

CURRENT DEBATES ON THE DEATH PENALTY AS A DETERRENT

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Footnotes and Appendix by Claudio Giusti

"If the beast who sleeps in man could be held down by threats
any kind of threats, whether of jail or of retribution after death
then the highest emblem of humanity would be the lion tamer in
the circus with his whip, not the Prophet who sacrificed himself."
Boris Pasternak, Doctor Živago

The Deterrence Claim.

Common sense arguments and impressionistic views.

Few people would seriously maintain that capital punishment is a good thing in itself, to be encouraged for its own sake. Most of those who support and defend the death penalty admit that it is a horrible and revolting practice but one which nevertheless is necessary to protect society. Many of these supporters are in fact aware of the arbitrary and discriminatory nature of the death penalty as well as the dangers inherent in its application namely the risk of executing the innocent. Still they are in favor of it because they regard it as a necessary deterrent without which there would be more murders. If such claim were true it would constitute a powerful argument for the retention of the death penalty. However, retentionist have failed to produce valid scientific evidence to prove that capital punishment is an effective deterrent and that it is a superior deterrent to other punishments such as life imprisonment. In other words, the demands to maintain or to restore the death penalty are based on nothing more than unsubstantiated claims, common sense arguments, and impressionistic personal views about its unique deterring power. Sir Patrick Spens said it best when he declared "I am absolutely convinced - I know - that fear of violent death is a deterrent, and no statistics, no argument whatever will convince me that it is not."¹ Similar convictions, or shall we say impressions, have frequently been expressed by death penalty advocates. Sellin (1980) quotes Sir James Fitzjames Stephen as sayings:

"No other punishment deters men so effectually from committing crimes as the punishment of death ... this is one of those propositions which it is difficult to prove, simply because they are in themselves more obvious than any proof can make them."²

As Sellin (1980) points out, Stephen's belief that the deterrent power of the death penalty was self-evident has been shared by many. In a speech in the House of Lords in 1948, Lord Jowitt said that "to his mind there was only one possible justification of capital punishment - that its potency as a deterrent reduced the number of murders". He believed it did; he could not prove it; it must be a matter of impression and one's own personal opinion. Lord Wright thought that deterrence "could obviously not be proved by evidence. It was a conclusion that must be drawn from the general impression one gains from experience, from looking around the world, from seeing how things are done and how people feel". Lord Simon "had no doubt that capital punishment prevented more murders to an extent that no other punishment could. It was not a matter of statistics but of the judgement and common sense of every individual". Lord Bridgeman based his belief in the deterrent force of the supreme penalty "more on what he thought is his knowledge of human nature than anything else", and the Bishop of Truro thought that "on the value of the death penalty as a deterrent ... his own feelings were a surer guide than any statistics from other countries ... and he was sure that the death penalty would be a great deterrent to him if he were contemplating murder". (see Sellin 1980, pp. 78-80).³

Statements like the ones quoted above might have been forgivable at a time when deterrence research was virtually non-existent. Yet these utterings continue to be heard in louder and louder tones and one cannot help being surprised that in this day and age many continue to advocate the sacrifice of offenders on the altar of justice on no other grounds but conventional wisdom and commonly held beliefs. That the belief in the

¹ <http://hansard.millbanksystems.com/commons/1956/feb/16/capital-punishment>

² Sir James Fitzjames Stephen, in Royal Commission on Capital Punishment 1866, page 254, 1980a
https://books.google.it/books?id=FewZAAAAYAAJ&redir_esc=y

³ Krishna Kumari, Areti, Capital Punishment: The Never Ending Debate <http://ssrn.com/abstract=956229>
Role of Theories of Punishment in the Policy of Sentencing <http://ssrn.com/abstract=956234>

super deterring power of the death penalty is widespread is beyond question. But just because a belief is widely held does not mean that it is necessarily true. Science has shown time and again that not all that is dictated by common sense is true. As Sellin (1980) points out, once upon a time common sense told us that the earth was flat.

The exaggerated and unfounded fears

The abolition of the death penalty in the countries which no longer practice it was not accomplished without years of arduous struggle. At each attempt to repeal the death penalty in former days, it was asserted that if criminals were not executed crime would substantially increase and the security of society would disappear. Yet these predictions and forebodings of evil always proved to be groundless. Speaking in the British House of Commons in 1878, Sir Joseph Pease explained that:

“The continual mitigation of law and of sentences has been accomplished with property quite as secure, and human life quite as sacred”. (see report of British Select Commission, 1930)⁴

And seventy years later the British Royal Commission on Capital Punishment (1953) reached the general conclusion that:

“there is no clear evidence in any of the figures we have examined that the abolition of capital punishment had led to an increase in the homicide rate or that its reintroduction has led to a fall.”⁵

Other commissions such as the Commission of Inquiry on Capital Punishment in Ceylon (1959); the Special Commission for the study of the abolition of the death penalty in capital cases, State of Florida (1963-1965); the Special Commission established for the purpose of investigating and studying the abolition of the death penalty in capital cases, Commonwealth of Massachusetts (1958); the Senate Joint Committee to study abolition of capital punishment, Pennsylvania (1961); all reached the same or similar conclusion. One would have expected the views of all these prestigious commissions to put an end to the death penalty debate or at least to the persisting claims about its supremacy as a deterrent. This, however, is not the case. A large segment of the general public, members of the police forces, and other pressure groups continue to entertain unfounded fears about the supposed disastrous consequences of doing away with the death penalty, and continue to propagate prophecies of doom and gloom about the likely effect of abolition on crime rates, in particular crimes against life.

