

**The Bill Blackwood
Law Enforcement Management Institute of Texas**

**Death Penalty
Restorative vs. Retributive Justice**

**A Leadership White Paper
Submitted in Partial Fulfillment
Required for Graduation from the
Leadership Command College**

**By
K.R. "Kenny" Lemons Jr.**

**Clay County Sheriff's Office
Henrietta, Texas
October 2020**

ABSTRACT

Moses climbed Mt. Sinai and heard the words of almighty God, and these words were the Ten Commandments. One of these commandments was; "Thou Shall Not Kill", yet in the teachings of the Holy Bible there are many places that describe killing, the killing of people in the interest of revenge, take for instance Deuteronomy 19:21; "Thus you shall not pity: life for a life, eye for an eye, a tooth for a tooth, hand for a hand, foot for a foot." The Death Penalty is the most controversial issue in existence today; it has been used for hundreds of years as a way for society to seek revenge in the name of justice. However, the means in which people and the crimes that they are sentenced to death for have changed over the years, one constant factor continues to be argued, and that is; does the death penalty have any deterrent factor in preventing violent crime, or has it become an in-effective tool due to the time it takes to put the condemned to death following conviction. The burden of proof to sentence someone to death should be changed from "proof beyond a reasonable doubt", to "proof beyond any doubt". This small change along with setting time limits on executions, will speed up executions, and begin to be a deterrent factor again. Punishment should be swift, and certain. It is the certainty of punishment that is the deterrent, not the punishment itself.

TABLE OF CONTENTS

	Page
Abstract	
Introduction	1
Position	6
Counter Arguments	9
Recommendation	11
References	13

INTRODUCTION

Revenge is one of the strongest motivations known to man. When one person is wronged by another, or his or her family member is harmed, the first reaction is to “get even.” This emotion is where the death penalty lives and thrives. We proclaim, as a nation of God fearing Christians, that the Holy Bible teaches us that an “eye for an eye” is the only way to seek justice in our system of government. The death penalty serves as a deterrent factor in preventing others from committing similar violent crimes, as the condemned individual that is about to be put to death. The fact is, the death penalty has no deterrent factor, and it is simply a form of revenge. This is stated in a study of five similar states that imposed the death penalty; Georgia, New York, Texas, California, and North Carolina (Decker, 1990).

For the most part of our nation’s history, according to Marcus (2007), the death penalty was used as the ultimate punishment for just about every felony violation, and was carried out in some of the most cruel and heinous ways that a person can think of. The Eighth Amendment forbids cruel and unusual punishment, and the United States Supreme Court has decided many cases concerning this issue, and this research will discuss some of those cases and many others that have altered the use of the death penalty.

The alternative sentence to the death penalty is life without parole. When proponents of both sides of the argument discuss the cost associated with the death penalty versus life without parole, there are more factors to discuss than just money, safety, closure for the victim’s family, and what is morally right. Some say that it costs more money to the general public when it comes to putting someone to death versus keeping them in jail for a period of their entire life. Proponents on both sides of the aisle claim that they are correct. This paper will search for data that will answer that question.

When it comes to the use of the death penalty, and whether it is based on deterrent factors, or cost effectiveness, you will find that research will never show anything more than what the Holy Bible spells out, and that is “an eye for an eye”. The death penalty’s only deterrent factor is the fact that it deters the convicted criminal from committing any further crimes, and his death at whatever cost to the tax payers is of no consequence because we as a free society want justice, and that justice is called revenge. The burden of proof to sentence someone to death should be changed from “proof beyond a reasonable doubt”, to “proof beyond any doubt”. This small change along with setting time limits on executions, will speed up executions, and begin to be a deterrent factor again. Punishment should be swift, and certain. It is the certainty of punishment that is the deterrent, not the punishment it self

Riding over the hill at a fast gallop, seven men and five horses were attempting to evade four cowboys and a hail of rifle rounds. After one fell dead, six men stopped and held their position, when the dust cleared, five men faced their accusers, the charge; horse theft. "Frontier Justice" was carried out then and there at the base of a tall oak tree, on the end of a long rope. Six men swung from the neck, hanged by the men who tracked them for stealing someone else’s horses. That was life for an outlaw in the Old West; “when you ride with an outlaw, you die with an outlaw” (Augustus McCray, *Lonesome Dove*, 1981).

