

IS CAPITAL PUNISHMENT A UNIQUE DETERRENT ?

A Dispassionate Review of Old and New Evidence

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IS CAPITAL PUNISHMENT A UNIQUE DETERRENT?

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1. The deterrence argument: why is it popular?

Retributive, religious and philosophical arguments in support of the death penalty have lost favor with many of its advocates. The radical change in penal philosophy that took place in the second half of the twentieth century was bound to bring about a change in retentionist rhetoric and strategy. At a time when correctional efforts were geared towards treatment and change, it was no longer fashionable to advocate the principles of talion law and the claim a life for a life, an eye for an eye and a tooth for a tooth. Advocates of the death penalty chose to focus instead on its presumed preventive effects and protective functions. Gradually, the deterrent effect of capital punishment became the focal point in arguments to support its retention or its reintroduction and continues to be presented by its supporters as the indisputable justification for the state's deliberate taking of human life. This change in focus that characterized death penalty debates of recent years is understandable. The deterrence argument is, in many respects, an attractive one.

Firstly, deterrence makes sense. It is common knowledge that people are afraid of death and will do everything they can to avoid it. The threat of execution is, therefore, likely to deter them from committing the criminal offences carrying the death penalty. In fact, the logic of the deterrence argument is impeccable.

After all, what can be more obvious than the assumption that people cherish life above everything else and will not willingly and deliberately put it in peril? Common-sense views, however, are not always correct. And if we are to justify the retention of the death penalty solely or mainly on grounds of its preventive effects, its supporters will have to come up with a more solid and convincing proof than more conventional wisdom.

Secondly, the deterrence argument is more civilized than arguments based on revenge and retribution. Retaliation and expiation are no longer acceptable as the ultimate goals of criminal sanctions. Changes in philosophy are not always accompanied by changing in people's sentiments. Since vindictive, retributive feelings continue to exist it is only appropriate to cloak them in rational arguments such as deterrence and protection of society. The deterrence argument thus serves to disguise the primitive desire to see the murderer pay for his crime with his life. As Hans Zeisel (1976) puts it:

“It is the belief in retributive justice that makes the death penalty attractive, especially when clothed in a functional rationalization.”¹

Thirdly, the deterrence argument provides a utilitarian rationale for the shedding of blood since this is supposedly indispensable for saving innocent lives.

The superiority of the deterrence argument to others advanced in support of the death penalty was reaffirmed by the Subcommittee on Moral Arguments For And Against The Death Penalty (Massachusetts, 1958). The Subcommittee stated:

“The only moral ground on which the State could conceivably possess the right to destroy human life would be if this were indispensable for the protection or preservation of other lives. This places the burden of proof on those who believe that capital punishment exercises a deterrent effect on the potential criminal. Unless they can establish that the death penalty does, in fact, protect other lives, at the expense of one, there is no moral justification for the State to take life.”²

Not only did the Subcommittee proclaim deterrence as the only legitimate justification for the death penalty, but it also squarely placed the burden of proof on the shoulders of the retentionists.

2. Is capital punishment a unique deterrent?

Discussions of the deterrent effect of capital punishment usually center on a wrong question. The question to be asked is not whether the death penalty deters would-be murderers, but whether it deters them more than the prospect of life imprisonment. The question is not whether the death penalty has a deterrent effect but whether it provides a unique and supreme deterrent whether it is the most powerful and most effective of all deterrents. It seems obvious that the death penalty cannot be justified on grounds of its deterring function alone unless and until it has been proven beyond a reasonable doubt that it supplies an additional increment of deterrence above and beyond the alternative which, in most jurisdictions, is life imprisonment. Has such a unique deterrent effect been unequivocally proven? The answer to this question is no.

Early deterrence research failed to show any relationship between the abolition or reinstatement of the death penalty and homicide rates. Despite the fact that several different studies reached the same conclusion, namely that the death penalty has no noticeable effect on the rates of homicide, these studies were dismissed by retentionists as “extremely primitive statistically” and as having been done by “not very good statisticians”. Retentionists, on the other hand, were quick to hail the one study that reached an opposite conclusion, namely the now famous Ehrlich study. They either failed to detect the flaws in Ehrlich's data and methodology or simply decided to ignore whatever defects the study suffered from.

3. Empirical tests of the difference hypothesis

Scholars who tried to assess the preventive functions of the death penalty used various methods to test the deterrence hypothesis. And proponents and opponents of the death penalty used various types of evidence to support or to challenge its unique deterrent effect. This evidence may be divided into two main categories: anecdotal stories and statistical findings.

