BOOK REVIEW

CAPITAL PUNISHMENT IN AMERICA

By Raymond Paternoster. New York: Lexington Books, 1992. Pp. xvii, 307. $35.00.

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Capital punishment has been applied in North America virtually since the first European settlers arrived.[2] It has been estimated that about 16,000 people have been legally executed in the United States and its colonial predecessors; an unknown additional number of persons have died as a result of extrajudicial executions.

Despite the long history of the death penalty in the United States, modern death penalty jurisprudence can be directly traced to 1972 when the United States Supreme Court decided *Furman v. Georgia*.[3] One of the longest and most fractured opinions in the Court's history,[4] *Furman* held that the death penalty, as it was then applied by the states, violated the cruel and unusual punishments clause of the Eighth Amendment because its imposition was arbitrary and capricious. The controlling opinions[5] held that then-existing death penalty statutes gave juries unfettered discretion to decide when to impose the death penalty for potential capital crimes. Since there was "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not,"[6] these opinions held that the death penalty was cruel and unusual "in the same way as being struck by lightning is cruel and unusual,"[7] and that it was therefore unconstitutional.

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1. It is the policy of the *Review of Law & Social Change* to use feminine pronouns for the third person singular when the pronoun is used generically. However, because the overwhelming majority of death row inmates and capital defendants are male, masculine pronouns will be used in this Book Review when generic references are made to death row inmates or capital defendants.

2. The first documented execution in America was that of George Kendall at Jamestown in 1608.

3. 408 U.S. 238 (1972) (per curiam).

4. The opinion of the Court consists of a one paragraph per curiam statement, followed by five separate concurring and four separate dissenting opinions, comprising 220 pages in the official reporter.

5. The concurring opinions of Justices White, Stewart, and Douglas are generally regarded as controlling.

6. *Furman*, 408 U.S. at 313 (White, J., concurring).

7. *Id.* at 309 (Stewart, J., concurring).

State legislatures responded to *Furman* in two ways. Some passed death penalty statutes that required mandatory imposition of a death sentence upon conviction of a capital crime.[8] Others, following the lead of the Model Penal Code,[9] enacted statutes that established guidelines for sentencers to follow in determining whether to impose the death penalty.[10]

In a series of cases decided on July 2, 1976, the Supreme Court held that before the death penalty could be applied, the sentencer must give individualized consideration to the offender and the circumstances surrounding the offense for which he stands accused. The Court concluded that mandatory death penalty statutes did not allow for such individualized consideration, and thus held that they were unconstitutional.[11] In *Gregg v. Georgia*[12] and two other cases,[13] the Court held that guided discretion statutes did not pose this problem and affirmed them.

At present, thirty-six states and the federal government have capital sentencing statutes on the books, and opinion polls indicate that about seventy-five percent of the populace favors capital punishment for first degree murder. These indicators are significant because modern judicial opinions on the cruel and unusual punishments clause have often focused on "the evolving standards of decency that mark the progress of a maturing society,"[14] and have used popular, as well as legislative, opinion as the measuring stick of society's "standards of decency."[15] But are the legislative responses to *Furman*, and the popular support for the death penalty, truly indicative of current standards of human decency in the United States?[16]

Justice Thurgood Marshall once answered this question by stating that if the average citizen had knowledge "of all the facts presently available regarding capital punishment, [he] would . . . find it shocking to his conscience and sense of justice."[17] A similar sentiment may well have been the primary moti-

8. *See, e.g.*, N.C. GEN. STAT. §§ 14-17 (Cum. Supp. 1975); LA. REV. STAT. ANN. § 14:30 (West 1974).

9. *See* MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962).

10. *See, e.g.*, FLA. STAT. ch. 921.141(5), (6) (Supp. 1976-1977); GA. CODE ANN. § 27-2534.1(b) (Supp. 1975); TEX. CRIM. PROC. CODE ANN. § 37.071 (West Supp. 1975-1976).

11. Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976) (plurality opinion).

12. 428 U.S. 153 (1976) (plurality opinion).

13. Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion); Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion).

14. Furman v. Georgia, 408 U.S. 238, 269 (1972) (Brennan, J., concurring) (quoting Trop v. Dulles, 356 U.S. 86, 100-101 (1958)).

15. *See, e.g., Woodson*, 428 U.S. at 288.