The first recorded execution in the new world according to Marcus (2007) occurred in Virginia in 1622. Since that time the death penalty has been used as a form of the ultimate punishment. The American colonist brought this form of punishment with them from Great Britain, and used it very arbitrarily, for various non-violent crimes, such as, arson, burglary, armed robbery, rape, kidnapping, and crimes that involved the use of a weapon (Malik, 2015). Its use was wide-spread across the United States, by every state. Mostly because crimes that

were committed, that qualified for the death penalty, at the state level, and the federal Judicial System had very little involvement in its use. Some of the crimes that qualified as death penalty crimes were moral crimes such as adultery. For example; in the mid-1600s, a women living in the colonies, was put to death for cheating on her husband and bragging about it in public. Still yet, the death penalty was used as a way to combat recidivism. Take for instance a person who was caught stealing for the third time, he or she would qualify for the death penalty. The first offense for an offender in Virginia convicted of stealing a hog, would be sentenced to receive 25 lashes and a fine. The second conviction would mean that the convicted offender would spend two hours in a wooden device that had three holes in which the offender's head and hands would be placed, called a "pillory", for public display (Malik, 2015, p. 694). In the early American colonies, the use of the death penalty and corporal punishment was all a public affair. Normally the entire community would gather, lunches were served, and a festival like atomsphere was present. This type of public display were widely accepted and encouraged. The use of the death penalty in early America prior to the American Revolution was a normal affair and widely used. The social and religious acceptance was based on our newly formed constitution that gave it the authority by the Fifth Amendment, that states " No person shall... be deprived of life, liberty, or property, without the due process of law" (Malik, 2015, p. 695). That small phrase is what the early framers of our constitution base their right to use the death penalty. "Be deprived of life and "due process of law", is the corner stone of what men like Thomas Jefferson, James Madison and many others since, have referenced the rights of states to take a human life in the name of justice.

For the next 100 years or so, the arbitrary use of the death penalty continued until America began to see a change in the ideology of its religious leaders. More of a human

rights atmosphere began to take a hold in the nations conscious, and new ideologies began to alter the way that death sentences were being imposed. After that, the Supreme Court banned the use of the Death Penalty, solely on the arbitrary way it was being imposed (*Furman v. Georgia*, 1972). Most states began to take legislative action in order to limit the arbitrariness in which the death penalty was being imposed. State lawmakers began enacting laws that limited the crimes of a person convicted of committing that would qualify them for the death penalty. In 1796, the Virginia State legislature eliminated the death penalty for all white people, except those convicted of premeditated murder (Malik, 2015, p. 696). These changes were made all over America and in England. The means of which people were being put to death was changing as well. Public hangings began to be the most popular, and most used form of execution. Normally the convicted offender would meet his or her fate at the end of a rope, from the top of a set of wooden gallows, that had been previously built just days before. Public hangings were widely used for many years. The quick and decisive way that the death sentence was carried out was a deterrent effect. The belief of the time, was the fact that if the public watched what happens to one who is convicted of crimes, anyone who was predisposed to committing crimes, would be less likely to commit those same crimes themselves. It would take centuries to dispel this myth.

Eva Dugan, the first and last woman to be hanged in the State of Arizona, occurred on February 21, 1930. Despite the fact that other states had transitioned from the hangman's noose to the electric chair as the means in which a person was to be executed, the State of Arizona chose to continue the time old method of the rope. When the designated time arrived, the trap door opened, and Dugan fell through to the end of the twisted hemp, and when the weight of her body hit the end of the measured length, Dugan's head was ripped

from her body (Malik, 2007, p. 699). This ghastly account caused shockwaves throughout the country. Not only was a woman executed, but she was executed in a terrible, gruesome fashion. Dugan's death brought about real change in not only the number of death sentences carried out, but also the means in which they were performed. The electric chair had now become the method of choice, and would remain so until the late 1970's.

