

RATIONALE BEHIND JUSTIFICATION OF DEATH PENALTY

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DETERRENCE: EVOLUTION AND BURDEN OF PROOF DISPUTE

The argument of deterrence viz a viz death penalty became popular in the second half of the twentieth century. The ideology used to correct the offenders was moving towards rehabilitation.¹

Gradually, the arguments for deterrence became the focal point to vouch for the retention or abolition of death penalty. The argument for deterrence gained momentum primarily because of the basic psychic of people to be afraid of death and hence not commit crime due to the fear of being executed. Also, the argument for deterrence was considered as a rationalisation of retribution.²

The crime rate of a country depends on the penalties and the social, economic, moral factors of a country. While the former can quantify change and produce results, the latter is a long drawn process.³

In Gregg v. Georgia Mr. Justice Stewart, concluded that there is no statistical basis to justify the presence of deterrence in awarding capital punishment.⁴

¹ Ezzat a. Fatah, Is Capital Punishment A Unique Deterrent? A Dispassionate Review Of Old and New ,1981,Canadian Journal of Criminology ,pp 2

² ibid

³ Ernest van den hag, On deterrence and the death penalty,1969, The journal of criminal law, criminology and political science,pp 147

⁴ Gregg v Georgia 428 U.S. 153 (1976)

The abolitionists argue that death penalty as a punishment is so inhuman and brutal that the burden of proof shall be on the retentionists to show that the deterrent effect and thereby advocate its retention.

The retentionists claim that because death penalty is an irrevocable and brutal punishment, the fear it instils in the mind of people is so high that they are automatically deterred. Hence, they claim that the burden of proof is on the abolitionists to show lack of evidence on deterrence.

The retentionists rely on the basic human psychology to get deterred by such a threat of punishment⁵. Also, they wholly rely on the Ehrlich data that lays the proof of deterrence.

Isaac Ehrlich, the well known economist applied execution per homicide conviction the data of USA for the last four decades was used. Ehrlich concluded that if executions are increased by 1 percent, the murders will reduce by 0.6 percent. Hence it can be said that executing one person would enable the state to save 8 lives.⁶

A survey was conducted by the U.N in 1988 and was updated in 2002. the focus of the survey was to compare the relation between homicide and death penalty. The findings revealed that there is no basis to assert that death penalty deters potential murderers than any other form of punishment which is not as grave as death penalty.

A survey of research findings on the relation between the death penalty and homicide rates, conducted for the UN in 1988 and updated in 2002, concluded: '*It is not prudent to accept the hypothesis that capital punishment deters murder to a marginally greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment.*'

However it is argued that if there is no proof of deterrence, there is also no proof of zero deterrence.⁷

Karl F Schuesser concluded that through statistical data the deterrent effect of death penalty is still unproved. The difference in homicide rate in the United States is due to changes in the social structure and culture. Also in the Netherlands the death penalty was abolished in 1870.

⁵ Hardy Jones & Nelson Potter, Deterrence , Retribution and Denunciation And Death Penalty,1980-1981,UMKC Law Review,pp2

⁶PeterPasselt,The Deterrent Effect of the Death Penalty: A Statistical Test ,1976 ,Stanford Law Review,pp 61-62

⁷ Ernest van den hag, On deterrence and the death penalty,1969, The journal of criminal law, criminology and political science,pp 147

In the year 1860-1869 the homicide rate was 1.46. Infact, after abolition it never reached such a high rate. Thereby, the deterrent effect remains disproved.⁸

The Subcommittee on Moral arguments for and against death penalty clearly mandates that the state has a right to take lives only for the preservation of other lives. Hence, the burden on the state to prove the deterrent effect of death penalty is exceptionally high.⁹

The conclusion reached by the British Royal Commission on Capital Punishment suggests that there is no relation between crime rate and the persistence of executions thereby depicting that the abolition or retention of death penalty hardly makes a difference.¹⁰

The crime rates in the US have declined after abolition of death penalty. A comparison of the states in US also showed how the existence of death penalty does not make a difference. In the European countries, the abolition led to a fall in the crime rate after the 19th or early 20th century when it was first abolished.

ATTEMPTS TO JUSTIFY DEATH PENALTY ON DETERRENCE GROUNDS

In order to deter potential criminals, it is essential that they believe that those convicted will be executed and also that if they commit a crime, the criminal justice system will apprehend them.¹¹

Even if they are fearless about the latter and believe that they will not be caught, deterrence cannot serve its purpose. The preference of death penalty without torture over inflicting death penalty with torture is based on standards of humanity. However from the point of view of deterrence, the latter would be having a more deterrent effect. If it is still condemned then so should be death penalty, if deterrence is the criteria.¹²

⁸ Karl F Schueser, *The Deterrent influence Of Death Penalty*, 1952,Sage Publication & American Academy of Political and Soocial Science,pp 3

⁹ Ezzat a. Fatah, *Is Capital Punishment A Unique Deterrent? A Dispassionate Review Of Old and New* ,1981,Canadian Journal of Criminology ,pp 3

¹⁰ *ibid*

¹¹ *ibid*

¹² Hardy Jones & Nelson Potter, *Deterrence , Retribution and Denunciation And Death Penalty*,1980-1981,UMKC Law Review,pp2

The accused shall be presumed to be entitled to such a punishment. If death penalty is not inflicted the lives of potential victims is kept at stake. Entitlement includes an action because it makes the accused worthy of blame and punishment. Such death by the state shall be justified. The burden on the state shall not be so heavy so as to hamper it in performing the function of a welfare state.¹³

There is an opposite opinion which says that deterrent theories of punishment do not fall prey to Kant's objection that by punishing the, citizen the state tends to use him for deterrence. What justifies imposing this punishment is the fact that she has committed an offence for which this is the prescribed or permitted punishment¹⁴.

It is essential to undergo executions and obtain their deterrent effect in order to save the lives of potential victims. It will result in a situation of net gain. If the convict is hanged to death, the entitlement theory is fulfilled and the lives of potential victims are saved. The right to life of future victims are on a higher pedestal than that of a death row convict.