¹ <http://www.jstor.org/stable/3108765>

² https://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bctwj/22_2/02_FMS.htm
<http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1318&context=tl>

i) Anecdotal stories

Proponents of the death penalty usually argue that almost every prisoner under sentence of death seeks a reprieve and welcomes it when it comes. This is seen as evidence that men fear death more than anything else and fear more than life imprisonment. It seems fallacious to assume from the terror of death experienced and manifested by an individual on death row that the same fear was operative in his mind at the time of the crime. This argument overlooks one indisputable fact: the difference between a potential and remote danger and one that is imminent and seemingly inevitable. In Sellin's words (1980):

“Surely a murderer, for whom a possible death penalty had proved to be no deterrent, would be considered abnormal were he not to make every effort to escape death after being discovered and sentenced to die.” (p. 79)

Another fact this argument overlooks is that the murderer on death row who is showing extreme fear and terror in fact of execution has not been deterred by the threat of death in the first place. It seems illogical to use the words or the psychological state of those who were not deterred by the death penalty to prove this penalty's unique deterrent effect.

Proponents of the death penalty also cite real life stories of criminals who have told the police that they refrained from killing the victim or from shooting at the pursuing police officer to avoid being put to death. For example, the Los Angeles Police Department reported to a California Senate Committee considering the abolition of the death penalty (1960) that during the course of one year, 13 robbery suspects had told the police that they used loaded or simulated guns “rather than take a chance on killing someone and getting the gas chamber”. The unreliability of such anecdotal evidence is obvious, and for every story alleging that the fear of the death penalty has acted as a deterrent, there are 10 others alleging that it has not. Clinton Duffy, former warden of San Quentin prison (California) asked thousands of prisoners convicted of homicide or armed robbery whether they had thought of the death penalty before their act. Not one had!

Among the most frequently quoted stories to deny the deterrent effect of capital punishment are those of the English pickpockets who actively applied their trade in the shadow of the gallows from which their fellow knaves were strung. Another often cited story is the one of an Ohio convict named Charlie Justice who devised the claps that held the condemned man in the electric chair. After his release, he was convicted of murder and electrocuted. A similar fate befell Alfred Wells who helped install San Quentin's gas chamber in 1938. It was his conversational cachet around the prison yard, usually with the moral: “That's the closest I ever want to come...”. Four years later, back at San Quentin for a triple killing, he was sealed in the chamber to die.

Needless to say, arguments and claims based on this kind of anecdotal evidence tend to neutralize each other and are of little help in settling the basic factual question whether or not the death penalty is a unique deterrent.

ii) Statistical evidence

Earlier studies on the preventive functions of the death penalty tried to ascertain its deterrent effect in five different ways:

- a) examining the effect of a declining rate of executions on criminal homicide rates;
- b) comparing homicide rates within countries and/or states before and after they abolished or restored the death penalty;
- c) comparing homicide rates between adjacent and apparently congruent states with and without the death penalty;
- d) 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
- e) examining homicide trends in cities where executions were carried out and were presumed to have been widely publicized.

a) The effect of a declining rate of executions on homicide rates

If capital punishment is, as its supporters claims, a unique deterrent to murder, then a declining use of it reflected in a decreasing rate of executions (which necessarily means an improved chance of escaping it) should be accompanied or followed by an increase in the murder rate. Yet statistics available from many countries, and particularly from the United States, tend to show that this is not the case. These statistics indicate, in fact, that murder rates have either remained constant or declined despite trends away from the use of capital punishment.

Chambliss (1967) compared the number-of prisoners executed under civil authorities and the murder rate from 1951 to 1966 in the USA and found that the substantial decline in executions has not been accompanied by any significant change in the murder rate.

Another study carried out in Ohio (1961) tested the relationship between execution rates and homicide rates. Both rates for the entire state for half a century (1909 - 1959) were computed. The statistical correlation did not indicate that homicides have increased as executions have decreased, or the reverse. Any correlation between the two rates seemed to be direct rather than inverse, indicating only that homicide rates and execution rates have risen and fallen together. The researchers concluded that the statistical analysis of Ohio execution and homicide rates over the 50 year period revealed no evidence that executions have any discernible effect on homicide rates.