The Preventive Mechanisms Of The Death Penalty

Capital punishment is supposed to fulfill its preventive function through three main mechanisms

a) elimination b) moralization, and e) deterrence

A. Elimination

In view of the lingering doubts about the unique efficacy of the death penalty as a deterrent, some of its supporters find it easier to advocate it on grounds of its incapacitating or eliminatory function. They point to the death penalty's absolute and permanent incapacitating power since it ensures that a person executed for murder will not commit further crimes. This argument would have been a strongly convincing one if a) capital punishment were applied widely and frequently; b) capital punishment were the only means of effectively incapacitating dangerous killers; and e) murderers as a group were known to have a high recidivism rate. But neither of these assumptions is true.

First, capital punishment is seldom applied in the western countries that still retain it. Even a quick comparison between the number of executions and the number of homicides in any given year is sufficient to show that the application of the death penalty is becoming less and less frequent all the time. The argument of elimination or incapacitation is therefore quite irrelevant. As Gibbs (1970) points out, incapacitation is a defensible rationale only if the death penalty is applied frequently.

Second, incarceration is, no doubt, an effective means of neutralizing the dangerousness of murderers and other violent offenders. Studies by Morris (1955), Sellin (1967), Akman (1966), and Buffum (1976) clearly show that the hazards involved in prison life are not increased by the abolition of the death penalty. Neither

⁴ <https://www.publicsafety.gc.ca/lbrr/archives/hv%208699.c2%20f3%201972-eng.pdf>

⁵ <http://www.rochester.edu/college/psc/clarke/214/Archer83.pdf>

<http://hansard.millbanksystems.com/commons/1956/feb/16/capital-punishment>

does such abolition result in an increase in homicidal or assaultive behavior in those penal institutions where convicted murderers are detained. Moreover, it is obvious that those who present the greatest threat of repeating their crimes are insane murderers. Yet, these murderers are by definition excluded from the possible infliction of the death penalty. By reason of insanity they are not liable to the maximum penalty and no one is calling for their execution as a way of protecting the staff or the patients of the psychiatric institutions in which they are usually detained. The incapacitative and eliminatory function of the death penalty is therefore invalidated by the fact that it does not extend to those most likely to repeat their offence. And surely if we have found incarceration to be an effective means of incapacitating insane killers we can live with it as a means of incapacitating the “normal” ones.

Third, empirical research shows that murderers as a group have one of the lowest rates of recidivism of any criminal group. Various studies conducted in Canada and abroad unequivocally demonstrate that released murderers behave well and that paroled murderers are among the best parole risks.

In England, the Royal Commission on Capital Punishment stated that information received from nearly all the Commonwealth countries and the United States shows that released murderers in general behave well after leaving prison and in none of the countries is this class of prisoner regarded as particularly liable to misbehavior on release.

In the United States, studies by Giardini and Farrow, (1952) Donnelly and Brewster, (1961) and by Stanton (1969) reached similar conclusions. In their report, the Research Staff of the Ohio Legislative Service Commission (1961) reported that Ohio penal authorities testified before the study committee that for the most part murderers are “model” prisoners. Furthermore, the committee established that the overall success ratio for paroled first degree murder life sentence convicts was 94.1 per cent compared with a success ratio of only 74 per cent for all other classes of paroled offenders. Data collected by Uniform Parole Reports and reported in the December, 1987, Newsletter showed that of 1,303 persons convicted of willful homicide, 91.25 per cent had a favorable parole performance during the crucial first 1-year period after release on parole. Further, data showed that 98.31 per cent of those persons had no new major offence conviction during the 1-year period following release. In a subsequent study it was found that from a sample totaling 8,908 persons paroled after conviction for willful homicide during the years 1965 - 1969 and reported to the UPR, 98.23 per cent (6,788) were successful on parole during the first year following their release. They had no new major convictions or allegations of offences resulting in their return to prison.

In Canada, statistics published by the National Parole Board, and quoted by Sheppard (1971) show that from 1920 to 1967, 119 capital offenders who had first had their sentence commuted were granted parole. Only one of the 119 committed a second murder, and was hanged in 1944. Between 1959 and 1967, out of the 32 under death sentence whose sentence had been commuted to life imprisonment and who were later paroled, only one was convicted of another crime, and it was not murder.

B. Moralization

The second mechanism by which the death penalty is supposed to achieve its preventive function is that of moralization through the emphatic denunciation of murder. In other words, the death penalty is presumed to have strong educational influence on the general population because more than any other punishment it reflects society’s revulsion and abhorrence toward the horrible act of killing. Thus, by retaining capital punishment for the gravest crime, the law fosters in the community a special aversion to murder.