CELERITY

The deterrent effect depends on the knowledge among people and the regular use of death penalty.¹⁵ When the judiciary applies death penalty only in minimal cases, the extent of deterrence fades away. Meaning thereby, less grave means cannot be adopted in order to deter potential criminals.¹⁶

The proponents of death penalty have argued that in order to make legal sanctions effective it is necessary that they are not only severe but also swift. Whatever statistical evidence that regarded or disregarded the deterrent effect of death penalty has not considered celerity as an essential factor. Hence William C Balley claims that the previous results have likelihood of bias.¹⁷

¹³ J.B. Cederblom, Gonzalo Munevar, The death penalty: the relevance of deterrence, 1982, criminal justice review, pp 2

¹⁴ .Duff, R.A, Trials and Punishments. Cambridge: Cambridge University Press, 1986

¹⁵ Karl F Schueser, The Deterrent influence Of Death Penalty, 1952, Sage Publication & American Academy of Political and Soolcial Science, pp 4

¹⁶ Hardy Jones & Nelson Potter, Deterrence , Retribution and Denunciation And Death Penalty, 1980-1981, UMKC Law Review, pp 3

¹⁷ William C . Baily, Deterrence and Celerity of Death Penalty: A Neglected Question in Deterrence , 1980, Oxford University Press, pp 3

The presumed importance of the celerity of punishment is illustrated by Beccaria:

*An immediate punishment is more useful; because the smaller the interval of time between the punishment and the crime, the stronger and more lasting will be the association of the two ideas of "crime" and punishment; so that they may be considered, one as the cause, and the other as the unavoidable and necessary effect.... Delaying the punishment serves only to separate these two ideas, and thus affects the minds of the spectators rather as being a terrible sight than the necessary consequences of a crime, the horror of which should contribute to heighten the idea of punishment.*¹⁸

In India, the case of *Bachan Singh v State Of Punjab* has restricted the application of death penalty to rarest of the rare category. Even the international conventions vouch for providing death penalty only in extreme cases.

The author argues that death penalty can serve as a deterrent only if there is public hanging and speedy executions.¹⁹

Regarding the celerity of execution, it is believed that lesser the time interval between crime and execution, more will be the deterrence. The swiftness will help the potential offenders to identify one as the cause and the other as the immediate effect of the former. Delaying executions cuts the deterrent effect of capital punishment.²⁰

However there is an opposite hypothesis to the celerity argument .The time at which the crime was committed does not make any difference if executions are carried out as a punishment for them.²¹

IRREVOCABILITY

Since one execution cuts down the life of a convict, to justify it, an enormous amount of net gain is essential.

¹⁸ *ibid*

¹⁹ *ibid*

²⁰ *ibid*

²¹ *ibid*

The foundation for justifying deterrence is based on doing justice and deterring others. Deterrence is based on utilitarian model. Justice and deterrence go hand in hand. However it is often argued that the guilty poor are more vulnerable to executions than the guilty rich. Van dan hag clears this misconception. He advocates that the inequality is not with respect to awarding death penalty but the inequality in the distribution system and the process of trial.²²

Death penalty is an irrevocable punishment and so is murder. No other punishment can be substituted in terms of deterrence.²³

The fact that the possibility of judicial error can result in judicial murder if an innocent is hanged to death as also been countered by professor van den hag. He believes that when the trial of a death row convict is in question the judiciary is prudent and rational to its core²⁴

Balancing the irrevocability of death penalty and the likelihood of injustice on one hand as well as the potential of saving the future victims and deterring the potential offenders on the other hand, van den hag believes that the risk of execution must be taken in order to ensure general deterrent effect.²⁵

THREAT TO LIFE

Though it is difficult to calculate deterrent effect of death penalty, it is more of a psychology based calculation than a quantitative numerical calculation. It causes a human to internally control the intention of crime by displaying an external execution. Meaning thereby, calculation of deterrence is not easy and accurate.

John Stuart Mill a staunch supporter of death penalty argues that death penalty is a justified punishment. When an offender commits a crime his life becomes unworthy. Therefore executing him would be a proportional sentence²⁶.

²² Van Den Haag, *On Deterrence and The Death Penalty*, 1968, The University Of Chicago Press, pp 3

²³ Hardy Jones & Nelson Potter, *Deterrence , Retribution and Denunciation And Death Penalty*, 1980-1981, UMKC Law Review, pp 4

²⁴ Van Den Haag, *On Deterrence and The Death Penalty*, 1968, The University Of Chicago Press, pp 4

²⁵ Van Den Haag, *On Deterrence and The Death Penalty*, 1968, The University Of Chicago Press, pp 5

²⁶ John Stuart Mill, 'Speech in favour of Capital Punishment 'in Peter Singer (Ed.). *Applied Ethics*, 1986, (oxford: University Press, pp.98.

In Sellin's words "*Surely a murderer, for whom a possible death sentence had proved to be of no deterrence, would be considered abnormal were he not make every effort to escape death after being discovered and sentenced to die*"²⁷

The basic human behaviour is such that we do not perform any such action that is likely to cause pain. When the pain is so grave, as that of fear of death, it is definite that the person will be deterred.

The social danger is transformed to a personal danger in order to deter.²⁸ The author puts forth that life is cherished; the fear of life is the ultimate fear.²⁹

Certain anecdotal studies such as the one reported by The Los Angeles Police Department reported to a California Senate Committee considering the abolition of death penalty that within one year, as many as 13 robbers had used unloaded pistols while robbery rather than take the risk of killing someone and getting executed.³⁰

The argument of threat to life being the ultimate fear has been refuted by the fact that everyone does not have a desire to live. Some find it exciting to become martyrs.³¹

There is a category of offenders who commit indirect suicides by way of committing murders. The threat of executions acts as an incentive than a deterrent. An epidemic of indirect suicides in Norway and Denmark was reported in the 17th and 18th century.³² Non-responsive persons may be (a) self-destructive or (b) incapable of responding to threats.³³

After undertaking an empirical analysis, the results revealed that there is absolutely no relation between celerity and execution as far as deterrence is concerned. Gibbs further argues, "*why*

²⁷ Ezzat a. Fatah, *Is Capital Punishment A Unique Deterrent? A Dispassionate Review Of Old and New*, 1981, Canadian Journal of Criminology, pp 4

²⁸ Van Den Haag, *On Deterrence and The Death Penalty*, 1968, The University Of Chicago Press, pp 5

²⁹ Ezzat a. Fatah, *Is Capital Punishment A Unique Deterrent? A Dispassionate Review Of Old and New*, 1981, Canadian Journal of Criminology, pp 5

³⁰ *ibid*

³¹ Hardy Jones & Nelson Potter, *Deterrence, Retribution and Denunciation And Death Penalty*, 1980-1981, UMKC Law Review, pp 4

³² Ezzat a. Fatah, *Is Capital Punishment A Unique Deterrent? A Dispassionate Review Of Old and New*, 1981, Canadian Journal of Criminology, pp 4

³³ Van Den Haag, *On Deterrence and The Death Penalty*, The University Of Chicago Press

*would he or she [the would-be offender] be deterred more if the crime took place six weeks rather than one year previously”.*³⁴

LACK OF CERTAINTY

It is believed that capital punishment is the most uncertain punishment thereby, reducing its deterrent value. It is argued that the more severe a punishment, the less certain it is.