The electric chair was an invention that was designed so that the condemned person would be strapped down to a wooden chair, electric wires would be attached to his or her extremities, and at the assigned time, electrical current would pass through their body. As a person would first think, this type of design would bring upon several different reactions from the condemned, such as; convulsions, burning flesh, bleeding, and sometime the person would even ignite in flames. Witnessed by many, this type of death sentence was seen as very cruel, and certainly unusual. Many botched executions were performed, and several death row inmates, suffered immense pain. State leaders searched for another form of execution that was more humane, and more acceptable to the public. This led to the use of lethal injection (Malik, 2007, p. 699).

Death by lethal injection was not a new concept, it was actually first considered by the State of New York in 1888, but legislators were convinced not to employ the concept, due to the medical communities influence. They felt that the use of lethal injection by a needle would equate the medical field with death (Salk, 2015, p. 287). It would take another 89 years for another state to take legislative action for the legalization of lethal injection. In 1977 the State of Oklahoma became the first state to pass the; "three step protocol," a procedure that all states began to follow. Even though Oklahoma was the first state to legalize the protocol, the State of Texas was the first state to actually use the previously approved method in 1982

(Salk, 2015, p. 288). By 2009, all the states that copied the Oklahoma three step protocol, were also using the same three drugs as Oklahoma. Then, the one and only manufacturer of one of the vital components in the process stopped manufacturing the drug within the United States, leaving the states without the necessary components to carry out executions. Hospira, the company that manufactured one of the key components; sodium thiopental, stopped manufacturing the drug because they could no longer get the key ingredient for it's production because they received it from overseas, and due to other countries opposition to the death penalty, the company was forbidden to manufacturing the chemical in its plant in Italy. Facing legal action from the Italian government, Hospira was unable to supply states with the required drug for the executions. Faced with this dilemma, states had to move to alternative solutions, and alternative drugs, which led to the drug midazolam (Salk, 2015, p. 288).

POSITION

Many think that a person is arrested, brought to trial, convicted, sentenced to death, given a few possible appeals, put to death, and that's it. That is not quite how it works. Once the announcement has been made by the prosecutor that the death penalty is to be sought in a murder case, the cash register begins to spin, costing tax dollars. One of the things that most people do not know, is the fact that not all criminal lawyers are qualified to defend a person in a capital murder case. According to the Texas Code of Criminal Procedure, Article 26.052, there are special qualifications and board certifications that a lawyer must meet before being capital murder qualified. Another alarming fact is that all expenses, most of the time, for the defense of a person accused in a capital murder case is paid for by tax dollars. The taxpayer pays for the lawyers salaries, assistants, expert witnesses, travel, motel lodging, and all expenses

incurred. Those costs are also bore by the prosecution, who have some of the same identical expenses. That is some of the cost incurred just getting to the guilty or innocent stage. Once the guilty verdict is rendered, and if the prosecution has been fortunate enough to get the death sentence that they had asked for, there is an automatic appeal. The convicted offender, is assigned another attorney to handle his or her appeal, or may retain the same attorney, whichever the case may be, and the tax payer pays that expense as well. This automatic appeal may take a year, or several years, and depending on the circumstances surrounding the case, the entire case from the time the death sentence was imposed, to the time the defendant receives the ultimate punishment can take 10-30 years. Opponents of the death penalty, have used the moral standard : “thou shall not kill” for years. As a battle cry for their cause, they have found solid financial evidence to bolster their case against the death penalty; cost effectiveness. In a report published by the Miami Hearld in 1988, figures showed that a typical death sentence case would cost the tax payers \$3.2 million dollars for a person to be executed as opposed to \$600,000 for a life sentence to be imposed (McLaughlin, 2014, p. 689). This information gave the opponents of the death penalty a solid argument for the abolition of the death penalty.

Proponents of the death penalty state that the cost of the death penalty is worth it, because it deters others that are inclined to commit similar crimes, from doing so. The mere death sentence itself is the deterrent. Opponents claim that not only is the death penalty not cost effective, but it actually has an opposite effect on society, causing more violent crimes to be committed (Warden, 2009). The onion fields in Los Angeles California in 1963, is an example of that statement. Jimmy Lee Smith and Gregory

Powell were being stopped on a traffic stop by two L.A.P.D. officers for a minor traffic violation. Believing that they were about to be arrested for a string of armed robberies that the two had committed, the two men overpowered the officers and kidnapped them and took the two officers to an onion field. Falsely believing that kidnapping was a capital crime that carried the death penalty, they shot and killed one of the officers, the other managed to escape and later testify against them at trial. Both Smith and Powell would later be convicted and sentenced to death, not for kidnapping, but for capital murder of the police officer (Warden, 2009, p. 330). This scenario and many others like it, are used by opponents of the death penalty, that attempt to show that the use of the death penalty has no deterrent effect, but there are conflicting views.