16. In polls, when life imprisonment without the possibility of parole, coupled with some form of restitution to the victim's survivors, is suggested as an alternative to the death penalty, approval for the death penalty falls to about twenty-five percent.

17. *Furman*, 408 U.S. at 369 (Marshall, J., concurring). Justice Marshall held to this opinion throughout the remainder of his tenure on the Court, as evidenced by his statement in virtually every death penalty case to come before the Court that the death penalty is *per se* cruel and unusual punishment in violation of the Eighth Amendment. *See, e.g.*, White v. Maryland, 470 U.S. 1062 (1985) (Marshall, J., dissenting from denial of certiorari); Gregg v. Georgia, 428

vation behind Raymond Paternoster's informative new book, *Capital Punishment in America*.

Paternoster is a Professor of Criminology at the University of Maryland's Institute of Criminal Justice and Criminology. In *Capital Punishment in America* he has authored a clear, straightforward discussion of the history and current state of the death penalty in the United States, supported by a thoroughly impressive collection of empirical data on the death penalty and relevant surrounding issues. It is not difficult to discern that Paternoster opposes the death penalty and likewise, that Paternoster shares Justice Marshall's view that, if people only understood all of the facts surrounding capital punishment, they would share his distaste for it.

Paternoster begins with a fairly brief discussion of the general history of capital punishment in what is now the United States, from the first European settlers to the modern death penalty, which is rooted in *Furman v. Georgia*.[18] The range of capital crimes has dwindled markedly in the 384 years since the first judicially imposed execution in North America. Before the American Revolution, capital offenses varied from colony to colony, but almost uniformly included murder, treason, and rape. Burglary, kidnapping, arson, and various religious offenses such as witchcraft, blasphemy, sodomy, and adultery were also commonly defined as capital offenses. Following the Revolution, the number and range of capital offenses declined, at least for white people. Beginning with Pennsylvania in 1794, states began narrowing the imposition of the death penalty, even for murder, through the introduction of varying degrees of murder.[19] Surprisingly, it was not until 1977 that crimes other than murder were finally removed from the list of potentially capital offenses.[20]

While this history is not terribly important to an understanding of the modern legal requirements regarding the death penalty, it is highly relevant to the philosophical debate surrounding contemporary Eighth Amendment jurisprudence, and to an understanding of the origins of the racial inequities that

U.S. 153, 231 (1976) (Marshall, J., dissenting); *Furman*, 408 U.S. at 314 (Marshall, J., concurring).

Whether or not the average citizen would, in fact, find the death penalty shocking is mere speculation. However, the implication of Justice Marshall's statement is undoubtedly true: the average citizen thinking about the death penalty in the abstract, as well as the average capital juror preparing to pass sentence of life or death, is largely unaware of significant factors surrounding the death penalty. To cite one example, studies have shown that capital jurors believe that, if they return a sentence of life imprisonment, the convicted offender will be released on parole — not merely eligible for, but actually released — in seven years. In fact, all states have mandatory minimum periods of incarceration, generally in the vicinity of twenty to twenty-five years. *See* Marshall Dayan, Robert Steven Mahler & M. Gordon Widenhouse, Jr., *Searching for an Impartial Sentencer Through Jury Selection in Capital Trials*, 23 LOY. L.A. L. REV. 151, 164-76 (1989).

18. 408 U.S. 238 (1972); *see supra* text accompanying notes 3-13.

19. This legislative activity was a response to the phenomenon of jury nullification. Often, juries would acquit a defendant when the mandatory punishment was death, even if they believed him to be guilty, on the ground that death was too harsh a penalty for the offense.

20. *See* Coker v. Georgia, 433 U.S. 584 (1977) (holding that the death penalty is disproportionately severe for rape of an adult woman).

still plague our system of capital punishment.[21] Justices Brennan and Marshall cited the historical narrowing of death eligible crimes as support for the proposition that the Eighth Amendment concept of cruel and unusual punishment is not fixed at what that clause was understood to mean at the time of its adoption in 1791.[22] This evolution in meaning is essential because constitutional challenges to the death penalty rest squarely on the fact that the death penalty is inconsistent with a modern understanding of what constitutes cruel and unusual punishment.[23]

Of course, modern understandings of the Eighth Amendment and the particulars of equal protection jurisprudence may be fascinating to lawyers and academics, but these are probably not the issues of greatest concern to the average American citizen. Accordingly, most of *Capital Punishment in America* addresses and rebuts the general assumptions upon which public support for the death penalty is based, including assumptions about the equity with which the death penalty is imposed.