Ezzat A. Fatah put forth that according to a statistical analysis undertaken in Canada, a death row convict has $\frac{3}{4}$ chance of escaping execution. The certainty is too low to account for deterrence.³⁵

Van den hag believes that it is desirable to risk something certain over something that is uncertain. Staking the death (or life) of the convict over the lives of potential future victims is what he vouches for. He compares to to normal human activities like gambling wherein one risks the certain money in hand in hope of an uncertain future gain³⁶.

DETERRENCE AND RETRIBUTION: A CUMULATIVE ANALYSIS

Deterrence is always coupled with retributivism. The statement can be proved by placing reliance on the fact that death penalty is not inflicted on less serious crimes. For instance, for the offence of pick pocketing or theft or for that matter cheating, the offence of death penalty does not make sense. This is because the public sentiment or outrage does not demand vengeance.³⁷

When an offence is committed, Kant believes that the offender shall be punished. He subscribes to the fact that evil must be returned to evil. When a murder is committed it raises a duty on

³⁴ William C . Baily, *Deterrence and Celerity of Death Penalty:A Neglected Question in Deterrence* , Oxford University Press

³⁵ Ezzat a. Fatah, *Is Capital Punishment A Unique Deterrent? A Dispassionate Review Of Old and New* ,1981,Canadian Journal of Criminology ,pp 5

³⁶ Van Den Haag, *On Deterrence and The Death Penalty*,1968,The University Of Chicago Press, pp 6

³⁷ J.B. Cederblom, Gonzalo Munevar,*The death penalty: the relevance of deterrence*, 1982,criminal justice review, pp 2

the part of the society to execute the murderer .Talking about proportionality, Kant believes that only execution can serve the purpose³⁸.

Merkel believes that executing prisoners reduces the risk that they will murder or rape or escape early. He refers to the deterrent effect of death penalty³⁹.

The author has put forth that deterrence is a civilised argument justifying retribution. Retaliation and vengeance are not accepted as goals of crimina justice system. Hence they are combined with the motive of deterring potential criminals. Meaning thereby, deterrence is a rational argument for retribution⁴⁰

Van den hag argues that executions will result in net loss if the convict is hanged however the general public is not deterred.⁴¹ As Bedau says, in order to support the retention of death penalty, evidence of an increased value of death penalty over life imprisonment has to be provided.⁴²

The situation of net loss will never be achieved if deterrence is assumed to be the rationalisation of retribution. The execution shall result in the public outrage being satisfied along with the potential offenders getting deterred.⁴³

The fact that an eye for an eye, a tooth for a tooth and a life for a life is applicable only when the offender is solely responsible for his actions. However, such a situation is not possible. Only if the offender is fully responsible he will be blamed for his actions, and thus only then is it appropriate to inflict a punishment equal in weight to the offence.

Various mitigating factors like poverty, provocation come into play. For instance – provocation, mental inability to know the nature of his act etc.⁴⁴

³⁸ Immanuel Kant, *The philosophy of law*,1887, W. Hastie & Edinburg, Clarke, pp 196

³⁹ .Merkel, Dan , ‘ State , Be Not Proud : A Retributivist Defence Of The Commutation Of Death Row And the Abolition Of the Death penalty’, 2005, Harvard civil Rights – Civil Liberties Law Review ,pp471

⁴⁰ Ezzat a. Fatah, *Is Capital Punishment A Unique Deterrent? A Dispassionate Review Of Old and New* ,1981,Canadian Journal of Criminology ,pp 5

⁴¹ Van Den Haag, *On Deterrence and The Death Penalty*,1968,The University Of Chicago Press, pp 6

⁴² Hugo Adam Bedau, *Deterrence and Death Penalty*,1970, The journal Of Criminal Law , Criminology, Political Science, pp3

⁴³ J.B. Cederblom, Gonzalo Munevar,*The death penalty: the relevance of deterrence*, 1982,criminal justice review, pp 2

⁴⁴ Hardy Jones & Nelson Potter, *Deterrence , Retribution and Denunciation And Death Penalty*,1980-1981,UMKC Law Review,pp 4

The crime for which the death penalty is most often provided is murder. However, the homicide in such cases is usually impulsive or a result of an emotional vengeance which act as mitigating factors.⁴⁵

The justification of deterrence shall not be forward looking. It shall not be mixed with retributivism and be based on the backward looking approach. The accused shall be convicted and sentenced to death penalty because of the crime he committed prior t the trial.⁴⁶

The justification behind retributive theory is based on the fact a criminal deserves to be punished if he has committed a felony it would amount to injustice, not only towards the victim but also towards the society if a felon is not punished.⁴⁷

This assertion of deterrence being backward looking is a result of an amalgamation of retribution with deterrence. It basically supports the utilitarian rationale that allows shedding of blood to save innocent lives.

