RESPONSE

The Problem with Capital Punishment:
A Critical Assessment of the
Ultimate Punitive Sanction

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One of the most controversial issues in criminal law is capital punishment. Often called the ultimate sanction, it has been used in the United States since the execution of Captain George Kendall in 1608 for the crime of espionage. Historically, capital punishment had at its core the goals of punishment, deterrence, and revenge. More recently, these goals have merged into retribution, deterrence, and closure for victims and their families. Currently, public support for capital punishment has been eroding as innocent individuals continue to be exonerated from death row. The questions now being raised are: Does the death penalty deter? Does the execution of capital offenders provide closure for victims? Can we as a society afford to use this form of punishment given the high cost of administration and the risk of executing an innocent person? This article addresses these questions.

I. INTRODUCTION

One of the most controversial topics in criminal law is the use of the death penalty as a punitive sanction. Since the inception of the death penalty in this country in 1608, whether to use execution as a form of punishment has been consistently debated. Those in favor of the sanction have argued, inter alia, that it provides severe punishment for those who have committed severe crimes and is therefore just. Many have also taken the position that the use of this extreme form of punishment serves as a warning to others who may be inclined to commit similar crimes. Further, it has been argued that executing offenders who have committed horrible, often atrocious, crimes provides victims and their families with closure.

On the other hand, those opposing the death penalty have argued that capital punishment by any means constitutes the type of “cruel and unusual” punishment that the Eighth Amendment was intended to prohibit, that there

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1 It is believed that the first person legally executed in the United States was Captain George Kendall. Historical records state that he was a Councilor for the Virginia Colony and was tried and executed for the crime of espionage, spying for Spain. See Part I: History of the Death Penalty, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/part-i-history-death-penalty (last visited Aug. 15, 2015); see also Michael H. Reggio, History of the Death Penalty, in SOCIETY’S FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY 3 (Laura E. Randa ed., 1997).


3 See infra Part IV.B.

4 See infra Part IV.A.

5 See infra Part IV.C.

6 U.S. CONST. amend VIII.

are—or have been—too many death-eligible crimes,\textsuperscript{8} that the decision to execute by government authority dehumanizes society as a whole, and, finally, that the suggestion that an execution provides closure and acts as a deterrent is false or, at the very least, cannot be proven.\textsuperscript{9} In order to assess the strengths and weaknesses of each view, it is important to begin with a historical perspective.

\section*{II. The History of the Death Penalty in America: A Brief Overview}

The first person legally executed in the United States was Captain George Kendall for the offense of spying on the United States for Spain.\textsuperscript{10} His execution was by firing squad, a method of execution that is still a military option today.\textsuperscript{11} Early settlers came to America armed with the experience of eighteenth-century Europe, where capital punishment was widely used.\textsuperscript{12} In England, for example, the death penalty was imposed for a variety of offenses,\textsuperscript{13} and that tradition continued in the new world. In early-1600s America, death-eligible crimes varied from colony to colony. Some early death-eligible offenses included trading with Native Americans, stealing grapes, idolatry, witchcraft, blasphemy, murder, poisoning, bestiality, adultery, sodomy, serving as a false witness in


\textsuperscript{8} A death-eligible crime is a crime that once committed, and after having been found guilty of the commission, the accused is “eligible” for the pronouncement of a death sentence depending upon the decision of the judge or jury. For a list of federal offenses punishable by death, see \textit{41 Federal Capital Offenses, ProCon}, http://deathpenalty.procon.org/view.resource.php?resourceID=004927 (last visited Aug. 15, 2015).


\textsuperscript{10} See supra note 1; see also Jones & Wilson, \textit{supra} note 7, at 460.


\textsuperscript{12} See Part I: History of the Death Penalty, \textit{supra} note 1.