It is difficult to see how the official killing of a murderer by the state can promote respect for human life. It seems illogical to say to the convicted killer and to society at large “we are killing you because Thou Shalt Not Kill”. As Baroness Wootton (1969) puts it, “to imitate immoral actions does not seem a very sensible way of discouraging them”⁶. If one of the major aims of the criminal law is to denounce the crime, then this aim can be better achieved by means other than repeating the same act for which the offender has been convicted. The death penalty neither fosters nor promotes reverence for life because its effect on the public mind is one of brutalizing not of humanizing. It is, regardless of what its proponents say, a mode of vengeance rather than a means of expressing society’s disapproval. The spectacle of the state extinguishing

⁶ In: Louis Blom-Cooper ed. *The Hanging Question: Essays on the Death Penalty*. Gerald Duckworth. London, 1969. P 13

the sacred life: of the convicted killer whether done in public or in prison tends to cheapen the very life it is supposed to help venerate. In the words of Clarence Darrow (1922):

“Frequent executions dull the sensibilities toward the taking of life. This makes it easier for men to kill and increases murders.”⁷

The same view was echoed by the Special Commission established in Massachusetts for the purpose of investigating and studying the abolition of the death penalty in capital cases (1958) when it declared that:

“The existence of capital punishment tends to cheaper human life. It tends to entourage both children and adults to believe that physical violence, the ultimate form of which is putting an individual to death, is a proper method of solving social and personal conflict.”⁸

1) The brutalizing effect of the death penalty

Social and penal reformers have always been aware of the brutalizing effect cruel, barbaric, and savage punishments have on the community in which they are inflicted. Sir Samuel Romilly was referring to this effect when he said “Cruel punishments have an inevitable tendency to produce cruelty in the people”⁹. This is similar to what Voltaire wrote:

“Ne remarquez-vous pas que les pays où la routine de la loi étale les plus affreux spectacles, sont ceux où les crimes sont le plus multipliés? N’êtes-vous pas persuadé que l’amour de l’honneur et la crainte de la honte sont de meilleurs moralistes que les bourreaux? Les pays où l’on donne des prix à la vertu ne sont-ils pas mieux policés que ceux où l’on ne cherche que des prétextes de répandre le sang, et d’hériter des coupables?”¹⁰

2) The contagious effect of the death penalty

The death penalty seems to exercise a contagious effect through the “savage example” it sets and through its suggestive and imitative impact. This is consistent with research on violent events such as publicized suicides, mass murders, and assassinations which shows that such events are frequently followed by acts of imitation. Bowers and Pierce (1980) report that as early as 1846 Robert Rantoul Jr. presented statistical evidence to the legislature and governor of Massachusetts showing that “after every instance in which the law violate the sanctity of human life, that life is held less sacred by the community among whom the outrage is perpetrated”¹¹. The same authors quote an observation appearing in the Times of London on January 25, 1884:

“It is often been remarked that in this country a public execution is generally followed closely by instances of death by hanging, either suicidal or accidental, in consequence of the powerful effect which the execution of a noted criminal produces upon a morbid and unmatured mind.”¹²

They also quote Karl Marx who made a similar observation in the New York Daily Tribune of February 18, 1853. Citing data on executions, suicides, and murders for forty-three days in 1849, he commented as follows: “This table ... shows not only suicides but also murders of the most atrocious kind following closely upon the execution of criminals”¹³.

In their research on the aftermath of the John F. Kennedy assassination and two highly publicized mass murders Berkowitz and McCauley (1971) found that the events were succeeded by significantly increased rates of violent crime in the months immediately following.

⁷ Clarence Darrow, *Crime its Causes and Treatment*, New York, 1922 <http://www.gutenberg.org/files/12027/12027-h/12027-h.htm>
<http://darrow.law.umn.edu/documents/Crime%20Causes%20&%20treatment.pdf>

⁸ http://www.nodp.org/ma/stacks/369_Mass_242.txt

⁹ “I call upon you to remember, that cruel punishments have an inevitable tendency to produce cruelty in the people. It is not by the destruction of tenderness, it is not by exciting revenge, that we can hope to generate virtuous conduct in those who are confided to our care.” The Debate in the House of Commons, April 5, 1813, Upon Sir S. Romilly’s Bill. By Basil Montagu, Esq
https://books.google.it/books/about/The_Debate_in_the_House_of_Commons_April.html?id=GEdfAAAACAAJ&redir_esc=y

¹⁰ <http://www.monsieurdevoltaire.com/2014/09/prix-de-la-justice-et-de-l-humanite-partie-9.html>

https://fr.wikisource.org/wiki/Page:Voltaire_-_%C5%92uvres_compl%C3%A8tes_Garnier_tome30.djvu/596

¹¹ <http://www.nytimes.com/1995/02/07/opinion/what-prosecutors-won-t-tell-you.html>

¹² *The Times* of Jan. 25 1853 <https://www.marxists.org/archive/marx/works/1853/02/18.htm>

¹³ Robert M. Bohm, *Karl Marx and the Death Penalty*, 25 September 2008, Springer
<http://www.controappuntoblog.org/2012/07/29/karl-marx-and-the-death-penalty-robert-m-bohm/>
KARL MARX, Dispatches for the New York Tribune
<https://libcom.org/files/Marx%20-%20Dispatches%20for%20the%20New%20York%20Tribune.pdf>

In an attempt to measure the long-term effect and short-term impact of executions on criminal homicides, Bowers and Pierce (1980) examined data on executions of offenders and homicides in the State of New York from 1907 through 1963. Their analysis was intended to find out how the number of homicides in a given month is affected by the occurrence of executions throughout the preceding year. The study used multiple regression techniques while controlling for seasonal covariation of homicides and executions as well as for exogenous factors. The analysis shows that in New York State there were, during the period under review, on the average, two additional homicides in the month after an execution was carried out. The authors interpret their findings as suggesting that the method of executions is one of “lethal vengeance” more than deterrence.