Hans Zeisel puts it -as

"It is the belief in retributive justice that makes the death penalty attractive, especially when clothed in a functional rationalization".⁴⁸

INCAPACITATION

Meaning and Evolution

Incapacitation involves preventing a similar offence at the hand of the same individual by depriving him with the power to do so.⁴⁹ It implies the infliction of physical restraint to prevent the individual, either entirely or nearly, from committing any crime further.⁵⁰

⁴⁵ Ezzat a. Fatah, Is Capital Punishment A Unique Deterrent? A Dispassionate Review Of Old and New ,1981,Canadian Journal of Criminology ,pp

⁴⁶ J.B. Cederblom, Gonzalo Munevar, The death penalty: the relevance of deterrence, 1982,criminal justice review, pp 2

⁴⁷ Thom Brooks, Punishment,pg 16-17

⁴⁸ Ezzat a. Fatah, Is Capital Punishment A Unique Deterrent? A Dispassionate Review Of Old and New ,1981,Canadian Journal of Criminology ,pp 5

⁴⁹ Guyora Binder & Ben Notterman, Penal Incapacitation , A situationiat critique , 2017,American Criminal Law Review, pp 4

⁵⁰ Stephen D Gotfredson, Don M. Gotfredson, Behavioural Prediction & the Problem of Incapacitation , 1994, Criminology, pp 3

Incapacitation means protecting the society from the risk of an individual resorting to crime once he has committed it once.⁵¹ It has future orientation.⁵²

Behavioural prediction acts as a variable determining incapacitation. It covers the rate of offending i.e. the rate of committing crimes and the pattern of offending behaviour. Behavioural prediction is a hallmark of the American criminal justice system. The focus while conducting such analysis should be on (1) participation in crime (2) frequency of offending (3) the seriousness of the offence (4) the length of the crime career of the offender (5) any attempt for career modification.⁵³

Incapacitation does a personality analysis of the offender on the fact that if he has committed a crime, he shall repeat it in future if not restrained.⁵⁴

The FOUNDATION on which the theory of incapacitation rests on is the belief that if one person has committed a crime, his psychology becomes such that he can commit any other crime of such sort again.

For instance, if a thief commits robbery, we anticipate him to commit more robberies if he is not prevented from doing so.⁵⁵ Hence prevention is better than cure. Herein the prevention includes giving sanctions by way of punishments like life imprisonment and death penalty. Punishment is necessary for restraint.

In the case of *Gregg V Georgia*⁵⁶, the court acknowledged incapacitation as a footnote giving more weight to deterrence and retribution as factors determining death penalty.

Following *Gregg v Georgia*, was the case of *Furman V Georgia*⁵⁷. In this case Justice Marshall recognised the importance of death penalty for preventing the criminal from repeating such crime again.

⁵¹ James R. Acker, *Questioning Capital Punishment*, Criminology and Justice series Studies, edited by; Penn Harrisburg

⁵² *ibid*

⁵³ Stephen D Gotfredson, Don M. Gotfredson, *Behavioural Prediction & the Problem of Incapacitation*, 1994, Criminology, pp 3

⁵⁴ *ibid*

⁵⁵ *ibid*

⁵⁶ 428 U.S. 153(1976)

⁵⁷ 408 U.S. 238(1972)

Finally, in the case of *Spaziano v Florida*⁵⁸ Justice Blackmun explicitly recognised incapacitation as a sufficient justification for death penalty.

“Although incapacitation has never been embraced as a sufficient justification for death penalty, it is a legitimate consideration in a capital sentencing proceeding.”

Incapacitation was first used as a function of punishment by Bentham. Bentham draws an analogy between incapacitation and transportation. He feels that incapacitation does not reduce crime but moves it from one place to the other.

Incapacitation presupposes that past offenders are dangerous enough to repeat crime in future. Penal sanctions are a subset of incapacitation. Locking in a room, using CCTV cameras are among other forms.⁵⁹

As Zimring and Hawkins commented

“The case for incapacitation at the individual level rests on the premise that the individual who has offended once will offend again unless restrained.

*The implicit assumption that offenders are intractable and insusceptible to change serves to justify imprisonment for the purpose of restraint on both moral and practical grounds. Indeed an image of the criminal offender as intractable was very much in fashion by the 1990s.”*⁶⁰

Strategies under incapacitation are twofold. –

Selective and charge based. The selective strategies are more based on predicting an individual’s future behaviour and then giving sanction. While the charge based strategy involves the sanction to be same or similar for a particular charge.⁶¹

Collective incapacitation does not allow a change in the sanction due to prediction of violent behaviour in future.⁶²

⁵⁸ 468 US 447 (1984)

⁵⁹ Stephen D Gotfredson, Don M. Gotfredson, *Behavioural Prediction & the Problem of Incapacitation*, 1994, *Criminology*, pp 3

⁶⁰ Franklin E.. Zimring & Gordon Hawkins, *Incapacitation: Penal Confinement and the Restraint of Crime* 1995, pp 19- 21

⁶¹ *Supra* 59

⁶² *ibid*

There are certain factors that need to be considered to determine death penalty as the justified punishment for incapacitation.

- (1) Likelihood of the defendant that he would be a continued threat to the society.
- (2) Criminal record of the defendant.
- (3) Severity of prior record of crime.
- (4) Age of the defendant.
- (5) Presence of provocation at the time of the offence.⁶³

Apart from these factors, if actuarial method calculations are relied on, the education , marital status , history of drug or alcohol abuse are other factors that need to be considered.⁶⁴

With respect to imposition of death penalty, the author believes that it is not impossible to predict human behaviour though it is difficult. In our criminal justice system, various such mechanisms require the use of such foresight. For example- bail, granting parole. It is essential that the jury has all the relevant information of the defendant. However, it is rather odd that the fact that the offender will die or not depends on the probability of his repeating the criminal acts of violence which would be a continuing threat to the society.⁶⁵

In the case *Ewing v California*⁶⁶ the Supreme Court analysed the importance of incapacitation. It mandated that prison sentence acts a sanction satisfying the incapacitate rationale. It did not vouch for any statistical evidence herein.

In the case of *Graham V Florida*⁶⁷ and *Miller v Albama*⁶⁸ the court felt that the problem with the system of incapacitation is that it is not reducing crime, but is actually redistributing it. Hence, empirical evidence was sought.

Amnesty International asserts that incapacitation cannot be the justification for death penalty. If an offender is sentenced to death on the ground of incapacitation, the judgement is based on sheer probability. There is no way to ascertain if the offender would have taken to crime if allowed to live. Amnesty international therefore vouches for life imprisonment without

⁶³ Guyora Binder & Ben Notterman, Penal Incapacitation , A situationiat critique , 2017,American Criminal Law Review, pp 4

⁶⁴ James R. Acker, Questioning Capital Punishment,Criminology and Justice series Studies

⁶⁵ James R. Acker, Questioning Capital Punishment,Criminology and Justice series Studies

⁶⁶ 538 US 11 (2003)

⁶⁷ 560 US 48(2010)

⁶⁸ 567 US 460 (2012)

remission as it provides a way to keep the offender away from the public without resorting to execution.⁶⁹

The limitation of using incapacitation as a justification for death penalty is that it is forward looking it implies that the focus is on what they are likely to do in future and not what criminal has done in the past. It is forward looking.⁷⁰

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Incapacitation and sentence proportionality

The eighth amendment prohibits cruel and unusual punishment.

