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## *Research on the Death Penalty*

### Rejoinder

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**W**e appreciate Professor Paternoster's evenhanded review of our article and consider many of his concerns legitimate differences of opinion. But it is, nevertheless, useful to specify the key points on which there is agreement or disagreement.

Professor Paternoster's consideration of a Rawlsian form of justice underscores that in capital charging decisions at least, there is an important stochastic component. If there were not, one would not need to worry about being fair *on the average*. There is apparently *no* dispute, therefore, about whether the charging process is stochastic. This very significant consensus should not be overlooked in any discussion of our various differences. It implies agreement that the individualized justice favored by the Supreme Court is a legal fiction or, at a minimum, an approximation. Life-and-death decisions are being made by a process whose consequences are indistinguishable from our multi-urn lottery. *Within each urn*, there is no principled way to distinguish between the cases charged with special circumstances and the cases not charged with special circumstances. To such a system, we apply the word "capricious" while at the same time noting that there are different kinds and amounts of capriciousness.

Concern then naturally shifts to what sorts of capriciousness are acceptable. Professor Paternoster is apparently prepared to accept an as-if, multi-urn lottery when the urns cluster near 0 and 1. There are effectively two types of offenders: those for whom the probability of a capital charge is very low, and those for whom the probability of a capital charge is very high. Our position is more agnostic. As we said in our article, in order to arrive at some summary assessment about a stochastic

charging system, one must attach a cost to the outcomes implied by each urn. This is not a scientific question but the proper preserve of philosophy and jurisprudence.

Consider the following example. Suppose there are two defendants. In one jurisdiction, a prosecutor secretly plans to charge both defendants with a capital crime but then on a whim flips a fair coin to determine which defendant will be charged instead with noncapital crime. This is, presumably, a “lightning strike” of mercy. In another jurisdiction, a prosecutor secretly plans to charge both defendants with a noncapital crime but then on a whim flips a fair coin to determine which defendant will be charged instead with a capital crime. This is presumably, a “lightning strike” of punitiveness. As a scientific matter, the two systems have identical outcomes; yet, some observers may prefer one system to the other. In our view, such preferences must be explicitly introduced in order to determine the overall fairness of a capricious charging system. And this is why we took no position on whether the pattern of urns revealed for San Francisco was acceptable or unacceptable capriciousness. And as we stated in our article, the amount of variation “explained” is *not* the yardstick by which such judgments are made.

Professor Paternoster believes that had we included more of the right kind of variables in our model for the San Francisco data, the predictive distribution we produced would far more closely approximate his ideal of acceptable capriciousness. Professor Paternoster provides no data to support his view, and we find no support for his views in our data. Moreover, our reading of the empirical literature is that most studies are consistent with an as-if, multi-urn lottery, with urns spread over a range of probabilities.

Also, it is our impression after reading hundreds of homicide files over the years that there is a far larger number of cases to which capital charges could be applied than to which such charges are actually applied. Perhaps the best example is homicides associated with robberies. Since the robbery is a contemporaneous felony, special circumstances could be charged, but such charges are relatively rare. More generally, we suspect that the majority of defendants charged with special circumstances would properly qualify under existing statutes and case law. However, there is a very substantial group of offenders who are not charged with special circumstances, although the facts would, under current law, perhaps justify such charges. And our reading of these cases does not reveal, by and large, what distinguishes the capital cases from the non-capital cases. In short, our hunches are different from Professor Paternoster’s.

Finally, we are very uneasy with Professor Paternoster’s no-

tion that there is one “correct” model. We agree that some models are more *useful* than others, but use value should not be confused with truth. We have no idea what is meant by the “correct model” and have no idea how one would know that a given model is, in fact, “correct.” While the issues are well beyond the scope of our article and of this response, we believe that the “correct model,” just like uncertainty, is in the eye of the beholder. There are a number of tools, to be sure, which can be used to help determine which of several models perform better by various *statistical* criteria. The added variable plots we employed are one illustration. But a better model by one or more statistical criteria is not in any deeper sense the “correct model.” It follows, therefore, that appeals to the “correct model” necessarily are appeals to the unknowable.