One fact is certain, the death penalty does have one certain deterrent, and that is to the one that it is imposed upon. It seems that when research is done on the subject of the overall deterrent factor of the death penalty, the results depend mostly on the feelings and beliefs of the ones doing the research. For nineteen sessions, the State legislature of New York debated death penalty legislation. Polls taken during that time revealed that most legislators were in favor of the death penalty, which reflected the views of themselves and their constituents (Carter, 2013). In stark contrast, the State of Kansas, a state whose majority of legislators were opposed to the death penalty, saw the same type of debates on the death penalty between 1975- 1993. During the time that the State of New York debated the death penalty legislation, many bills passed both houses and new laws were passed by huge margins, while very few death penalty legislation passed either of the Kansas chambers (Galliher, 2001). The State of New York population is far larger, thus the crime rate is higher than that of Kansas, which is

more rural. Per capita, the murder rate for the State of Kansas is lower. The odds of being a victim of a violent crime in the urban streets of New York verses the rural areas of Kansas are far better (Galliher, 2001). These cultural differences possibly make up the reasons for the differences of whether or not the death penalty is viewed as a deterrent to violent crime, in the opinion of the respective legislative bodies.

There have been many studies performed on the deterrent factor of the death penalty, but more validity must be given to the ones that are unbiased, and performed by neutral parties, that are simply the finder of the facts. Nevertheless, it will be hard to find out whether or not the true answer to the deterrent question, because it remains in the mind of the perpetrator. The initial decision of the offender is based on two factors, risk vs. punishment. Psychologists have been attempting to unlock those kinds of decisions for years, as of yet without much success.

COUNTER ARGUMENT

Opponents of the death penalty argue that in recent years many people have been exonerated, and that is proof that the death penalty should be abolished (Westervelt, 2010). When you think of a deterrent factor, both the death penalty and the sentence of life without parole have the same deterrent factor for the one that is convicted of the capital offense. First you must break down the charge of murder, and which type would qualify as a capital offense. Fagen (2006) writes in his research essay, that there are two types of murder; one type is committed during a crime of passion such as a fight or an argument, and the other type is committed during the commission of a crime such as; robbery, kidnapping, and rape. One type of murder is driven by feelings such as jealousy, and is unplanned, and the other is usually

motivated by greed, and is often planned. Both of these types of capital crimes bring different challenges when it comes to the mindset of the perpetrators. The offenders that would often commit crimes that are impulsive, and unplanned such as relationship type crimes, would have the best chance in refraining from committing these types of capital offenses, while the ones motivated by greed and usually plan their attacks would have very little deterrence in the same act (Fagan, 2006, p. 276).

Life without Parole was a new sentence that was passed by state legislatures throughout the country in the mid to late 1990's. This was a different form of punishment that would satisfy the country's need for an alternate sentence for the ultimate crime, that if handed down incorrectly, could be reversed, especially if an innocent person had been convicted, while at the same time making sure that at least there was a deterrent factor in place for the one that was convicted of the crime. As of 2002, juries all across the country are sentencing convicted individuals to life without parole three times more frequently than the death penalty (Fagan, 2006).

The country we live in is made up of political, religious, and social beliefs. Different people, in different regions of the United States have different core values, including prejudice and bias. Supreme Court Justices are appointed by sitting Presidents that represent the party that elected them (Republican or Democratic). Those political beliefs are mirrored in the decisions that those Justices decide on. An example of this is the case of *Furman v. Georgia* (1972), (Oyez, 2018). While the other Justices on the Court made their decision that the death penalty was cruel and unusual punishment based on the arbitrariness of which the sentence was imposed, Justice Brennan, and Justice Marshall, stated that the death penalty itself, was cruel and

unusual in all cases. That is an example of those two Justice's core beliefs (Oyez, 2018). In contrast with the opinion of those two Justice's some 43 years later, Justice Samuel Alito gave the majority opinion in the case of *Glossip v. Gross*, a case where death row inmates accusing the state of Oklahoma for using an untested drug for executions would cause the inmates pain and discomfort, which was a violation of their civil rights. Justice Alito stated; that in a perfect world everyone would like to die in a painless manner, but forcing the Eight Amendment to that standard would eliminate the Eighth Amendment (Salk, 2015, p. 291). These are examples of pro death penalty and anti- death penalty Supreme Court Justices.