The author vouches for long term sentences as an adequate measure of incapacitation. The death penalty can be justified with only deterrence and retribution as grounds supporting it. Incapacitation cannot be a justification for death penalty because such offenders have more culpability assigned to them.⁷²

In the Ewing case, the court even vouched for an indeterminate sentence in order to incapacitate. It said that such a sanction implies public safety and welfare. While Ewing required the court to give one justification out of deterrence, retribution and incapacitation but the case of Graham V Florida made it mandatory to show the penological justification with respect to all three.⁷³

There are major flaws in the use of incapacitation for death penalty. The use of incapacitation as a justification requires the court to answer if there is PROBABILITY of the offender to commit the act in future and not a certainty.⁷⁴

⁶⁹ Amnesty International, The death penalty v human rights, Why abolish the death penalty, 2007, AI Index ACT 51/002/2007 pp 1-6

⁷⁰ *ibid*

⁷¹ Guyora Binder & Ben Notterman, Penal Incapacitation, A situational critique, 2017, American Criminal Law Review, pp 4

⁷² Guyora Binder & Ben Notterman, Penal Incapacitation, A situational critique, 2017, American Criminal Law Review, pp 4

⁷³ *ibid*

⁷⁴ *Jurek v Texas* 428 U.S. 153

Also uncertainty is present in the interpretation of the definition of incapacitation itself. The phrases ‘criminal acts of violence is subject to interpretation. The use of the word ‘society’ may imply the world outside or the inmates of prison or both.⁷⁵

The Texas court of Criminal Appeal explained in the case of *King v State*

“Where terms are simple..Common meaning of such words can be used.”⁷⁶

The drawback of the finality clause of execution viz a viz incapacitation was highlighted through a survey undertaken post the *Furman V Georgia* judgement which spared the execution of hundreds of offenders. The survey revealed that 98.7% of the 558 prisoners examined did not commit crime in the future. This implied a failure of the use of incapacitation as a justification of death penalty.⁷⁷

The case of *Evans v Muncy*⁷⁸ the fact that Evans took steps to control the jail escape of six death row convicts. He also prevented the rape of the nurses during the same event. It also suggested a reformation that had taken in place in Evans. However, the court did not reconsider its decision of executing Evans based on ‘likelihood of committing crime in future.’

Reliability of Psychologists in ascertaining incapacitation

In the case *Barefoot v Estelle*⁷⁹ Justice White delivered the judgement. In this case the psychologists termed barefoot as a sociopath and referred the judiciary to execute him by predicting his future dangerousness.

In this case, they had not examined him personally but had based their predictions on his cross examination in the trial. The dispute here was the conflicting statistical result of the American Psychiatric Association that says that two out three predictions by the psychiatrists are wrong.

The actuarial methods allow the calculation based on likelihood of the offender to commit the offence in future or engage in future violence.⁸⁰

⁷⁵ James R. Acker, Questioning Capital Punishment, Criminology and Justice series Studies

⁷⁶ 675 S.W.2d 514 (1984)

⁷⁷ James R. Acker, Questioning Capital Punishment, Criminology and Justice series Studies

⁷⁸ 498 US 927

⁷⁹ 463 US 880

⁸⁰ James R. Acker, Questioning Capital Punishment, Criminology and Justice series Studies

The court's decision to allow the testimony to be admissible. However, it is contingent on the court's ability to reason out its weight. It believes that the adversary system can be trusted to sort out the reliable from the unreliable.⁸¹

Tools of incapacitation

Both life imprisonment and death penalty are tools that are used for incapacitation. Unless, life imprisonment is a one in which the convict remains in prison till his life it can not be a substitute for death penalty. Such a sentence can be used as a substitute for death penalty⁸².

With respect to USA, 36 states that use death penalty, allow the court to use life imprisonment without the possibility of parole⁸³.

However, incapacitation through incarcerations is resulting in an increase in the overall prison population.⁸⁴ Incapacitation through life imprisonment entails California to spend \$ 8.2 billion annually on adult and juvenile correctional homes.⁸⁵

The author has used Maryland the target place to compare the two tools. The incarceration cost is \$1.13 million and the cost for execution is from \$1.8-3 million.⁸⁶

Death penalty involves the cost of

- (1) Heightened security
- (2) Lethal drugs
- (3) Corrections staff
- (4) Facility to carry out executions⁸⁷

However abolishing death penalty will also have a drawback. The prosecutors will not be able obtain plea bargaining as the defendants will not be tempted to plead guilty in exchange of a life sentence. However in the case of *Furman v Georgia* it was held that

⁸¹ *ibid*

⁸² *Rolando V. del Carmen, The Death Penalty, Lexis Nexis*

⁸³ *Death penalty information centre, www.deathpenaltyinfo.org/article*

⁸⁴ *Guyora Binder & Ben Notterman, Penal Incapacitation , A situationiat critique , 2017, American Criminal Law Review, pp 4*

⁸⁵ *Stephen D Gotfredson, Don M. Gotfredson, Behavioural Prediction & the Problem of Incapacitation , 1994, Criminology, pp 3*

⁸⁶ *James R. Acker, Questioning Capital Punishment, Criminology and Justice series Studies*

⁸⁷ *ibid*

“If the death penalty is used to encourage guilty pleas and thus to deter suspects from exercising their rights under the sixth amendment to jury trials, it is unconstitutional.”⁸⁸

Hence it can be concluded that even if the threat of execution is not directly a threat but shall be considered one as it imposes a lot of pressure on the accused.

One argument that the retentionists argue on is the fact that one cannot price justice. If awarding death penalty is necessary for justice to be done, it shall be given.⁸⁹

The financial considerations shall not be equated with what the justice demands.