\textsuperscript{13} See id.; see also Reggio \textit{supra} note 1, at 2 (“In Britain, the number of capital offenses continually increased until the 1700’s when two hundred and twenty-two crimes were punishable by death.”).
capital cases, conspiracy, and rebellion. The large number of death-eligible crimes reflected the puritanical view of the times, which intertwined crime with sin.

The methods of execution also reflected the harshness of the times; rather than rehabilitation and humane treatment of the condemned, the emphasis was on punishment and atonement. Early executions were a community event and often took on a “carnival-like” atmosphere. Families brought their children to witness the event and to listen to the local religious leader preach about sin and attempt to save the soul of the condemned. Often a procession, including the accused, the local religious leader, law enforcement officers, and the judge or magistrate, would march through the town before reaching the gallows where the execution would occur. It was typical for the condemned to be allowed to speak his “last words.” In some cases, the sincerity of the condemned’s words could persuade the executioner to forego the execution.

III. MODERN DEATH PENALTY ADMINISTRATION AND THE LAW

In the United States, the use of the death penalty moved forward uninterrupted until the 1970s. However, questions about the morality of its use began in earnest as early as the mid-1700s. One of the first to publicly organize against the death penalty was Dr. Benjamin Rush, a Philadelphia-based physician and original signer of the Declaration of Independence. Dr. Rush, along with several prominent society members and Quakers, organized abolitionist movements in an attempt to end the death penalty. Early opponents of the death penalty often joined forces with slave abolitionists and women’s suffragists. These abolitionist societies were most active along the eastern seaboard. From these early efforts to abolish the sanction, the abolitionist movement grew increasingly critical of the continued use of capital punishment.

15 See id.
16 Some of the early methods of execution were drawing and quartering, hanging, breaking on the wheel, boiling in oil, and beheading. See Part I: History of the Death Penalty, supra note 1.
17 See BOHM, supra note 14, at 3, 7.
18 Id. at 2–3.
19 Id.
20 Id. at 2 (“Condemned prisoners would often . . . confess their guilt and proclaim their newfound faith to the congregation and especially its most influential members [because it gave the] prisoners their best opportunity of receiving executive clemency.”).
21 Id. at 5.
22 Id.
23 See generally id. at 6–7 (discussing the period between 1825 and 1850 as a “time of reform in America” where the “general abolitionist sentiment, spurred anti-death penalty activity”).
24 Id. at 5, 7.
Notwithstanding this growing criticism, public support for its use remained consistently favorable. This all changed in 1972 when the United States Supreme Court in *Furman v. Georgia* declared that the death penalty constituted cruel and unusual punishment and was therefore prohibited by the Eight Amendment to the United States Constitution. This prohibition was short lived, however, because the same Supreme Court clarified a mere four years later, in *Gregg v. Georgia*, that the death penalty in and of itself did not necessarily constitute cruel and unusual punishment. The death penalty was reinstated by the Court and has continued mostly undisturbed until today.

### IV. Why Do We Have a Death Penalty in America?

The inevitable questions that are often asked are: Why do we have a death penalty in America? What purpose is it intended to serve? Does it accomplish its intended goals? To answer these questions, we must first examine some of the basic theories of punishment. There are three principal “theories of punishment” that endorse use of the death penalty.

**A. Deterrence**

One of the leading arguments in support of continuing the use of the death penalty is the deterrence argument. It is posited that in order to prevent the rampant commission of violent crimes, an equally harsh punishment must be used to deter or influence others from committing the same or similar offenses. Therefore, vicious crimes must be met with harsh penalties, and the harshest of all penalties is execution. Knowing that death-eligible offenses will be met with the death penalty is an important factor in controlling crime and criminals, according to the deterrence theory of punishment.