RECOMMENDATION

The death penalty is interwoven into the fabric of our society, and will continue to be, as long as human beings have a desire for retribution and revenge. There is only but one deterrent factor in the death penalty, and that is; the death penalty deters the one being executed from committing another crime. A person is driven to commit murder by ideas in their own head, whether it be for jealousy, revenge, or greed, these motivations are only known to the people that harbor them. It would be difficult for them to rationalize in their own minds why they should or should not commit murder simply because they may or may not get caught, and whether or not they may or may not get the death penalty. For the sake of closure to the families left behind of the victims of these most violent crimes, the death penalty must remain a part of our criminal justice

system. A final solution to a societal problem, that can only be carried out by death of the most violent criminals.

When these type cases are presented, standards must be maintained to assure that proper due process procedures are followed, and the accused receives a fair and impartial trial of his peers. The burden of proof to sentence someone to death should be changed from “proof beyond a reasonable doubt”, to “proof beyond any doubt”. This small change along with setting time limits on executions, will speed up executions, and begin to be a deterrent factor again. Punishment should be swift, and certain. It is the certainty of punishment that is the deterrent, not the punishment itself.

As the United States political, religious, and ethical beliefs change, so does the popularity of the death penalty, but as long as there are people in this country that commit the most violent crimes, the death penalty will always be an option, all it takes is for our nation to get a better memory. “You Ride With An Outlaw, You Die With an Outlaw”. (*Lonesome Dove*, Augustus McCray, 1981)

REFERENCES

- Aittliff, B. (Producer) & Bogdanovich, P. (Director). (1981) Augustus McCray, *Lonesome Dove*, [Motion Picture]. United States: C.B.S.
- Carter, L. E. (2013, 07 22). The Evolution of Justice Kennedy's Eighth Amendment Jurisprudence on Categorical Bars in Capital Cases. *McGeorge Law Review*, 1, 229-246.
- Decker, S. H. (1990, September). The Deterrent Effect of Capital Punishment in the Five Most Active States;. *Criminal Justice review*, 15(2), 173-191. Retrieved August 08, 2019
- Fagan, J. (2006, September 01). Death and Deterrence redux: Science, Law and Casual Reasoning on Capital Punishment. *Ohio Journal of Criminal Law*, 4(255), 255-320.
- Furman v. Georgia. (n.d.). Oyez. Retrieved October 18, 2019, from <https://www.oyez.org/cases/1971/69-5030>
- Gallihier, J. M. (2001). A Commons Sense Theory of Deterrence and the Ideology of Science. *Journal of Criminal Law & Criminology*, 1-16.
- Malik, S. C. (2015). A Survey of the History of the Death Penalty in the United States. *UR Scholarship Repository*, 693-710.
- Marcus, P. (2007). Capital Punishment in the United States, and Beyond. *Faculty Publications*, 31, 837-872.
- McLaughlin, J. (2014). The Price of Justice: Interest- Convergence, cost and the Anti-Death Penalty Movement. *Northwestern University Law Review*, 108(2), 675-710.

- Salk, R. (2015). Lethal Injection in Uncharted Territory: The Need to Ensure the Humanity of Current Death Penalty Practices. *Criminal Justice Ethics*, 34(3), 284-311.
- Texas Code of Criminal Procedure, Article 26 § 052. Retrieved from:
https://texas.public.law/statutes/tex._code_of_crim._proc._article_26.052
- Warden, R. (2009). Reflections on Capital Punishment. *Northwestern Journal of Law & Social Policy*, 4(2), 329-359.
- Westervelt, S. D. (2010, January 08). Framing Innocents: The Wrongly Convicted as Victims of State Harm. *Criminal Law and Social Change*, 53, 259-275.
doi:10.1007/s10611-009-9231-z