Matthew Kramer in his book *The Ethics of Capital Punishment* brings out the difference between death penalty and life imprisonment with remission with respect to incapacitation.

While death penalty is focused on instilling fear in people other than the offenders, the incapacitative theory is focused on permanently eliminating these offenders. In both the cases (life imprisonment without parole and death penalty) the focus is not on specific deterrence. (the convict is deterred and not the general public)⁹⁰

Conclusion

Incapacitation is the third justification for punishment however it is not always used as a justification for death penalty. There are various sanctions that may be used in to order to incapacitate. Death penalty is the ultimate sanction. The offender is permanently prevented from repeating the crime.

According to Beccaria even when an accused is apprehended, convicted and incarcerated, the likelihood of their continuing to commit violence and disorder is unacceptably high therefore he believes that death penalty and not life imprisonment without remission can incapacitate the convict.⁹¹

The most remarkable feature in the punishment of death is the taking from the offender the power of doing further injury.

⁸⁸ 408 US 238 (1972)

⁸⁹ James R. Acker, *Questioning Capital Punishment*, Criminology and Justice series Studies

⁹⁰ Matthew H. Kramer, *The Ethics of Capital Punishment*, oxford university press

⁹¹ Beccaria, Cesare. 1995. *On Crimes and Punishments and other Writings*, Cambridge: Cambridge University Press

However the incapacitation theory does not take into account various social factors and mainly focuses on predicting the individual behaviour and his dangerousness.⁹²

Also, most often incapacitation is sidelined and is considered a subsidiary justification to the punishment of death after deterrence and retribution.⁹³

RETRIBUTIVE JUSTICE

Meaning and Evolution

Retribution originated from the Mosaic Code of the Old Testament and pertains to the concept of 'Lex Talionis' which implies an eye for an eye. This was the foundation of the code of Hammurabi.⁹⁴

Retribution looks in the past. It punishes according to the crime committed by the offender in the past. It is backward looking. The offender is punished according to what he deserves. This definition has actually elaborated upon what revenge is.⁹⁵ Retribution is a normative concept.⁹⁶

The justification behind retributive theory is based on the fact a criminal deserves to be punished if he has committed a felony it would amount to injustice, not only towards the victim but also towards the society if a felon is not punished.⁹⁷

Retribution is not an explicit ingredient of our criminal justice system but an embedded consequence of all punishments. The proponents of death penalty support its justification by placing reliance on "an eye for an eye a life for a life" thereby explaining why the offender deserves to be executed. The offender should be convicted in order to compensate the enormous sufferings of the victim, victim's family and the society at large.⁹⁸

⁹² Guyora Binder & Ben Notterman, Penal Incapacitation , A situationiat critique , American Criminal Law Review , Volume 54

⁹³ James R. Acker, Questioning Capital Punishment,Criminology and Justice series Studies

⁹⁴ Rolando V del Carmen, The Death Penalty, Lexis Nexis

⁹⁵ Andrew Oldenquist, Retribution and The death Penalty, 2003-2004,University Of Dayton Law Review, pp 2-3

⁹⁶ James R. Acker, Questioning Capital Punishment, Criminology and Justice Series

⁹⁷ Thom Brooks, Punishment,pg 16-17

⁹⁸ Michael L Radelet,The incremental retributive impact of a death over life without parole, University of Michigan Journal of Law Reform

A survey was undertaken by the Gallup Organisation in 2014 in America which revealed that 35% people believed retribution to be the correct justification for death penalty.⁹⁹ Most people cited reasons such as eye for an eye, fits the Crime, the convict deserves it.¹⁰⁰

It is argued that punishment by way of death penalty is a result of natural retribution that the punishment offers. It is described as disguised utilitarianism. It justifies punishment as an expression of public outrage.¹⁰¹

The most frequently quoted exponent of this view is that of Stephens and Lord Denning. Stephen wrote, '*that criminals should be hated, that punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it*'.¹⁰²

Lord Denning wrote, '*The punishment inflicted for grave crimes, should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else ... The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime*'.¹⁰³

Van Den Haag believes that the paramount purpose of punishment is retribution. He says

*“Capital Punishment, a deliberate expulsion from human society, is meant to add deserved moral ignominy to death. This irks some abolitionists who say that no one should be blamed for whatever he does. But murder deserves blame. Death may be a less punishment than what criminals deserve,”*¹⁰⁴

It is impossible to calculate punishment based on what one deserves. The social, psychological, and economic issues that each offender goes through are different. There shall be a very high

⁹⁹ *ibid*

¹⁰⁰ Duff, R.A, Trials and Punishments, Cambridge University Press(1986)

¹⁰¹ Alan Brudner, Retribution and The Death Penalty, University of Toronto Press

¹⁰² Stephen, A History of the Criminal Law of England (1883), volume 2

¹⁰³ Alan Brudner, Retribution and The Death Penalty, University of Toronto Press

¹⁰⁴ Duff, R.A, Trials and Punishments, Cambridge University Press(1986)

risk of default in such calculations. The impossibility to measure is not with respect to the punishment but also with respect to the pain and sufferings.¹⁰⁵

The USA has done away with the use of various forms of punishments to cause death. For instance electrocution, shooting, electric chair. This is an oxymoronic situation. If the justification for death penalty is retribution then why are humane methods used for execution. The offender should be given what he deserves.¹⁰⁶

Kant insists ‘ *The murderer must die, , because there is no sameness of kind between death and remaining alive even under the most miserable conditions, and consequently there is also no equality between the crime and the retribution unless the criminal is judicially condemned and put to death.*’¹⁰⁷ He believes that retribution brings equality. However this philosophy has been condemned. When we execute keeping in mind our moral decencies then no such equality of punishment is achieved, the measure of punishment shall not be based on retributive sentiments but on moral and decency grounds. The punishment can not be ascertained by the principle of proportionality in literal sense.¹⁰⁸ This is the reason why we do not burn down houses of those offenders who have been convicted of arson. The correspondence with death penalty and the crime for which it is given is imperfect. It cannot technically be avenged by an eye for an eye.¹⁰⁹

However it has been contented that death penalty as a punishment is the most severe forms of punishment and is proportional to the gravest of crimes. Also, since it is irrevocable in nature the judicial prudence applied is exceptionally high.¹¹⁰