A third study conducted in Australia by Barber and Wilson (1968) similarly revealed that the relationships between execution and murder rates tended to be a positive rather than a negative one. It was found that the state of Queensland has had a higher execution rate than the other Australian states over a longer period of time (1860-1915) and that the murder rate in that state during the pre-abeyance period (1901-1914) was also considerably greater than in New South Wales and South Australia. Barber and Wilson concluded:³

“The apparently disproportionately high frequency of executions in Queensland during this period would not, then, seem to have had a very great deterrent effect on potential murderers in Queensland. Indeed, the evidence is more supportive of Sir Samuel Romilly’s contention that brutal punishments accustom people to the brutality, and tend to create attitudes conducive to the commission of violent crimes.”⁴

b) The effect of repeal and reintroduction of capital punishment in homicide rates.

The experience of those European countries which abolished the death penalty in the nineteenth or twentieth century and for which statistics are available shows that abolition was followed by a decrease rather than an increase in homicide rates. But it is the experience of those countries which more recently repealed capital punishment statutes that is really worth mentioning.

Morris and Blom-Cooper evaluated the British experience and reported their findings in an article published by The Observer in 1979. The authors analyzed murder statistics in England and Wales since 1957 when hanging was partially abolished and concluded that abolition has had no visible effect on the murder rate in Britain:

“One aspect stands out starkly. The penalty for the crime of murder has no discernible influence on the ratio at which murder is committed.”

Following the suspension of the death penalty in Canada in 1967 for a trial period of five years, I conducted a study (1972) in which I attempted to assess the impact this suspension had on homicide rates. The study clearly showed that the statistical increase in criminal homicide in Canada could in no way be attributed to the suspension of the death penalty. The large difference in homicide rates among the Canadian provinces suggested that the rates are conditioned by factors other than the death penalty. They confirmed what criminologists have held for a long time, namely, that the causes of criminal homicide are not related to any

³ <http://journals.sagepub.com/doi/pdf/10.1177/000486586800100203>
<https://www.publicsafety.gc.ca/lbrr/archives/hv%208699.c2%20f3%201972-eng.pdf>

⁴ “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

single factor but to a total social situation in which a special law or a particular punishment can have little or no effect.

The effect of reinstating capital punishment on criminal homicide rates has been thoroughly researched by Professor Sellin. Sellin (1966) examined and analyzed statistics for 11 US states which experimented with abolition for periods of time varying in duration. Here is the conclusion he reached:

“If any conclusion can be drawn from all the above data, it is that there is no evidence that the abolition of the death penalty generally causes an increase in criminal homicides or that its reintroduction is followed by a decline: the explanation of changes in homicide rates must be sought elsewhere.”

Professor Sellin’s conclusion is almost identical to the one reached by the British Royal Commission on Capital Punishment (1949-1953):

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

c) Comparisons of homicide rates in states with and without death penalty

Professor Sellin (1961, 1967) compared homicide rates for states with similar outlook in the USA. He selected five sets of three states each and compared their crude homicide death rates. The comparisons covered a 43-year span for each set of states, extending from 1920 to 1963. In each set, at least one of the three states did not provide the death penalty for all or a part of the period while the others did provide it. Each of the three states in each set borders one or both of the other two. The figures showed clearly that homicide death rates in all the states have followed the same trends, whether or not the death penalty was provided. In all of the 15 states covered by the comparisons, homicide death rates reached peaks in the 1920s and early 1930s, then followed a general downward trend, levelled out in the 1940s and continued through 1960 at about that level. Comparison of trends and rates revealed no difference among adjacent states with and without the death penalty which could be ascribed to either its presence or absence. Professor Sellin found that:

- the level of the rates is not the same in all regions;
- within each group of contiguous states it would be impossible to identify the abolitionist state, were it not designated as such; and
- the trends of the rates of the states compared are similar.

The inevitable conclusion, therefore, is that the presence of the death penalty, either in law or practice, does not influence homicide death rates. As Professor Sellin puts it:

“The important thing to be noticed is that whether the death penalty is used or not, or whether executions are frequent or not, both death penalty states and abolitionist states show rates which suggest that these rates are conditioned by other factors than the death penalty.”

d) Comparisons of risks to law enforcement officers in states with and without the death penalty

Proponents of the death penalty claim that it provides superior protection to law enforcement officers and prison guards whose job, it is argued, would become more difficult and more hazardous if it were abolished. Since the 1950s the truth of this assertion has been subjected to several tests.