The aggravating effects of the death penalty

In addition to its dehumanizing, brutalizing, and contagious effects, the death penalty sometimes leads to an aggravation of certain types of criminal behavior thus creating additional crimes. When rape, robbery, kidnapping, or hijacking are made punishable by death, an incentive is created to get rid of the victim who more often than not is the sole witness. The female is raped and killed, the man is robbed and eliminated as a witness, the child is kidnapped and murdered, the plane is hijacked and ultimately blown up. An important, though usually overlooked, consequence of the institution of the death penalty for drug importation in some Asian countries has been a substantial increase in the shooting and killing of officers trying to apprehend the smugglers.

C. Deterrence

Upholders of the death penalty believe it exercises a unique deterrent effect and a supreme retaining power on potential offenders. This conviction is accepted as a given and is nurtured by man’s emotions and retaliatory sentiments. No attempt is made to check its validity or accuracy. Yet once the claim of a unique deterrent effect is subjected to careful scrutiny serious doubts immediately emerge and the inherent weakness in the position of the upholders of this belief becomes evident.

Any serious attempt to assess the general deterrent effect of the death penalty requires a careful examination of the following:

- 1) the nature and the reality of the threat,
- 2) the categories of potential offenders for whom the threat is intended,
- 3) the effectiveness of the threat,
- 4) a comparison of the threat presented by the death penalty with other threats available to society. Such a comparison is necessary to find out whether there are other punishments that deter as effectively as, or more effectively than, the death penalty.

1 The nature and reality of the threat

The exaggerated faith in the efficacy of the death penalty as a deterrent is based on the commonly held belief that men fear death more than anything else and far more than life imprisonment. This general view fails to take account of various facts related to the nature and application of the death penalty.

- No matter what statistics one uses, the inevitable conclusion is that the objective, statistical risk for a potential killer of being convicted, sentenced to death and executed in a capital punishment jurisdiction is, indeed, a very low one.
- In fact, the potential killer runs a much higher risk of being slain while committing his offence or while escaping the scene of the crime than of being legally executed.
- When the motivation is strong and when the temptation is great, subjective estimates of the risk of incurring the death penalty are likely to further underrate the objective probability of execution.
- The threat of legal execution is by its very nature a remote one. If the potential offender is to do a rational calculation of the immediate pleasure or gain to be derived from the crime and the threat of being executed, he is likely to dismiss the latter not only because of the low probability but also because of its remoteness.
- The assumption that the threat to one’s life, even when remote and improbable, is the most powerful of all threats is based on a hypothetical state of mind. This is described by the late American psychiatrist Dr. Roche (1958) author of “the criminal mind” in the following manner:

“The argument that capital punishment deters may be a valid assertion as long as it rests upon a hypothetical state of mind which is a fictional invariable. But it is not verified by experience which

tells us that in a given community there will be found a segment of its population predetermined with pathological and criminal potentials transcending the deterring effect of any punishment including capital punishment. The psychological and sociological sciences do not support the belief that the fear of death is an effectual deterrent to crime. On the contrary, we more often encounter the opposite effect; the death penalty may be an incentive to murder, and here indirectly capital punishment tends to lower the respect for human life. The number of murderers who are mentally unstable is larger than we wish to admit. Even in some instances they are attracted to the spectacle of their own execution and attempt to secure it to insure their own destruction.”¹⁴

2) For whom is the threat intended?

When considering the need for capital punishment and its effectiveness as a deterrent, a definite population must be specified. This population for whom the threat of the death penalty is intended consists of those who:

- are likely to commit the behavior punishable by death; in most retentionist jurisdictions this behavior is murder;
- are likely to be deterred by the threat of death.

This excludes two major groups from the perspective of deterrence, two groups who are not affected by the death penalty. For the first group the penalty is unnecessary, for the second it is ineffective.

- the first group consists of those who do not need a legal threat to refrain from taking a human life. This group includes the bulk of the population, the mass of people who have adequately interjected the moral norms of society and who never contemplate killing, not because it is punishable by law but because it is against their moral and religious convictions. In any society the vast majority of the population belong to this group. They are highly socialized, law abiding citizens who do not view or think of killing as a means of gain, pleasure, or solving conflicts and who, therefore, do not need the threat of punishment to keep them from taking other people's lives;
- the second group consists of those who are not and will not be deterred by the threat of punishment, be it death or otherwise. This is the group of the undeterrables for whom deterrence is ineffective. That we have crime despite legal sanctions and that many offenders repeat their offence or commit other offences after having experienced punishment, is an indication that in every society there is small group of people who are neither deterred by legal threats nor by the actual experience of punishment.