Right to pardon is considered to be an antithesis to retribution. The supporters of retribution argue that mercy leads to the wrong being forgotten.¹¹¹

¹⁰⁵ Michael L Radelet, The incremental retributive impact of a death over life without parole, University of Michigan Journal of Law Reform

¹⁰⁶ Michael L Radelet, The incremental retributive impact of a death over life without parole, University of Michigan Journal of Law Reform

¹⁰⁷ Kant The Metaphysical Elements of Justice, 1965, pp 99-108

¹⁰⁸ Alan Brudner, Retribution and The Death Penalty, University of Toronto Press

¹⁰⁹ Duff, R.A, Trials and Punishments, Cambridge University Press(1986)

¹¹⁰ *ibid*

¹¹¹ *ibid*

Though there have been attempts to segregate the element of revenge from retributive justice. However, the two remain inseparable. The balance between the two is struck by the concept of 'judicial retribution' which implies punishing within the constitutional boundaries.¹¹²

Imposing the punishment of death penalty cannot always be justified on the ground of deterrence. The Israeli courts punished Adolf Eichmann in order to satisfy retribution. The ultimate aim was not deterrence.¹¹³

Also, judicial retribution prevents the victim or indirect victims to seek personal vengeance. If the following points are followed it is an example of retributive justice.

- (1) Punishment is applied by officials who are not friends or relatives of the victim or defendant;
- (2) It is done consistently for similar cases and hence is predictable;
- (3) It is determined in accordance with formally adopted and publicly promulgated procedures and penalties;
- (4) It is decided and pronounced in a context of ritual and ceremony, thus conveying that a community or "the law" is speaking and not just an individual;
- (5) It is decided after due deliberation and not in the heat of passion.¹¹⁴

The eighth amendment and death penalty viz a viz retribution

In the case of *Furman V Georgia*¹¹⁵ Justice Stewart ruled that death penalty and its retributive justification is not against the eighth amendment. He stated that “*states are given the authority to impose death penalty on the most violent offenders to seek retribution for crimes committed (just deserts), as long as this ultimate sanction was not imposed arbitrarily or capriciously in violation of the equal protection clause of the fourteenth amendment.*”

¹¹² Rolando V del Carmen, *The Death Penalty*, Lexis Nexis

¹¹³ Andrew Oldenquist, *Retribution and The death Penalty*, 2003-2004, *University Of Dayton Law Review*, pp 2-3

¹¹⁴ *ibid*

¹¹⁵ 408 US 238,303 (1972)

In the case of *Gregg v Georgia*¹¹⁶ it was held “the retributive quality of the death penalty was essential to an ordered society because it reflected society’s desire to punish those who engaged in morally outrageous and offensive conduct.”

Retribution and Victim Rights

The definition of retribution that is based on awarding such punishment that the offender deserves has now been reformed. Now the necessity for executions is seen as a step to help the victim and his/her family. The public prosecutor saw this as a victory if he was able to secure death penalty of the convict as a means to safeguard the victim’s rights. This transformed death penalty into a ‘victim service programme’.¹¹⁷

Victim rights in capital cases are a manifestation of retribution. Victims have a place at each step of the criminal justice system. While victims are the ones directly affected, their families are the indirect victims. Victim rights include participation in the trial, right to witness execution, giving victim impact statements. The evolution of the victim’s rights also marks the evolution of the concept of retribution being a justification for death penalty. The code of Hammurabi prescribed punishments that were meant to restore the loss of the victim. This victim oriented system was then taken over by the newly recognised victim – the state / society as a whole. State v offender replaced victim v offender. The shift was because of the increasing crime rate.¹¹⁸

Debate over victims’ rights

It is the responsibility of the state to punish the offender. Punishment helps in restoration of equilibrium with respect to independence of the wrongdoer and the sufferings of the victim.¹¹⁹

HLA Hart believes when an offence is committed the offender himself gives the licence to the state and the society.

¹¹⁶ 428 U.S 153

¹¹⁷ Michael L Radelet, The incremental retributive impact of a death over life without parole, University of Michigan Journal of Law Reform

¹¹⁸ Ashley G Blackburn, James W Marquart, Janlt L Mulling & Ched R Truson, Addressing the Rights of the victims in Capital Cases, Legal Issues and Courts

¹¹⁹ Herbert Morris, On Guilt and Innocence, 1976 Berkeley: University of California Press, p.34

The two most heated and controversial rights include – right to witness execution and right to pass the victim impact statements. A victim impact statement is a statement passed by the victim or the indirect victim highlighting the havoc and impact of the crime.¹²⁰

The debate is due to the apprehension that such statements, driven by retribution, may hamper the process of fair trial for the accused. It is very important to strike a balance.

It was questioned that these statements violated the defendant's constitutional rights. In the case of *Booth v Maryland*¹²¹ these statements highlighted the emotional impact on the victim and are against the eighth amendment as the likelihood of bias on the part of the jury arises.

In the case of *South Carolina v Gathers*¹²² these statements were found unconstitutional. In *Payne v Tennessee* the court held “*Victim impact evidence is admissible in sentencing phase of the capital trial as long as it does not violate the fundamental fairness protected by the due process clause.*”¹²³

With respect to witnessing executions of the death row convicts the debate is on the fact if such a right will satisfy the feelings of vengeance or will aggravate the trauma.

Hence, in retributive justice where the purpose is to seek revenge for the wrong done to the victim and society, the death penalty is the ultimate sanction.¹²⁴

The victims of the crime demand judicial retribution which is justified as it is an automatic response and describes the basic human behaviour. If saints can get praised, the convict needs to be punished. Each deserves the consequences of his actions.¹²⁵

The Rights of the Offender

When an inmate is sentenced to capital punishment, the victim and his family satisfy their feeling of vengeance. However, one aspect that goes overlooked is the suffering of the convict's family, particularly women and children. This justifies the statement as to how the

¹²⁰ *ibid*

¹²¹ 482 U.S. 496 (1987)

¹²² 490 U.S. 805(1989)

¹²³ 501 U.S. 808 (1991)

¹²⁴ Ashley G Blackburn, James W Marquart, Janlt L Mulling & Ched R Truson, Addressing the Rights of the victims in Capital Cases, Legal Issues and Courts

¹²⁵ Andrew Oldenquist, Retribution and The death Penalty, 2003-2004, University Of Dayton Law Review, pp 2-3

death penalty punishes the innocent as it punishes the guilty. The worst hit are the female relatives of the convict.¹²⁶

Though the death penalty is meant to punish offenders but most of the retributive burden of punishment is on the family of the convict and children. They are hit both emotionally and economically bearing the heavy fee of the attorneys. In the USA 57.2% of the death row convicts are racial or ethnic minorities.¹²⁷

Even if the life of the convict is taken by justifying it in terms of ‘an eye for an eye’ only the life of the convict shall be taken, not his family. However, execution brings misery and suffering to the family of the convict thereby taking away the dignity of their lives.¹²⁸

Punishing the offender is not wrong but if such punishment is justified on retributive grounds, it isolates the offender and his family from the mainstream society¹²⁹

The family of the death row convict has to bear the consequences of retribution after the execution. Once the offender is hanged his pain comes to an end but the family continues to suffer.