In 1956 Father Leonard Campion published a study of 24 US police forces, 18 of which represented death penalty states and six of which represented abolitionist states. The study covered a 50-year period from 1905 to 1954 and took many factors into account, such as the varying size of the police forces and the population they served. Father Campion concluded that the data:

“do not lend empirical support to the claim that the existence of the death penalty in the statutes of a state provides a greater protection to the public than exists in states where the penalty has been abolished.”

Professor Sellin (1955, 1967) did an extensive study of police homicide rates over a 25-year period. He examined the rates for 183 cities in 11 capital punishment states and for 82 cities in six abolitionist states. The general results of the study demonstrated that between the years 1919 and 1954 the cities in death penalty

states had a police homicide rate of 1.3 per 100,000 population, while the cities in abolitionist states had a police homicide rate of only 1.2 per 100,000 population. Commenting his findings, Professor Sellin wrote: "It is obvious from an inspection of the data that it is impossible to conclude that the states which had no death penalty had thereby made the policeman's lot more hazardous. It is also obvious that the same differences observable in the general homicide rates of the various states were reflected in the rates of police killings."

Sellin concluded further that:

"The claim that if date could be secured they would show that more police are killed in abolition states than in capital punishment states is unfounded. On the whole, the abolition states as is apparent from the findings of this particular investigation, seem to have fewer police killings but the differences are small. If this, then, is the argument upon which the police are willing to rest their opposition to the abolition of capital punishment, it must be concluded that it lacks any factual basis."

Some years later, Professor Sellin (1967), using statistics of police officer killed in the USA by offenders or suspect during 1961-1963 (140 police officers) and using as a base the number of police in the 15 states where the killings occurred according to the 1960 census, found that the annual average risk for the three years was 1.312 per 10,000 police in abolitionist states and 1.328 in the bordering states. There was, than, no significant difference.

Cardarelli (1968), analyzing the some data (police killed by criminal action from 1961 to 1963), came to the conclusions that the data "lend no weight to the argument that the death penalty states afford more protection".

Robin (1963, 1967) found that in any given year policemen in the USA are approximately six times more likely to kill than to be killed in the course of their duty; at the same time the probability of either event occurring is very small.

More recently, Professor Sellin (1980) did yet another study of police killings in abolitionist and retentionist states based on data published in 1975 in the annual report of the Federal Bureau of Investigation (FBI). His conclusion did not differ from his earlier ones:

"Not only did the police in retentionist states ran a greater risk of being feloniously killed, but so did the slayers and suspects involved in these homicides"

"The data presented in these pages permit only one conclusion, namely that the belief of the police that in order to be safer in their occupation they need laws that threaten potential murderers with death has no factual bases. Indeed, it is evident that the police are more efficient executioners than the public hangman and should inspire more fear than any capital law could do if deterrent were operative."

Studies by Morris (1955), Sellin (1967) Akman (1966) and Buffam (1976) clearly show that the hazards involved in prison life are not increased by the abolition of the death penalty. Neither 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 danger are insane murderers. Yet three murderers are by definition excluded from the possible infliction of the death penalty, and nobody is calling for their execution as a way of protecting the staff or the patients in the psychiatric institutions in which they are usually held.

e) Examining homicide trends following widely publicized executions

In 1935 Dann conducted a study to assess the impact of publicity of executions on deterrence. He hypothesized that if the death penalty is a deterrent, its greatest effects should be shown through executions which are well publicized. Furthermore, the effect should be more noticeable in the community where the offence occurred, where the trial aroused wide publicity and the offender, lived and had relatives, friends and acquaintances. To test the hypothesis, Dann compiled the dates of executions of Philadelphia residents for a period of several years and was able to find five cases that met the study's specifications. Three of the five

cases were of great notoriety. The study found no significant difference in homicide rates for equal period before and after the execution. There was a total of 105 days free from homicides during the 60-day periods before the executions and 74 in the periods after the executions. There were a total of 91 homicides in the “before the execution” periods and 113 in the “after” periods. Of the 204 homicides included in the study, 19 resulted in sentence for murder in the first degree. Nine of them had occurred during the 60-day periods preceding and 10 in the corresponding periods following the executions. During the 10 days just before the exertions there were two, and during the 10 days immediately following there were three such first degree murders in Philadelphia.

Another study was undertaken, also in Philadelphia, by Savitz (1958). After examining homicide trends before and after four widely publicized trials during the 1940s, Savitz concluded that no pattern emerges that would indicate deterrence and that the assumption that the deterrent effect of the imposition of the death penalty might be felt shortly after the date of sentencing is not borne out by the data. He further concluded that on the basis of the data “there was no significant decrease or increase in the murder rate following the imposition of the death penalty on four separate occasions”.