These distinctions are meant to show that generalizations about the effectiveness of the death penalty as a deterrent are not very useful in identifying the specific population who is intended by the threat and in pinpointing those likely and those unlikely to be deterred by it. Once the types or categories of offenders who are thought to need the threat of the death penalty and who are likely to be deterred by it are specified we find ourselves faced with one of the many paradoxes of the death penalty: where it is wanted it is not likely to be effective and where it is likely to be effective it is not wanted. Those in favor of retaining or restoring capital punishment claim it to be necessary to deter terrorists and potential political assassins, hired killers, sex killers, mass murderers, and killers of police. Yet, those types of criminals are precisely the ones least likely to be deterred by the threat of legal death.

a) The ideologically-motivated killer

Faced with increasing terrorist activities and unable to deal with the political and socio-economic conditions that breed terrorism, some west European countries are coming under mounting pressure to restore the death penalty. Terrorist acts committed in several countries of Western Europe during the past decade brought more cries for a return to capital punishment than at any other time in recent memory.

In Britain, calls for a return to the noose were made following the Irish bombings in London and the killing of Earl Mountbatten. In Italy, traditionally an abolitionist country, the demands to restore the death penalty were prompted by the activities of the Red Brigade and intensified by the killing of Premier Aldo Moro. In West Germany, the slaying of the Israel athletes at the Munich Olympic in 1972, the activities of the Baader-Meinhof group, in particular the kidnap-killing of the industrialist Hans Martin Schleier, provided the needed

¹⁴ <https://www.publicsafety.gc.ca/lbrr/archives/hv%208699.c2%20f3%201972-eng.pdf>

fuel to those who wanted the death penalty brought back. More recently, in France which abolished the death penalty only last year, the French police has called for return of the guillotine in the aftermath of some recent anti-Semitic and anti-American attacks in Paris. A French senator, Pierre Salvi, a centrist, urged re-establishment of the death penalty for terrorists convicted of murder. It might well be that these demands are motivated by the same vindictive sentiments that animated the Talion Law. In any case, it is the presumed unique deterrent effect of the death penalty that is always given as a justification for the call for its reinstatement. Those who really think that the reinstatement of capital punishment will put an end to, or will produce a reduction in the number of terrorist incidents are either extremely naive or under an illusion.

Standard punishments, including the death penalty, do not impress terrorists or other political criminals who are ideologically motivated and dedicated to make sacrifices for the sake of their cause. The terrorist is convinced of the legitimacy and the moral righteousness of his cause. He resorts to terrorist tactics out of dedication, desperation, and is quite often in search of martyrdom. No punishment, be it death or prison, will act as a deterrent in such cases. Moreover, terrorist activities are fraught with danger and the terrorist runs all kinds of deadly risks without being intimidated by the prospect of immediate death. Is it conceivable that he will be deterred by the remote and low risk of the death penalty?

Not only is the death penalty ineffective in deterring the potential terrorist but its use is likely to lead to an escalation in the acts of terror. Schreiber (1978) points out that terrorist groups have genuine power, however small it is, and to put a captured terrorist to death is to invite retaliation in kind against the innocent. Furthermore, death by execution does in many cases serve the purpose of the terrorist by conveying upon him, especially in the eyes of fellow terrorists and those who sympathize with his cause, a hero-like status, and by fulfilling his inner wish for martyrdom. In such cases, the death penalty may act more as an incentive than as a deterrent.

b) The hired killer

Those who believe that capital punishment is a powerful and unique deterrent simply place too much faith in the power of legal threats, in man's rationality, and in the ability of fear to curb or to control undesirable behavior. They forget that the prospect of immediate pleasure or gain largely outweighs all remote risks including the risk of death, hell, and damnation.

In many occupations the risk of accidental death is much higher than the threat of legal execution faced by the hired killer. Death as an occupational hazard does not prevent people from entering occupations such as mining, ocean drilling for oil, skyscraper construction, auto racing, bull fighting, and so on. There is little difference between the hired killer and the mercenary. Neither is afraid of death and both are willing to risk their lives for pay.

c) The sex killer

Even the most ardent supporters of deterrence admit that it is not likely to be operative in situations where strong passions or emotions are present. Fitzgerald (1962) describes the likely effects of the death penalty on various murder types as follows:

“Sex-murders and murders committed by the mentally abnormal are unlikely to be deterred by any threats. Impulsive murders, including “les crimes passionnels”, are likewise unlikely to be deterred by any sanction. On the other hand, the ordinary person, who may assert that the death penalty would deter him more than imprisonment, is unlikely in any event to commit murder, because to do so would be contrary to his moral beliefs, while in any case the threat of imprisonment will assist him to net according to his beliefs. Murderers like Crippen, who are not professional criminals, are not likely to be deterred by any threat because they calculate on escaping detention.”

Some sexual murderers are insane, some are feeble minded, others still suffer from some mental disorder or pathological abnormality that diminishes their responsibility and excludes them from the application of the death penalty. The test, the so-called normal ones, if there is such a thing as a normal sex killer, lack the capacity to control their sexual impulses. Once they are under the spell of their sexual desires they are either unable to think about the consequences of their actions or are willing, for the sake of a temporary pleasure or relief, to risk the most dire consequences.