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25 *See Furman v. Georgia, 408 U.S. 238, 240 (1972).*

26 *See Gregg v. Georgia, 428 U.S. 153, 168–73 (1976) (stating that precedent requires that “the punishment must not involve the unnecessary and wanton infliction of pain [and] the punishment must not be grossly out of proportion to the severity of the crime.”).*

27 *Id. at 207.*


B. Retribution

Another leading theory in support of capital punishment is requisite punishment—retribution. Extreme offenses must be met with equally extreme punishment. It is only in this manner that society maintains its “balance.” Offenders must be punished for the commission of their crimes to prevent societal imbalance. This theory goes to our base instinct most often exemplified by the Biblical phrase “eye for an eye.” The “eye for an eye” philosophy has permeated the use of the death penalty and still carries considerable weight in modern discussions of its use.

C. Closure for Victims

A third theory in support of capital punishment is closure for the victims. Once a crime is committed, the offender must be punished to prevent vigilante justice and to assuage the hurt of a victim and a victim’s family. It is argued that victims cannot have closure until the appropriate punishment has been meted out.

V. DOES THE DEATH PENALTY ACCOMPLISH ITS INTENDED GOALS?

A. Does the Death Penalty Actually Deter Crime?

A common belief among death penalty proponents is that capital punishment deters crime. The theory is that those who would commit a death-eligible offense will observe the harshness of the penalty imposed if convicted and will independently decide that it is best to refrain from committing such a crime, lest they too suffer this harsh fate. The problem is that such a theory presupposes that capital offenders consider the consequences of conviction when, in reality, the one thing offenders likely never consider is getting caught.

31 Id.
32 Deuteronomy 19:21 (King James).
33 See, e.g., Art Swift, Americans: “Eye for an Eye” Top Reason for Death Penalty, GALLUP (Oct. 23, 2014), http://www.gallup.com/poll/178799/americans-eye-eye-top-reason-death-penalty.aspx (“Americans who favor the death penalty most often cite ‘an eye for an eye’ as the reason they hold their position, with 35% mentioning it.”); Retribution: In Support of the Death Penalty, supra note 30 (“Retribution has its basis in religious values, which have historically maintained that it is proper to take an ‘eye for an eye’ and a life for a life.”).
34 See supra Part IV.A.
35 See BOHM, supra note 14, at 164–65.
Marshall Dayan, an assistant professor of law at North Carolina Central University, argues that murderers do not take into account the penalty for their crime because they do not expect to be caught; thus, the death penalty has no deterrent effect. Further, he suggests that the underpinnings of the deterrence theory are also flawed because deterrence relies on the proposition that individuals know the harshness of the penalty for their crime before they commit it. However, Dayan points out that several members of law enforcement, lawyers, and even judges have been found guilty of committing murder at one time or another albeit knowing the harshness of the penalty beforehand. To illustrate this point, he uses the case of William Huggins Jr., a former assistant district attorney prosecuted for soliciting murder. Even though Huggins knew the penalty for murder, he conspired to commit it anyway.

The deterrence theory also fails to take into consideration that there are certain classes or types of offenders that will never be deterred by the penalty associated with the crime. For example, serial killers who act out of a criminal mental compulsion, attention-seeking killers who kill for the notoriety, and suicidal killers who kill to be killed due to their desire to commit suicide but lack of ability to do so. These are all types of capital offenders who would not be affected by the harshness of the penalty and, in certain circumstances, would embrace it.

Finally, assuming arguendo that having a death penalty would in fact serve as a deterrent, states with a death penalty should have lower murder rates than states that do not have a death penalty. However, according to the Death Penalty Information Center, states that have abolished the death penalty—such as North Dakota, Maine, Rhode Island, and Minnesota—have lower murder rates than states that continue to allow the death penalty, including Alabama, Tennessee, Louisiana, and Texas (the state with the most executions). Based on the foregoing, it does not appear that having the death penalty available as a

36 See Marshall Dayan, Death Penalty No Deterrent, Even to an Assistant Prosecutor, HERALD-SUN, Sept. 24, 2002, at A13 (“A former client of mine, a convicted murderer, once said, ‘You can tell people that you’re going to boil ‘em in hot oil, but it won’t deter crime, because criminals don’t think they’re going to get caught.’”); see also LAURI S. FRIEDMAN, THE DEATH PENALTY 66 (Greenhaven Press 2006).
37 See Dayan, supra note 36.
38 Id.
39 Id.
40 Id.
41 See BOHM, supra note 14, at 164–65.
42 Murder is used as an example here because it is a universally recognized death-eligible offense.
punitive sanction acts as an effective deterrent to the commission of death-eligible offenses.