Recently, Phillips (1980) examined weekly murder statistics for London (England) for the period 1858-1921 and came to the conclusion that the homicide rate drops during the week of a highly publicized execution and during the following week and then begins rising again:

“Within, five or six weeks of a publicized execution; the drop in homicides is cancelled by an equally large rise in homicides.”

Phillips’ results were in contrast to those of Bowers and Pierce (1980), who used monthly rather than weekly murder rates. They found an increase of two murders during the month following a highly publicized execution.

iii) Isaac Ehrlich’s study and its replications

Until 1975, researchers analyzing murder or criminal homicide statistics were unanimous in their conclusion: they found no empirical evidences support the presumed unique deterrent effect of the death penalty and could discern no visible effect of this penalty on homicide rates. But in 1975 a study reporting an opposite conclusion was published in the American Economic Review. The study was done by I. Ehrlich, an economist at the University of Chicago. Ehrlich used a set of assumptions, to construct an econometric model, employed aggregate data and claimed to have found evidence that a capital execution would indeed deter some potential killers and perhaps save as many as eight lives:

“Empirical analysis suggests that on average the trade-off between the execution of an offender and the lives of potential victims it might have saved was of the order of magnitude of one for eight for the period 1933-1967 in the USA.”

Not only was Ehrlich’s claim at odds with the findings of all studies done in the US and elsewhere, but it was, the first time ever that a researcher has claimed to have been able to estimate the number of murders prevented by each execution. Ehrlich’s findings received a great deal of publicity and were circulated widely by many police forces in the USA and Canada. More important still was their presentation as evidence in support of the death penalty before US courts. Until then, the deterrence debate was largely an academic one, and was rarely used in the courtroom. But in 1976, statistical evidence in support of the deterrence hypothesis was submitted to the US Supreme Court in *Fowler v North Carolina* (428 US 904, 1976). It was in this case that the Solicitor General submitted to the Court an amicus curiae brief citing Ehrlich’s conclusion that capital punishment deters murder. And in another case, *Gregg v Georgia* (428 US 153, 169, 1976), the Supreme Court ruled that “the punishment of death does not invariably violate the Constitution” and added that for many murderers “the death penalty undoubtedly is a significant deterrent”. One would have expected the Court to substantiate such a claim with empirical evidence but the Court did not, although such evidence was not totally ignored. The Court stated that although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convicting empirical evidence either supporting or refusing this view (see Forst, 1977). Zeisel (1976) took issue with the Court’s statement arguing that the evidence about the deterrent effect is, indeed, “quite sufficient” and that the request for more proof is but “the expression of an unwillingness to abandon an ancient prejudice”.

Because of the nature of Ehrlich's claims and the 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 (Bowers and Pierce, 1975; Klein, Forst and Filatov, 1978; Passell and Taylor, 1976), the inclusion of a particular set of observations, the use of a limited set of control variables and a peculiar construction of the exertion rate, the key variable.

One important criticism of Ehrlich's study is his use of time series data for 1933-1969 in which homicides and executions were aggregated for the entire US. The Panel on Research on Deterrent and Incapacitative Effects of the National Academy of Sciences (1978) pointed out that Ehrlich's findings were particularly sensitive to the time period included. This sensitivity was largely due to the fact that during 1962-1969, executions in the US ceased while homicides increased, though not more than other crimes. When Bowers and Pierce (1975) reproduced Ehrlich's analysis using data from slightly different periods, all beginning in 1935 but each ending in a different year in the 1960s, their findings were entirely different from those of Ehrlich. They concluded:

“It becomes evident that the so-called deterrent effect of execution risk altogether disappears when the effective time period is foreshortened by dropping recent data points.”

Another researcher, Passell (1975), used cross-sectional data in various states in the US from 1950 and 1960. He also concluded that there was no reasonable way of interpreting the cross-sectional data that would lend support to the deterrence hypothesis.

A third researcher, Forst (1977), replicated Ehrlich's analysis while avoiding some of the major flaws that were identified in Ehrlich's research. For instance, he focused on a unique decade during which the homicide rate increased by over 50 percent and the use of the death penalty ceased. He also examined changes in homicides and executions over time and across states. His findings did not support Ehrlich's claim that capital punishment deters homicides. His final conclusion was:

“The results of this analysis suggest ... that it is erroneous to view capital punishment as a means of reducing the homicide rate.”

