

## **PAINTING A DECEPTIVE PORTRAIT: A CRITICAL REVIEW OF *DEADLY JUSTICE***

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*This is a critical review of the book, Deadly Justice: A Statistical Portrait of the Death Penalty. Parts of the book addressed are public opinion polling, racial disparities, and death-qualified juries. Numerous examples are provided for how the book, while informative, provides a deceptive view on the subject through the selective use of statistics and provided explanations.*

**Keywords:** *death penalty, Furman v. Georgia, racial disparities, cruel and unusual punishment, death-qualified juries, Eighth Amendment*

This is a review of the 2018 book, *Deadly Justice: A Statistical Portrait of the Death Penalty*, by Frank R. Baumgartner, Marty Davidson, Kaneesha R. Johnson, Arvind Krishnamurthy, and Colin P. Wilson (collectively, the “authors”) published by Oxford University Press for \$29.95. This critical review is limited to the parts of the book addressing public support, racial disparities, and death-qualified juries.

As the name implies, the book provides a big-picture view of the death penalty and largely avoids anecdotal stories. It opens with a good summary of the jurisprudential history of the U.S. death penalty and how cases are currently carried out. The remainder of the book primarily focuses on providing various statistics.

The authors created a theme that runs throughout the book and enhances readability. The standards for analyzing the constitutionality of

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the death penalty set out in *Furman v. Georgia* (which temporarily imposed a death penalty moratorium in 1972) are discussed at the beginning of the book. Then, evidence is presented about the modern death penalty to address those standards. Finally, an analysis is conducted to determine if our modern use of the death penalty meets the standard set in *Furman*.

The subtitle of the book, *A Statistical Portrait of the Death Penalty*, is somewhat misleading. This is not a neutral compilation of statistics. Rather, the authors selected certain statistics (and left out others) to carefully guide the reader to their desired outcome: the death penalty should be abolished. Furthermore, certain explanations for the statistics are provided (and others omitted) to reach this same end.

In the unlikely event a reader has any doubts as to what they are supposed to conclude after reading the book, the authors provide assistance in the book's last sentence: "A reasoned assessment based on the facts suggests not only that the modern system flunks the *Furman* test but that it surpasses the historical death penalty in the depth and breadth of the flaws apparent in its application" (351).

## I. PUBLIC SUPPORT

Public opinion polls would normally not be a relevant factor when discussing a constitutional issue. However, they do play a role regarding the constitutionality of the death penalty. In *Furman*, for example, the Court held that public opinion is an indicator of "contemporary standards of decency," which is a factor to consider regarding the constitutionality of the death penalty.<sup>2</sup>

Given the relevance of public opinion regarding the death penalty and the widespread, consistent support for it displayed in polls, abolitionists engage in a variety of practices to attempt to excuse these results. This section will evaluate some of these attempts employed in *Deadly Justice*.

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2. *Furman*, 408 U.S. 238 (1972). Furthermore, public opinion played a role in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005), in which the Court invalidated the death penalty for the mentally deficient and juveniles, respectively. In the 1910 case of *Weems v. United States*, the Supreme Court explicitly pointed out the role of public opinion: "[It] is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice" (217 U.S. 349, 378).

The authors attempt to undercut the results of the Gallup Death Penalty question (hereinafter “Gallup Poll”) by showing that a survey with different wording “lowered the level of support for the death penalty” (268). They compare the 80 percent support in 1995 for the Gallup Poll question with the only 52 percent support for the question, “Do you generally favor or oppose the death penalty for murder . . . if the convicted person was . . . a young teenager at the time of the crime?” (268). But this juxtaposition does little to show a “lowered level of support for the death penalty.” Rather, it just shows that many people who support the death penalty do not want it applied to people who murdered when they were 13, 14, or 15.<sup>3</sup> It is deceptive to use a question that asks about something that has never happened in the last 50 years<sup>4</sup> as evidence of “the level of support for the death penalty.”