B. Does the Execution of an Offender Provide “Closure” to Victims?

What about victims and co-victims? Shouldn’t the death penalty exist to provide them with a sense of finality and closure, putting an end to their misery and loss? Perhaps Professor Thomas Bertonneau said it best:

The justice that the death penalty seeks, it seeks foremostly for the deceased, who can no longer demand it for himself. In another way, the death penalty is society’s belated application of self-defense in place of the victim. “We should like to have been there,” the sentence says, “to have met lethal force with lethal force for the victim’s sake.”

The death penalty thus honors and commemorates the dead and speaks to the sanctity of life in the civilized order.  

Most victims, however, allege that the execution of the offender does nothing to assuage the loss. In fact, many take the position that executions continue the process of needlessly punishing innocent families; in the case of an execution, it is the family of the offender. Even more interesting is the view of Marietta Jaeger-Lane, whose daughter was kidnapped and murdered. When asked about her view of the death penalty, Jaeger-Lane said, “Loved ones wrenched from our lives by violent crime, deserve more beautiful, noble and honorable memorials than pre-mediated, state-sanctioned killings.”

Or consider the view of Vicki Schieber, whose daughter Shannon was murdered. “In honor of our daughter, my husband and I are committed to spending the remainder of our lives trying to seek not just the elimination of the death penalty, but meaningful change.” Still, others take a less charitable position against the death penalty, arguing that murderers should live and suffer

46 Id. (“The death penalty only creates more victims and more grieving families.”).
47 Id.
49 Victims and the Death Penalty, supra note 45; Testimony in Support of Senate Bill 820—Vicki A. Schieber, supra note 49.
so that they can think about the harm they have caused.\textsuperscript{51} Does the execution of offenders provide closure for victims and victims' families? Arguably not.

VI. IS CAPITAL PUNISHMENT WORTH IT?

A. Can We as a Society Afford the Financial Cost of Capital Punishment?

The death penalty is an expensive form of punishment, and taxpayers are becoming more aware of the implications of maintaining this costly system.\textsuperscript{52} Consider, for example, that defense costs for death penalty trials in the state of Kansas average almost $400,000 per case, compared to almost $100,000 per case when the death penalty is not sought.\textsuperscript{53} A study of Los Angeles, California, county trials showed that the average trial in which the death penalty is sought costs $1,898,323, as compared to the average trial in which the death penalty is not sought that costs $627,322.\textsuperscript{54} In fact, in California, a recent study revealed that the state has spent over four billion dollars in costs related to capital punishment since 1978. To reach this conclusion, the study considered pretrial costs, costs of automatic appeals and state habeas corpus petitions, costs of federal habeas corpus appeals, and the cost of incarceration on death row.\textsuperscript{55}

California is bearing the costs of capital punishment administration all while struggling financially, cutting essential services, and trying to balance the state budget.\textsuperscript{56} A 2005 article from the Los Angeles Times tallied the annual public costs of maintaining the death penalty in California: “it costs $90,000 more per year to house an inmate on death row, where each person has a private cell and extra guard,” than to house a non-death row inmate; eleven executions