Probably the most detailed critique of Ehrlich's research was published in Canada (Hahn, 1977). Hahn is very conscious of the serious policy implications that defective studies might have and is particularly perturbed by the great publicity which Ehrlich's study received. His final comments contain both a warning and an advice:

“The techniques introduced by the economist may represent significant advances over those used in the past. These techniques are, however, useless unless they are combined with sufficient, accurate and relevant data. Unfortunately, it will be many years before data of sufficient quality and quantity is available for undertaking research which is adequate for supporting deterrent policy. (...)

Until that time, uncritical publicity of the earlier economic findings, publicity that has in the past bordered on the irresponsible, should cease. Economist like Ehrlich should also exercise more professional responsibility in undertaking and reporting what amounts to circumstantial results.”

4. How effective is the death penalty as means of prevention and societal protection?

The nature of the death penalty, its irrevocability, together with the safeguards necessary to avoid errors in its application, are such that it can never become an effective means of crime prevention or of societal protection. This point will be illustrated through a discussion of three aspects related to the application of the death penalty.

a) Capital punishment is the least-certain of all punishments

More than two hundred-years ago Beccaria noted that severity and certainty of punishment are hard to reconcile. In this he was referring the inverse relationship that often exists between the two variables: the more severe the punishment, the less certain it is. The same point was well stated in what is known as the “Rejected Preamble” of Sir Samuel Romilly's Bill of 1808:

“Whereas the extreme severity of penal laws has not been found effectual for the prevention of crimes; but, on the contrary, by increasing the difficulty of convicting offenders, in some cases affords them immunity and in most cases renders their punishment extremely uncertain.”

This rule applies to capital punishment more than to any other. In my study of the deterrent effect of capital punishment (1972) I compiled data on charges and sentences for murder, manslaughter and other offences in Canada during the period 1881-1967. The average yearly conviction rate for murder proved to be the lowest among all crimes of violence.

b) Capital punishment endangers society by preventing convictions

Capital punishment is known to exercise an inhibitory effect on juries and judges in capital cases. Those who are familiar with the administration of justice know that retaining the death penalty, especially if it is made mandatory, reduces the likelihood that indicted offender will be convicted. In this way, the menace of the death penalty tends more to protect the accused through intimidation of the jury than to protect society through the conviction of the murderer. In a democratic, fair system of justice it is doubtful that the death penalty can ever reach the certainty level necessary for it to operate effectively as a deterrent. This difficulty was outlined in the introduction to the British criminal statistic furnished by the Home Office. (1924)

“The consequence of the strong proof of guilt necessary for conviction of crimes punishable by death, the proportion of acquittals for murder is higher than for most other crimes, and an acquittal in such a case does not necessarily imply failure to detect the perpetrator of the crime.”

One of the paradoxes of the death penalty is that if it is made mandatory, it results in a high acquittal rate and leads to many murderers being let free. If, on the other hand, it is made discretionary, then its application becomes arbitrary, discriminatory and erratic.

c) The paradoxical nature of the death penalty

If capital punishment is really a unique deterrent, then a scarce and sporadic use of it would undoubtedly weaken its deterrent value by reducing the possibility and the threat of execution. It is in this fact that the real paradox of capital punishment lies. If it is used lavishly, it loses its horror, people become accustomed to it and are no longer affected or deterred by it; if it is rarely applied, then the probability of incurring it sinks to insignificance in the mind of potential offenders (see Sellin 1932). This led Professor Sellin (1932) to declare that “the death penalty probably can never be a deterrent. Its very life seems to depend on its rarity and therefore on its ineffectiveness as a deterrent”.

Another paradox of the death penalty relates to the nature of the crimes for which it is provided. Where it is wanted and used, that is for crimes of violence and sex, it is not likely to be effective. Where it might be effective (such as for rational economic crimes), it is not wanted.

5. Why capital punishment fails as a deterrent

The belief, shared by many, in the effectiveness of the death penalty as a deterrent and in its uniqueness as a means of discussion can usually be traced to a lack of knowledge as to the penalty’s application, to an inadequate understanding of the nature of criminal homicide and the psychology of the killer, and to a failure to realize that deterrence has its limits.

a) The odds against incurring the death penalty

In his study of the death penalty in Canada, Topping (1952) made the following statement,

“It seems clear that there is an inverse relationship between severity of punishment and certainty of punishment, and that Canadians are suffering under a delusion when they assert that they know how to bang. The net result of the administration of justice in Canada as it relates to capital offence is that murder has become the least risky of any or all of the offences which a citizen might choose to commit.”