Paternoster first discusses whether the *Furman* requirement, that the death penalty not be imposed in an arbitrary and capricious manner, has been satisfied by the post-*Gregg* guided discretion statutes. Since the role of race cannot be ignored when considering the arbitrariness with which the death penalty is imposed,[24] implication of racial biases informs much of this early

21. Paternoster points out the widely known fact that the race of the offender and victim are strong predictors of whether a sentence of life or death will be imposed. Furthermore, he links these current problems with the historical use of capital punishment, most notably through the pre-Civil War Slave Codes and post-Civil War Black Codes, which imposed death on African Americans for a far larger number of offenses than was imposed on whites.

22. *See Furman*, 408 U.S. at 335-40 (Marshall, J., concurring).

23. The Supreme Court effectively eliminated equal protection attacks alleging systemic discrimination based on the race of both offender and victim by holding that, to successfully press an equal protection claim, a capital defendant must demonstrate that his particular prosecutor and/or sentencer acted with intentional racial animus. It is not sufficient to prove that the capital sentencing system of the jurisdiction in which he was sentenced demonstrates a system-wide bias against defendants of a certain race, or against those who kill victims of a certain race, no matter how overwhelming the evidence. *See* McClesky v. Kemp, 481 U.S. 279 (1987).

24. Perhaps this is an overstatement. The Court did effectively ignore the importance of race in capital sentencing in its decision in McClesky v. Kemp, 481 U.S. 279. But this is inconsistent with the concerns expressed by the Court in *Furman*. In that case, Justice Douglas argued that then-existing capital sentencing statutes violated the Eighth Amendment because they provided substantial opportunity for sentencers to impose death in a racially discriminatory manner. "[T]he discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority . . . ." *Furman*, 408 U.S. at 255 (Douglas, J., concurring). Compare this with Justice Powell's majority opinion in *McClesky*, rejecting what is arguably the most thorough empirical study ever performed on the effects of race in capital sentencing. This study demonstrated, among other factors, that those convicted of killing a white victim in Georgia (where McClesky was convicted and sentenced) were 4.3 times more likely to be sentenced to death than those convicted of killing an African American victim. African American defendants were 1.1 times more likely to be sentenced to death than white defendants, regardless of the race of the victim. *See* David Baldus, George Woodworth & Charles Pulaski, *An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

discussion. Paternoster presents and analyzes empirical data showing the disturbing, though not surprising, fact that capital defendants convicted of killing white victims are significantly more likely to be sentenced to death than those defendants convicted of killing African American victims. Paternoster demonstrates that racial bias is not limited to capital sentencers by presenting further empirical evidence that the race of the victim and offender play a significant role in the charging and indictment stages of the process as well.

Obviously, charging is a very important part of the process. If a defendant is not charged with a capital crime, he cannot be sentenced to death upon conviction. At this stage, too, the race of the victim plays a very significant role, with those accused of killing whites exponentially more likely to be charged with capital murder than those accused of killing persons of color. The conclusion to be drawn is that racial bias is not merely a function of citizen-sentencers, but is endemic to the whole capital punishment system, from beginning to end.[25]

Race is not the only factor contributing to the arbitrary imposition of the death penalty. Hence, Paternoster discusses how other extra-legal factors influence capital sentencing: differences in sentencing patterns in different parts of the same state; the location of the crime in a rural or an urban area; and the quality of defense counsel obtained by the offender.

If the application of the death penalty is so blatantly unfair, then why does it enjoy such apparently overwhelming popular support? Surveys have often shown that popular support for capital punishment is based on several grounds. People resent having their tax dollars spent on maintaining criminals in prison; they fear that convicted murderers will kill again, either in prison or after release on parole; they seek to deter future violence; and they believe that those who kill deserve to die. Paternoster analyzes and rebuts each of these arguments.

First, Paternoster demonstrates that the *system* of capital punishment makes death a more expensive alternative than life imprisonment. This, as the author points out, is a result of the commonly shared recognition that death is different from any other punishment.[26] As a result of this recognition, certain procedural protections have emerged in the capital sentencing context that do not exist in other criminal contexts — what Paternoster refers to as "super due process." Indeed, it is not only the much maligned appeals and post-conviction processes that make capital punishment more expensive, it is the trial process itself.