Likewise, it would be dishonest for death penalty advocates to use person-specific death penalty polls to demonstrate public support for the death penalty. For example, over 80 percent of those polled were in favor of Timothy McVeigh being executed (Jones, 2001). This clearly doesn’t mean that over 80 percent of Americans favored the death penalty overall. In fact, even a majority of those who are generally opposed to the death penalty were in favor of McVeigh being executed (Jones, 2001).

After acknowledging that the Gallup Poll averages 65 percent support, the authors attempt to diminish the significance of that poll by stating that it provides “limited information about the state of public opinion” (265). The authors refer to this and other surveys that demonstrate public support for the death penalty as generating “apparent support” (267).

The authors routinely point out that “[q]uestion wording must be considered in any evaluation of public support for the death penalty” (266). And that different wording can generate “vastly different levels of support” (268). And for these reasons, the Gallup Poll provides “limited information about the state of public opinion” (265). This author agrees

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3. While “young teenager” is somewhat ambiguous, breaking down the teenage years into 13–15, 16, and 17–19 (with 13–15 being “young”) is the most logical.

4. In the last 50 years, 21 people have been executed for crimes committed while age 17. One person, Sean Richard Sellers, was executed for a crime committed while age 16. Sellers confessed to the premeditated murder of his parents and the murder of a convenience store clerk who refused to sell him beer. Furthermore, the execution of someone for a crime committed while 15 or younger (young teens) was held unconstitutional 30 years ago in *Thompson v. Oklahoma* (487 U.S. 815, 1988).

that the phrasing of the Gallup Poll results in somewhat misleading results. However, the results are skewed in favor of the abolitionists' position, not against it. The wording of the poll question is, "Are you in favor of or opposed to the death penalty for persons convicted of murder?" This implies that an affirmative answer supports the death penalty for all convicted murderers, including for second-degree murder and voluntary manslaughter (crime of passion murder). This is the equivalent of asking, "Are you in favor of 30-year prison sentences for larceny?" Most people would respond, "No." And yet in extreme cases where a career criminal stole millions, many of those same people would want a 30-year term as an option. For these reasons, the Gallup Poll (which consistently shows support for the death penalty) actually under-reports public support.

Another attempt by the authors to excuse the polling results is one this author has never been exposed to in any previous death penalty books or articles. The authors say that when someone is answering questions in a long survey, "when a question or two refers to capital punishment, these are considered abstract issues, and people respond accordingly, perhaps based on general, abstract beliefs. [However, when people are sitting on a capital jury and are really confronted with the realities of applying the death penalty, support decreases.]" (266).<sup>5</sup> But the evidence used to support this claim is tenuous at best. The authors state, "While the public is quick to assert their abstract support for the death penalty, the penalty is rare. With more than 700,000 homicides since 1976 but only about 8,000 death sentences and just 1,422 executions . . . [t]here is a puzzle of how we can have such high apparent levels of support for the death penalty in the abstract, based on public opinion polls, and such relatively rare use of it" (266).

I am puzzled at how anyone could be puzzled by this result. Under *Gregg v. Georgia* (428 U.S. 153, 1976), capital trials must be bifurcated into two parts, the guilt-finding phase and the sentencing phase. In the sentencing phase, the general rule is that the jury must unanimously decide in favor of the death penalty based on the incredibly high standard of beyond

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5. Furthermore, this argument would seem to go both ways. The results of a respondent who answered that they were against the death penalty could equally be dismissed by saying, "This question was asked in the middle of a long survey. The respondent was likely only considering the question as a mere abstraction. They weren't really thinking about the heinous crime committed and the lasting devastation that the victim's family and community had to endure."

a reasonable doubt. This means that if only one juror has some reasonable doubt as to finding an aggravating factor to apply the death penalty, then the death penalty cannot be given. There is nothing inconsistent with the overall population supporting the death penalty, and very few 12-person juries unanimously deciding to apply it.

And again, being pro-death penalty does not require that one supports the death penalty for every, or even most, homicides. Finally, the authors are comparing the 700,000 homicides nationwide with the 8,000 death sentences. However, 38 percent of the states currently have bans against the death penalty. Therefore, it would be impossible for any homicide tried in these state courts to result in the death penalty, regardless of public opinion. For these three reasons, the reality of public support for the death penalty and the low number of death sentences handed down is not inconsistent in the least.

