Institution* essay repeats the key phrase from his *Baze* concurrence, quoting Justice White's statement that the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." Yet the essay also lists a series of extreme death-penalty categories that Stevens thinks the narrowing approach from *Furman* might still recognize: treason, Timothy McVeigh's bombing of the federal building in Oklahoma City, attempted assassination of the Pope, murder of police officers or prison guards, and serial killings. Stevens regrets that Garland "does not tell us whether he would be an abolitionist in such cases," but Stevens also doesn't quite tell us this for himself.

The ambiguity may be tactical. Stevens is clear that he finds the death penalty as it now exists unconstitutional, but is less clear on whether it might be made constitutional in a much more restricted form. I suspect that he would prefer complete abolition, but if this can't be accomplished, he wants at a minimum for the court's expansionist tendencies to be reversed as firmly as possible. Regardless of his intentions, however, his five-point test is a risky proposition. The question of benefit to each class of affected persons could easily be twisted to justify a still greater growth in the number of death

sentences. The best argument against narrowing the death penalty is *Furman* itself: The narrowing principles found in that decision were reinterpreted to justify enlargement. A narrowed death penalty is an expanded death penalty waiting to happen. From a utilitarian viewpoint, the only sure way to prevent abuse of capital punishment is to eliminate it.

Garland and Stevens share a method of evaluating the problems with the death penalty in pragmatic terms, downplaying the partisan political and cultural divisions that the subject inspires. In this sense, their approach is very much in line with the American Law Institute's 2009 decision to withdraw its model penal-code provision on capital punishment. The ALI stated that it had chosen to remove the provision due to "the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment."

The general public remains largely unaware of the ALI decision, but its significance for the legal foundation of the death penalty is considerable. An independent and long-established nonprofit organization with four thousand members, the ALI produces a great deal of scholarly material that lawyers and judges rely on in their everyday work, including the ALI restatements of the law and model principles. In addition, the ALI's work has substantially affected the common law and legislation in many states. This is especially true of its model penal code's death-penalty provision, Section 210.6. The provision dates back to 1962, when the ALI determined that it was inappropriate for the organization to take a position on abolition as a political issue. The ALI decided that it instead had a duty to provide "the most reasonable standards and procedures for application of the death penalty for use by those jurisdictions which chose to retain it." After *Furman,* many states used Section 210.6 as a guide for their revised legislation, since the ALI's prestige gave the laws extra credibility for Supreme Court review. The revival of capital punishment since 1976 owes much of its legislative form to the ALI's influence.

Now, however, the ALI has declared that Section 210.6 no longer works, and that it isn't possible to devise an acceptable model death-penalty provision under the current system. The organization still refuses to express an opinion on whether the death penalty should be abolished. Its decision, as explained in its April 2009 council report to its members, springs from doubts as to "whether the capital-punishment regimes in place in three-fourths of the states, or in any form likely to be implemented in the near future, meet or are likely ever to meet basic concerns of fairness in process and outcome." The ALI had earlier commissioned a paper on Section 210.6 from the independent researchers Carol Steiker and Jordan Steiker. The paper raised many of the difficulties that Garland and Stevens note, including the politicization of judicial elections, where "candidate statements of personal views on the death penalty and incumbent judges' actions in death-penalty cases become campaign issues." The paper also identified inherent difficulties in creating constitutionally fair lists of aggravating factors or acceptable categories for death sentences.

I interviewed Michael Traynor, the president emeritus of the ALI, who spoke to me with the understanding that his comments were personal and not made on the ALI's behalf. Traynor talked about the death-penalty system in his home state of California, and concentrated on the huge amounts of time, money, and energy that capital punishment consumes.

"When you look at the substantial resources being spent on the death penalty," Traynor said, "you have to consider whether they could be better allocated for other purposes."

I asked him if he thought the death penalty should be declared unconstitutional as a form of cruel and unusual punishment or on any other broad moral grounds.

"I don't think you need to reach those issues," he said. "I believe the ALI simply reacted to the unworkability of capital punishment, which is riddled with these resource and fair-enforcement problems."

I also talked with Natasha Minsker, another ALI member, who is the death-penalty policy director for the ACLU of Northern California. She wasn't yet part of the ALI when Section 210.6 was withdrawn, but like Traynor she finds the death penalty problematic in legal and practical terms, and sees these as the ALI's concerns.

"The ALI represents the intellectual leadership of the legal community," Minsker said. "For that leadership to withdraw its support from its death-penalty provision is like the National Academy of Sciences saying that it no longer thinks the theory of evolution is real. Everyone knows that the ALI's decision was made through a long process of review and serious, scholarly consideration."