Paternoster correctly points out that, in preparing for a capital trial, competent defense counsel cannot merely contest her client's guilt but must also prepare to present a case in mitigation of the sentence if her client is con-

25. Paternoster suggests that race affects not only the beginning but the end of the process as well, i.e., in the decision whether or not to grant executive clemency.

26. *See* Woodson v. North Carolina, 428 U.S. 280, 303-304 (1976) (plurality opinion) ("[D]eath is a punishment different from all other sanctions in kind rather than degree.").

victed.[27] Thus, in her trial preparation, the defense attorney will investigate her client's past, try to locate people whose testimony might sway the sentencer in the client's favor, and use any expert testimony which might help to mitigate her client's culpability. Clearly, this is expensive as it takes more of the lawyer's time, and entails investigative costs and experts' fees. Many capital defendants are unable to afford private counsel, investigators, or experts. Therefore, the State must pay at least some of these expenses[28] in addition to any expenses incurred by the prosecution as it develops its own case and rebuttal arguments.

Capital trials run longer than non-capital trials as well. These trials are bifurcated, and both the defense and the prosecution have legal grounds for excusing prospective jurors that do not exist in non-capital cases.[29] As a cumulative effect of "super due process," it is more expensive to put a defendant through the capital trial/sentencing process than it is to try, convict, and incarcerate an offender for life. Yet unless we are prepared to abandon the heightened degree of protection necessary to insure that only the most culpable are executed, there is no way to avoid the added expense.

Another oft-cited reason for maintaining capital punishment is incapacitation: if the murderers are permitted to live, they may be a threat to other inmates, prison employees, and if they are ever paroled, the general public. Yet Paternoster rebuts this argument with ample empirical evidence that murderers are no more likely to violate prison rules, be involved in violent altercations, or violate the terms of their parole than are other criminals. Thus, Paternoster concludes, death is not necessary to adequately restrain those who murder.

Paternoster also rebuts the presumption that the death penalty deters individuals from committing capital crimes. The statistics cited by Paternoster suggest that the death penalty carries no weight as a deterrent, and that it may in fact have a "brutalization effect" upon society, stimulating violent crime and homicide.

Paternoster uses multiple studies to support these claims. One study, by R.D. Peterson and W.C. Bailey, showed a per capita homicide rate of 5.35 per 100,000 in non-death penalty states, and of 8.46 per 100,000 in death penalty states during the post-*Furman* years of 1973-1984. In an effort to control for relevant demographic distinctions, the study compared neighboring death penalty and non-death penalty states, and found that the non-death penalty

27. A capital defendant has a right to present and have heard any evidence which may carry mitigatory weight. *See* Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 596 (1978) (plurality opinion).

28. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68 (1985) (holding that, when a capital defendant's psychiatric state is likely to be at issue, the State must provide psychiatric examination if the defendant cannot afford his own psychiatrist).

29. *See, e.g.*, Morgan v. Illinois, 112 S. Ct. 2222 (1992); Turner v. Murray, 476 U.S. 28 (1986); Witherspoon v. Illinois, 391 U.S. 510 (1968).

states consistently had homicide rates that were the same or lower than their death penalty neighbors.[30]

Perhaps more informative is a study by Thorsten Sellin analyzing homicide rates in states that abolished, and later reinstated, the death penalty. If the death penalty is, in fact, a deterrent, then homicide rates should increase upon abolition, and drop back to the pre-abolition levels upon reinstatement. But, while Sellin's study shows a consistent increase in homicide rates upon abolition, there is no subsequent decrease in homicide rates upon reinstatement of the death penalty.

Finally, Paternoster tackles the most difficult of the pro-death penalty arguments: just dessert. This is most difficult because it is neither empirically rebuttable nor supportable. Indeed, determining what is morally appropriate punishment for murder must ultimately rest on logical consistency and moral intuition.