In an attempt to demonstrate another contradiction with opinion polling, the authors point out that, while the majority of Americans favor the death penalty, an even larger majority (86 percent) think that an innocent person has been sentenced to death in the last 20 years. This author fails to see how this is a contradiction. First, the dangers of an innocent person being sentenced to death at the trial court level are far less relevant than the dangers of an innocent person being executed. Furthermore, most people reading this review would likely agree that 30-year sentences should be allowed and that an innocent person has been sentenced to a 30-year sentence. That does not somehow illustrate a contradiction in beliefs.

The authors illustrate another abolitionist attempt to excuse public opinion as popularized by Justice Thurgood Marshall. Marshall said that the U.S. public was actually far less supportive of the death penalty than surveys made it seem because the public was uneducated about the issue. This conveniently allowed Marshall to answer the question of whether the death penalty is cruel and unusual on behalf of the ignorant American populace. Marshall states that, if the information he was privy to (much of it a debatable matter of interpretation) was available to all Americans, it “would almost surely convince the average citizen that the death penalty was unwise . . .” (*Furman*, 1972). The authors say, “It is hard to disagree with Justice Marshall’s assertion” (344).

In a final attempt to excuse the polling results, the authors point out that there is little to no correlation between a state population’s support for the death penalty and the corresponding use of the death penalty in that state.

While accurate, using this as part of an anti-death penalty argument is specious. The authors refer to the “substantial variation in public opinion across the states” (288), which would understandably lead some readers to conclude that there are states that have the death penalty even though the populace opposes it. But this is not true. The “substantial variation” only refers to how high above 50 percent the support for the death penalty goes. The Gallop Poll shows a majority of people favor the death penalty in all 31 states where it is legal.

## II. RACIAL DISPARITIES

The authors acknowledge that, relative to the homicide rate, white males are over-represented in executions while black males are under-represented. (Although not explicitly mentioned, white females are also over-represented in executions while black females are under-represented.) No doubt because of the commonly held belief that the death penalty is a racist institution, the authors felt it necessary to confirm that the statistic was not a misprint: “[It] may seem counterintuitive . . . however, it is no mistake; it is a robust finding no matter which year we consider” (70).

Readers who may be tempted to question their beliefs on the death penalty and race are quickly reassured not to worry, because these statistics (that show whites are disproportionately executed) are “less significant” than victim statistics (that allegedly show society values white lives over black). The authors attempt to prove this by presenting the statistic that a murderer is more likely to receive the death penalty if the victim is white as opposed to black. With no further evidence, the conclusion is then drawn that “[t]his hierarchy places a premium on white lives over black . . .” (72). It is true that you are most likely to be executed if you kill a white woman, followed by white male, then black female, and finally black male. But this race-of-victim statistic is the exact inverse order found in the rate-of-murders-committed statistic: black males are highest, followed by black females, then white males, and finally white females. Perhaps the authors of *Deadly Justice* think this is a coincidence, or perhaps they didn’t consider this at all.

An analogy with a less incendiary topic will help to explain. Imagine a fictional America where homicide commission rates strongly correlate with the season in which someone was born. People born in winter commit

the most murders, followed by spring, summer, and then people born in fall, who commit the least murders. Likewise, this is inversely correlated with execution rates based on the victim's birth season: you are most likely to receive the death penalty if you murder someone who was born in the fall, followed by summer, spring, and then least likely to receive the death penalty if you murder someone born in winter.

Applying the same logic implemented by the authors, this would conclusively prove that this hypothetical society favors the lives of those born in fall over those born in winter. But this would prove no such thing. When someone from the least-violent group (fall) is killed, it is more probable that it was unprovoked compared to when someone from the most violent group (winter) is killed. Given these victim demographic differences, it should come as no surprise that someone who murders a victim born in fall is more likely to receive the death penalty than someone who murders a victim born in spring.