In California, Minsker argued, the capital-punishment system demonstrates the legitimacy of the ALI's decision, and illustrates why public opinion on the system no longer splits along clear conservative and liberal lines. "Universally," she said,

> everyone in California agrees that the death penalty here is a failure. Even people in favor of capital punishment recognize that it's broken, that it doesn't serve any of the purposes they think the death penalty is there for. And then you add the costs—many people haven't known how much capital punishment is costing, and they're shocked when they find out. They're discovering, after thirty years of experimenting with the death penalty, that life-without-parole provides swifter and more certain justice, without putting family members and other survivors through such a decades-long ordeal.

Since Minsker works for the ACLU, her opposition to the death penalty is unsurprising. Part of what makes her comments interesting, though, is how she couches that opposition in utilitarian language. Like Garland, she seems to believe that Americans who aren't ready to reject the death penalty on moral grounds might be ready to reject it on the grounds of financial waste and ineffectuality.

Not everyone agrees with the pragmatic outlook of Garland and the ALI, or would draw the same conclusions from that outlook. William "Rusty" Hubbarth is the vice-president of Justice For All, a victims' rights group that is a leading public supporter of the death penalty. In speaking with me, Hubbarth brought to the center of the discussion some of the considerations that Garland tries to sideline: the moral justifications for capital punishment, and the importance of remembering the pain of the murder victims.

As the former counsel of the Pardons and Paroles Division of the Texas Department of Criminal Justice, as well as through his earlier work for the attorney general's office, Hubbarth developed an extensive familiarity with death-penalty cases. In 1995 he left his position with the state and joined Justice For All. Over the phone, he was straightforward and forceful in presenting me with his reasons for believing in capital punishment.

"It's the ultimate sanction for the ultimate violation: the taking of a human life," he said. "In Texas, not every murder gives rise to the death penalty. We aren't executing people for rape or for anything less than murder committed in certain special circumstances. Often the murder involves protected classes of individuals, like children or the elderly or public servants in the course of their duties."

He gave great weight to the jury's role in death sentencing. "It's a jury of their peers who put these people on death row, not some arbitrary Roman emperor with a thumb. This is a jury that, through an extensive trial process, has had the opportunity to judge all aspects of the crime and has been able to make an informed decision to send that person to death row."

On the question of deterrence, Hubbarth made two points. First, he said, he believes that the death penalty does indeed have a deterrent effect. A murderer who is executed has no ability to murder again, either by killing innocent citizens upon potentially reentering society or by killing fellow inmates in prison. Second, even if the deterrent effect didn't exist, Hubbarth would still consider

the death penalty justified as the correct degree of response to the extreme act of depriving another person of his or her life:

> Murderers need to be held responsible for their actions. Remember: Their victims don't get another twenty years of living after they are killed. Even the inmates who are on death row, they're still breathing, they're still alive, they're still experiencing occasional pleasurable sensations, and yet they have robbed someone of those same sensations in order to get to this point. They have magazines, they have books, they have whatever outside stimulation they receive. They still have contact with family members. They still have life. They have not been deprived of the most basic part of human existence, even though they have taken it away from others. Murderers must pay the price for the crimes they have committed, regardless of how they might reform afterwards, because otherwise you minimize the lives of the people they have killed.

Again and again, Hubbarth came back to the singular, irreplaceable loss that murderers impose on their victims. Given the seriousness of this deprivation, Hubbarth found it hard to say that death-penalty cases cost too much. Furthermore, to the degree that the capital punishment system might be wasteful and expensive, he blamed the obstructive tactics of death-penalty opponents, and proposed streamlining the entire post-sentencing process.

"It's the defense on appeals and on habeas proceedings that drives the costs up so high," he said. Part of the solution, he thought, might be to limit the number of appeals and petitions, and to create stricter time frames for proceeding at every level. The death penalty might be fast-tracked, set on a capital punishment version of the "rocket docket" approach that many jurisdictions are already taking to handle other kinds of cases more expeditiously. For Hubbarth, the time from sentencing to execution should last no longer than five or six years.

In place of spending such large amounts on the post-trial process, Hubbarth would devote greater resources to ensuring that the trial itself is performed as fairly as possible:

> If you're going to have capital punishment, for God's sake do it right. Make sure the prosecutor is competent. Make sure the defense counsel is competent. Otherwise, you end up with procedural issues that detract from the purpose of the death penalty. So have fair representation on both sides. That's where the effort should go.

It didn't trouble Hubbarth if different parts of the country had different attitudes towards the death penalty. He looked at it as part of America's inherent variety, and as a sign of our freedom to choose our own environments:

> I'm a Texan, and I know how folks in states that use the death penalty tend to get portrayed as a bunch of grinning bloodthirsty yahoos. But that's not the case. We're American citizens. And how we feel about capital punishment is a reflection of our beliefs. That may change in different areas. But then people are drawn to different places. So if you don't like the death penalty and you don't want to live around people who believe in capital punishment, move to areas where they don't have it. If you support the death penalty, move to areas that do have it. But the death penalty needs to be in touch with local mores.