\textsuperscript{52} See Jon Sorensen, The Administration of Capital Punishment, 29 ACJS TODAY, no. 2, May/June 2004, at 1, 5 (2005) (reporting that in a comprehensive examination performed by Duke researchers “a capital murder case was found to exceed the cost of a non-capital first-degree murder case by $163k”).
over a twenty-seven-year period cost, on average, $250 million per execution; “a
capital murder trial costs three times more to try than a noncapital murder trial”;
“the Office of the State Public Defender, which represents some death row
inmates, has an annual budget of $11.3 million”; the Habeas Corpus Resource
Center “represents inmates and trains death penalty attorneys on a budget of $11
million”; federal public defenders and appointed attorneys receive $12 million
annually. All things considered, from a purely financial perspective, the death
penalty exacts a very costly fiscal penalty on taxpayers. In times of drastic budget
cuts and reductions of services, it would appear to be fiscally irresponsible to
continue to administer such a costly system of punishment.

B. Wrongful Convictions, Innocence, and the Death Penalty

Perhaps the most compelling reason for questioning the continued use of
the death penalty is the criminal justice system’s lack of reliability and the very
real possibility of executing an innocent person for a crime he or she did not
commit. Executing an innocent person is an error that can never be corrected.
Death row exonerations have garnered increasing attention recently. Renowned
author, John Grisham, wrote his first nonfiction novel about the heartbreaking
story of Ron Williamson, an innocent man who came within hours of being
executed only to die five years after being exonerated from death row. Academy
Award-winning actress, Hillary Swank, starred in a movie about the true story of Betty Anne Waters, the sister of a wrongfully convicted man. Waters courageously put herself through college and law school to defend her brother and ultimately won his freedom after he had served eighteen years on
death row.

57 Rone Tempest, Death Row Often Means a Long Life, L.A. TIMES (Mar. 6, 2005),
58 See generally David Von Drehle, More Innocent People on Death Row Than Estimated:
Study, TIME (Apr. 28, 2014), http://time.com/79572/more-innocent-people-on-death-row-than-
estimated-study/.
59 See generally Carimah Townes, 6 Death Row Inmates Were Exonerated in 2014. All of
Them Were Black, THINK PROGRESS (Jan. 27, 2015, 1:51 PM),
http://thinkprogress.org/justice/2015/01/27/3615918/black-people-have-the-highest-exoneration-
rate-in-the-us/. While courts tend not to “entertain claims of innocence when the defendant is
dead,” the Death Penalty Information Center provides a list of executed persons where strong
evidence of innocence exists. See Executed but Possibly Innocent, DEATH PENALTY INFO. CTR.,
60 See generally JOHN GRISHAM, THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL
61 See Conviction: The Incredible True Story of Betty Anne Waters, INNOCENCE PROJECT,
62 Id.
In fact, the problem of wrongful convictions in death penalty cases has become so pervasive that several state governors have signed legislation abolishing the death penalty in their states. Perhaps former Illinois Governor George H. Ryan said it best when initially declaring a moratorium on capital punishment in Illinois: “Until I can be sure that everyone sentenced to death in Illinois is truly guilty, until I can be sure with moral certainty that no innocent man or woman is facing lethal injection, no one will meet that fate.”

VII. CONCLUSION

The death penalty is a controversial topic over which the nation is divided. However, capital punishment fails to accomplish most, if not all, of its intended goals. Facts show that capital punishment does not deter crime nor provide closure for victims and that the system is too costly to maintain. These reasons alone are enough to declare an end to capital punishment, as many state governors have done.

Notwithstanding the foregoing, there is one factor that should compel an end to capital punishment in America: innocence and wrongful convictions. Whether one is in favor of or against capital punishment, no person of sound mind could favor executing the innocent. Nevertheless, it is clear that the United States has, and most likely will, continue to put innocent individuals on death row as long as we continue to use capital punishment. If for no other reason than protecting the innocent, the time has come to abolish capital punishment in the United States.

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63 For a list of recent legislation on the death penalty, see Recent Legislative Activity, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/recent-legislative-activity (last visited Aug. 15, 2015).


65 See supra note 63.