The family undergoes guilt, anger, isolation, shame and stigma. The family tends to blame the upbringing of the offender that instigated him to resort to crime. For instance, each offender has different histories including drug abuse, sexual abuse etc. The family is also surrounded by the regret of not controlling the aggressive behaviour when first signs were unveiled

The emotion of anger erupts either with the one executed for getting disgrace to the family or with the criminal justice system. The newspaper reports stimulate such reactions.¹³⁰

Their also surrounds a guilt regarding the steps taken post the order of execution. If the right attorney was consulted, if all steps were exhausted to save him from execution. These people

¹²⁶ Michael L Radelet, The incremental retributive impact of a death over life without parole, University of Michigan Journal of Law Reform

¹²⁷ *ibid*

¹²⁸ Andrew Oldenquist, Retribution and The Penalty, University Of Dayton Law Review

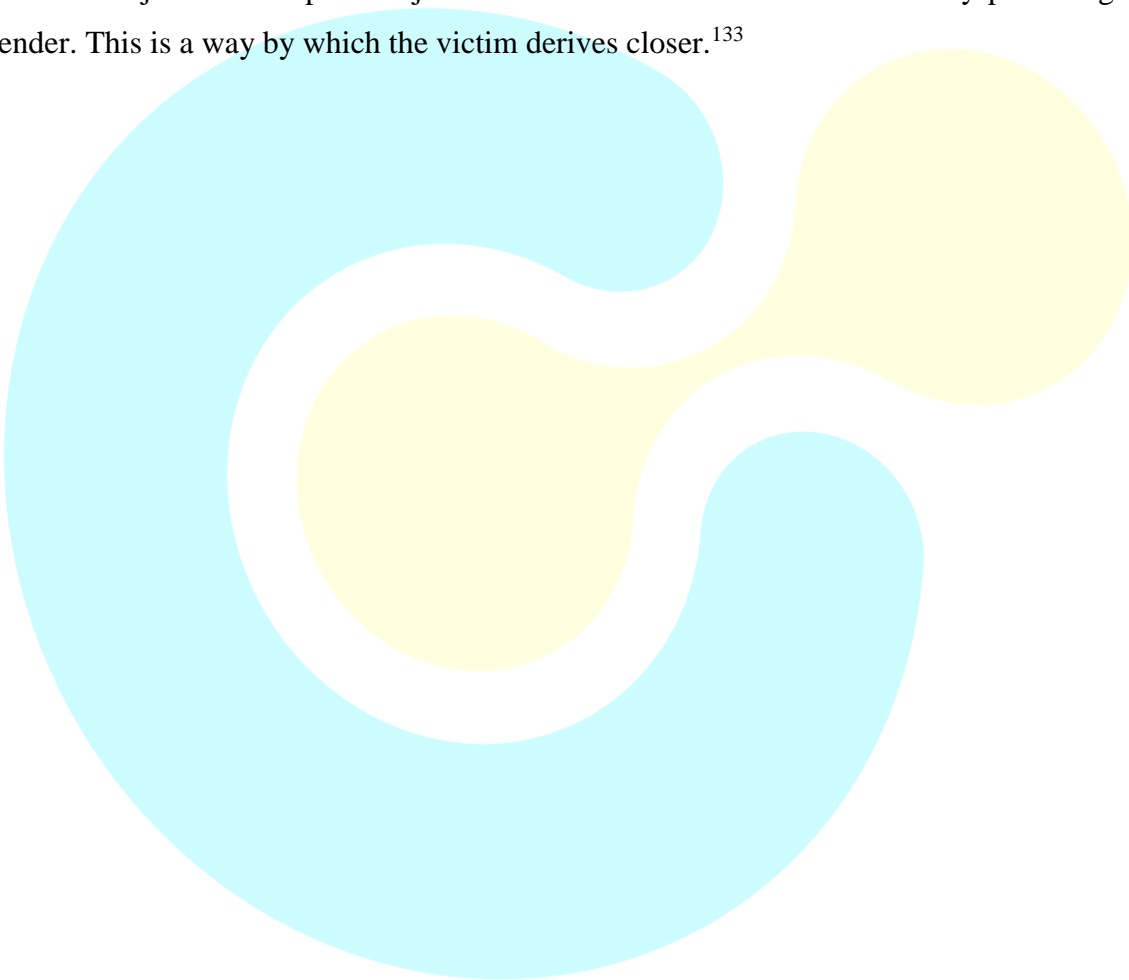
¹²⁹ *ibid*

¹³⁰ Michael L Radelet, The incremental retributive impact of a death over life without parole, University of Michigan Journal of Law Reform

have not been convicted but still suffer. The death penalty operates like a shotgun affecting multiple targets.¹³¹

Revenge is believed to be the dark side a human psyche. Hence, it must be refrained from forming a part of justification of penalty. Deterrence acts as the rationalisation of revenge thereby justifying capital punishment.¹³²

Retributive justice is based on two elements distributive justice and corrective justice. The aim of retributive justice is to provide justice to the victim which can be done by punishing the offender. This is a way by which the victim derives closer.¹³³



¹³¹ Michael L Radelet, The incremental retributive impact of a death over life without parole, University of Michigan Journal of Law Reform

¹³² Duff, R.A, Trials and Punishments, Cambridge University Press(1986)

¹³³ . George P. Fletcher, The Place of Victims in the Theory of Retribution, 1999, Criminal Law Review, pp58

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