Peculiar Institution **is understandably vague on the details of** abolition in other Western countries: The topic is so large that it would have taken too much space to address it thoroughly. After reading the book, though, I wanted to see how some of Garland's generalities about Europe-versus-America played out against a specific historical example. With this in mind, I talked to two of Helsinki University's criminal law professors about the Finnish death

penalty and Nordic methods of administering criminal justice.

"For us here in Finland," said Kimmo Nuotio, a specialist in Nordic, European, and international criminal law, "an essential difference between the Finnish and American attitudes towards crime can be traced to the concept of Nordic exceptionalism. Nordic exceptionalism is the basis for our penal exceptionalism—shorter prison sentences and lower imprisonment rates. The policy has its roots in Nordic notions of egalitarianism, and in our view that penal policy is less to punish than to reform."

Nuotio directed me to a 2007 article on the practice of Nordic exceptionalism in penal law, written by New Zealand legal scholar John Pratt. Pratt gives the Finnish imprisonment rate as 68 inmates per 100,000 people. The American rate is 750 per 100,000, more than ten times the Finnish figure. Since the Nordic countries also have substantially lower crime rates than America does, their imprisonment practices pose a challenge to the common U.S. assumption that a tough punishment policy, with death as the toughest punishment of all, is necessary to keep crime under control.

The other professor I interviewed, Jukka Kekkonen, is an expert on Finnish legal history and on the comparative history of criminal law and punishment systems. Kekkonen told me that he knows Garland personally. He had much to say about Garland's work, and about the death penalty's abolition in Finland:

> The Finnish death penalty ended in 1826. For 700 years Finland was under Swedish rule. Then in 1809 it came under the control of Russia as part of the deal-brokering of the Napoleonic wars. For political reasons, after Nicholas I became the new Russian emperor in 1825, he decided to make some minor liberal reforms. He decreed that he would pardon any death sentence in Finland unless the case involved a threat to the tsar's family or to the state. In return, he required that the pardoned convict should be deported to Siberia, which the Russian government was attempting to colonize. It was a political strategy on his part.

After the tsar's decree, no death sentence was ever again carried out in Finland during peacetime. "Nevertheless," Kekkonen said,

> Finland has had these crisis episodes in its history where there has been strict and frequent use of the death penalty. Our civil war started in 1918, soon after Finland declared its independence from Russia in 1917. During the civil war, the Whites executed more than 8,400 Reds after summary court martials, and the Reds executed 1,830 Whites. Another 150 executions occurred right after the war, though still in 1918. Then came the next period of frequent death penalty use, the Winter War of 1939–1940, when Finland was attacked by the Soviet Union. This was followed by Finland's complicated involvement in World War II. A total of 681 capital punishment sentences were made between 1939 and 1946, and at least 528 of the sentences were carried out, mostly during the "continuation war" of 1941–44, when Finland was fighting on the same side as Hitler against the Soviets.

Since the time of these dramatic exceptions, however, the death penalty has vanished from Finland, in both law and practice. During the 1960s and 1970s, the country's modern criminal justice system began to intensify its adoption of the standards of Nordic exceptionalism. That process was closely tied to the comparatively late development of a Nordic-style welfare state in Finland.

The Finnish example is consistent with Garland's theory of top-down abolition in Europe, since it involves a centralized decision made without concern for local opinion. Yet even a superficial summary of Finland's complex historical circumstances illustrates how much Garland's overview ignores or glosses over. In the nineteenth century, it was Finland's peasants, liberal bourgeoisie, and lower clergy who sought more lenient criminal control policies, while it was the highest estates that wanted the death penalty. Then in the first half of the twentieth century, during the period when Finland was gaining and consolidating its independence, leftwing parties that represented the working classes were the death penalty's

most outspoken opponents. The liberal middle classes also tended to oppose the death penalty, but less fervently than the leftists did. Only the conservative bourgeois parties were outright death-penalty supporters. After World War II, however, all but certain right-wing groups reached a consensus against capital punishment—a consensus that remained relatively stable over the coming decades. Though the Finnish example doesn't entirely contradict Garland's thesis, it reminds us how resistant specific events are to even intelligent attempts to generalize about them on an international scale.

In addition, while Kekkonen admires Garland's research and writing, he thinks that *Peculiar Institution* should have paid fuller attention to a topic it treats only briefly: the influence of economic inequality on capital-punishment law.

"In every legal system that I know from antiquity to today," Kekkonen said, "the basic issue of criminal and penal control is connected to the power structures, and to how wide the gap is between the rich and the poor. If the divide between them is very large, the control system as a whole is probably quite harsh. And if the divide is not so large, the opposite is true."