Although the authors do note that this victim "hierarchy" also favors women over men, significantly more focus is given to the alleged favoring of whites over blacks. Perhaps this is because the notion of an anti-black, racist legal system is a much easier sell than that of an anti-male, sexist legal system. The latter would be more likely to cause people to think skeptically about using victim statistics to prove a prejudicial legal system.

I was unable to find any research asking how the age of a murder victim correlates to the likelihood of receiving the death penalty. It seems likely that someone who murders an 80-year-old is more likely to receive the death penalty than someone who murders a 25-year-old. If so, this does not mean that we value octogenarians more than young adults (as the authors' logic would maintain). Rather, the more likely explanation is that people in their twenties (their criminal prime) are more likely to be partially blame-worthy in why they were murdered than an 80-year-old.

Another explanation for the authors' disproportionate race-of-victim statistic that is absent from the book, is that prosecutors are less likely to seek the death penalty if they know they are unlikely to obtain it. Given the disproportionate homicide rates based on race, a murder involving a black victim is more likely to be tried in a community with jurors who are opposed to the death penalty and with a prosecutor selected by people who are against the death penalty (Blume, Eisenberg, & Wells, 2004).

Completely absent from the over-400-page book are inconvenient statistics regarding race, such as how a white person on death row is more

likely to be executed than a black person on death row (Bedau & Cassell, 2004). Also, the proportion of blacks on death row (based on homicide rates) is lower in the South than in non-Southern states (Blume et al., 2004). Finally, once on death row, white people are executed at a faster rate than black people (Samaniego-Kopsky & King, 2011). It would be a very peculiar racist system against blacks that resulted in whites being more likely to receive the death penalty, more likely to be executed after receiving the death penalty, executed at a faster rate, and to have these results more prominent in the South.

Finally, even if the evidence presented logically led to the conclusion that the death penalty is racist against blacks (and sexist against men), it doesn't necessarily follow that the death penalty should be abolished. The victim demographic statistic does nothing to show that blacks undeservedly receive the death penalty while whites receive it the right amount. Perhaps blacks receive the death penalty at the right amount, and whites (due to the racist system) are undeservedly not given the death penalty. The victim demographic statistics presented in *Deadly Justice* simply do not provide an answer to this. Likewise, if it was shown that a racial disparity existed in, say, the distribution of ten-year prison sentences, it seems the more prudent course of action would be to address the disparity as opposed to abolishing all ten-year prison sentences.

### III. DEATH-QUALIFIED JURIES

It is long-settled law that any potential juror on a capital case who states they would refuse to apply the death penalty in any situation regardless of the facts is excluded from serving on the jury. The authors find this “one of the most surprising, puzzling, and troubling aspects of the death penalty system” (33). It is certainly true that “death-qualified” jurors are more likely to be male and non-black (Lynch & Haney, 2018) and more likely to find guilt, even if something less than the death penalty is ultimately given as punishment (Young, 2010). However, the authors fail to put forward any alternative to this standard (other than abolishing the death penalty altogether).

Although not mentioned by the authors, it is interesting to note that this is a two-way street. Yes, potential jurors who refuse to apply the death penalty regardless of the facts are excluded. But a potential juror who stated



they would impose the death penalty in all situations regardless of the facts would likewise be excluded. It would make as much sense to allow the former person on a capital jury as it would the latter.

Perhaps because they considered the alternatives, many staunchly anti-death penalty justices have ruled in favor of death-qualified juries. In *Witherspoon v. Illinois* (391 U.S. 510, 1968), even Thurgood Marshall, one of the strongest anti-death penalty justices of the twentieth century, supported death-qualified juries.

## CONCLUSION

*Deadly Justice* is an excellent book for those looking to better understand the modern jurisprudential history of the death penalty and the abolitionists' case for ending it. A focus on the big picture, as opposed to anecdotal stories, allows the reader to more efficiently learn about the nuances involved in the death penalty. However, if you are interested in hearing from both sides of the debate, and analyzing how conflicting arguments stand up under criticism, you should look for a point-counterpoint book such as *Debating the Death Penalty: Should America Have Capital Punishment? The Experts on Both Sides Make Their Case*, by Hugo Bedau and Paul Cassell.

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