There are several types of sex killers but the two most common are the sadistic and the primitive. The sadistic killer who derives a sexual pleasure from inflicting pain upon his victim, from mutilation and torture, from the view of blood, is typically an individual so obsessed by his sexual impulses and fantasies that no punishment, no matter how severe it is, is likely to intimidate or to dissuade him from giving in to his deviant sex drive. As to the primitive sex slayer who kills his victim, the sole witness to his crime, for no other reason but to escape detection, he is likely to be encouraged rather than discouraged to eliminate his victim by the prospect of the death penalty.

Moreover, it is well known that sexual murders are difficult to solve because of the absence in most cases of a prior relationship between the killer and his victim. This low clearance rate means that the objective probability of incurring the death penalty is even lower than it is in other types of murder. Such low objective probability coupled with the excessive optimism of many sexual killers are likely to neutralize whatever deterrent effect the death penalty may have.

d) The mass murderer

What is said above about the sex slayer applies to those mass murderers whose principal motive for the killing is a sexual one. Sexual mass murders, though relatively rare incidents, receive wide publicity and media coverage disproportionate to their numbers. In any case, they do happen and among the recent cases is one that took place in my home province, British Columbia.

Mass murders that are not sexually motivated whether involving snipers shooting at random, a family member killing all other members before committing suicide, or a bluebeard killing his wives, are committed by deranged individuals who are not governed by the normal rules of rationality and logic. The notion of their weighing potential penalties is absurd.

Since the penalties for murder, whether death or a long prison sentence, are both so severe as to destroy the future of anyone subjected to them, the crime would not be committed by a rational man unless he thought there was little likelihood that he would be caught. For this reason, the difference in deterrent effect between the possibility of execution and a maximum of life imprisonment must be small to the vanishing point (see the Washington Research Project Report, 1971, p. 17).

e) The killer of police

While terrorists may choose or focus on policemen as targets, premeditated killings of police officers by ordinary citizens are extremely rare. The vast majority of slayings of police officers occur in the course of their intervention in family disputes, in robberies or burglaries in progress. They result from a violent overmastering passion, a sudden impulse, an overreaction, or a strong urge for self-defense. They are committed in situations loaded with panic or high emotions both or which exclude the possibility of cool, rational calculation of the consequences.

The impulsive and irrational character of murders committed against the police in the course of a robbery, a burglary, or a traffic chase is self-evident. A rational offender, in full control of his behavior, would not risk life imprisonment to avoid a much lesser penalty of a few years in prison or a fine in the case of speeding. The act of killing in these circumstances is a totally irrational act and the punishment prescribed by the law is, therefore, of no consequence in preventing it from being committed.

3) How effective is the threat?

a) capital punishment and the rising homicide rate

Death penalty supporters, particularly in the U.S.A., usually point to the rise in the rate of criminal homicide over the years and argue that this constitutes a compelling reason for not abolishing capital punishment or for bringing it back where it has been abolished or suspended. The strategy is simple and typical of it is a report published last year (1981) by the California Justice Department under the title "Murder and the death penalty: a special report to the people". This report, highly critical of the California Supreme Court for effectively thwarting death penalty laws in the State, attempts to create the impression that a causal link exists between the non-enforcement of the death penalty and the increase in criminal homicide in California.

The report claims that during the sixteen years preceding its publication, a period during which California did not enforce the death penalty, homicide rate increased 240%, from 4.2 per 100,000 population in 1964 to

14.3 per 100,000 population in 1980. It claims further that the citizens of California are four times more likely to be killed by unlawful homicide today than they were when killers were executed! The intent is clear: alarming the public in the hope of mustering support for legal executions by suggesting that the rise in homicide is causally linked to the de facto suspension of the death penalty in California, the report, to say the least, is misleading the public.

What this report and others like it, intentionally fail to point out is that the upward trend in the incidents of criminal homicide and the non-enforcement of the death penalty are, in all likelihood, coincidental. Another intentional omission is the failure to compare the change in homicide rate to the change in other crimes of violence. If such a comparison showed a steeper increase in other violent offences could it still be suggested that the increase in homicide is attributable to the non-execution of killers in California? It is fallacious to examine homicide rates in isolation from other crimes. Any attempt to establish a causal link between the abolition or suspension of the death penalty and the homicide rate should look at the latter against a background of violent criminality. Only then can the true picture of violence be captured and interpretations of changes and fluctuations be made. What the report of the Justice Department fails to tell the citizens of California is that other crimes of violence excluding criminal homicide increased during the same period 237 percent, that aggravated assault rose by 217 percent and that the rise in robbery rate was almost four times that of criminal homicide: 899 percent! (see table 1).

When it was claimed in Canada that the de facto, followed by de jure suspension of the death penalty was responsible for a substantial increase in criminal homicide, I took upon myself to test the validity of such claim¹⁵. The study covered a nine-year period from 1962 (the year the last executions in Canada took place) to 1970 and examined not only the statistics on criminal homicide (murder and non-negligent manslaughter) but also those on attempted murder, wounding and assault, rape, and robbery. The findings were non-equivocal. Criminal homicide rate showed the widest variations from year to year and its overall increase was the lowest among all offences studied. This indicated beyond any doubt that the increase in homicide was neither attributable nor in any way related to the suspension of the death penalty.