Kekkonen had brought this issue up with Garland when they had met: "I commented to him, 'You might have compared the different states in the U.S., since anyone can see at a glance that it's states like Texas, where the wealth gaps are very wide, that perform more executions.' For the most part I agree with Garland. But he should have looked in more detail at what factors unite, say, the Southern states in regard to wealth distribution and what kinds of possibilities the underprivileged have for social mobility in those states."

My own feeling is that Garland acknowledges the role of economic inequality in the death penalty, but that he touches on the subject as lightly as possible to avoid alienating his more conservative readers. *Peculiar Institution* is a cautious book, and Garland generally errs on the side of avoiding direct confrontation on political issues that might

take him away from his utilitarian analysis of capital punishment in its practical and cultural dimensions.

Through his criticism of capital punishment as entertainment, Garland presses us to consider more closely the question of how we fantasize about murder cases. It's easy to say that the act of fantasizing is itself the problem, but that goes too far, and in the wrong direction. All our thoughts require fantasy—the ability to imagine things we haven't directly experienced—to help us understand the world. It's crucial for us to rely on our imagination in contemplating the death penalty.

The problem isn't that we fantasize about murder and execution, but that our fantasies are so self-indulgent. Our thoughts on death-penalty cases are too tied up with sensationalism and wish fulfillment, the Hollywood clichés of revenge against the guilty or salvation of the underprivileged. There's no reason we need to accept this. In *Hamlet,* Shakespeare starts with a revenge scenario as common for his audiences as it is for us: We've all grown up with an endless supply of action stories where the hero sets out to destroy the criminal who killed his partner or his wife. But Shakespeare doesn't give us the easy triumphalism we expect from our blockbuster movies and bestselling books, the shopworn struggle between good and evil, with the villains defeated at the end. Instead, he drives every aspect of the play into paradox, into the hard complexities that revenge creates. He is relentless in showing the difficulties all our choices contain, from Hamlet's depressed inaction to Claudius's patient manipulations to Laertes's rash boldness. Just before his final duel with Laertes, Hamlet says he has shot an arrow over his house and hurt his brother. It's a statement that could apply to most of the characters. Trying to protect his marriage and his crown, Claudius brings about the murders of both Gertrude and himself, while Polonius sets in motion the deaths of his two children. Claudius plots and dies, Laertes attacks and dies, Gertrude loves and

dies, Ophelia obeys and dies, Hamlet agonizes and dies; nobody escapes. Shakespeare never loses sight of the unpredictable and largely uncontrollable consequences of violence.

It's obviously unfair to expect the average Hollywood movie to meet the standards of the greatest poet and playwright in the English language. But we can take at least as much pleasure from complex, sophisticated fantasies as from trashy, self-serving ones. *Hamlet* has always been one of Shakespeare's most popular plays, and some of our best contemporary writers and filmmakers, from Cormac McCarthy to Martin Scorsese, have found a large audience without sacrificing their abilities to portray violence as something other than an excuse for easy heroics. The superb new crime novelist James Thompson has written two books—*Snow Angels* and *Lucifer's Tears*—that combine his extraordinary skills as a stylist and storyteller with his mature and moving awareness of the costs that violence exacts from individuals and from society as a whole. Both J. G. Ballard with *Crash* and Anthony Burgess with *A Clockwork Orange* achieved lasting pop-culture success writing about violence while avoiding lowest-common-denominator exploitation, and the same can be said of less artful yet honorable novels like Scott Turow's *Presumed Innocent*. Even in movies and television, where our expectations tend to be lower than with books, a genuine difference still exists between productions that wallow in dumb, essentially one-note revenge fantasies, like *Death Wish* or *Man on Fire,* and productions that attempt to complicate our responses, like *Blue Velvet* or *Unforgiven* or *The Sopranos*.

If, in our fantasies about the death penalty, we accept low-grade entertainment—visions that work on our minds the same way that cut-rate candy works on our bodies—it's not because we're incapable of enjoying anything else. It's because we've surrendered to the sugar rush. This is damaging in all areas of our lives, but it's particularly damaging where the death penalty is concerned. We're literally offering human sacrifices to our imagination, while we neglect the

complicated facts that have made our capital punishment system so contradictory and confused.

In his 1923 poem "Meditations in Time of Civil War," Yeats wrote: "We had fed the heart on fantasies. / The heart's grown brutal from the fare." Yeats knew that brutality thrives on fantasies of revenge and injustice, and that these fantasies can easily become addictive. Yet he also understood the importance of fantasy, and famously reminded us that in dreams begin responsibility. We've been dreaming about our modern form of the death penalty since 1976. Now would be a good time for us to use those dreams to move toward a deeper sense of our responsibilities.