In an attempt to assess the level of certainty of the death penalty in Canada and the odds against incurring it, I compiled statistics for the 80-year period from 1881 to 1960. The 80 years were then divided into periods of five years each. The highest percentage of death sentences to charges (45.9 percent) was recorded in the period from 1931 to 1935 when a person charged with murder had approximately an even chance of being sentenced to death. The last period, 1956 to 1960, revealed a low percentage of death sentences (33 percent), the highest percentage of commutations (73 percent) and the lowest percentage of executions (23.8 percent). In other words, during that period, although capital punishment was still the mandatory penalty for murder, a

person charged with murder had only one chance in three of being sentenced to death. Once sentenced to death, he had more than three chances out of four of escaping the death penalty. The chances of being executed during that period for a person accused with the capital offence of murder were eight in a hundred, a very low probability indeed. If the period is examined as a whole, we find that out of a total of 3,249 persons charged with murder, only 634 were actually executed. The percentage of executions to charges was 19.5, meaning that only one charge in five led to an execution, again a very weak probability.

Those who feel that the death penalty, despite the very low probability of incurring it, still provides an effective means of societal protection, simply forget that the other risks the potential killer takes are far greater than the risk of legal execution. Comparison between the rates of legal executions and the rates of offenders killed by the police, by the intended victim, or by some bystander during or after the crime show that this latter risk is much higher than the former. If the potential killer is not deterred by the greater threat of being killed on the spot while committing his crime or while escaping could it be claimed that he would be deterred by the minor and remote threat of being legally executed? The fact is, the potential killer rarely contemplates the consequence of his acts, calculates the risk involved, or makes a rational consideration of gain or loss.

To illustrate the differential risks to which the potential killer is exposed, Sellin (1959, 1961) made the following calculations:

“During the period 1934-1954, in Chicago, for instance, policemen killed 69 and private citizen 261 criminals or suspects involved in homicide, or a total of 330. During the same period there were 45 persons executed for murder in the Cook County jail. In other words, there were nearly eight times as many homicidal offenders killed unofficially, so to speak, as were those electrocuted. There were 5,132 murders and non-negligent manslaughters known to the police during those years. In connection with 6.45 percent of these homicides, a criminal or suspect met his death at the hands of police or citizens, while 0.88 percent were put to death in the electric chair.”⁵

b) The impulsive and pathological character of many homicides

Paradoxically the crime for which the death penalty is most often provided and applied, namely murder, is one of the offenses least likely to be deterred. It is universally recognized that homicide is most frequently an emotional and impulsive crime rarely subject to control by reason or fear of consequence. In the majority of cases the crime is the result of a sudden impulse or a violent over-mastering passion. The high emotions and strong motivations involved are likely to preclude a careful consideration of consequences or to outweigh the threat of any punishment, be it life imprisonment or even death. Quite often the victim is closely associated with the offender.

A large number of homicides are committed under the influence of alcohol, drugs, sexual stimulation, or provocation, with the thought of punishment hardly crossing the mind of the killer. Only a small percentage of all criminal homicides are truly thought out and premeditated. This small percentage is usually perpetrated by persons as convinced of their ability to escape detection as rule out all thought of consequences. As Calvert (1927) pointed out, one of the most common characteristics exhibited by the murderer who commits an apparently cold-blooded crime is an exaggerated sense of confidence in his ability to escape detection.

c) The undeterrability of many killers

The act of killing is quite commonly committed by mentally deranged or psychologically abnormal individuals under the spell of an obsession or an irresistible impulse, or under the pressure of some unusual circumstances. Abnormal offenders, offenders suffering from mental illness, those reacting to provocation and those acting under the influence of alcohol or drugs commit their crimes while in a state of mind that does not enable them to foresee or to consider the consequences of their actions. The more savage, heinous, and atrocious the crime is, the greater is the likelihood that the criminal will be declared not guilty by reason of insanity. Many of the cases cited in support of the death penalty or used to justify its retention are cases to which the death penalty does not apply because of the insanity of the offender.

⁵ <https://www.publicsafety.gc.ca/lbrr/archives/hv%208699.c2%20f3%201972-eng.pdf>

Another category of murderers comprise individuals who are actually attracted by the prospect of death. And still another type is attracted by the notoriety that the principal actor in a murder trial gets. In such cases the death penalty is likely to act as an incentive rather than a deterrent. It might even exercise a morbid fascination.