What happened following the total abolition of capital punishment in 1976 is even more revealing. Since 1976 the rate of criminal homicide in Canada has been steadily declining. The year 1981, the last for which statistics are available, witnessed a slight increase over the previous year; from 2.48 per 100,000 population in 1980 to 2.67 per 100,000 population in 1981. This latter rate, however, is still lower than it was prior to the abolition: 3.07 per 100,000 population in 1975.

All available evidence suggests, therefore, that capital punishment is irrelevant to the homicide rate. This fact is eloquently summarized by Professor Norval Morris (1967) in the following manner:

“all of the available data suggest that, where the murder rate is increasing, abolition does not appear to hasten the increase; where the rate is decreasing, abolition does not appear to interrupt the decrease; where the rate is stable, the presence or absence of capital punishment does not appear to affect it”¹⁶

Morris concluded that in considering the wisdom of abolition or retention of capital punishment for homicide, reliance cannot be placed on capital punishment having a higher general deterrent effect than the alternative penalty. He noted that those who persist in arguing that the issue of general deterrence is still open have insufficiently comprehended the available data.

b) capital punishment and the killing of policemen

Police forces in Canada, the U.S.A., and many other countries are among the most vocal supporters of the death penalty. At a recent meeting of the Canadian chiefs of police in Halifax, Nova Scotia, a resolution was passed calling for the reinstatement of the death penalty. This resolution has become an annual ritual. The argument made to support policemen's demands for a return to hanging is always the same. Despite evidence to the contrary, it is claimed over and over again that capital punishment provides additional protection to policemen against being killed on the job. This argument, like all others pertaining to the unique deterrent

¹⁵ Ezzat Fattah A Study of the Deterrent Effect of Capital Punishment with Special Reference to the Canadian Situation <https://www.publicsafety.gc.ca/lbrr/archives/hv%208699.c2%20f3%201972-eng.pdf>

¹⁶ <http://hansard.millbanksystems.com/commons/1969/dec/16/murder-abolition-of-death-penalty>

effect of the death penalty, lacks any empirical support. Both old and new research do not lend credence to police claims.

Campion (1956), Sellin (1962, 1967, 1980), and Cardarelli (1968) compared police killings in abolitionist and retentionist states in the U.S.A. They all concluded that the rates do not lend empirical support to the assumption that law enforcement officers are better protected when the death penalty is retained or that their occupational risks are increased by its abolition.

More recently, Bailey (1982) conducted a multivariate analysis of the deterrent effect of the death penalty on the rate of lethal assaults against the police. The study examined state-level data for the period 1961 to 1971. Bailey hypothesized a significant inverse relationship between the rate of police killings and 1) the statutory provision for capital punishment and 2) the execution rate of convicted murderers. Contrary to the deterrence hypotheses, he found no support for the argument that the provision and use of the death penalty provides an added measure of protection for the police. Rather, variations in police killing rates, like the general homicide rate, appeared to be largely a function of socio-demographic factors.

4) Is capital punishment a unique deterrent?

In a recent article published in the *Canadian Journal of Criminology* (1981) I reviewed early and recent research on the deterrent effect of the death penalty. The review did not support the assumption that the death penalty possesses unique deterring power.

Early research tried to ascertain the deterrent effect in several different ways:

- examining the effect of a declining rate of executions on criminal homicide rates;
- comparing homicide rates within countries and/or states before and after they abolished or restored the death penalty;
- comparing homicide rates between adjacent and apparently congruent states with and without the death penalty;
- ascertaining whether law enforcement officers and prison guards were safer from murderous attacks in states with the death penalty than in those without it; and
- examining homicide trends in cities where executions were carried out and were presumed to have been widely publicized.

Until 1975 researchers analyzing murder or criminal homicide statistics were unanimous in their conclusion; they found no empirical evidence to support the presumed unique deterrent effect of the death penalty and could discern no visible effect this penalty has on the rates of homicide. But in 1975 a study reporting an opposite conclusion was published. The study was done by I. Ehrlich¹⁷, an economist at the University of Chicago. Ehrlich used a set of assumptions to construct an econometric model, employed aggregate data on homicides and executions for the entire U.S.A., and claimed to have found evidence that a capital execution would indeed deter some potential killers and perhaps save as many as eight lives. Because of the nature of Ehrlich's claims and the wide publicity they received there were several replications of his study. The replications revealed fundamental weaknesses in his assumptions, his model and his analysis. His detractors claimed that his evidence of deterrence depends upon a restrictive assumption about the mathematical relationship between homicides and executions, the inclusion of a particular set of observations, the use of a limited set of control variables, and a peculiar construction of the execution rate, the key variable. McGahey (1980) summarized the flaws in Ehrlich's study as follows:

“All those who directly considered Ehrlich's work found that the alleged effects of capital sanctions were dependent on the choice of variables included in the equation, the definition and forms of those variables, the particular mathematical forms of the equation, and the use of a very specific time period.”