Paternoster cites a 1985 Gallup poll asking people why they support capital punishment for murder. Seventy-two percent of those who expressed support for capital punishment said that they did so because of their belief in the principle of "an eye for an eye," and another eighteen percent expressed the belief that this is the punishment that murderers deserve. More sophisticated retributivist theories are offered in the form of arguments by Immanuel Kant and by Ernest van den Haag.[31]

Paternoster counters these retributivist arguments by pointing out that we, as a society, do not find strict retributivism morally acceptable across the board. We do not insist that rapists be forcibly sodomized, for example. Perhaps more telling, we do not insist that all who wrongfully take another life be executed. Even in death penalty states, there are degrees of murder which are not death eligible, and certain types of homicide are not labelled "murder" at all but are instead identified as some sort of manslaughter. A consistent retributivist position would demand that all forms of unjustified homicide be

30. The one exception to this is the non-death penalty state of Michigan, which had a higher per capita homicide rate than its death penalty neighbors of Indiana and Ohio. The study's authors attribute this to the extraordinarily high homicide rate in Detroit. When Detroit is factored out of the study, Michigan's homicide rate is virtually identical to those of Indiana and Ohio.

31. In a nutshell, Kant argues that the rational being is one who acts in accordance with the concept of law. It is therefore the responsibility of society, out of respect for the criminal's status as a rational being, to punish according to the criminal's transgression. Accordingly, Kant argues that strict retributivism is not only appropriate, but is indeed the morally required response to criminal transgressions. *See* IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 100-107 (John Ladd trans., 1965).

Van den Haag, as his theory is described by Paternoster, is not quite as strict a retributivist as Kant. He recognizes that it is not always possible to impose upon the criminal the same harm he has imposed upon society. Van den Haag argues, however, that when it is possible, that same punishment should be imposed. Van den Haag goes beyond Kant's retributivism when arguing how the standard of harm should be measured. He argues that any crime does more than merely harm the victim, it harms all of society by reducing the communal sense of security. It is therefore imperative to inflict punishment that exceeds the actual harm imposed on the criminal's victim when possible.

punished by death, and that no crime that does not result in a loss of life be punished by death.[32]

As an alternative to strict retributivism, Paternoster presents the theory of Jeffrey Reiman, who argues for "proportional retributivism." This approach holds that it is not necessary for society to punish the worst crime with the worst possible punishment; instead the worst crime should be punished with the worst punishment that society chooses to mete out for any crime. Therefore, if the most severe punishment possible under the law is life imprisonment, this is the appropriate punishment for the most serious crimes. Moreover, Paternoster argues, life imprisonment is adequate punishment for the crime of murder. It expresses society's moral approbation for such crime without causing society to engage in an act substantially similar to the one it condemns.

While Paternoster draws upon some compelling arguments in response to traditional retributivist theory, he is at his weakest when he strays from empirical argument. There is too much of a tendency in *Capital Punishment in America* to use the current state of death penalty law as the basis for refutation of abstract arguments in favor of the death penalty. Paternoster uses the legal fact that not all murders are death eligible[33] to refute the retributivist argument. The simple response of the retributivist is that the law is wrong in this regard, and the appropriate moral response is to execute all murderers. But when Paternoster sticks to what he does best — compiling and arguing from empirical data — his text is compelling.

Paternoster is not a lawyer. Since his target audience is apparently not one comprised of legal professionals, this is one of his greatest strengths. His writing style is clear and remarkably free of technical terminology. When the use of such terminology is unavoidable, Paternoster explains the terms clearly and succinctly, and then uses them comfortably in his discussion of the death penalty.

The argument stumbles when Paternoster allows his agenda to get in the way. His angle is clear, and that is fine. However, his determination to prove that capital punishment serves none of the functions usually attributed to it causes him to put a spin on certain empirical data that, while plausible, is not always necessary.

Capital Punishment in America is an excellent introduction to the history and complexity of modern capital punishment in the United States. It contains thorough, thoughtful, and very readable arguments and analyses of the empirical facts surrounding our system of capital punishment, and their relevance to the arguments commonly offered in support of the death penalty.

Lawyers who are involved in death penalty work will find Paternoster's

32. This is the de facto state of the death penalty at present. Until comparatively recently in our history, however, crimes other than those involving loss of life have been punishable by death. *See* Coker v. Georgia, 433 U.S. 584 (1977) and *supra* text accompanying note 19.

33. Only those first degree murders that are in some way aggravated are death eligible.

book a valuable resource. His substantial compilation of empirical data is, apart from all else, a very useful bibliography to some of the more important statistical studies of the death penalty performed in this century. However, *Capital Punishment in America* is more than a mere compilation of statistics. Effectively combining empirical data and moral discussion, it is a forceful argument against capital punishment. Anyone, lawyer or non-lawyer, who wishes to develop an informed, intelligent opinion regarding the moral and practical appropriateness of the death penalty, as it is applied in the United States today, will benefit from Paternoster's book.