Professional killers, or hired guns as they are sometime called, often mentioned in discussions in favour of the death penalty, consider punishment, be it death or otherwise, a professional risk in the same way in which a physician consider the risk of contamination or a racing driver the risk of a car-crash. The great majority of these killers are adventurers who are not afraid of death; they are rather attracted by it, in the same way that mercenaries are attracted to the dangers of war.

As to terrorists and other political criminals, often singled out as a group to whom the death penalty should be applied, their fanaticism and dedication to their cause counteract and neutralize whatever legal threat is meant to deter them. Moreover, many of them seek through their actions their own self-destruction, a destruction which they view as the easiest and quickest way to the state of martyrdom to which they aspire.

d) Murderers' indifference to death

The death penalty cannot be an effective deterrent to those who are indifferent to death or are not afraid of it, or to those who have a conscious or unconscious desire to die. The large percentage of murderers who commit or attempt suicide fall into this category. Figures from some European countries show that one quarter to one half of murder cases are followed by the suspect's death.

According to West (1965), something like one half of the murders in England are followed by the suicide or attempted suicide of the aggressor.

Home Office researchers Gibson and Klein (1961, 1969) reported in their study of murder in England and Wales in the years 1952-1960 that about one third of all suspects in cases finally recorded as murder committed suicide. In over half of the murders known to have been committed by females, suicide followed the crime.

A Danish study by Siciliano (1965) covering all homicides in Denmark over a period of 28 years reported that 42.2 percent of the Danish killers subsequently killed themselves and a further 9.6 percent made a serious suicidal attempt. The incidents of suicide was particularly high among females offenders with 63.9 percent killing themselves and 16.1 percent making serious suicidal attempts. Obviously none of these murders would have been prevented had the death penalty been in effect in Denmark during that period.

Another category of potential killers unlikely to be deterred by the prospect and threat of the death penalty are those who see the ultimate sentence as a way of achieving a death wish. In such cases capital punishment acts as a direct incentive to murder.

Abrahamsen (1944) and Hurwitz (1952) cite the epidemic of indirect suicides that took place in Norway and Denmark in the seventeenth and eighteenth centuries when depressed people committed murder in order to be put to death since they would not commit suicide for religious reasons. These cases were so frequent that a special law had to be passed excluding such individuals from the death penalty to stop this particular type of homicide. Several recent cases reported in the literature confirm that this form of indirect suicide by means of the death penalty still exists.

e) Man's inability to conceive of his own death

Two important factors that weaken to a considerable extent whatever deterrent effect the death penalty may have are the time dimensions and man's inability to conceive of his own death. This latter phenomenon has been discussed and documented by many psychiatrists.

Modern life is full of hazards. But the dangers in everyday life do not stop people from going about their daily activities oblivious of the risks involved. This is made possible by this peculiar aspect of human psychology: the inability of man to conceive of his own death. It is this inability that explains why the risk of accidental death does not prevent people from driving or flying, racing drivers or bullfighters from

competing, etc. It explains why the risk of death from lung cancer or from liver cirrhosis does not prevent people from smoking or drinking.

The British Select Committee on Capital Punishment (1930) noted that:

“The mass of mankind put death in the far distance and push it into the doubtful future. Men peril it for trifling aims. Some are reckless of others, reckless of life itself. Be its consequences what they may, they will take them. Some dodge death and think they can, evade all its penalties; and flatter themselves that, whatever the penalty, they will never be found out.”

f) The remoteness of the threat

For punishment to elicit the desired behavioral responses from the potential killer, it has to pose an immediate threat of unavoidable dire consequences. The threat the death penalty poses is both remote and improbable. It is well known that the threat of the more dire consequences can have little effect if the prospect is uncertain and distant in time. The threat of hell and damnation has not been effective in deterring people from sin and it would be too naive and too optimistic to expect the death penalty to deter them from crime. In both cases the effectiveness of the threat is greatly weakened by its remoteness and uncertainty. Even if potential killers were rational and careful calculator of gain and loss, as some assume they are, the remoteness of the threat would always tip the scale against the death penalty. As Honderich (1971) puts it:

“It is truism that people do not choose between possible courses or action in a prudential way if the possible consequences of one course are distant in time and the consequences of the other immediate. A penalty is a distant possibility; the gain from an offence is usually immediate.”

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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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