¹⁷ Isaac Ehrlich, “The Deterrent Effect of Capital Punishment: A Question of Life and Death” *The American Economic Review*, Vol. 65, No. 3, (Jun., 1975), pp. 397-417. <http://www.nber.org/papers/w18>

SUMMARY

- 1) The demands to maintain or to restore the death penalty are based on nothing more than unsubstantiated claims, common sense arguments, and impressionistic personal views about its unique deterring power.
- 2) At each attempt to repeal the death penalty in former days it was asserted that if criminals were not executed crime would substantially increase and the security of society would disappear. Yet, these predictions and forebodings of evil always proved to be groundless.
- 3) Capital punishment is supposed to fulfill its preventive function through three major mechanisms: elimination, moralization, and deterrence.
- 4) Elimination is a defensive rationale only if the death penalty is applied frequently which it is not. Incarceration is an effective means of neutralizing dangerous killers and is used effectively with insane murderers. It could be as effective in the case of "normal" killers. Furthermore, murderers as a group have one of the lowest rates of recidivism of any criminal group.
- 5) The official killing by the state does not promote respect for human life. It has a brutalizing and contagious effect through its suggestive and imitative impact. In addition, when the death penalty is prescribed for crimes other than murder it has a tendency to aggravate these crimes and to create a new criminality.
- 6) The exaggerated faith in the efficacy of the death penalty as a deterrent fails to take account of various facts related to the nature and application of the death penalty: the objective statistical risk for a potential killer of being convicted, sentenced to death, and executed is very low and much lower than other risks the criminal is exposed to while committing the crime or escaping the scene.
- 7) Subjective estimates of the risk of incurring the death penalty are likely to further underrate the objective probability of execution. Furthermore, the risk is remote and is outweighed by the prospect of immediate pleasure or gain.
- 8) When considering the effectiveness of the death penalty as a deterrent, the definite population aimed by the threat must be specified. Once this is done, it becomes evident that where the death penalty is wanted it is not likely to be effective and where it is likely to be effective it is not wanted.
- 9) Those who want capital punishment retained or restored claim that it is necessary to deter potential terrorists and political assassins, hired killers, sex killers, mass murderers, and slayers of police. Yet those types of criminals are precisely the ones least likely to be deterred by the threat of legal death.
- 10) Claims that there is a causal link between the de facto or the de jure abolition of the death penalty and an increase in homicide rates are belied by the fact that the increase in the rate of criminal homicide is not higher than that of other crimes of violence and also by the steady decline of criminal homicide rates in some countries following the abolition of the death penalty. In fact, all available evidence suggests that capital punishment is irrelevant to the homicide rate.
- 11) Both old and new research do not support the claim that capital punishment provides additional protection to policemen against being killed on the job. Variations in police killing rates, like the general homicide rate, are largely a function of socio-demographic factors.
- 12) Old and new deterrence research on the effect of the death penalty does not support the common sense assumption that capital punishment is a unique deterrent or that it is a more effective penalty than the alternatives.

TABLE
Changes in crimes of violence In the State of California
1964 - 1980

	1964		1980		percent change
	number	rate	number	rate	
Criminal homicide	740	4.2	3,411	14.3	240%
Aggravated assault	24,880	137.6	102,766	436.7	217%
Robbery	18,687	103.2	90,420	384.2	899%
Forcible rape	3,621	20.0	13,693	58.2	191%
Violent crime total	47,908	265.0	210,290	893.4	237%
Violent crime excluding criminal homicide		260.8		879.1	237%

Source: Uniform Crime Reports, published by the Federal Bureau of Investigation, FBI 1964 and 1980

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PLEASE NOTE

The opinions expressed in this paper are those of the author and do not necessarily reflect the views of Amnesty International

Appendix
By Claudio Giusti

“The morning of the execution both of them sang: “Long live the rebels”, they sang without fear while they went to the gallows pole. (...) If they aren't afraid of death, why can capital punishment be a deterrent? To be honest, I think that, with the many death sentences I executed, I didn't stop any murderer.”
Albert Pierrepoint, the last English executioner, about the execution of two members of IRA.

British authorities ruling Palestine hanged several members of the underground Zionist Irgun organization in the 1940s following their conviction on charge of bombing and other violent attacks. Menachem Begin, former Irgun leader and later Prime Minister of Israel, reportedly told a former British Government minister that the executions had “galvanized” his group, which subsequently hanged several British soldier in retaliation. Menachem Begin said the hangings “got us the recruits that we wanted, and made us more efficient and dedicated to the cause ... you were not sentencing our terrorists to death, you were sentencing a lot of your own people, and we decided how many”
Amnesty International “When the State Kills”, ACT 51/07/1989 p. 19

“During the 1930s, for example, there were a total of 1,676 executions in the United States. That represents 167 executions per year, 14 executions per month, and the most executions in any single decade of the twentieth century. The most executions in any single year since 1930, the first year records were kept by the U.S. government, were the 199 recorded in 1935. Furthermore, although data on the celerity of executions are not available for this period, data on celerity for 1951-1960 show that the average time between death sentence and execution was 14.4 (the range was from 4.6 to 46.1 months); the average for 1996 was 125 months. If capital punishment had a deterrent effect, and the frequency and celerity of executions were important, then one might expect a relatively low murder rate for the decade. The evidence shows, though, that homicide rates were higher in the 1930s than in the 1940s, 1950s, and early-to-mid-1960s—decades that had fewer executions. Historical evidence provides no reason to believe that increasing frequency and celerity of executions would dramatically increase the death penalty deterrent effect.”
Robert M. Bohm, *Deathquest*, 4th Edition, Anderson Publ. 2012, p. 164

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